GEILS, ... APPELLANT (*a*).

FRANCES GEILS, . . . RESPONDENT.

1852.
22nd and 30th November.

A domiciled Scotchman marries a domiciled English woman in England. This is a Scotch marriage. The wife's domicile merges in that of her husband. *Warrender* v. *Warrender* pronounced unassailable.

The parties return to Scotland. Afterwards the wife leaves her husband and comes back to England. He sues her in Doctors' Commons for restitution of conjugal rights. Her defence coupled with a prayer for divorce *à mensâ et thoro*. Sentence accordingly. She then sues her husband in Scotland for divorce *à vinculo matrimonii*. HELD, that she was not barred.

Whether the wife's domicile was, or was not, severed by divorce in Doctors' Commons,—*Quære.*

But the adultery having been committed in Scotland, and the husband's domicile continuing there,—*Semble* that the Scotch Court had jurisdiction.

Mc Carthy v. *De Caix* and *Lolly's* case commented upon. Conflict of laws not to be rectified by judicial authority.

A sentence of divorce *à mensâ et thoro* which is ancillary to divorce *à vinculo matrimonii* in England ought not to be an impediment to that remedy in Scotland.

With a view to divorce *à vinculo matrimonii* in Scotland, it is immaterial whether the previous sentence of divorce *à mensâ et thoro* has been obtained in England or in Scotland.

Allison v. *Catley* commented upon.

The record ought always to be closed before judgment on the merits is pronounced.

How far the House can examine into the correctness of a civilian's opinion upon a question of English ecclesiastical law, obtained for the guidance of the Court below,—*Quære.*

MR. *Bethell* and Mr. *Anderson*, for the Appellant; Mr. *Moncreiff* and Dr. *Addams*, for the Respondent.

The account given of this case at a former stage (*b*) will be a sufficient introduction to the following opinions, which exhaust the arguments of counsel:—

The LORD CHANCELLOR (*c*):

My Lords, this case is one of a marriage celebrated in England between a Scotchman domiciled in Scotland, and an English lady having landed property in this country.

It appears, my Lords, that on the occasion of this marriage a settlement had been made. I think the husband had no property at that time in possession; but there seems to have been a jointure secured upon the Scotch estates for the lady, and the husband had 1200*l.* a-year provided to him out of her English property, which consisted of an estate of between 3000*l.* and 4000*l.* a-year.

Immediately after the marriage, the parties took up

(*a*) See the Report of this case in the Court below, Second Ser., vol. xiii. p. 321.

(*b*) *Suprà*, p. 36.

(*c*) Lord St. Leonards.

GEILS *v.* GEILS.

Lord Chancellor's opinion.

their abode at the husband's family residence in Scotland; where, cohabiting as husband and wife, they had several children. Differences, however, arose. Mrs. Geils left her husband and returned to England. The husband followed her and instituted a suit in Doctors' Commons for restitution of conjugal rights. In answer to that demand, the wife set up a case of adultery and cruelty. I need not go into the allegations of cruelty. The consequence of the adultery being proved would of course be that the husband would not succeed in his suit. But it appears clearly enough, from the case of *Best* v. *Best* (*a*), that formerly a cross suit was necessary by the wife, if she desired her defence to be followed up by a decree in her own favour, divorcing the husband *à mensâ et thoro*. That form, however, has long since been deemed unnecessary, and very properly so. A wife may now frame her defence generally, without praying for a divorce *à mensâ et thoro*. If she does not pray for it in her written defence she may ask it at the hearing, and that will be equally good. The result, I believe to be, that no case can be found in which a wife has rested simply upon her defence, and has not coupled it with a prayer for a divorce from bed and board.

Now, if your Lordships will consider for a moment, you will see that this, in the nature of things, could not be otherwise. If the husband instituted a suit against the wife for restitution of conjugal rights, what must be her defence, she living then, of course, separate from him? Her defence must be, that, in consequence of his criminal conduct, she ought to be absolved from her obligation to live with him. If she were to rest upon the defensive, and if the husband's process were simply dismissed, the right to compel restitution would remain in the husband, although the remedy might perhaps be

(*a*) 1 Addams, 411.

imperfect. It is of necessity, therefore, that the defence upon this ground should be accompanied by that which so naturally follows from it, viz. the right to continue in the situation in which she is found at the moment that the proceedings were instituted, living as a wife apart from her husband, and insisting upon her title so to remain. If we look at the rights of a husband, and advert to the way in which they may be exercised, and if we suppose that his suit for restitution of conjugal rights is to be dismissed, without more, just observe, my Lords, how unprotected the wife must be after that sentence. This, it appears to me, is the reason why we must consider it an indispensable element in her defence, that she should not only charge adultery, but pray divorce (*a*).

(*a*) With reference to this point, the Lord Chancellor, in course of Dr. Addams's argument, observed that the House was placed in a singular position; for that the opinion of Sir John Dodson, the Queen's Advocate, and Mr. Stuart Wortley, had been obtained for the guidance of the Court in Scotland, as upon a question of foreign law—and his Lordship thought it was doubtful how far the learned doctor could be suffered to impeach that opinion, or even to discuss it, seeing that the House was sitting merely as a Tribunal of Appeal from the Court below, which had considered itself bound by that opinion. Dr. Addams, however, proceeded, and referred to the case of *Westmeath* v. *Westmeath* (3 Knapp, 42; see also 2 Addams, 380) before the Judicial Committee of the Privy Council; where, he said, the wife did not seek divorce, but simply a dismissal of the husband's suit for restitution of conjugal rights; and yet the Court decreed a divorce *à mensâ et thoro*; the truth being, that there had never been a case in which that sentence was not awarded upon proof of adultery or cruelty,—on a responsive allegation to a suit for restitution of conjugal rights. There was in fact, said Dr. Adams, no such sentence known as one of simple dismissal. In *Connelly* v. *Connelly*, the married parties were converted to the Roman Catholic religion. The husband became a priest, the wife a nun and Superior of a convent. And they mutually discharged each other from their nuptial ties. Afterwards, however, the husband sued the wife at Doctors' Commons for restitution of conjugal rights. In defence, she pleaded the vows she had taken with his sanction. Those vows

GEILS *v.* GEILS.

Lord Chancellor's opinion.

Before I proceed further, I must draw your Lordships' attention to the nature of the case as regards the jurisdiction of the Courts in Scotland, which has been assumed to rest, independently of any general reasoning, upon the fact that this lady was a Scotch spouse. She is equally an English wife—the marriage is both an

did not warrant a divorce, but they might well have justified a dismissal of his suit. The Ecclesiastical Court, however, refused a dismissal, because no instance of such an order could be found. Adultery and cruelty being the only matrimonial offences taken cognizance of by the Ecclesiastical Courts, the case of *Connelly* v. *Connelly* was beyond their reach. They could not divorce for want of power, and they would not dismiss for want of precedent. Such was Dr. Addams's account of the case of *Connelly* v. *Connelly*. But see 2 Robertson's Ecc. Rep. 201, and *Denniss* v. *Denniss*, there cited by Sir H. J. Fust. See also more particularly *Molony* v. *Molony*, 2 Add. 249.

The opinion procured by order of the Court below contained the following paragraphs:—

"A wife can defend herself against a suit for the restitution of conjugal rights, at her husband's instance, on the grounds of adultery or cruelty *only*. The Ecclesiastical Court will recognise no other cause, whether by agreement or otherwise, as justifying separation.

"We are of opinion, that a wife may perhaps defend herself in such a suit on the ground of adultery, *without praying for a divorce;* but it is not a course likely to be resorted to; and we are not aware of any case in which it has been done.

"Assuming that the wife could have established adultery without praying for a divorce, the judgment would probably have merely dismissed her from the suit, and pronounced against the prayer of the husband; but we believe no such case has occurred, nor is such a case likely to arise." [See the Second Series, where the opinion is given at length.]

A suit for "restitution of conjugal rights" corresponds with the Scotch action for "adherence." The Scotch name expresses clearly what is meant in one word. The English leaves it unintelligible in four.

Questions of English Ecclesiastical law and practice are foreign to the House of Lords itself, as well as to the Scotch Courts. It often happens that questions of English Common Law and Equity arise incidentally in Scotland. In such cases, the opinion of a barrister guides the decision; and if that opinion be erroneous, it will be set right by the House on appeal (see last case, *suprà*, p. 248),

English and a Scotch marriage (*a*). As, however, the husband was a domiciled Scotchman when he married, there is no doubt that, by the marriage, the wife's domicile followed that of the husband, and she became a Scotch spouse.

But it has been said that the wife's Scotch domicile was severed by the English divorce. On that point I would rather not give any opinion. But I apprehend the circumstance ought not to create any difficulty as to the jurisdiction of the Scotch Court, because, supposing the proceeding which the wife has instituted there to be, in other respects, right according to the law of Scotland, the husband being a Scotchman domiciled in Scotland, the crime too having been committed in that country, it would seem to me that the lady was entitled to seek her remedy there against her husband. As far, therefore, as depends upon the simple question of jurisdiction, I think the case is free from doubt. What the effect of the proceeding may be is another question.

Now, my Lords, it appears that against the proceedings instituted by the wife in Scotland for a divorce *à vinculo matrimonii*, the husband pleaded several pleas. He pleaded, first of all, want of jurisdiction, in these words—

> The Pursuer (the wife) being a native of England, and the marriage between the parties having been contracted and solemnised in England, when she was domiciled there, according to the rites of the Church of England and the laws of that country, this Court has

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because the House has an English Common Law and Equity appellate jurisdiction. But it has no English Ecclesiastical jurisdiction; neither has it any constitutional method of ascertaining what the English Ecclesiastical law or practice is on any given point. This was perhaps the reason why the Lord Chancellor said that the House, in dealing with *Geils* v. *Geils*, stood in "a singular position."

(*a*) It is English in point of celebration, and Scotch in point of substance.

GEILS *v.* GEILS.

Lord Chancellor's opinion.

no jurisdiction to entertain the present Action, and no power to dissolve the marriage.

This plea the *Lord Ordinary* repelled so far back as November, 1849. His interlocutor was affirmed by the First Division in December, 1849, and from these consecutive orders there seems to have been no appeal to this House.

Now it was said at your Lordships' bar, that the not appealing against this interlocutor was an oversight,—that, in fact, the great foundation of the Appellant's argument must rest upon the want of jurisdiction; and that it was still open to your Lordships, if you should think it right, to allow the Appellant to appeal from that interlocutor. And probably the House, as I ventured to observe in course of the argument, might be induced—if a strong case were made out—to give the Appellant that liberty. But, my Lords, the point of jurisdiction was so clearly settled by this House in *Sir George Warrender's case* (*a*), that any attempt to disturb it would have been hopeless. And, therefore, it was not from any inadvertency, but evidently on mature consideration, that the Appellant abstained from appealing against this interlocutor.

In *Sir George Warrender's case*, my Lords, the domicile of the husband was held to have been Scotch, under circumstances infinitely more difficult than any to be found in the present case; which, on the point of domicile, is in truth attended with no difficulty whatever. Sir George Warrender had been a Lord of the Admiralty. He had for years resided in England; and there were circumstances which rendered the domicile in his case open to considerable question.. Adultery was committed by his wife abroad, and he sued in the Courts of Scotland to have a divorce. And, my Lords,

(*a*) 2 Shaw & M'L. 154.

the decision of this House, confirming the judgment of the Court below, was that although the marriage was celebrated in England with an English woman, and although the adultery was committed abroad, yet inasmuch as the husband's domicile was Scotch, and continued Scotch, there was sufficient ground to give to the Courts in Scotland the power of decreeing divorce *à vinculo*.

There is, my Lords, a very material difference to be observed between the law of Scotland and the law of England as regards divorce. By the former, you may obtain a divorce *à mensâ et thoro*. Or you may obtain divorce *à vinculo matrimonii*. But the law of England does not rescind a marriage once validly contracted. Divorce, therefore, *à vinculo matrimonii* in this country can only be by Parliament.

My Lords, there is one other distinction to which I must shortly call your Lordships' attention. In England, speaking generally, a woman cannot obtain a divorce from Parliament as a man can. In Scotland the woman's rights and the man's are equal.

Keeping these diversities in view, I think your Lordships will see without difficulty the point of law which arises in this case. It is stated in the second plea (*a*). This plea, I conceive, is founded upon a false allegation; for I do not admit that the Pursuer "did institute a suit against the Defender in the Arches Court in England." The husband was the institutor. The wife indeed took a defence, which, by the forms of the Court, amounted to a counter process no doubt; and as she had to prove her case, she became defensively an actor in a certain sense. But that does not justify the statement in this plea that she instituted a suit against her husband. My Lords, in my opinion, she instituted no suit.

But it is objected upon the pleadings, and also in

(*a*) See this plea set out, *suprà*, p. 36, note (*a*).

GEILS *v.* GEILS.

Lord Chancellor's opinion.

argument at your Lordships' bar, that even if there had been no proceeding by the wife in the Arches Court, still she could not have sued with effect in Scotland under the circumstances of the present case.

Now, as I understand that point, it depends upon one or two authorities. One of them is the case of *M'Carthy* v. *De Caix* (*a*), in which I was Counsel, before Lord *Brougham* in the Court of Chancery; and the other is the well-known case of Lolly (*b*).

In *M'Carthy* v. *De Caix* the suit arose between the representatives of the wife and of the husband upon the right to certain property which had belonged to her;—and it involved the question whether the marriage had or had not been properly dissolved by the authorities in Denmark. The husband was a domiciled Dane. He married an English lady. They went to Denmark, and the husband there obtained an absolute divorce dissolving the marriage. And upon certain letters which had been written, the point arose whether he had or had not waived his marital right to a certain portion of the wife's property. My recollection enables me to say that the question of the effect of the divorce was not argued in that case, but the Lord Chancellor took up the point, and upon the strength of *Lolly's case*, he held that an English marriage could not be dissolved by a Danish Court, and that our law could not recognise a dissolution.

Now *Lolly's case* was of this nature. An Englishman and an English woman were married in England. The man married twice in England, the first wife being alive; he was tried for bigamy. His excuse was that the first wife had committed adultery in England, and that he had obtained a divorce *à vinculo* in Scotland. All the English Judges were of opinion that the marriage was

(*a*) 2 Russ. & Myl. 614.
(*b*) *Lolly* v. *Sugden*, Russ. & Ry. 237.

not dissolved by the law of England. He was convicted, sentenced, and punished, though afterwards pardoned. This no doubt was a solemn decision. But it was a case between English subjects with an English domicile, the crime being committed in England with a residence of forty days by the husband in Scotland. It was, I believe, an undefended case on the part of the wife; but whether that was so or not, the sole object in the case of Lolly was to evade the law of England, and I think that is proved pretty clearly by the fact that the husband seems to have married again in England, as I collect from the dates, almost immediately after the sentence of divorce *à vinculo* had been pronounced in Scotland.

Now I am not here to advise your Lordships to dispute the law in *Lolly's case*. It shows that which we know well exists—a conflict between the law of England and that of Scotland; a conflict to be regretted and to be deprecated, but which we have no power to rectify or redress sitting here as a tribunal of appellate jurisdiction.

My Lords, having stated what was the opinion of the noble and learned Lord who decided the case of *M'Carthy* v. *De Caix*, and who relied so much upon *Lolly's case*, I will now advert to what he said when the same argument was pressed upon him in the Warrender appeal. It could not have been more strenuously urged than it was there; for it was said, how can you decide in favour of the jurisdiction in Scotland to dissolve an English marriage, after the opinion you expressed that an English marriage could not be dissolved in Denmark; and after saying that you thought *Lolly's case* was unimpeachable? What was the answer of the noble and learned Lord?—He said (*a*), and I entirely concur with him, that the judgment which he recommended in the

(*a*) 2 Cla. & Finn. 567.

GEILS *v.* GEILS.

Lord Chancellor's opinion.

Warrender appeal would not break in on *Lolly's case*, adding, "this is a decision in reference to the law of Scotland, a judgment founded on which, we now, as a Court of Appeal, confirm. *Lolly's case* refers to the law of England. The note of what I said in Chancery in *M'Carthy* v. *De Caix* may or may not be accurate. I did not correct that note, nor did I know of it until I saw it in these papers. But whatever opinion I may have entertained of *Lolly's case* in the Court of Chancery, or privately, cannot affect my judicial opinion in this House, sitting as a member of a Court of Appeal on a case from Scotland."

Therefore, my Lords, I shall dismiss these cases from my consideration, as not bearing upon the present; and I shall assume that the only question for the House to decide is *this*—Has the wife lost her right to go to the Courts of Scotland for further relief in consequence of the relief which she has already obtained in the Courts of this country?

My Lords, the principal, indeed, I may say, the only case on this question is that of *Allison* v. *Catley* (*a*), where a marriage was contracted in England between two parties who were English by birth and by domicile. The husband going to Scotland, as is usual in these cases, and residing there upwards of forty days to found a jurisdiction, commenced an action of divorce against his wife, alleging her to have committed adultery in England. She was not present, but she was served. In course of the discussion in this, which was an undefended case, it appeared that the husband had a proceeding at that very time in the Consistory Court in England, and that he had obtained, pending the proceedings in Scotland, a divorce *à mensâ et thoro* here. It did not appear when it was that he commenced these proceedings. The

(*a*) Second Series, vol. i. p. 1025.

Judges in Scotland saw the great difficulty which arose in the case; knowing, as they could not but know, that it was a case in which it was intended to evade the law of England, it being the case of English subjects domiciled in England, the alleged adultery being committed in England, the husband going to reside a short time in Scotland for the mere purpose of giving him a right, in respect of domicile, to commence proceedings there, the wife not appearing. The Court, therefore, perceived that it was a mere attempt to make use of the Scottish jurisdiction in order to evade the law of England to which the parties were properly amenable. Now, upon the point to which I have just called your Lordships' attention the Scotch Judges make this observation :—

> We rest our opinion chiefly on the ground, that the Pursuer, having already obtained all the reparation which the wisdom of the law of his own country has thought due and sufficient for the wrong he has suffered, cannot afterwards insist for any additional reparation from the law of another country, though he may have qualified himself by forty days' residence, to sue in its Courts. The sentence he has obtained in the Consistory Court of England is truly a sentence of divorce, upon proof of adultery. It is not indeed *divortium à vinculo matrimonii;* its proper character and denomination is *divortium à mensâ et thoro.* It is still a divorce, and the only divorce known to that Law under which both parties have always lived; under which their marriage was contracted; and in the territory of which the marriage-vow was said to have been broken.

My Lords, I entirely concur with the learned Judges in Scotland in this opinion; which is not only sound in a legal point of view, but wholesome and beneficial as preventing a resort, first, to the law of this country, by which both parties are clearly bound; and, secondly, a resort to the law of a foreign country, (which, for the purposes of this argument, Scotland must clearly be considered)—in evasion of English law, the benefit of which the parties take as far

GEILS *v.* GEILS.

Lord Chancellor's opinion.

as they can obtain it. [Here his Lordship cited and commented upon the opinions of Lords *Fullerton* and *Wood* and the *Lord-President* in the Court below. His Lordship then proceeded as follows] :—

We have then the opinion of Lord *Cuninghame*, who puts the case a good deal higher than the other Judges. Says his Lordship :—

> Suppose it were found in our Court, in an action of mere adherence, that the complaining spouse had been guilty of adultery, and that the Defender was not bound to adhere, or in a suit for separation, that the Defender had been guilty of adultery, authorising a decree of separation, would these judgments constitute any valid or reasonable defence, in our Court, against a subsequent process of divorce *à vinculo matrimonii?* They have never been so considered; and in my view they would make strong corroborative grounds for the ultimate remedy.

Now this is very strong; for your Lordships find here that the learned Judge says, it has never been considered that the taking of the first step would be any bar to the taking of the higher step afterwards, but, on the contrary, (and here I agree with him,) would be a strong corroborative ground for the ultimate remedy. The learned Judge proceeds further :—

> In such a case there is no principle for holding that a spouse, by taking the lesser remedy in the first instance, is precluded from the greater relief, or has abandoned his right to it. There may, indeed, often be reasons in cases like the present for inducing wives to refrain for a time from dissolving the marriage-tie with their husbands. But when judgment of separation is pronounced on evidence of guilt found to be sufficient, there may in general be less reluctance in the injured parties to pursue for the ulterior remedy. Their right to do so has never been questioned in any case on record.

Lord *Cuninghame* then cites the authority of "Erskine's Institute" in support of his opinion; and I have myself perused the passage, which is very important. His Lordship proceeds thus :—

Lord Chancellor's opinion.

Mr. Erskine, when treating of our actions of separation as distinguished from divorce *à vinculo matrimonii*, says that "the Judge will on proper proof authorise a separation *à mensâ et thoro*, and award a separate alimony to her, suitable to her husband's fortune, to take place from the time of the separation, and to continue till there shall be either a reconciliation between the parties or a sentence of divorce (*a*).

This, of course, means such a sentence as would altogether untie the knot and dissolve the marriage. There is no authority to the contrary. The learned Judge says, "The right to do so has never been questioned in any case on record." Certainly no such case has been quoted at your Lordships' bar; and I think, therefore, we may safely assume it to be the law of Scotland that the wife may first obtain in Scotland a divorce *à mensâ et thoro*, and then afterwards maintain another suit for a divorce *à vinculo matrimonii*.

My Lords, before I say anything of the important analogy which exists between the law of divorce here and in Scotland, I will refer to an argument which was advanced at your Lordships' bar, on the part of the Appellant, by way of illustration, taken from contracts for the purchase of land in this country. It was asked, was there any instance of a man bringing an action for damages and then filing a bill for specific performance? Probably not; and for this reason, that, in point of fact, the two remedies are inconsistent. A man has the choice: he may either go to law for damages, and keep his estate, or he may insist that the agreement be executed *in specie*. The cases, therefore, do not apply. But, suppose a purchaser, in the first instance, to file a bill for specific performance and to fail, he is left at liberty (and in many instances that liberty has been

(*a*) See Ersk. Inst. B. 1, T. 6, S. 19.

GEILS *v.* GEILS.

Lord Chancellor's opinion.

exercised with very great advantage) to resort to law afterwards for the recovery of damages.

Take the case where a vendor files a bill for specific performance, and the bill is dismissed. He may, nevertheless, go to law for damages, and he may recover damages. So that, in point of fact, the two remedies are open where they are not inconsistent. If the two remedies are inconsistent, a man must make his election; but if they are consistent he may try one, and though he fail in that trial, he may resort to the other and succeed.

Now, my Lords, although, as I have said, the laws of divorce in England and Scotland differ from each other, there is, for the decision of this case, a very material analogy between them. Thus I apprehend no one can dispute that this lady by the law of Scotland (with which the law of England could not interfere) might have resorted to the Scotch Courts in the first instance, and might have obtained a decree of divorce *à vinculo matrimonii*. It is equally clear, I think, that she might have gone to Scotland, and obtained, in the first instance, the lesser remedy of a divorce *à mensâ et thoro*, and afterwards maintained a suit for an absolute dissolution of the tie of marriage. It was said at the bar, in the course of the argument, that the latter remedy could not be resorted to, unless for a subsequent crime; but no authority was quoted for that restriction, and I take it to be clear that it is not the law of Scotland. Of course, subsequent crime might and would entitle the aggrieved party to the remedy; but without any fresh delinquency it would, I conceive, be effective. If, then, the wife by the law of Scotland, which we are bound here to administer, could obtain a release altogether from the marriage in the first instance, or even obtain it by steps, I ask your Lordships, can

the act of the husband deprive her of that right? Can he, by simply coming to the Courts of this country for a restitution of conjugal rights, which she had refused to him, as it is alleged, for ample cause, and which, therefore, naturally would lead him to suppose that she had legal measures in contemplation—can he, my Lords, by getting the start of her in this way, exclude her from that redress and that protection which she would otherwise have been entitled to claim? My Lords, I apprehend that such a contention is clearly unsustainable. Then ought she to be prejudiced by the line of defence which she took in this country? As I before remarked, she was not a volunteer litigant in the English Court. She was compelled to defend herself. If she had not done so there would have been a sentence enforcing against her a restitution of those conjugal rights which she had previously (and, as it is asserted, on good grounds) refused. Was she to submit to this when she had a defence open to her which, as I have before stated, would make perpetual that separation which had already taken place in point of fact, and which could only be put an end to by a joint reconciliation? Can it be reasonably maintained that, because this lady accepted that which the Ecclesiastical Court tendered to her, she is, therefore, to be stopped from asking a higher remedy where the law of the country affords it? As regards the administration of the Scotch and English law there is truly a difference; but it is a difference of mode rather than of effect. Now, so far is a prior sentence of divorce *à mensâ et thoro* from being an impediment to further relief in this country, that, as your Lordships know, Parliament will not interpose with us until such previous divorce has been procured from the Ecclesiastical Court. Now, if we uphold the decision of the Court below in this

GEILS *v.* GEILS.

Lord Chancellor's opinion.

case, we shall find that, upon the question of the right to consecutive remedies, the two systems will be, to a certain extent, in harmony with each other.

Upon these several grounds, my Lords, I humbly move that this judgment be affirmed.

Lord TRURO:

Lord Truro's opinion.

My Lords, the question what is the effect of the proceedings in the English Consistorial Court has been correctly represented as a question of foreign law to the Court in Scotland. My Lords, according to my humble apprehension, a very erroneous view is taken of the effect of those proceedings. I do not think, however, that the error ought in any degree to affect your Lordships' ultimate decision upon the merits of this appeal. It is said that, according to the course of practice in the Ecclesiastical Court in England, a husband or wife who by a responsive allegation in a suit charges adultery, and prays a remedy upon that charge, is not the institutor and originator of the suit. My Lords, I am satisfied that, upon a full investigation, that opinion would turn out to be wrong. The process of every tribunal has but one object, which is, to bring the party before the Court to answer the matter which is to be produced against him. The complaint is to be found in the libel. If a person is already engaged in a suit there wants no proceeding to bring his opponent before the Court: he is there. If a man brings an action against a debtor for one cause, and he has another cause of action which cannot in point of form be joined with the first, he needs not to begin a new action, though he cannot engraft the second upon the first; but, without any new process, the Plaintiff can declare "*by the bye*," as it is called, against the Defendant; and that is just as much a

substantive suit as if it had been preceded by process to bring him into court. And it appears to me impossible to attend to the cases cited in *Best* and *Best* without coming to the conclusion that if the wife or the husband advances in a responsive allegation matter which may be made the foundation of a decree, that libel is in the nature of a declaration in a new cause.

What said Sir *Herbert Jenner Fust* in this very case (*a*)? Why, he said, originally a suit was commenced by the husband for the restitution of conjugal rights; but the wife, by a responsive allegation, has now charged her husband with adultery, and now the cause is changed. My Lords, it is desirable to prevent future litigation by reason of an erroneous view of this proceeding. And I am, therefore, anxious to state my opinion that, even if the wife had instituted a distinct and independent suit, the effect would not have been different in the present case. But, unfortunately, by giving judgment on a matter of merits without the record being closed, the Court below and the House are left without some of those materials which they would have otherwise possessed.

My Lords, whether or not the parties would now derive any advantage from this case being remitted by reason of the omission to close the record, is another question. This is not a technical defect. It arose from this circumstance (I say it under the authority of this House (*b*), but with all respect for the learned Judges in Scotland), that the plea of the sentence of the Consistorial Court in England was considered a dilatory defence. When the appeal came to this House, a petition was presented by the

(*a*) Notes of Ecclesiastical Cases, vol. vi. p. 109.
(*b*) *Suprà*, p. 36.

GEILS *v.* GEILS.

Lord Truro's opinion.

Respondents against its reception. The Appeal Committee thought the question so grave that they directed it to be argued at your Lordships' bar, and the House determined that the plea was not dilatory. Accordingly, the appeal was ordered to be received. But, my Lords, I consider that the rule ought to be inflexible that wherever merits are to be decided, the record ought to be closed; and the House will always be careful to see that by omitting to close the record in such circumstances parties are not prejudiced.

I will now, however, pass to the main question in the cause, namely, whether the plea brought under your Lordships' consideration is a sufficient answer in point of law to the libel of this lady, in which she prays for divorce *à vinculo matrimonii*.

My Lords, it will be necessary to consider what is the nature of the plea. Is it a plea by way of estoppel,—that the party has taken a course which estops her in point of law from prosecuting the remedy which is now sought in the Scotch Courts; or is it in the nature of a plea of judgment recovered? I am not aware precisely to what extent the law of estoppel prevails in Scotland; but all that I have been enabled to discover on the subject leads me to the conclusion that the principle is encouraged in that country as here, with very little difference,—every estoppel must be precise and distinct, and to the same point. This is an application in Scotland for a divorce *à vinculo matrimonii*. What has been done by this lady which is inconsistent with her prayer for a divorce, so as to put the case upon the ground of estoppel, and to enable the husband to say—You, by your conduct, have said and done that which is inconsistent with the remedy which you are now pursuing? The passage which my noble and learned friend read

from the Scotch text writer seemed to suggest that a divorce *à mensâ et thoro* might be considered as ancillary to an ultimate judgment of divorce *à vinculo matrimonii;* showing most distinctly, therefore, that in the Scotch law the two are not inconsistent, supposing that both proceedings were in Scotland; and, in truth, nothing has been urged at the bar which at all makes the doctrine of estoppel applicable to this case, so as to lead to the conclusion that this plea presents a good bar to the proceeding.

It is more in the nature of a plea of judgment recovered.

This, I apprehend, would be found to be pretty much the law of every country, that, where a man has once sought redress for a particular injury, he is not entitled to split his complaint, and ask for one species of redress, which shall be applicable to the whole subject-matter, in one Court, and a different species of redress for identically the same wrong in another Court. Suppose this lady, independently of any suit on the part of the husband, had commenced a suit for a divorce *à mensâ et thoro* in England. Consider what her situation is. She is exposed to the coercion of her husband, she stands under the legal duty of cohabiting with him, and it is obvious that much distress might be occasioned to a woman who, having just cause of separation from her husband, should yet omit (he desiring to continue the cohabitation) to protect herself by the authority of the law and the sentence of a Court. She is in a country where marriages are indissoluble. She comes into Court, not to ask partial relief, not to divide her complaint, or to recover by instalments the redress which she desires. She states her whole case, and she asks all the relief (divorce *à mensâ et thoro*) which it is in the power of the Court to afford. This being granted to her, she then repairs to Scotland, (and we are dealing

GEILS *v.* GEILS.

Lord Truro's opinion.

with a case in which the Scotch Courts have jurisdiction) and there prays for a divorce *à vinculo matrimonii*. What authority has been cited to show that the remedy or protection which she has obtained in the Court of Doctors' Commons is a bar to that proceeding? I am not aware that any such authority has been adduced, except the case of *Allison* v. *Catley*, which I will deal with presently. It is said, can a man bring an action for damages for a breach of contract, and can he also file a bill for specific performance? I can very readily conceive that he may do both. Suppose a man has entered into a contract for the purchase of an estate—suppose he then makes a sub-contract, and that by reason of the failure of the first party, he himself not having the power of conveying the estate, which has not been conveyed to him, is subjected to an action by the other party. He may have a right to have the contract performed—he may have a right to require that he shall be placed in that situation in which it was the object of the contract to place him; but he may also have suffered a legal injury by which he would become entitled to a certain amount of damages. A Court of Equity may say, we will not allow you to have the remedy of requiring a specific performance of the contract; but I apprehend, if it could be shown that real injury had been sustained, the party might then proceed to recover damages at law for the loss of the estate. Suppose a man covenants to pay an annuity: you may bring an action of debt for payment, or you may bring an action of damages for non-payment, of the annuity, but you cannot split your remedy—you cannot do that which was attempted in the case of Lord Bagot (*a*). You cannot go to a Court with an entire demand, and limit that demand below its real amount, and, after recovering there, go next to

(*a*) *Lord Bagot* v. *Williams*, 5 Dow. & Ryl. K. B. Rep. 87.

some other Court and get the remainder. But here the ground upon which I think, in concurrence with my noble and learned friend, that this is no bar, is, that the two remedies are collateral—they are directed to distinct objects and have totally different effects; and therefore the circumstance of this lady pursuing a remedy for the purpose of obtaining protection against being compelled to cohabit with her husband, either during a given time, or an indefinite time, is quite consistent with the proceedings which she afterwards instituted to dissolve the marriage. The two things may well stand together.

With respect to the case of *Allison* v. *Catley*, it is material to observe what was the precise decision come to? It went upon the ground of jurisdiction. The Court had nothing to do with what was the effect of the English divorce. It is said, the man's residence in Scotland was only colourable. I am not aware that there is such a thing as colourable residence. When the law says that a man's residence in a country for a certain space of time shall place him in a certain position, I do not understand how the *mode* in which he resides there can have any operation in qualifying the effect of the residence. Six of the Scotch Judges have said that a sentence of divorce *à mensâ et thoro* is a bar in Scotland to a suit for divorce *à vinculo matrimonii*.

It appears to me that the learned Judges in Scotland, in their decision of the present case, have said the contrary of that which is laid down in *Allison* v. *Catley*; and I think your Lordships must not shrink from taking the correct view of *Allison* v. *Catley*, and must not let it be set up hereafter, unless you think it contains good law.

On the whole, my Lords, I must express my opinion, in concurrence with that of my noble and learned friend, that this plea is a bad plea; and I must join

GEILS *v.* GEILS.

him in recommending that the decision complained of be affirmed.

Dr. *Addams* applied for the costs of the preliminary discussion upon the question respecting the alleged irregularity or incompetency of the appeal under the reservation made by the House (*a*). He cited *Gray* v. *Forbes* (*b*).

Mr. *Anderson:* The reservation of costs was made upon the application of the Appellant. The decision on the competency was against the Respondent, *Keith* v. *Kerr* (*c*).

The LORD CHANCELLOR: The House is of opinion that there ought to be no costs on either side.

Interlocutors affirmed.

(*a*) *Suprà*, p. 42. (*b*) 5 Cl. & Finn. 363. (*c*) 1 Bell, 386.

SMEDLEY & ROGERS, DODDS & GREIG——GRAHAME, WEEMS, & GRAHAME.