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APPEAL

FROM THE COURT OF SESSION.

The Hon. Lady ANNE WARRENDER,—*Appellant;* The Right Hon. Sir GEORGE WARRENDER, Bart.,—*Respondent.*

[Mews' Dig. viii. 226; S. C. 9 Bli. N.S. 89. Among the numerous cases in which *Warrender* v. *Warrender* has been dealt with, it may suffice to refer to *Harvey* v. *Farnie* (1880-82), 8 A. C. 43; and *Le Mesurier* v. *Le Mesurier* (1895), A. C. 517, where all the principal authorities are examined. See also Westlake's *Priv. Int. Law*, 3d Ed. 65, 78, and Dicey, *Confl. of Laws*, 2nd Ed. 388.]

A Scotchman domiciled in Scotland was married in England to an Englishwoman, and by marriage contract secured to her a jointure on his Scotch estates. They went to Scotland after their marriage, and resided there a short time, when they returned to England. They afterwards agreed to a separation, and articles of agreement were executed, by which the husband secured a separate maintenance to the wife during the separation. From the time of the separation the wife resided abroad, and the husband continued to be domiciled in Scotland, where he raised an action of divorce against her, on the head of adultery, alleged to have been committed abroad after the separation. HELD by the House of Lords, affirming the interlocutor of the Court of Session, that the wife's legal domicile was in Scotland, where the husband's was, and that she was amenable to the jurisdiction of the Scotch Court; that an edictal citation, with actual intimation by serving a copy of the summons personally, was a good citation; and that it is competent to the Scotch Courts to entertain a suit to dissolve a marriage contracted in England.

This was an appeal against an interlocutor of the Court of Session in Scotland, repelling preliminary defences taken by the Appellant to an action of divorce raised against her there, in September 1833, at the instance of the Respondent. The main question, now for the first * time submitted for adjudication to [489] this House, was whether the Scotch Courts have jurisdiction to entertain suits for dissolving marriages contracted and solemnized in England, according to the law of England.

The Respondent, in the case prepared on his behalf in the Court of Session, and afterwards presented to this House for the purposes of the appeal, stated, among other things, that he was born in Scotland, of Scotch parents; succeeded to the family estates in the county of East Lothian, and acquired, by purchase in other counties of Scotland, landed property of considerable extent and value; that on succeeding to the estate of Bruntsfield near Edinburgh, in 1820, he fitted up the mansion-house there as his principal place of residence, and actually resided there from that period; that in early life he obtained a commission in the Berwickshire militia, and was still lieutenant-colonel of that regiment. In 1807 he was returned to Parliament for the Haddington district of burghs; afterwards was elected Member for an English borough, and during his attendance on his parliamentary duties, for the first five years, he lived in temporary lodgings or in hotels in London, having then no house or establishment in any part of England. In 1812, being appointed a member of the Board of Admiralty, he took possession of a house assigned to him in right of that appointment, and continued to occupy it until April of the year 1822; but in every year during that period he returned to Scotland, whenever his official duties permitted his absence from London. In October 1810, while the Respondent was residing in lodgings in London, he was married, according to the laws of England and the rites of the Church of England, to the Hon. Anne Boscawen (the Appellant), daughter of George Evelyn, Viscount [490] Falmouth, then deceased, with the consent of her guardians, she being only 18 years of age: That previous to and in contemplation of the marriage, a settlement in the English form,

* The same question was submitted in *Tovey* v. *Lindsey*, 1 Dow. 117, but was not decided.

to which the Appellant's guardians were parties, was duly made and executed, securing the interest of her fortune to herself for life; and also an ante-nuptial contract of marriage, in the Scotch form, was executed at the same time, by which it was provided that the Appellant should be secured in a jointure of £1000 a year, partly over the Respondent's heritable estates of Lochend, and partly over his lands at Goodspeed, both situated in the county of Haddington; and in virtue of the precept of sasine contained in that contract, the Appellant was afterwards duly infeft in those lands: That immediately after the marriage the Respondent, accompanied by the Appellant, returned to Scotland, and they resided together on his paternal estates there for the greater part of the two years next following; the Respondent being obliged by the duties of his office in 1812 and thenceforwards, to reside more constantly in London, where the Appellant also resided with him.

The Respondent further stated, that in the year 1814, and subsequently, differences sprung up between him and the Appellant; and that in 1819, at the solicitation of herself and her relations, he reluctantly consented to a separation. The articles of agreement entered into on that occasion, dated the 1st of January 1819, and made between the Respondent of the first part, the Appellant of the second part, and her brothers, Viscount Falmouth and the Hon. and Rev. John Evelyn Boscawen, of the third part, recited, that "Whereas circumstances have arisen which have induced the said Sir George War-**[491]**-render and Dame Anne, his wife, to agree to live separate and apart from each other henceforth, until these presents shall be annulled as hereinafter mentioned," etc.; and, after securing to the Appellant certain annual income, to be paid by the Respondent to her trustees, at such periods and in such manner as therein mentioned, for her separate maintenance during the separation, they contained the following clauses: "That if the said Sir George Warrender shall in any one year be obliged to pay and shall pay any debt or debts of the said Dame Anne Warrender hereafter contracted, to the amount in the whole of upwards of £1010 (the annual sum secured for her separate maintenance), then and thenceforth the covenants of the said Sir George Warrender, hereinbefore contained, shall cease and be void;" and again, "That if the said Sir George Warrender and Dame Anne his wife shall jointly be desirous of annulling these presents, and the agreements and provisions therein contained, and shall signify such desire in writing indorsed on these presents, or on a duplicate thereof, (such writing to be under their joint hands and attested by two credible witnesses,) then and from thenceforth these presents, and every article, matter and thing herein contained, shall cease, determine and be null and void, anything hereinbefore contained to the contrary notwithstanding." On the 6th of February 1819, the Respondent addressed the following letter to the Appellant's brothers, the trustees of the articles: "My Lord and Sir,—Although I have objected to have any clauses inserted in the articles of separation between Lady Warrender and myself, which should contain a permission from me to her to go and reside where she pleases, or which should preclude me from suing her in the Ecclesiastical Court for restitution of conjugal rights, I hereby **[492]** pledge myself that Lady Warrender shall be at liberty, during our separation, to go and reside where she pleases, and that I will not institute any suit against her, for the purpose mentioned. I am, etc., G. Warrender."

The Respondent in his case further stated, that he and the Appellant had lived separate ever since the date of the said recited articles; he continuing to reside sometimes in Scotland, sometimes in London, as required by his official situation and parliamentary duties; but that the Appellant went to the Continent, and, except one short visit to England in 1821, she had ever since resided abroad, in France, Switzerland, or Italy: that circumstances having lately come to the knowledge of the Respondent, which led him to distrust the Appellant's conjugal fidelity, he, upon an investigation directed by him, satisfied himself that she had, in 1822, formed an improper intimacy with one Luigi Rabitti, a music-master, and had been guilty of adultery with him in that year, and kept up an adulterous intercourse with him through the years 1822, 1823, 1824, 1825, 1826, 1827 and 1828, in Paris, Dieppe and Versailles, all in the kingdom of France; whereupon the Respondent instituted his suit praying for "a decree, finding and declaring the Appellant guilty of adultery, and divorcing and separating her from his fellowship and company; and also finding and declaring the Appellant to have forfeited the rights and privileges

of a lawful wife; and that the Respondent is entitled to marry any person he pleases, sicklike and in the same manner as if he had never been married, or the Appellant were naturally dead; conform to the law and practice of Scotland."

The Respondent's summons of divorce, concluding in these terms, was executed against the Appellant **[493]** edictically as forth of Scotland,* and a copy thereof was served personally on her at her residence at Versailles.

The Appellant appeared to process, and denying that she had been guilty of conjugal infidelity, she took three preliminary defences to the action: First, that she was not subject to the jurisdiction of the Court, being English by birth, parentage and connection, and never having been in Scotland since the date of the contract of separation; nor had she any Scotch property, except that part of her eventual matrimonial provision was secured over the Respondent's Scotch estate: her plea was, that she was not within the jurisdiction of the Court of Session, even although it were to be assumed or admitted that at the date of the marriage the Respondent was and had ever since been a domiciled Scotchman: the contract of separation, which was fully carried into effect for fourteen years, excluded the application of the Scotch legal fiction, that the domicile of the husband is necessarily the domicile of the wife. Secondly though the appellant should be held amenable to the Court, on the ground of the husband's domicile being in Scotland, and his domicile being the wife's, still she had not been properly cited even in that view: she had only been cited as "forth of Scotland;" whereas, if jurisdiction over her be claimed on any presumption that she was living with the husband in that country, she ought, besides receiving personal intimation, to have been cited as at his residence, or somewhere else in Scotland. Thirdly, that the Appellant being a domiciled Englishwoman at the time of her marriage, **[494]** and having been married in England according to the rites of the English church and to the English law, her marriage could be dissolved only by Parliament; at all events it could not be dissolved by a Scotch Court, when all the alleged acts of conjugal infidelity were stated to have been committed in foreign countries. The Appellant, in conclusion, insisted, that the marriage being an English marriage, and the Respondent himself being, at the date of both the contract of marriage and contract of separation, a domiciled Englishman, all questions relative to the effect of either of those contracts should be decided according to the law of England; and by that law the marriage was indissoluble, except by Act of Parliament.

The Lord Ordinary, having heard counsel for both parties in these defences, appointed them to give in mutual cases. Before the cases were lodged, the parties being at issue as to the fact of the Respondent's domicile, a joint minute was entered on the pleadings, by which the Dean of Faculty, for the Respondent, stated, "That in the cases to be lodged for the parties, he consented that the preliminary defences should be argued on the assumption that the Respondent was a domiciled Scotchman at the date of the marriage, and had been so ever since; provided always, that the facts stated in the summons for founding his domicile should not afterwards be disputed in discussing the preliminary defences:" and the Solicitor-general, for the Appellant, answered, "that he was willing to discuss the preliminary defences on that understanding, reserving the whole statements respecting the domicile, in so far as they may be of avail on the merits."

Mutual cases were subsequently lodged for the parties, and brought before the Lords of the first **[495]** division of the Court of Session, who unanimously pronounced an interlocutor, on the 14th of June 1834, repelling the preliminary defences, and remitting to the Lord Ordinary to proceed in the cause (12 Shaw and D. 847).

Lady Warrender appealed from that interlocutor.

The Attorney-general (Sir J. Campbell), and Dr. Addams, for the Appellant:—The Appellant has been for the last twelve years almost constantly resident in France. Denying, in the most unqualified manner, the truth of the charges imputed to her in the summons, she is ready to meet them before the proper tribunal; but she declines pleading before what is to her a foreign Court, where, for many

* An edictal citation is given to defenders out of Scotland, by proclamation at the Market-cross of Edinburgh, and pier and shore of Leith.—Act of Sederunt, 14th December 1805, s. 1; and see Ersk. B. 1, tit. 2, s. 18.

reasons, her defence must be conducted under comparatively great disadvantages: she has, therefore, taken preliminary objections to the action. In arguing those objections, the Appellant is bound to assume, hypothetically, the truth of the statement contained in the Respondent's summons, that he is a domiciled Scotchman. But it is also clear, from his summons, that, from the year 1812 until within a short period before the raising of the action, he had been almost constantly resident in England, and that the Appellant was not in Scotland during the last twenty years. With the exception of two short visits to Scotland soon after the marriage, the parties resided constantly in England until the separation in 1819. On that occasion articles of agreement were executed, and a letter was written by the Respondent, which, bearing express reference to the contract of separation, must be taken as part of that contract, and the obligations which it imposes on him must be con-[496]-sidered as effectual as if they were embodied in the agreement. By these articles, which are declared to be irrevocable except by the joint deed of the parties, and by the letter taken as part of them, the Appellant was permitted to reside wherever she pleased; and she accordingly, in the terms of that permission, took up her residence in France, where, except a short visit to England in 1821, she has continued to reside up to the commencement of this action, and where also all the acts of infidelity alleged against her are by the summons charged to have been committed.

The Appellant has been, under these circumstances, advised to take preliminary objections to the action. The first objection is, that as she was not resident within the jurisdiction of the Scotch Courts, it was incompetent to insist against her there, in any action declaratory of her personal *status*. The rule of law in such cases is, *actor sequitur forum rei*. It is true that in the case of *Brunsdon* v. *Wallace* (Fac. Coll. Feb. 1789; S.C. Ferg. Cons. Rep. App. 259), where that rule may be said to have been established, there was a difference of opinion among the Judges; but that difference arose as to the effect to be given to the *forum originis*, as founding jurisdiction. All doubts upon the point were removed by the decision of this House in *Grant* v. *Pedie* (1 Wils. and Shaw, 716); so that, notwithstanding the seemingly different decree pronounced in the case of *Pirie* v. *Lunan* (Fac. Coll. March 1796; S.C. Ferg. Cons. Rep. App. 260), it may be now considered as settled law in Scotland, that even in the case of a marriage contracted in that country, the Courts there have no jurisdiction to dissolve it, unless the defender is a domiciled native, or resident within the jurisdiction for forty days before summons served.

[497] The rule having been laid down in the cases referred to, and the principle having been recognised in subsequent cases, that in all actions in which the wife is the complainant it is necessary. in order to found jurisdiction, that the husband be a domiciled Scotchman, or resident in Scotland for a certain time anterior to the date of citation; the question then is, whether, in administering the remedy of divorce, which, by the law of Scotland, is competent to the wife as well as to the husband, a different rule is to be applied in determining the question of jurisdiction when the husband is the complainant? That a wife may, in point of fact, be resident in a different country from her husband, is undeniable; but it may be maintained, as a proposition founded on principle and supported by legal authority, that as the *consortium vitae* is the object of matrimony, and as it is the duty of the parties to live together, therefore, in all cases, the Court will hold the domicile of the husband to be also the domicile of the wife. That such is the general rule of law in Scotland, as in England, the Appellant has no occasion to dispute: she is well aware of the legal maxim, and that full effect was given to it in the case of *French* v. *Pilcher* (Fac. Coll. June 1800; S.C. Ferg. Cons. Rep. App. 262); but, like every other general rule, it may be subject to exceptions, and may be qualified by the acts of the parties. It may be true that the house of her husband is the legal residence of the wife, and that, whenever it is necessary to cite the wife for her interest, a citation at the house of her husband may be a good citation. Such is the import of the case of *Chichester* v. *Lady Donegal* (1 Add. Eccle. Rep. 5-19), where a citation for the wife, left at the [498] house of her husband, with whom she was then cohabiting, was held to be a good citation. The rule obtains, too, whether the wife be, in point of fact, resident in her husband's house or not, provided there has been no separation between them, either awarded by law or consented to by the parties. Accordingly, a wife who elopes with her paramour from her husband's house in Scotland, and goes into a foreign country, is still subject to the

jurisdiction of the Scotch Courts in an action of divorce, since her absence from her husband's house is, on her part, a gross breach of duty, on which she can found no plea in aid of her defence. But the case is different when the parties are separated by voluntary agreement, or by the sentence of a Judge. In such cases, the wife, in living separate from her husband, is guilty of no breach of duty: she is entitled to acquire a domicile for herself, which, as it is her actual domicile, must also be held to be her legal domicile, in questions with third parties, and above all, in questions with her husband, the party to the deed of separation.

The application of the legal fiction, which makes the husband's house the legal and proper domicile of the wife, is excluded in this case by the deed of separation. That deed, which was executed in England, all the parties to which, except the Respondent, were English, was irrevocable except by the consent in writing of the principal parties, and the Appellant never consented to revoke it. The validity of this deed was placed beyond all doubt by the case of *Tovey* v. *Lindsay* (1 Dow, 117) in this House, and was not affected by the cases of *Beeby* v. *Beeby* (1 Hagg. 142), *Sullivan* v. *Sullivan* (2 Addams, 299), *Worrall* v. *Jacob* (3 Meriv. 256), or the passages which **[499]** may be cited for the Respondent from Roper's Law of Property of Husband and Wife. These cases show that a deed of separation does not bar a suit for divorce, nor alter the legal condition of the parties resulting from the state of marriage, *Marshall* v. *Rutton* (per Lord Kenyon, C. J., 8 T. Rep. 547); but they decide no question of domicile or of jurisdiction. The deeds in those cases were revocable by either party at any time, and each of them was virtually revoked by the mere act of executing the summons of divorce. It is no part of the argument for the Appellant that a separation, whether judicial or voluntary, excludes either party from the remedy of divorce for adultery: all that she insists upon is, that the trial of such action must be subject to the ordinary rules regulating jurisdiction in other matters; and that if a wife is legally resident in a foreign country, having acquired a domicile there, it is not more competent for the husband to cite her to a Scotch Court, than it would be for a wife to cite to the same Court a husband legally domiciled in England. The agreement entered into by those parties, whether it be practically productive of inconvenience to the husband or not, is a conclusive answer to all his arguments founded on the fiction of law in respect to domicile. The remedy of divorce is in Scotland, as in England, a purely civil remedy, of which the injured party may or may not take advantage; a remedy which the law will infer, from certain acts of the party, to have been abandoned or forfeited. Either party, after detecting and being in a condition to prove the infidelity of the other, may still decline to sue for a divorce, or may continue to cohabit with the other, which amounts to condonation, and excludes the right **[500]** to obtain a divorce; or there may be connivance at the offence, amounting to what is termed *lenocinium*, which is a complete bar to any action of the kind. If there are so many ways in which a husband may abandon his right to demand a divorce, how can it be maintained, with any show of reason, that a deed of separation is absolutely void, merely because the party chooses to allege that an adherence to its express terms will render the attainment of his remedy only a little more difficult, tedious and expensive? Questions of jurisdiction may often arise in Courts of Law, on account of the foreign residence of one or other of the parties; but of the jurisdiction of Parliament to legislate upon the rights of two natural-born subjects there is no doubt. While that tribunal, and the Ecclesiastical Courts of England, are open to the Respondent, he has no reason to complain of being remediless.

The question now at issue was fully considered, both in the Court of Session and in this House, in the case of *Lindsay* v. *Tovey* (Fac. Coll. June 1807; S.C. Ferg. Cons. Rep. App. 265). The circumstances of that case are these: Martin Eccles Lindsay, born and educated in Scotland, entered the army, and went with his regiment to Gibraltar, where, in 1781, he married Miss Tovey, an Englishwoman, and they remained there till 1784; from that time they resided together in Scotland until 1792, when they went to live at Durham. The husband soon afterwards went abroad with his regiment, his residence being regulated by the orders of his superiors. In 1802 a deed of separation was executed at Durham, by which Mrs. Lindsay accepted an annuity; the deed also declaring, that "the said M. E. Lindsay shall and will **[501]** permit and suffer the said Augusta Margaret Tovey Lindsay to live, inhabit and reside separate and apart from him, in such place as she shall think proper," etc. In

1804 Mr. Lindsay raised against her an action of divorce for adultery before the Commissaries of Edinburgh, Mrs. Lindsay at the time being in Durham. A preliminary objection was taken by her to the jurisdiction of the Commissaries, but they sustained their jurisdiction. The case was brought by appeal before the Court of Session. Two questions were raised in the progress of that suit: first, whether the pursuer was a domiciled Scotchman; secondly, whether, if he was, it necessarily followed that his wife was also in the eye of the law domiciled in Scotland, she being, in fact, resident in England, in the terms of the deed of separation. To the argument for the defender, founded on that deed, it was answered, that it was by its very nature a revocable deed, and was virtually revoked by the summons of divorce. The Court of Session, adopting that view, sustained the jurisdiction of the Commissaries. The interlocutor of the Court of Session being appealed from to this House, Lord Eldon said, with reference to the objection to the jurisdiction by reason of the deed of separation, "Even if the fiction or rule of law were admitted, that the *forum* of the wife followed that of her husband, so as to give jurisdiction to the Scotch Courts, still the effect of the deed must be to put an end to that rule or fiction till the deed was revoked. The husband himself had agreed that their *forum* should be different, if the wife so pleased, and then he endeavoured by this process to get rid of the effect of his own agreement" (1 Dow, 138). Lord Redesdale, **[502]** concurring in the observations of Lord Eldon, said, "When it was considered that, on the principles of this decision of the Court below, any one, from any quarter, might go and establish a domicile in Scotland, and by that means, even in the face of a deed of separation, draw his wife to a Scotch *forum*, and proceed against her for an absolute dissolution of the marriage, the question must appear to be one of very great importance. If this were to prevail, any person had it in his power to alter the nature of his solemn engagements, etc. It could not be just, that one party should be able, at his option, to dissolve a contract by a law different from that under which it was formed, and by which the other party understood it to be governed" (1 Dow, 139).—[Lord Lyndhurst: These opinions of those eminent Judges were not delivered as a judgment, and they appear to go on a misapprehension of some of the facts.]—Their opinions are not cited as a judgment; no judgment was pronounced by this House on that case, except to remit it for consideration to the Court below, and Mr. Lindsay died in the meantime. The observations of these eminent persons have been cited as being entitled to the greatest attention, and being applicable to this case, which has this additional feature, that the deed of separation was declared not to be revocable except by the joint written consent of the Respondent and Appellant.

The Respondent has alleged, as another argument for the Scotch jurisdiction, that as the Appellant was infeft in real estate in Scotland in pursuance of her marriage contract, she must be held as domiciled there, where the subject of her settlement was situated.—[Lord Brougham: Do you, Sir Wm. Follett, **[503]** mean to support your case on that ground?—Sir Wm. Follett: Certainly not.]—That being the only circumstance that distinguished this from a purely English marriage, if the argument arising from it be abandoned, Lady Warrender is in the same situation in which Mrs. Lindsay was,—liable to be sued in England, but not amenable to the jurisdiction of the Scotch Courts.

The second plea to the action is, that even if, according to the legal fiction, the domicile of the husband should be held to be the domicile of the wife, still the Appellant has not been duly cited to appear to this action. This is a point of practice in Scotland, best known to the practitioners there. The facts agreed upon are, that the summons was executed against the Appellant edictally, as forth of Scotland; that is, by proclamation at the market-cross of Edinburgh, and pier and shore of Leith: it was also personally intimated to her, by service of a copy on her at her residence at Versailles. But if the Appellant is to be held as resident at her husband's in Scotland, it plainly follows that the summons should be served against her at her husband's house; and it is a contradiction to cite her as forth of Scotland, when it is insisted that by fiction of law she is resident in Scotland, and when it is that fiction alone which renders this action competent. This objection to the service occurred in the case of *French* v. *Pilcher* (Fac. Coll. June 1800; S.C. Ferg. Cons. Rep. App. 262), and it was stated from the Bench in Scotland, that the defender should be cited not only at the market and pier and shore, but also at the house of her husband. The

personal intimation, which may be required *ad majorem cautelam*, did not supply the want of a regular execution of the summons. The Respondent, while he **[504]** rested his whole case on a legal fiction, rejected the fiction altogether in the execution of the summons.

The last and main ground of objection to the suit in Scotland is, that even if the Appellant were amenable to the jurisdiction of the Court there, it is incompetent for that Court to dissolve this marriage, contracted in England, with an Englishwoman, and celebrated according to the rites of the English Church. This objection goes to the extent, that although the evidence of adultery were clear and conclusive, yet no Court of Law can dissolve this marriage; no Court of Law is competent to take cognizance of the conclusion of the summons. The general result of cases decided even in Scotland, such as *Edmondstone* v. *Edmondstone*, *Forbes* v. *Forbes*, and *Levett* v. *Levett* (Ferg. Cons. Rep. pp. 68, 168, 209), comes to this, that an English marriage cannot be dissolved for adultery by the Scotch Courts, unless the adultery was committed there, and the party cited be domiciled there. But the authority on Lolley's (Fac. Coll. March 1812, and Russ. and R. C. C. 237) case is quite decisive on this question. Lolley had been married in England: his marriage was dissolved by the Commissary Court in Scotland: he thereupon contracted a second marriage in England, for which he was tried and convicted of bigamy. In that case, which is entitled in Scotland, in the action of divorce, *Sugden* v. *Lolley* (Sugden being the maiden name of the wife), the adultery was charged to be committed in Scotland, and the defender was actually residing there; two material ingredients which do not belong to the present case. If the English Judges did not intend to break in upon the jurisdiction of the Scotch Courts, Lolley was unjustly convicted of bigamy, and was illegally sentenced to transportation. But there is no question that Lolley's case was well decided, and the principle **[505]** of the decision is, that the contract of marriage, like other personal contracts, is to be construed according to the law of the country where the contract was made. In Scotland, marriages may be dissolved for adultery or desertion; in Prussia, for incompatibility of temper; in France, for any cause that either party may assign; but an English marriage cannot be dissolved, except for adultery, nor even then by any principal tribunal in England; and that which was the principle of the decision of the twelve Judges in Lolley's case, has been adopted by one of their Lordships very recently, in *M'Carthy* v. *Decaix* (*vide infra*), in the Court of Chancery, and by an eminent Ecclesiastical Judge, in the case of *Beazley* v. *Beazley* (3 Hagg. 639).

It is not denied that many decisions have been from time to time pronounced in the Scotch Courts, supporting the Respondent's case to the fullest extent: but not one of those cases has been appealed from; for they were all collusive. The present case is the first which gives this superior tribunal an opportunity of settling the law. This House, having regard to the morals of the people, will be more inclined to restrict than extend the facility of divorces. The reasons given by the Court below for sustaining their jurisdiction are far from being satisfactory (12 Shaw and D. 847-854).—[Lord Lyndhurst: The Judges in Scotland hold, that if other contracts made in England are dissoluble, so is the contract of marriage.—Lord Brougham: It cannot be contended that all the effects of a contract in one country are to be attributed to it in another country: if that were so, children born before the marriage of the parents, being legitimate in Scotland, should be held legitimate in England.]—They are legitimate in England; but they are not heirs, and that is by reason **[506]** of the statute of Merton (*vide infra Birthwhistle* v. *Vardill*). It is not to be denied that the Scotch Courts may dissolve a Scotch marriage—a dissoluble marriage—either for adultery or for non-adherence; as in Prussia a marriage is dissoluble for incompatibility of temper. But the Ecclesiastical Courts of England have not jurisdiction to dissolve a valid marriage for any cause. The Judges in Scotland, in their reasoning in this case, evade the chief question: they have admitted that their decisions were broken in upon by Lolley's case, and the Appellant insists that the decision in her case is inconsistent with that case. Much of the fallacy in this case arises from the false assumption, that this marriage was a Scotch contract: if a native of Russia came to this country, and married here, is that contract of marriage to be regulated by the laws of Russia or of England? It is alleged that the contract was Scotch, because Sir G. Warrender says, he intended to reside

in Scotland. But in fact he did not act according to his alleged intention, for he chiefly resided in England; and an intention never acted upon must be construed as an intention never entertained; *Bruce* v. *Bruce* (2 Bos. and Pull. 229). The basis of the decision of the Scotch Court was, that there was nothing in the legal character of an English marriage that made it incapable of being dissolved by the sentence of a Court of Law; whereas it is well established in this country, that judicial indissolubility is a legal quality of every English marriage. It is true that the Scotch Courts have dissolved many marriages on the principle which they assert; but in most of these cases the adultery was charged as having been committed in Scotland; a circumstance which distinguishes this case from them.

[507] It is no argument to be addressed to this House, to say that the decisions of the Courts below have been many and uniform in support of their jurisdiction; in fact, that circumstance makes it imperative on this House to declare the law.—[Lord Brougham: I should like to have some authority for the assertion, that this House is not bound by a uniform course of decisions, not one of which has been appealed from.]—It is well known that effect had been given for two hundred years to general bonds of resignation, and that there had been a uniform course of decisions on them until the case of the *Bishop of London* v. *Ffytche* (2 Bro. P. C. 211), brought on writ of error to this House, reversed them all. The decisions in Scotland have not been uniform, as may be collected from the cases of *Gordon* v. *Pye*, *Brunsdon* v. *Wallace*, *Morcomb* v. *Maclelland*, and several others (Ferg. Cons. Rep. App. pp. 276. 259. 264). The question is now brought for adjudication to this House; it becomes necessary to settle the law; and it does not follow that, if this decision is reversed, that reversal can have any effect on a former decision which was not appealed from.

Sir William Follett and Dr. Lushington, for the Respondent:—The question put in issue by the Appellant's first plea is, whether it was competent for the Respondent to institute a suit for a divorce against her in the Scotch Courts, while she was living apart from him under a deed of separation, and actually residing in a foreign country? The Respondent is a Scotchman by birth, education, residence, and possession of property; his proper and unquestionable domicile is in Scotland. It is a fact, formally admitted in this case, that he is now and ever has been a domiciled Scotchman. The question then is, was Lady **[508]** Warrender domiciled in Scotland when the suit was instituted? She was, it is true, an Englishwoman up to the time of her marriage. The effect of that marriage was, that she lost her domicile of origin, and took the domicile of her husband. It is a rule of law, admitted in the municipal code of all states, that the *forum* of the husband is the *forum* of the wife. By entering into the marriage contract, the wife leaves her own family, and comes under the obligation to follow the fortunes of her husband, in whom the law vests a curatorial power over her: by the marriage her separate interests merge in those of the husband; her separate character is lost in his, and she is no longer capable of retaining the domicile which she had before the marriage, or of acquiring any other separate from that of her husband. The soundness of this principle was once questioned by the Commissary Court in Scotland, but was sustained by the Court of Session on appeal; *French* v. *Pilcher* (*Ubi supra*, p. 497). The principle has been followed ever since, not only in Scotland, but also in the Consistorial Courts of England; *Chichester* v. *Marchioness of Donegal* (1 Add. Eccl. Rep. 5-19). Although the question of domicile was not the point at issue in that case, yet the Judge observed, "Was not the Consistory Court of London the legal jurisdiction, notwithstanding her (the defendant's) actual residence, during a certain period, in Ireland? A party may have two domiciles, the one actual and the other legal; and, *primâ facie* at least, the husband's actual and the wife's legal domicile are one, wheresoever the wife may be personally resident. It is admitted that the husband's domicile is within the diocese of London." The civil law concurs with the law of England and of Scotland **[509]** in holding, that the domicile of a married woman depends not on the place of her own residence, but on the domicile of her husband (Cod. Lib. 10, t. 39, sec. 9; Voet ad Pand. Lib. 23, t. 2, sec. 40; Lib. 5, t. 1, sec. 101; Stair's Inst. B. 1. tit. 4, sec. 9; Loth. Consist. Law, p. 136).

The general rule is strengthened in this case by the peculiar consideration, that the husband being a domiciled Scotchman at the time of the marriage, having neither residence nor property in England, and also the wife's fortune as well as the other

family provisions being secured on his Scotch estates, the marriage must be taken to be a Scotch contract, although it was had and solemnized in England. It is clear, from these circumstances, that both the parties had a view to Scotland when they entered into the contract. Huber thus lays down the law: *Non ita precise respiciendus est locus in quo contractus initus est, etc. Contraxisse unusquisque in eo loco intelligitur in quo ut solveret se obligavit. Proinde et locus matrimonii contracti non tam is est ubi contractus nuptialis initus est quam in quo contrahentes matrimonium exercere voluerunt* (De Conflictu Legum, sec. 10). Lord Mansfield also, in *Bland* v. *Robinson* (1 Sir Wm. Black. Rep. 258), said, "The general rule established, *ex comitate et jure gentium*, is, that the place where the contract is made, and not where the action is brought, is to be considered in the expounding and enforcing the contract. But this rule admits of an exception, where *the parties at the time of making the contract had a view to a different country.*" It is impossible to deny that the marriage of these parties was entered into *intuitu* of a Scotch domicile; and it must, therefore, be considered as a Scotch contract; **[510]** and consequently the Appellant must be held, in respect of her husband's admitted domicile, to be amenable to the jurisdiction of the Scotch Courts. If the cases of *Brunsdon* v. *Wallace*, *Pirie* v. *Lunan*, and *Sharpe* v. *Orde*, cited for the Appellant, have any bearing on this point, they will be found to sustain the Respondent's case.

But Lady Warrender, though she admits the general rule that the actual domicile of the husband is the *forum* of the wife, still insists that her case is an exception, inasmuch as by the deed of separation she had her husband's permission to live apart from him and to choose her own domicile, of which permission she availed herself; and for this position she relies on the observations of Lords Eldon and Redesdale in *Tovey* v. *Lindsay* (1 Dow, 117). The Respondent answers, that she had not capacity to acquire a separate domicile independent of his; there was no covenant in the deed of separation binding him to permit her to live where she pleased, or restraining him from suing her for conjugal rights. His letter bound him in honour not to interfere with her choice of residence during the separation, but it was not intended to dissolve the matrimonial engagement, and release her from all liability to answer in the *forum* of the husband. The letter was not under seal; was not part of the deed, and is not better than waste paper as affecting process or jurisdiction. Even if it had been incorporated in the deed, it would not have any effect, as the Respondent might put an end to the deed at any time, even by the summons of divorce. The principle of the law of Scotland, deduced from the cases decided there, is, that all voluntary separations are **[511]** revocable, although they bear to be irrevocable *ex facie* of the deeds, except where the separation has proceeded *propter saevitiam* of the husband, or is sanctioned by judicial authority. The marriage being the radical and the original contract, and separation being contrary to the implied inherent condition, and to the duties, of the married state, the law allows either party to revoke expressly, at any time, a contract of separation; and such contract is void by the fact of the parties again living together, or by either suing the other for restitution of conjugal rights, or for divorce; *Fletcher* v. *Fletcher* (2 Cox, 99), *Bateman* v. *Ross* (1 Dow. 235). So also by the law of the Ecclesiastical Courts of England, the relation of husband and wife must, notwithstanding deeds of separation, continue complete until it is dissolved by decree *à mensa et thoro*, or *à vinculo*; *Mortimer* v. *Mortimer* (2 Hagg. 318), *King* v. *Sansom* (3 Add. 277), *Beeby* v. *Beeby* (1 Hagg. 142), *Sullivan* v. *Sullivan* (2 Hagg. 239; S. C. 2 Add. 299-303). In this last case Sir John Nicholl says, "These Courts have so repeatedly said that such deeds of separation are no bars either to suits for conjugal rights or to charges of adultery, that it would be superfluous to combat this argument," (that a deed of separation was a bar to the husband's prayer for a divorce). "I see no more in this deed than the ordinary class of provisions for enforcing, as far as it may be, the continuance, and preventing the termination, of the separate state, in which the parties covenant to live, by means of a suit for restitution brought by either, which nearly in all cases find their way into deeds of this nature, though nugatory as to any binding effect **[512]** on the parties." Neither do the Courts of Equity give effect to deeds of separation, further than to enforce, reluctantly, during the separation, the payments stipulated by the husband to the wife's trustee, whose covenant to indemnify the husband against her debts is held to be a sufficiently valuable con-

sideration; *Wilkes* v. *Wilkes* (2 Dick, 791), *Legard* v. *Johnson* (3 Ves. jun. 352), *Worral* v. *Jacob* (3 Meriv. 256), *St. John* v. *St. John* (11 Ves. 526). Mr. Roper, in his Treatise of the Law of Property of Husband and Wife, refers to other cases, and deduces from them this general conclusion, that Courts of Equity will not infringe on the jurisdiction of the Ecclesiastical Courts, by enforcing the performance of a mere personal contract entered into between husband and wife to live apart from each other (2 Roper, 265-287). It has also been held by the Courts of Common Law, that those deeds do not affect the rights or relation of the parties, and that husband and wife cannot by any private agreement alter the character and condition which by law results from the state of marriage, while it subsists; *Marshall* v. *Rutton* (8 T. Rep. 546), *Beard* v. *Webb* (2 Bos. and Pull. 93-107). The law, as thus established in all the Courts of England as well as in Scotland, is not, in the least, affected by the case of *Tovey* v. *Lindsay* (1 Dow, 117), which differed from this case in the very material circumstance, that Major Lindsay was not held to be a domiciled Scotchman at the date of the deed of separation, or when he sued for the divorce. Lord Eldon having a doubt upon that point, being inclined to think his domicile was at Durham, and being also **[513]** impressed with the circumstance that the then recent decision of the English Judges in *Lolley's* case had not been brought before the view of the Judges of the Court of Session, recommended a remit, for the purpose of reconsideration, but there was no final decision ever afterwards pronounced here or in Scotland; so that the case so much relied upon by the Appellant, does not affect this case one way or the other. It would be great injustice to Lord Eldon to say, that if Major Lindsay had his domicile in Scotland, his Lordship could entertain any doubt that the Courts there had jurisdiction, in the face of *Lauder* v. *Vanghent* (Fac. Coll. 27th February 1692; S. C. Ferg. Rep. App. 250), *M'Donald* v. *Fritz* (Fac. Coll. 26th March 1813; S. C. Ferg. Rep. App. 273), and numerous other cases which have never been impugned. In the cases of *Brunsdon* v. *Wallace* (Fac. Coll. 9th February 1789; S. C. Ferg. Rep. App. 259), and *Morcombe* v. *Maclelland* (Fac. Coll. 27th June 1801; S. C. Ferg. Rep. App. 264), the actions were dismissed on the ground that the defenders (the husbands) had not domicile in Scotland; the attempts made in both cases to found jurisdiction on domicile *ratione originis*, failed. In the present case it is a fact admitted, that the Respondent had actual domicile in Scotland, both at the date of the marriage and of the commencement of the action.

The second plea of the Appellant is to the manner of the citation: she insists, that if her domicile be held to be at the dwelling-house of the Respondent, then she ought not to have been cited edictally, as forth of Scotland, but the citation should have been left for her at the Respondent's dwelling-house. But it is the practice in Scotland to cite a party edictally, if he or she be absent from the country above forty **[514]** days. The Appellant having been absent for that and a longer period, she was properly cited edictally; and, for the purpose of giving her actual notice of the suit, and as a measure of precaution, the summons was served personally on her, at her temporary residence in France. By the Scotch Judicature Act (6 Geo. 4, c. 120, s. 53) it is declared, "That where a person, not having a dwelling-house in Scotland, occupied by his family or servants, shall have left his usual place of residence, and have been absent forty days without having left notice where he is to be found, within Scotland, he shall be held to be absent from Scotland, and be cited according to the forms prescribed." And by the Act of Sederunt, (14th of December 1805, s. 1,) "It shall in time coming be held, that a person after forty days' absence from his usual place of residence, is forth of the kingdom of Scotland; and the citation, after that period, must be at the market-cross of Edinburgh, and pier and shore of Leith," etc. There can be no doubt that in this case edictal citation, accompanied with personal notice, was the proper course to be observed.

The third plea and ground of appeal, is the alleged indissolubility of this marriage by the Courts of Scotland. The Respondent conceiving that so much of this plea as was not contained in the first preliminary defence, was involved in the merits of the action, which the judgment of the Court below did not at all touch; and being also advised that by the 6 Geo. 4, c. 120, s. 5, any appeal against the interlocutory judgment was incompetent; presented a petition to this House against entertaining it. The Appeal Committee, to whom that petition was referred, sus-**[515]**-tained the appeal, on the ground that the judgment of the Court below did decide

the principle, that an English marriage might be dissolved by a Scotch Court. In deference to that opinion of the Appeal Committee, the Respondent has undertaken to sustain the competence of the Court of Session to entertain the action. He is a Scotchman by birth and connexions and estates; he was married in England during a transient visit to that country, without any intention then or at any time to make it his permanent abode. It is evident, from the antenuptial contract, that the marriage was entered into with a view to residence in Scotland; the rights and obligations arising out of the marriage contract were to be performed in Scotland; and although England was the place of celebration, yet it was essentially a Scotch contract, and must be regulated in all its relations and consequences by the rules of Scotch law. The question for the decision of the House is not whether indissolubility is an inherent element in a marriage contracted in England between two English parties; this House, sitting on this case as a Scotch Court of Appeal, is not to consider what effect the English Courts of Law, either civil or criminal, would give to a divorce pronounced by a Scotch Court.

The argument for the Appellant on this part of her case is, that the contract of marriage is to be governed by and according to the law of the country where the contract is entered into. There is a fallacy in that argument: it is true, that in all questions of *status* or personal obligation, the constitution of the contract is governed by the *lex loci contractus;* that is, the questions whether the contract was valid or void, whether the requisite forms and solemnities for completing the contract were duly complied with, **[516]** must be determined by the law of the country where the contract was made: but where questions arise about enforcing or expounding the contract, or about granting redress to one party for a breach of its obligations by the other, these must be decided by the law of the country which the parties had in view with reference to its fulfilment. Marriages at Gretna Green between English parties, duly performed according to the Scotch form, are valid in England; it is the law of Scotland that determines their validity or nullity, but all the obligations arising from the conjugal relation are regulated by the laws of England; so much so, that a wife so married is entitled to dower out of her husband's English estates, tho"gh not to her terce out of his property in Scotland, if he should happen to have any there; *Ilderton* v. *Ilderton* (2 H. Black. 145). The *lex loci contractus* cannot prevail, unless the parties had, in entering into the contract, reference to the same place for the fulfilment of its obligations; for if the *forum* of the contract were to prevail against the *forum* of the real domicile, a contract entered into in a foreign country, during one day's visit, would be governed by the laws of that country, and not by those of the country of the parties' birth and permanent residence; which would be too absurd. In a recent case, *Anstruther* v. *Chalmers* (2 Sim. 1), in the Court of Chancery, it was held that the will of a Scotchwoman, who was domiciled in England, and who, during a visit to Scotland, executed there, in the Scotch form, a will of personal property, deposited it there, and died in England, was to be construed by the English law. All writers on the civil law lay it down as an acknowledged rule, that the import and effect of all ordinary civil con-**[517]**-tracts are to be determined by the law of the place of performance, to which alone the contracting parties are presumed to have reference. *Contraxisse unusquisque in eo loco intelligitur, in quo ut solveret se obligavit,* are the words of Julian in the Pandects (Lib. 21, tit. *De obligationibus et actionibus*). There are numerous cases decided by the Courts in Scotland, establishing the general rule, that questions relating to the negotiation of bills of exchange are to be decided by the laws of the place of payment, and not of the place of contract. *Brown* v. *Crawford* (Morr. 1587), *Stevenson* v. *Stewart* (Morr. 1518), *Watson* v. *Renton* (Bell's Rep. 103), *Armour* v. *Campbell* (Morr. 4476). The same rule has been adopted by the English Courts of Law, as in *Robinson* v. *Bland* (1 Wm. Black. Rep. 256). This doctrine applies with equal force to the contract of marriage, and it is so expressly stated by Huber (De Conflictu Leg. sec. 10), whose words, as also those of Lord Mansfield in *Robinson* v. *Bland*, have been already quoted (P. 509 *supra*). This marriage, therefore, on the authority of the civilians and of the cases cited, must be dealt with as a Scotch contract, and its obligations construed and enforced by the laws of Scotland, where they were intended to be performed. There is no reason to apprehend that the affirming of the interlocutor now appealed

from will produce any conflict between the jurisdiction or decisions of the Scotch and English Courts, as this case is distinguished from those of *Sugden* v. *Lolley*, and *Beazley* v. *Beazley*, by the material circumstance that in these the husband and wife were English, were domiciled in England, and it was there that all **[518]** the obligations arising out of the contract of marriage were to be performed.

The cases of *Ryan* v. *Ryan* (2 Phil. 332), and of *M'Carthy* v. *Decaix* (vide *infra*), cited in behalf of the Appellant, have no bearing on the question for the decision of the House. The observations attributed to a noble and learned Lord, in the latter case, were not necessary for the decision of that case, and can only have the authority of an extrajudicial *dictum*. The case of *Lolley* must be confined to the circumstances on which the twelve Judges adjudicated, and is not to be extended. Subsequently to that case, and with full knowledge of it, the Judges of the Court of Session asserted their jurisdiction over a marriage contracted in England, *Edmonstone* v. *Edmonstone* (Ferg. Cons. Rep. 168), thereby following up a long series of uniform decisions. This House, sitting as a Scotch Court of Appeal, is bound to recognize those decisions, which have never been questioned. The case of *The Bishop of London* v. *Ffytche* (2 Bro. P. C. 211) was referred to for the purpose of showing, that a judgment pronounced on the authority of decisions long acquiesced in, might still be reviewed and reversed by this House. That case, indeed, was reversed in this House, by nineteen against eighteen; all the bishops on one side, against all the lawyers, except Lord Thurlow, on the other. It is better for the Respondent that such a decision should be quoted against him than for him. If two foreigners, Prussians for instance, (with whom incompatibility of temper is ground of divorce,) met on a visit in this country, and were married here and returned to Prussia, could it be maintained that the Courts of **[519]** Prussia have not power to dissolve that marriage for any cause whatsoever, but that the parties are to be released from the contract only by Act of the English Legislature? If two English persons, travelling in France, meet and marry there, and return to this country, could not the husband, after discovering the wife's adultery, apply to the tribunals of his domicile for such remedy as they could afford him, although the Courts of the place of the contract would afford none? The law of England does not allow any valid marriage to be dissolved *à vinculo*, by the Courts of Law; but the Scotch Courts have the power to entertain those actions, and have frequently exercised it. The question here is, not what effect the divorce granted in Scotland would have in England, but it is, whether the Courts of Scotland have, by the law of Scotland, the power to divorce on proof of adultery.

Dr. Addams, in reply:—The whole of the argument for the Respondent is put on the fact of his domicile being in Scotland when the action was raised. The Appellant had not her residence then in Scotland, either in fact or in law. It is not alleged that her actual residence was there, and the fiction of law is excluded by the deed of separation, which was not revoked when the action was commenced. It is a fallacy to say that the marriage of these parties was a Scotch contract; for the marriage was performed in England, the Appellant was an Englishwoman, and the Respondent was residing in England. If a Spaniard or other foreigner came to this country and married an Englishwoman here, according to the law of England, could it be said, that that was a Spanish and not an English marriage? There cannot be a doubt, **[520]** that if the interlocutor be affirmed, the Court below will proceed, on proof of adultery, to dissolve this marriage, whether it is Scotch or English. The Commissaries in Scotland were generally inclined against the assumption of this power, but they were overruled by the Judges of the Court of Session. The case of *Gordon* v. *Pie* (Ferg. Cons. Rep. App. 276, 357) was the first English marriage over which the Court of Session assumed jurisdiction, by remitting that case to the Commissary Court, with instructions to proceed; but there were numerous cases previous to that, in which the jurisdiction was declined; *Brunsdon* v. *Wallace*, *Morcombe* v. *Maclelland*.—He further cited, for the purposes of his argument, *Dalrymple* v. *Dalrymple* (2 Hagg. 58), and *Anstruther* v. *Adair* (2 Myl. and K. 513); and many of the cases already referred to.

The Lords took time to consider the case.

Lord Brougham:—Sir George Warrender, a Scotch baronet, possessed of large hereditary estates in Scotland, born and educated in that country, and having

there his capital mansion, where he resided the greater part of the year, except when he held office or was attending his parliamentary duties in England, intermarried in London, in 1810, with the daughter of the Viscount Falmouth, Anne Boscawen, who was born and educated in England, and never had been in Scotland previous to the marriage. After that event, she was twice there with her husband, but subsequently he resided for the most part in London, to discharge the duties of Lord of the Admiralty and **[521]** Commissioner of East India Affairs; offices which he held from 1812 to 1819, inclusive. In the latter year, at the end of much domestic dissension, a separation was determined upon, and an agreement executed by the parties; in which, after setting forth by way of recital only their having agreed to live separate, Sir George bound himself to allow Dame Anne Warrender a certain annuity; and it was further agreed that the agreement shall only be rescinded by common consent, and in a certain specified manner. A letter was written by Sir George, bearing equal date with the agreement, and addressed to the trustees under the marriage settlement. In this he stated that he had refused to insert any provision for her being allowed to live apart, in order that he might not be precluded from suing, if he chose, for restitution of conjugal rights, but also stating that it was not his intention ever to do so, or to interfere with or molest her in the choice of a residence. The marriage settlement had secured her a jointure upon the Scotch real estates; upon which fact it is now admitted that nothing can turn, except that it may serve the better to show the connexion of the parties and the contract with Scotland.

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

[522] In 1834, after the parties had lived separate for fifteen years, Sir George's residence being, during the latter part of the time, almost constantly on his Scotch estates, and Lady Warrender's varying from one country to another—a few months in England, generally in France, and occasionally in Italy—Sir George brought his suit in the Court of Session (exercising, under the recent statute, the consistorial jurisdiction formerly vested in the Commissaries) for divorce, by reason of adultery alleged to have been committed by his wife. Lady Warrender took preliminary objections to the competency of the suit, under three heads: First, that the summons of divorce was not served on her at her husband's residence, so as to give her a regular citation; secondly, that the Court had no jurisdiction, inasmuch as the wife's domicile was no longer her husband's after the separation;* thirdly, that even if the service had been regular, and the two domiciles one and the same, and that domicile Scotland, the marriage having been contracted in England, and one of the parties being English, no sentence of a Scotch Court could dissolve the contract. To these several points I propose to address myself in their order.

The first need not detain us long. It is clear, that if the wife's domicile is not in Scotland, her being cited or not cited at the mansion is wholly immaterial; and the minor objection of irregularity merges in the exception to the jurisdiction: and if the wife's domicile was in Scotland, it must be her husband's, which, indeed, the objection supposes; and then the **[523]** argument amounts to this, that Sir George should have served himself with a notice, by way of regularly serving his wife. Surely it is unnecessary to show that such a proceeding would have been nugatory, not to say ridiculous, and that the omission of it can work nothing against the validity of the notice. Lady Warrender had, it is admitted on all hands, personal service and full notice of the proceeding against her; nor was any reliance placed upon her domicile in contemplation of law, (that is, her husband's domicile,) being sufficient to exclude the necessity of bringing notice, in point of fact, home to her. If the preliminary objection to the service is good for anything, it is good to show

* The order in which these two objections were pleaded and argued is here reversed.

that the pursuer might have served a notice on her whom he knew to be some hundreds of miles distant, by leaving it for her in his own house, and then have considered this as good and sufficient service, without personally notifying his intended suit to her, or serving her with the summons which he had filed. We may therefore come at once to the serious and more substantial exceptions taken against the jurisdiction; the first of which arises upon the domicile, as affected by the articles of separation.

Secondly, It is admitted on all hands that, in the ordinary case, the husband's domicile is the wife's also; that, consequently, had Lady Warrender been either residing really and in fact with her husband, or been accidentally absent for any length of time, or even been by some family arrangement, without more, in the habit of never going to Scotland, which was not her native country, while he lived generally there, no question could have been raised upon the competency of the action as excluded by her non-residence. For actual residence—residence in point of fact—signifies nothing in the case of a married woman, and **[524]** shall not, in ordinary circumstances, be set up against the presumption of law, that she resides with her husband. Had she been absent for her health, or in attendance upon a sick relation, or for economical reasons, how long soever this separation *de facto* might have lasted, her domicile could never have been changed. Nay, had the parties lived in different places, from a mutual understanding which prevailed between them, the case would still be the same. The law could take no notice of the fact, but must proceed upon its own conclusive presumption, and hold her domiciled where she ought to be, and where, in all ordinary circumstances, she would be,—with her husband. Does the execution of a formal instrument, recognising such an understanding, make any difference in the case? This is all we have here; for there is no agreement to live separate. The "letter" has indeed been imported into the agreement, and argued upon as a part of it. Now, not to mention that the instrument in which parties finally state their intentions, and mutually stipulate and bind themselves, is always to be regarded as their only contract; and that no separate or subsequent agreement is to be taken into the account, unless it contains some collateral agreement; admitting that we have a right to look at the letter at all, either as part of one transaction with the agreement, or as providing for something left unsettled in the principal instrument, and so collateral in some sort to the contract itself, it does not appear that the tenor of the letter aids the Appellant's contention. For the letter sets out with expressly saying, that Sir George has refused to insert in the agreement a leave to live apart, in order to preclude all objection against his suing for restitution of conjugal rights. Is not this **[525]** sufficient to deprive the letter of all binding force in law, whatever else it may contain? In truth, the words which follow this preliminary statement amount only to an honorary pledge, in no legal view obligatory, even had they stood alone; but, taken in connexion with the preceding statement, they plainly exclude all possibility of construing the letter as a legal obligation. It therefore appears impossible to consider the parties in this case as living apart under a contract of separation. The agreement, by its obvious construction, only imports an obligation upon Sir G. Warrender to pay so much a year to Lady Warrender, as long as she should live apart from him. But let us suppose it to be an ordinary deed of separation; that it contained a covenant on the husband's part to permit the wife to live apart from him, and to choose her own residence; and let us consider what difference this would make, and whether or not this would be sufficient to determine the legal presumption of domicile.

First of all, it must be admitted that, even if the execution of such a deed gave the wife a power of choosing a residence, and if that residence once chosen were to be deemed her separate domicile, still this would only give her a power; and unless she had executed the power by choosing a residence, no new domicile could be acquired by her. The domicile which she had before marriage was for ever destroyed by that change in her condition. The dissolution of the marriage by divorce, or by the husband's decease, never could remit her to her original or maiden domicile; much less could this be affected by any such deed as we are supposing; for that, by the utmost possible stretch of the supposition, could only give **[526]** her the option of taking a new domicile, other than her husband's; and until she did exercise this option, her married or marital domicile would not be changed. Now there is no

evidence here of Lady Warrender having ever acquired any domicile after 1819, other than the one she had before the separation, that is to say, her husband's; and this proof clearly lay upon her, for she sets up the separation to exclude the legal presumption that she is domiciled with her husband; and the separation only conveying to her a power of choosing a domicile, and the production of the articles only proving that power to have been conferred upon her, unless she goes further, and also proves the exercise of the power by acquiring a new domicile, she proves nothing. She only shows, and all the ample admissions we are, for the sake of argument, making, confess that she had obtained the power or possibility of gaining a domicile other than her husband's, but not at all that she had actually gained such separate domicile. The evidence in the cause is nothing to this purpose. It is, indeed, rather against than for the Appellant's argument; it rather shows that she had done nothing like gaining a new domicile, for she was living chiefly abroad, and in different places. But there is, at any rate, no evidence in the cause of her acquiring a separate domicile, and the proof lying upon her, it follows that, for all the purposes of the present question, her husband's Scotch domicile is her own. But suppose we pass over this fundamental difficulty in her case, and which appears to me decisive of the exception with which I am now dealing, I am of opinion that there is nothing in the separation, supposing it had been ever so formal, and ever so full in its provisions, which can by law **[527]** displace the presumption of domicile raised by the marriage, and subsisting in full force as long as the marriage endures.

A party relying on the *lex loci contractus*, in construing the import and tracing the consequences of the marriage contract, cannot well be heard to deny that the same *lex loci* must regulate the construction and the consequences of any deed of separation between the married pair. Nor do I understand the Appellant as repudiating the English law as to the import of the separation in this case. Then what is the legal value or force of this kind of agreement in our law? Absolutely none whatever—in any Court whatever—for any purpose whatever, save and except one only—the obligation contracted by the husband with trustees to pay certain sums to the wife, the *cestui que trust*. In no other point of view is any effect given by our jurisprudence, either at law or in equity, to such a contract. No damages can be recovered for its breach—no specific performance of its articles can be decreed. No Court, civil or consistorial, can take notice of its existence. So far has the legal presumption of cohabitation been carried by the common law Courts, that the most formal separation can only be given in mitigation of damages, and not at all as an answer to an action for criminal conversation, the ground of which is the alleged loss of comfort in the wife's society; and all the evidence that can be adduced of the fact of living apart, and all the instruments that can be produced binding the husband to suffer the separate residence of his wife—nay, even where he has for himself stipulated for her living apart, and laid her under conditions that she should never come near him—all is utterly insufficient to repel the claim which he makes for the loss of her **[528]** society without doing any act either in court or in *pais*, to determine the separation or annul the agreement. In other words, no fact and no contract, no matter in *pais* and no deed executed, can rebut the overruling presumption of the law that the married persons live together, or, which is the same thing, that they have one residence—one domicile. In the contemplation of the common law then, they live together and have the same domicile. That the Consistorial Courts regard the matter in the same light is manifest from the strong decision given upon the 3 and 4 Geo. 4, as applicable to a case where the parties had never been near one another for ten years before it passed; yet this case was held within the provision of the statute which gives the benefit of confirmation of the marriage to all parties who have been living together at and before the passing of the Act. But we need not resort to such extreme cases, or seek support from such strong decisions. It is admitted on all hands that the Consistorial Courts never regard a separation, how formal soever, as of any avail at all against either party, nor require any person suing for his rights under the marriage, and standing on the marriage, to do any act for annulling the separation. Either party has a clear and undenied right to pass it by entirely, and proceed, whether in bringing or in defending a suit exactly as if the separation articles had no existence.

Thirdly, We are therefore, in every view that can be taken of the question, bound to regard Lady Warrender's domicile as identical with her husband's, and thus the

case becomes divested of all special circumstances, and is that of a marriage had in England between a domiciled Scotchman and an Englishwoman, sought to be dissolved by reason of the wife's adul-[529]-tery, through a suit in the Courts in Scotland, the residence or domicile of the husband being *bonâ fide* Scotch; and as the determination at which we have arrived upon the question of domicile makes the *forum originis* of the wife quite immaterial, the question is in truth the general one, whether or not a Scotch divorce can dissolve a marriage contracted by a domiciled Scotchman in England, the parties to that marriage being *bonâ fide* and not collusively for the purposes of the suit, domiciled in Scotland. The importance of this question to the parties, and, considering the constant and fortunate intercourse between the two countries, to the law which governs each, cannot be denied; at the same time it is of considerably less interest than it would have been had the domicile not been *bonâ fide* Scotch, because then the more absolute question would have been raised as to the validity of a Scotch divorce generally, to dissolve an English marriage. Possibly the decisions upon the validity of Scotch marriages generally and without regard to the fraud upon the English law, practised by the parties to them, may seem to make the distinction to which I have just adverted less material and substantial; nevertheless I think it right and convenient to make it, and to keep it in view.

The general principle is denied by no one that the *lex loci* is to be the governing rule in deciding upon the validity or invalidity of all personal contracts. This is sometimes expressed, and I take leave to say inaccurately expressed, by saying that there is a *comitas* shown by the tribunals of one country towards the laws of the other country. Such a thing as *comitas* or courtesy may be said to exist in certain cases, as where the French Courts inquire how our law would deal with a Frenchman in similar or parallel circum-[530]-stances, and upon proof of it, so deal with an Englishman in those circumstances. This is truly a *comitas*, and can be explained upon no other ground; and I must be permitted to say, with all respect for the usage, it is not easily reconcileable to any sound reason. But when the Courts of one country consider the laws of another in which any contract has been made, or is alleged to have been made, in construing its meaning, or ascertaining its existence, they can hardly be said to act from courtesy, *ex comitate;* for it is of the essence of the subject-matter to ascertain the meaning of the parties, and that they did solemnly bind themselves; and it is clear that you must presume them to have intended what the law of the country sanctions or supposes; it is equally clear that their adopting the forms and solemnities which that law prescribes, shows their intention to bind themselves, nay more, is the only safe criterion of their having entertained such an intention. Therefore the Courts of the country where the question arises, resort to the law of the country where the contract was made, not *ex comitate*, but *ex debito justitiae;* and in order to explicate their own jurisdiction by discovering that which they are in quest of, and which alone they are in quest of, the meaning and intent of the parties.

But whatever may be the foundation of the principle, its acceptance in all systems of jurisprudence is unquestionable. Thus a marriage, good by the laws of one country, is held good in all others where the question of its validity may arise. For the question always must be, Did the parties intend to contract marriage? And if they did that which in the place they were in is deemed a marriage, they cannot reasonably, or sensibly, or safely, be considered otherwise than [531] as intending a marriage contract. The laws of each nation lay down the forms and solemnities, a compliance with which shall be deemed the only criterion of the intention to enter into the contract. If those laws annex certain disqualifications to parties circumstanced in a particular way, or if they impose certain conditions precedent on certain parties, this falls exactly within the same rule; for the presumption of law is in the one case that the parties are absolutely incapable of the consent required to make the contract, and in the other case that they are incapable until they have complied with the conditions imposed. I shall only stop here to remark, that the English jurisprudence, while it adopts this principle in words, would not perhaps, in certain cases which may be put, be found very willing to act upon it throughout. Thus we should expect that the Spanish and Portugueze Courts would hold an English marriage avoidable between uncle and niece, or brother and sister-in-law, though solemnized under papal dispensation, because it would clearly be avoidable in this country.

But I strongly incline to think that our Courts would refuse to sanction, and would avoid by sentence, a marriage between those relatives contracted in the Peninsula, under dispensation, although beyond all doubt such a marriage would there be valid by the *lex loci contractus*, and incapable of being set aside by any proceedings in that country.

But the rule extends, I apprehend, no further than to the ascertaining of the validity of the contract, and the meaning of the parties, that is, the existence of the contract and its construction. If indeed there go two things under one and the same name in different countries—if that which is called marriage is of a different nature in each—there may be some room **[532]** for holding that we are to consider the thing to which the parties have bound themselves, according to its legal acceptance in the country where the obligation was contracted. But marriage is one and the same thing substantially all the Christian world over. Our whole law of marriage assumes this; and it is important to observe, that we regard it as a wholly different thing, a different *status*, from Turkish or other marriages among infidel nations, because we clearly never should recognize the plurality of wives, and consequent validity of second marriages, standing the first, which second marriages the laws of those countries authorize and validate. This cannot be put upon any rational ground, except our holding the infidel marriage to be something different from the Christian, and our also holding Christian marriage to be the same every where. Therefore all that the Courts of one country have to determine is, whether or not the thing called marriage, that known relation of persons, that relation which those Courts are acquainted with, and know how to deal with, has been validly contracted in the other country where the parties professed to bind themselves. If the question is answered in the affirmative, a marriage has been had; the relation has been constituted; and those Courts will deal with the rights of the parties under it according to the principles of the municipal law which they administer.*

But it is said that what is called the *essence* of the contract must also be judged of according to the *lex loci;* and as this is a somewhat vague, and for its vagueness, a somewhat suspicious proposition, it is rendered more certain by adding, that dissolubility or indissolubility is of the essence of the contract. Now I take this to be really *petitio principii.* It is **[533]** putting the very question under discussion into another form of words, and giving the answer in one way. There are many other things which may just as well be reckoned of the essence as this. If it is said that the parties marrying in England must be taken all the world over to have bound themselves to live until death or an Act of Parliament "them do part;" why shall it not also be said that they have bound themselves to live together on such terms, and with such mutual personal rights and duties, as the English law recognizes and enforces? Those rights and duties are just as much of the essence as dissolubility or indissolubility; and yet all admit, all must admit, that persons married in England and settled in Scotland will be entitled only to the personal rights which the Scotch law sanctions, and will only be liable to perform the duties which the Scotch law imposes. Indeed if we are to regard the nature of the contract in this respect as defined by the *lex loci*, it is difficult to see why we may not import from Turkey into England a marriage of such a nature as that it is capable of being followed by and subsisting with another, polygamy being there of the essence of the contract.

The fallacy of the argument, "that indissolubility is of the essence," appears plainly to be this: it confounds incidents with essence; it makes the rights under a contract, or flowing from and arising out of it, parcel of the contract; it makes the mode in which judicatures deal with those rights, and with the contract itself, part of the contract; instead of considering, as in all soundness of principle we ought, that the contract and all its incidents, and the rights of the parties to it, and the wrongs committed by them respecting it, must be dealt with by the Courts of the **[534]** country where the parties reside, and where the contract is to be carried into execution.

But at all events this is clear, and it seems decisive of the point, that if, on some such ground as this, a marriage indissoluble by the *lex loci* is to be held indissoluble everywhere; so, conversely, a marriage dissoluble by the *lex loci* must be held everywhere dissoluble. The one proposition is in truth identical with the other. Now it would

[* See as to this passage an article on "Non-Christian Marriage" by Sir Dennis Fitzpatrick in *Jour. Soc. Comp. Leg.* N.S. No. V. p. 374.]

follow from hence, or rather it is the same proposition, that a marriage contracted in Scotland, where it is dissoluble by reason of adultery or of non-adherence, is dissoluble in England, and that at the suit of either party. Therefore a wife married in Scotland might sue her husband in our Courts for adultery, or for absenting himself four years, and ought to obtain a divorce *à vinculo matrimonii*. Nay, if the marriage had been solemnized in Prussia, either party might obtain a divorce on the ground of incompatibility of temper; and if it had been solemnized in France during the earlier period of the revolution, the mere consent of the parties ought to suffice for dissolving it here. Indeed, another consequence would follow from this doctrine of confounding with the nature of the contract that which is only a matter touching the jurisdiction of the Courts, and their power of dealing with the rights and duties of the parties to it: if there were a country in which marriage could be dissolved without any judicial proceeding at all, merely by the parties agreeing in *pais* to separate, every other country ought to sanction a separation had in *pais* there, and uphold a second marriage contracted after such a separation. It may safely be asserted, that so absurd a proposition never could for a moment be enter-**[535]**-tained; and yet it is not like, but identical with the proposition upon which the main body of the Appellant's argument rests, that the question of indissoluble or dissoluble must be decided in all cases by the *lex loci*.

Hitherto we have been considering the contract as to its nature and solemnities, and examining how far, being English, and entered into with reference only to England, it could be dissolved by a Scotch sentence of divorce. But the circumstance of parties belonging to one country marrying in another (which is the case before us) presents the question in another light. In personal contracts much depends upon the parties having regard to the country where it is to be acted under, and to receive its execution; upon their making the contract, with a view to its execution in that country. The marriage-contract is emphatically one which parties make with an immediate view to the usual place of their residence. An Englishman, marrying in Turkey, contracts a marriage of an English kind, that is, excluding plurality of wives, because he is an Englishman, and only residing in Turkey and under the Mahometan law accidentally and temporarily, and because he marries with a view of being a married man and having a wife in England, and for English purposes; consequently the incidents and effects, nay, the very nature and essence (to use the language of the Appellant's argument) must be ascertained by the English, and not by the Turkish law. So of an Englishman marrying in Prussia, where incompatible temper, that is, disagreement, may dissolve the contract; as he marries with a view to English domicile, his contract will be judged by English law, and he cannot apply for a divorce here, upon the ground of incompatible tempers. In **[536]** like manner, a domiciled Scotchman may be said to contract not an English but a Scotch marriage, though the consent wherein it consists may be testified by English solemnities. The Scotch parties, looking to residence and rights in Scotland, may be held to regard the nature and incidents and consequences of the contract, according to the law of that country, their home: a connexion formed for cohabitation, for mutual comfort, protection and endearment, appears to be a contract having a most peculiar reference to the contemplated residence of the wedded pair; the home where they are to fulfil their mutual promises, and perform those duties which were the objects of the union; in a word, their domicile; the place so beautifully described by the civilian: "*Domicilii quoque intuitu conveniri quisque potest, in eo scilicet loco, in quo larem, rerumque ac fortunarum suarum summam constituit, unde rursus non sit discessurus, si nihil avocet, undeque cum profectus est, peregrinari videtur*" (Voet ad Pand. Lib. 5, tit. 1, s. 92). It certainly may well be urged, both with a view to the general question of *lex loci*, and especially in answering the argument of the alleged essential quality of indissolubility, that the parties to a contract like this must be held emphatically to enter into it with a reference to their own domicile and its laws; that the contract assumes, as it were, a local aspect; but that at any rate, if we infer the nature of any mutual obligation from the presumed intentions of the parties, and if we presume those intentions from supposing that the parties had a particular system of laws in their view (the only foundation of the argument for the Appellant), there is fully more reason to suppose they had the law of their own home in their view, where they purposed to **[537]** live, than the law of the stranger, under which they happened for the moment to be.

Suppose we take now another but a very obvious and intelligible view of the subject, and regard the divorce not as a remedy given to the injured party, by freeing him from the chain that binds him to a guilty partner, but as a punishment inflicted upon crime, for the purpose of preventing its repetition, and thus keeping public morals pure. The language of the Scotch acts plainly countenances this view of the matter, and we may observe how strongly it bears upon the present question. No one can doubt that every State has the right to visit offences with such penalties as to its legislative wisdom shall seem meet. At one time adultery was punishable capitally in England; it is so, in certain cases, still by the letter of the Scotch law. Whoever committed it must have suffered that punishment, had the law been enforced, and without regard to the marriage, of which he had violated the duties, having been contracted abroad. Indeed, in executing such statutes, no one ever heard of a question being raised as to where the contract had been made. Suppose again that the proposition, frequently made in modern times, were adopted, and adultery were declared to be a misdemeanor, could any one, tried for it either here or in Scotland, set up in his defence, that to the law of the country where he was married there was no such offence known? In like manner, if a disruption of the marriage tie is the punishment denounced against the adulterer for disregarding its duties, no one can pretend that the tie being declared indissoluble by the laws of the country where it was knit, could afford the least defence against the execution of the law declaring its [538] dissolution to be the penalty of the crime. Whoever maintains that the Scotch Courts are to take cognizance of the English law of indissolubility when called upon to inflict the penalty of divorce, must likewise be prepared to hold that, in punishing any other offence, the same Courts are to regard the laws of the State where the culprit was born, or where part of the transaction passed; that, for example, a forgery being committed on a foreign bill of exchange, the punishment awarded by the foreign law is to regulate the visitation of the offence under the law of Scotland. It may safely be asserted, that no instance whatever can be given of the criminal law of any country being made to bend to that of any other in any part of its administration. When the Roman citizen carried abroad with him his rights of citizenship, and boasted that he could plead in all the Courts of the world "*civis Romanus sum*," his boast was founded not on any legal principle, but upon the fact that his barbarian countrymen had overrun the world with their arms, reduced all laws to silence, and annihilated the independence of foreign legislatures. Their orators regarded this very plea as the badge of universal slavery, which their warriors had fixed upon mankind. But if any foreigner had come to Rome, and committed a crime punishable with loss of civil rights, he would in vain have pleaded in bar of the *capitis diminutio*, that citizenship was indelible and indestructible in the country of his birth. The *lex loci* must needs govern all criminal jurisdiction, from the nature of the thing and the purpose of that jurisdiction. How then can we say, that when the Scotch law pronounces the dissolution of a marriage to be the punishment of adultery, the Scotch Courts can be justified in im-[539]-porting an exception in favour of those who had contracted an English marriage; an exception created by the English law, and to the Scotch law unknown?

But it may be said, that the offence being committed abroad, and not within the Scotch territory, prevents the application to it of the Scotch criminal law. To this it may however be answered, that where a person has his domicile in a given country, the laws of that country to which he owes allegiance may visit even criminally offences committed by him out of its territory. Of this we have many instances in our own jurisprudence. Murder and treason, committed by Englishmen abroad, are triable in England and punishable here. Nay, by the bill which I introduced in 1811, and which is constantly acted upon, British subjects are liable to be convicted of felony for slave-trading, in whatever part of the world committed by them. It would no doubt be going far to hold the wife criminally answerable to the law of Scotland, in respect of her legal domicile being Scotch. But we are here not so much arguing to the merits of this case, which has abundant other ground to rest upon, as to the general principle; and at any rate the argument would apply to the case most frequently mooted, of English married parties living temporarily in Scotland, and adultery being there committed by one of them. To such a state of facts the whole argument now adduced is applicable in its full force; and without admitting that application,

I do not well see how we can hold that the Scotch legislature ever possessed that supreme power which is absolutely essential to the very nature and existence of a legislature. If we deny this application, we truly admit that the Scottish Parliament had no right to punish the offence of adultery by the penalty of divorce. Nay, we hold **[540]** that English parties had a right to violate the Scotch criminal law with perfect impunity in one essential particular; for, suppose no other penalty had been provided by the Scotch law except divorce, all English offenders against that law must go unpunished. Nay worse still, all Scotch parties who chose to avoid the punishment had only to marry in England, and then the law, the criminal law of their own country, became inoperative. The gross absurdity of this strikes me as bearing directly upon the argument, and as greater than that of any consequences which I remember to have seen deduced from almost any disputed position. It may further be remarked that this argument applies equally to the case, if we admit that the Scotch divorce is invalid out of Scotland, and consequently that it stands well with even the principles of Lolley's case.

In order to dispose of the present question, it is not at all necessary on the one side, to support, or on the other to impeach, the authority of Lolley's case, or of any other which may have been determined in England upon that authority. This ought to be steadily borne in mind. The resolution in Lolley's case was, that an English marriage could not be dissolved by any proceeding in the Courts of any other country, for English purposes; in other words, that the Courts of this country will not recognize the validity of a Scotch divorce, but will hold the divorced wife dowable of an English estate, the divorced husband tenant thereof by the curtesy, and either party guilty of felony by contracting a second marriage in England. Upon the force and effect of such divorce in Scotland, and for Scotch purposes, the Judges gave, and indeed could give, no opinion; and as there would be nothing legally impossible in a marriage being good in one **[541]** country which was prohibited by the law of another, so if the conflict of the Scotch and English law be complete and irreconcileable, there is nothing legally impossible in a divorce being valid in the one country which the Courts of the other may hold to be a nullity. Lolley's case, therefore, cannot be held to decide the present, perhaps not even to affect it in principle. In another point of view it is inapplicable; for, though the decision was not put upon any special circumstance, yet in fairly considering its application, we cannot lay out of view that the parties were not only married, but really domiciled in England, and had resorted to Scotland for the manifest purpose of obtaining a temporary and fictitious domicile there, in order to give the Scotch Courts jurisdiction over them, and enable them to dissolve their marriage; whereas here the domicile of the parties is Scotch, and the proceeding is *bona fide* taken by the husband in the Courts of his own country, to which he is amenable, and ought to have free access; and no fraud upon the law of any other country is practised by the suit. It must be added that, in Lolley's case, the English marriage had been contracted by English parties, without any view to the execution of the contract at any time in Scotland; whereas the marriage now in question was had by a Scotchman and a woman whom the contract made Scotch, and therefore may be held to have contemplated an execution and effects in Scotland.

But although, for these reasons, the support of my opinion does not require that I should dispute the law in Lolley's case, I should not be dealing fairly with this important question, if I were to avoid touching upon that subject; and as no decision of this House has ever adopted that rule, or assumed its **[542]** principle for sound, and acted upon it, I am entitled here to express the difficulty which I feel in acceding to that doctrine—a difficulty which much deliberation and frequent discussion with the greatest lawyers of the age, I might say both of this and of the last age—has not been able to remove from my mind.

If no decision had ever been pronounced in this country, recognizing the validity of Scotch marriages between English parties, going to Scotland with the purpose of escaping from the authority of the English law, I should have felt it much easier to acquiesce in the decision of which I am speaking: for then it might have been said, consistently enough, that whatever may be the Scotch marriage law among its own subjects, and for the government of Scotch questions, ours is in irreconcileable conflict with it, and we cannot permit the positive enactments of our statute-book,

and the principles of our common law, to be violated or eluded, by merely crossing a river, or an ideal boundary line. Nor could anything have been more obvious than the consistency of those, who, holding that no unmarried parties, incapable of marrying here, can, in fraud of our law, contract a valid marriage in Scotland, by going there for an hour, should also hold the cognate doctrine, that no married parties can dissolve an English marriage, indissoluble here, by repairing thither for six weeks. But upon this firm ground the decisions of all the English Courts have long since prevented us from taking our stand. They have held, both the Consistorial Judges in *Compton* v. *Bearcroft*, and those of the common law in *Ilderton* v. *Ilderton*, the doctrine uniformly recognized in all subsequent cases, and acted upon daily by the English people, that a Scotch marriage, contracted by English parties in the face and in fraud **[543]** of the English law, is valid to all intents and purposes, and carries all the real and all the personal rights of an English marriage, affecting, in its consequences, land, and honours, and duties, and privileges, precisely as does the most lawful and solemn matrimonial contract entered into among ourselves, in our own churches, according to our own ritual, and under our own statutes.

It is quite impossible, after this, to say that we can draw the line, and hold a foreign law, which we acknowledge all-powerful for making the binding contract, to be utterly impotent to dissolve it. Were a sentence of the Scotch Court in a declarator of marriage to be given in evidence here, it would be conclusive that the parties were man and wife; and no exception could be taken to the admissibility or the effect of the foreign evidence, upon the ground of the parties having been English, and repaired to Scotland for the purpose of escaping the provisions of the English law. A similar sentence of the same Court, declaring the marriage to be dissolved by the same law of Scotland, being now supposed to be given in evidence between parties who had married in England, can it, in any consistency of reason, be objected to the reception or to the force of this sentence, that the contract had been made, and the parties had resided here? In what other contract of a nature merely personal—in what other transaction between men—is such a rule ever applied—such an arbitrary and gratuitous distinction made—such an exception raised to the universal position, that things are to be dissolved by the same process whereby they are bound together; or rather, that the tie is to be loosened by reversing the operation which knit it, but reversing the operation according to the same rules? What gave **[544]** force to the ligament? If a contract for sale of a chattel is made, or an obligation of debt is incurred, or a chattel is pledged, in one country, the sale may be annulled, the debt released, and the pledge redeemed, by the law and by the forms of another country, in which the parties happen to reside, and in whose Courts their rights and obligations come in question; unless there was an express stipulation in the contract itself against such avoidance, release, or redemption. But at any rate this is certain, that if the laws of one country and its Courts recognise and give effect to those of another in respect of the constitution of any contract, they must give the like recognition and effect to those same foreign laws when they declare the same kind of contract dissolved. Suppose a party, forbidden to purchase from another by our equity as administered in the Courts of this country (and we have some restraints upon certain parties which come very near prohibition), and suppose a sale of chattels by one to another party standing in this relation towards each other, should be effected in Scotland, and that our Courts here should (whether right or wrong) recognise such a sale, because the Scotch law would affirm it—surely it would follow that our Courts must equally recognise a rescission of the contract of sale in Scotland by any act which the Scotch law regards as valid to rescind it, although our own law may not regard it as sufficient. Suppose a question to arise in the Courts of England respecting the execution of a contract thus made in this country, and that the objection of its invalidity were waived for some reason; if the party resisting its execution were to produce either a sentence of a Scotch Court declaring it rescinded by a Scotch matter done in *pais*, or were merely to pro-**[545]**-duce evidence of the thing so done, and proof of its amounting by the Scotch law to a rescission of the contract—I apprehend that the party relying on the contract could never be heard to say, "The contract is English, and the Scotch proceeding is impotent to dissolve it." The reply would be, "Our English Courts have (whether right or wrong) recognised the validity of a Scotch proceeding to complete the obligation, and can no longer deny the validity

of a similar but reverse proceeding to dissolve it—*unumquodque dissolvitur eodem modo quo ligatur.*"

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

Nor can attempt succeed, in this argument, which rests upon distinctions taken between marriage and other contracts, on the ground that its effects govern the enjoyment of real rights in England, and **[546]** that the English law alone can regulate the rights of landed property. For, not to mention that a Scotch marriage between English parties gives English honours and estates to its issue, which would have been bastard had the parties so married, or pretended to marry, in England; all personal obligations may in their consequences affect real rights in England. Nor does a Scotch divorce, by depriving a widow of dower or arrears of pin-money charged on English property, more immediately affect real estate here, than a bond or a judgment relased in Scotland according to Scotch forms, discharges real estate of a *lien*, or than a bond executed, or indeed a simple contract debt incurred in Scotland, eventually and consequentially charges English real estate.

It appears to me quite certain that those who decided Lolley's case did not look sufficiently to the difficulty of following out the principle of the rule which they laid down. At first sight, on a cursory survey of the question, there seems no great impediment in the way of a Judge who would keep the English marriage contract indissoluble in Scotland, and yet allow a Scotch marriage to have validity in England; for it does not immediately appear how the dissolution and the constitution of the contract should come in conflict, though diametrically opposite principles are applied to each. But only mark how that conflict arises, and how, in fact and in practice, it must needs arise as long as the diversity of the rules applied is maintained. When English parties are divorced in Scotland, it seems easy to say, "We give no validity to this proceeding in England, leaving the Scotch law to deal with it in that country; and with its awards we do not in anywise interfere." But the time speedily arrives when we can no longer refuse **[547]** to interfere; and then see the inextricable confusion that instantly arises and involves the whole subject. The English parties are divorced—they return to England, and one of them marries again: that party is met by Lolley's case, and treated as a felon. So far all is smooth. But what if the second marriage is contracted in Scotland? and what if the issue of that marriage claims an English real estate by descent, or the widow demands her dower? Lolley's case will no longer serve the purpose of deciding the rights of the parties—for Lolley's case is confined to the effects of the Scotch divorce in England, and professes not to touch, as, indeed, they who decided it had no authority to touch, the validity of that divorce in Scotland. Then the marriage being Scotch, the *lex loci* must prevail by the cases of *Compton* v. *Bearcroft*, and *Ilderton* v. *Ilderton*. All its consequences to the wife and issue must be dealt with by the English Courts; and the same Judge, who, sitting under a commission of gaol delivery, has in the morning sent Mr. Lolley to the hulks for felony, because he re-married in England, and the divorce was insufficient, sitting at *nisi prius* in the afternoon, must give the issue of Mrs. Lolley's second marriage an estate in Yorkshire, because she re-married in Scotland, and must give it on the precise ground that the divorce was effectual. Thus the divorce is both valid and nugatory, not according to its own nature, or the law of any one State, but according to the accident whether a transaction which follows upon it, and does not necessarily occur at all, chanced to take place in one part of the Island or in the other; and yet the felony of the husband depended entirely

upon his not having been divorced validly in Scotland, and not at all upon his not being divorced validly in England; and the **[548]** title of the wife's issue to the succession, or of herself to dower, depends wholly upon the same husband having been validly divorced in that same country of Scotland.

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

If, in a matter confessedly not clear, and very far from being unincumbered with doubt and difficulty, we find that manifest and serious inconvenience is sure to result from one view, and very little, in comparison, from adopting the opposite course, nothing can be a stronger reason for taking the latter. Now surely it strikes every one that the greatest hardships must occur to parties, the greatest embarrassment to **[549]** their rights, and the utmost inconvenience to the Courts of Justice in both countries, by the rule being maintained as laid down in Lolley's case:—The greatest hardship to parties; for what can be a greater grievance than that parties living *bona fide* in England, though temporarily, should either not be allowed to marry at all during their residence here, or if they do, and afterwards return to their own country, however great its distance, that they must be deprived of all remedy in case of misconduct, however aggravated, unless they undertake a voyage back to England, aye, and unless they can comply with the Parliamentry forms in serving notices:—The greatest embarrassment to their rights; for what can be more embarrassing than that a person's *status* should be involved in uncertainty, and should be subject to change its nature as he goes from place to place; that he should be married in one country, and single, if not a felon, in another; bastard here, and legitimate there?—The utmost inconvenience to the Courts; for what inconvenience can be greater than that they should have to regard a person as married for one purpose, and not for another—single and a felon if he marries a few yards to the southward; lawfully married if the ceremony be performed a few yards to the north—a bastard when he claims land; legitimate when he sues for personal succession—widow when she demands the chattels of her husband; his concubine when she counts as dowable of his land?

It is in vain to remind us of the opportunity which a strict adherence to the *lex loci*, with respect to dissolution of the contract, would give to violators of our English marriage law. This objection comes too late. Before the validity of Scotch marriages had been supported by decisions too numerous and too old for any **[550]** question, this argument *ab inconvenienti* might have been urged and set against those other reasons which I have adduced, drawn from the same consideration. But we have it now firmly established as the law of the land, and daily acted upon by persons of every condition, that, though the law of England incapacitates parties from contracting marriage here, they may go for a few minutes to the Scotch border, and be married as effectually as if they had no incapacity whatever in their own country, and then return, after eluding the law, to set its prohibitions at defiance without incurring any penalty, and to obtain its aid without any difficulty in securing the enjoyment of all the rights incident to the married state. Surely there is neither sense nor consistency in complaining of the risk, infraction or evasion arising to the English law from supporting Scotch *divorces*, after having thus given to the Scotch *marriages* the power of eluding, and breaking, and defying that law for so many years.

I have now been commenting upon Lolley's case on its own principle—that is, regarding it as merely laying down a rule for England, and prescribing how a Scotch divorce shall be considered in this country, and dealt with by its Courts. I have felt this the more necessary because I do not see, for the reasons which have occasionally been adverted to in treating the other argument, how, consistently with any principle, the Judges who decided the case could limit its application to England, and think that it did not decide also on the validity of the divorce in Scotland. They certainly could not hold the second English marriage invalid and felonious in England, without assuming that the Scotch divorce was void even in Scotland. In my view of the present question, there-[551]-fore, it was fit to show that the Scotch Courts have a good title to consider the principle of Lolley's case erroneous even as an English decision. This, it is true, their Lordships have not done; and the Judgment now under appeal is rested upon the ground of the Scotch divorce being sufficient to determine the marriage contract in Scotland only.

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

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

In approaching this branch of the question, it is most important to remark, that there may be a very small body of judicial authority upon a point of law very well established in any country; nay, that oftentimes the less doubtful the point is, the fewer cases will you find decided upon it. Thus no one denies [552] that the Scotch Consistorial Court had, ever since its establishment upon the Reformation, been in the practice of pronouncing sentences of divorce for adultery. The Catholic religion was abolished by the Parliament of Scotland in 1560; and three years after that important event, we find a statute made, the Act 1563, c. 74, in which, after a preamble expressing great and lively horror of the "abominable and filthie vice of adultery," (an opinion, perhaps, more sincere in the estates of Parliament than in the Queen,) it is declared to be a capital offence, if "notour" (notorious); and all other adultery is to continue punishable as before, but with an express saving of the right to "pursue for divorcement for the crime of adultery, conform to (according to) the law." For above two centuries the jurisdiction thus recognized by the statute had been exercised by the Consistorial Courts. Nor was any objection whatever made to the want of jurisdiction over parties, in respect of their domicile having been foreign or the marriage contracted abroad. In truth, the view which the law took of adultery as a crime punishable with even the severest of penalties, seems almost to preclude any such exception. If a person were indicted under the statute for notour adultery committed in Scotland, he clearly never could have defended himself by showing he had been married in England, and was only temporarily a resident in Scotland; so there seems never to have been any such distinction taken, in giving the injured party the civil remedy against the offender by dissolving the marriage. That Englishmen temporarily residing in Scotland have been in use to sue for divorces from marriages contracted in England, ever since the intercourse of the two countries became constant by the union first of the Crowns and then of the Kingdoms, [553] is a fact of much importance, and it is not disputed. The importance of it is this—that the Courts administering the law of divorce have, with a full knowledge that they were dissolving English marriages, never inquired further than was necessary for ascertaining that the Pursuers and Defenders had acquired a domicile in Scotland, and then exercised the jurisdiction without scruple, and without any hesitation. This is a clear proof that the law, the Scotch law, was always understood among its

practitioners, and by the Judges of the country, as the present decision supposes it to be; and such a long continued and unqualified practice is a fully better proof of what that law is, than even a few occasional decisions *in foro contentioso*. It would be a dangerous thing to admit that generally recognized and long continued practice should go for nothing, merely because, until a few years ago, no one had brought those principles and that practice in question, and because the judicial decisions in its favour were few in number, and of a recent date. There is every reason to believe that in this, as in most other particulars, the more ancient law of England was the same with that of our northern neighbours. Between the Reformation and the latter end of Queen Elizabeth's reign, it was held that the Consistorial jurisdiction extended to dissolve marriages *à vinculo* for adultery (2 Burn's Eccl. Law, 503).

It was, however, apparently not till 1789 that the question of jurisdiction was raised *in foro contensioso*, by the case of *Brunsdon* v. *Wallace*. But there a question was made upon the sufficiency of the *forum originis* to found a jurisdiction. The husband, before marriage, had left Scotland without any intention of **[554]** returning, and so had the wife. The Judges were much divided, and the judgment was given with an express reference to the circumstances of the case, of which the absence of the defender, the husband, from Scotland, when and long before the suit was commenced, must be regarded as one. Nevertheless, as the majority of the Court considered the *forum originis* of both parties sufficient to found the jurisdiction, I should have thought this a decision against the principles which I deem to be recognised by later cases, had it stood untouched by these.

Pirie v. *Lunan* is, I believe, the next case; but it was the case of a Scotch marriage between Scotch parties, and only raised the question of *forum;* for both were domiciled in England. The Court sustained the jurisdiction *ratione originis*. This decision clearly proves little or nothing anyway in the present question. And the same may be said of *Grant* v. *Pedie*. So *French* v. *Pilcher* turned on the wife, the defender being an Englishwoman and resident out of Scotland, and the adultery chiefly committed abroad; and, accordingly, it does not touch, and hardly even approaches, any of the points now in dispute.

In *Lindsay* v. *Tovey*, the Court of Session sustained the jurisdiction in all respects, though the parties had been living separate under a deed. It is true that your Lordships, on appeal, remitted the case; and that the death of one of the parties prevented any further proceedings. The ground of the remit was twofold: that the domicile of the husband appeared to your Lordships (acting under Lord Eldon's advice) to be in England; and that Lolley's case had not been considered by the Court below. Upon that case Lord Eldon pronounced no opinion, but he certainly intimated a doubt; and I can inform your Lordships **[555]** (having been counsel in the cause, and having, at the argument, given his Lordship a note of the judgment in Lolley's case) that he said, "It is a decision on which we probably shall hear a good deal more."

But since Lolley's case was decided, with the doctrine there laid down fully before them, and after maturely considering it, the Scotch Courts have repeatedly affirmed the jurisdiction in all its particulars. Those cases to which I particularly refer were decided in 1814, and the two or three following years. *Lovett* v. *Lovett*, and *Kibblethwaite* v. *Kibblethwaite*, both of the same date, 21st December 1816, are those to which I shall particularly advert. In both cases the marriage was had in England; in both, the parties were English by birth and by domicile; in both, the suit was brought by the wife for the husband's adultery; and the only domicile in Scotland being that required to give the Courts jursdiction, the Commissaries in both refused to divorce, on the ground, not of the indissolubility of the English marriage, but the insufficiency of the Scotch residence; in both, the Court of Session, after the fullest discussion, with one dissentient voice, and that turning upon the question of domicile, sustained the jurisdiction, and remitted to the Commissaries to proceed with the divorce.

Upon the other cases, of *Edmonstone* v. *Edmonstone*, and *Butler* v. *Forbes*, I need not dwell in detail. The state of the judicial authority on this question is fully given in the work of Mr. Ferguson, one of the most experienced of the Scotch Consistorial Judges. After referring to all the cases, the words of that learned person, though not to be cited as an authority, are well worthy of attention, as the testimony of a Judge

sitting for so many years in the Scotch Consistorial [556] Court, and speaking to its uniform and established practice, twenty years after Lolley's case had been determined here. Mr. Ferguson says, "According to these precedents, the municipal law of Scotland is also now applied by the Consistorial Judicature in all cases of divorce, without distinction, whether the parties are foreign or domiciled subjects and citizens of this kingdom; whether, when foreign, the law of their own country affords the same remedy or not, and whether they have contracted their marriage within this realm, or in any other; provided only that they have become properly amenable to the jurisdiction in this *forum*. None of these last-mentioned cases, nor indeed any other from Scotland, in which a question of international law could be raised for trial and judgment, having hitherto been appealed, the rule has for a period of more than ten years stood as fixed by them, and the subsequent practice has furnished additional instances of its application."

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

But although it was necessary, to complete the view which I have taken of this important question, that I should advert to the cases which bear upon it in all its extent, there is no necessity whatever for our assenting to the proposition in its more general and [557] absolute form, for the purpose of the case now before us. That is the case of a marriage contracted in England, between a man, Scotch by domicile and birth, and a woman about to become Scotch by the execution of the contract. It is moreover the case of a suit instituted in the Scotch Courts, while the pursuer had his actual domicile in Scotland, and his wife had the same domicile by law. To term a marriage so contracted an English marriage, hardly appears to be correct. I am sure it is, if not wholly a Scotch contract, at the least, a contract partaking as much of the Scotch as of the English. This, in my judgment, frees the case from all doubt; but as I have also a strong opinion upon the more general question—an opinion not of yesterday, nor lightly taken up—I have deemed it fitting that I should not withhold it from your Lordships, and the parties, and the Court below, upon the present occasion.

Lord Lyndhurst:—My noble and learned friend has, in the judgment which he has just read, given your Lordships so full and clear a view of the state of the case, and of the law applicable to it, that it is not necessary for me to do more than communicate the result of my own opinions on the principal question submitted for your Lordships' decision. That question is one of great importance, not only to the parties immediately interested, but also to the public, on account of the principle which is involved in it. I have, on that account, from time to time during the argument, and since, given my best consideration to the subject, in the earnest desire to arrive at a just and satisfactory conclusion. I must, however, in the outset declare, that if I conceived that the judgment which your Lordships are now about to adopt, were [558] to be understood as affecting that delivered by the twelve Judges in Lolley's case, I should feel it my duty to object to so dangerous and precipitate a course—a course so likely to create inconvenience and embarrassment in its results—and should recommend to your Lordships, before you pronounced a final judgment, to review the principles of the law, and especially to request the assistance and opinions of the learned Judges of the Courts of Law on the whole case, or so far at least as your judgment might be in conflict with their unanimous decision in the case of Lolley. It may be in the recollection of some of your Lordships that Lolley had been married in England, had subsequently gone to Scotland, and there procured a divorce, and then returned to England, where he married a second time, and was, in consequence, tried for bigamy. His defence was, that he had been legally divorced in Scotland; but the twelve Judges declared that the sentence of divorce pronounced in Scotland, however effectual there, could not be permitted to enable a party, who had previously solemnized one marriage in England, to effect a second in it while his first wife was living. He was found guilty, and sentenced to transportation. That proceeding was not carried through lightly and unadvisedly; for it came before the assembled Judges of England,

in the course of objections raised in reference to Lolley's plea of impunity, founded on the fact of the Scottish divorce, and supported by advocates of the first ability; yet the sentence, overthrowing the force of the Scottish ceremonial of divorce, was confirmed by the unanimous approbation of the twelve eminent individuals in England best fitted, by talent, legal knowledge and great experience, to pronounce with the voice of undoubted authority on the [559] wisdom of that decision. If, therefore, your Lordships contemplate any interference with that sentence, so supported, it would only be just and wise to take care that such interference is warranted, and, as a consistent preliminary, to consult those twelve individuals, and obtain their assistance on this important point. It has been stated that Lord Eldon has entertained some doubts on the propriety of that decision; but my noble and learned friend is hardly warranted in drawing such a conclusion, or so interpreting what might have dropped from that learned Lord, who was then at the head of the law, and would certainly not have allowed Lolley to be punished, if he had not fully acquiesced in the principle involved in the sentence, and confirmed by the twelve Judges. But Lolley's case has received further confirmation; for my noble and learned friend, sitting in the Court of Chancery, deciding a case which came before him there in 1831, referred to this case of Lolley, and on the high authority of that case laid it down, in the most satisfactory manner, that an English marriage could not be dissolved or affected by a Danish or other foreign divorce.—[His Lordship read, from the printed case, the observations said to be made by Lord Brougham upon Lolley's case, when giving judgment in the case in Chancery (vide *M'Carthy* v. *De Caix*, infra, p. 568), and proceeded thus:]—If after this confirmation of Lolley's case by my noble and learned friend, and by Lord Eldon, as my noble and learned friend distinctly states in the judgment which I have read—if after all this your Lordships intend to pronounce this judgment as interfering with the principle established in Lolley's case, my opinion is, that we should have a new hearing before the twelve [560] Judges, that we may have the question settled advisedly once for all, and know henceforth with certainty what the law shall be in Great Britain.

It must be admitted that the legal principles and decisions of England and Scotland stand in strange and anomalous conflict on this important subject. As the laws of both now stand, it would appear that Sir George Warrender may have two wives; for, having been divorced in Scotland, he may marry again in that country: he may live with one wife in Scotland most lawfully, and with the other equally lawfully in England; but only bring him across the border, his English wife may proceed against him in the English Courts, either for restitution of conjugal rights, or for adultery committed against the duties and obligations of the marriage solemnized in England: again, send him to Scotland, and his Scottish wife may proceed, in the Courts in Scotland, for breach of the marriage contract entered into with her in that country. Other various and striking points of anomaly, alluded to by my noble and learned friend, are also obvious in the existing state of the laws of both countries; but however individually grievous they may be, or however apparently clashing in their principles, it is our duty, as a Court of Appeal, to decide each case that comes before us according to the law of the particular country whence it originated, and according to which it claims our consideration; leaving it to the wisdom of Parliament to adjust the anomaly, or get rid of the discrepancy, by improved legislation.

The real question now before us amounts to this: whether in the law of Scotland a divorce obtained in Scotland, as decided by the Scottish Judges, is supported and justified by the invariable course of the law of Scotland. We are now sitting as a Scottish [561] Court of Appeal, this case coming thence to us, and as such we must be guided by a reference to the principles of the law of that country. In English cases, on the contrary, we sit as an English Court of Appeal, and must equally be guided by the spirit of the laws prevailing here. As to the first question—the point of the domicile—it is fully established by all the papers produced in the case, and was without hesitation admitted by counsel on both sides, in the preliminary argument, that Sir George Warrender has been a domiciled resident in Scotland during the whole period, from his marriage up to the commencement of the suit and to the present time. This is the basis of the whole case, and it therefore clearly follows that Lady Warrender became, as his wife, similarly domiciled in Scotland; for the principle of the law of both countries equally recognises the domicile of the husband

as that of the wife. No point of law is more clearly established that point being established, the subsequent deed of separation amounts to nothing more than a mere permission to one party to live separate from the other—not a binding obligation in the eye of the law—and there the matter rests. It confers no release of the marriage contract on either party, and neither can thereupon presume to violate it. The letter of Sir George Warrender cannot alter the principle of law. The strongest articles of separation may be drawn up and signed with full acquiescence of husband and wife, yet he may sue her and she may sue him notwithstanding. It is at the most a mere temporary arrangement, a permission to live elsewhere; but the legal domicile remains as it was. One may pledge himself not to claim or institute a suit for conjugal rights; but he cannot be bound by any such pledge, for it is against the inherent con-**[562]**-dition of the married state, as well as against public policy. It is said that Lord Eldon, in the case of *Tovey* v. *Lindsay*, in this House, threw some doubt on the principle, and seemed inclined to give effect to those deeds of separation; but I am of opinion, on the authority of cases deliberately decided by that noble Lord himself, that the deed of separation here cannot affect the domicile, or any other condition inherent in the relation of husband and wife, or be any bar to the husband's suit.

The next point in the case regards the *locus delicti*. The allegations in the summons are, that the adultery was committed in France, and other countries abroad. We must assume for the present that Lady Warrender is innocent of these charges; they are not to be taken as facts proved in the cause: she may, for anything that has yet appeared in this suit, be as pure and spotless as any woman in the country. But it is proper to remark, that it is no bar or objection to the suit, that the adultery was committed, not in this country, but in a foreign country: the law, either in this country or in Scotland, makes no distinction in respect of the place of the commission of the offence. An action for damages may be brought in this country for adultery committed abroad; that circumstance cannot have any effect even in the mitigation of damages. There is no validity in this objection of the place where the adultery is alleged to have been committed.

On the third plea depends the main question in the appeal; and it is, whether it is competent for the Scotch Courts, on proof or admission of adultery, to pronounce a decree of divorce in a marriage which was contracted and solemnized in England. I may observe here, that marriage is looked upon, in the international spirit of the laws of almost every country **[563]** in Europe, as a Christian contract, equally binding on the parties wheresoever they may be found; and in looking to the propriety of the law of divorce in Scotland, it must be treated as a question of remedy for a violation of nuptial rights—rights guaranteed by peculiar ceremonials in every country, and in enforcing respect to which each country has a right to provide what remedy it pleases. In ascertaining what the principle of that remedy may be in any country, the safest rule is to look to the decisions of the Courts of that country. In Scotland these are found, in perfect agreement with each other, extending in its records over the space of a century, and embodying a principle which, till the case of Lolley occurred in England, was never doubted or disputed. In *Gordon* v. *Englegraaff* (Fac. Coll. 9 June 1699; S. C. Ferg. Cons. App. 251), in the year 1699, the marriage was contracted in Holland, between a Scotchman and a native of Amsterdam. All that was in proof was the fact of adultery committed by her in Holland, and the Scotch Court pronounced a decree of divorce at the suit of the husband. In *Graham* v. *Wilkieson* (Fac. Coll. 16 December 1726; S. C. Ferg. Cons. App. 252), in 1726, the parties were married in Ireland; the husband a Scotchman, and the wife an Irishwoman. A suit for divorce, on the head of adultery, was instituted by the husband in Scotland, and a decree was pronounced. In 1731 happened the case of *Scot* v. *Boutcher* (Fac. Coll. 6 March 1731; S. C. Ferg. Cons. App. 252): the marriage was had in England with an Englishwoman, and the adultery was alleged to have been committed in England. The husband, a Scotchman, instituted a suit in the Consistorial Court of Edinburgh, and, on proof of her guilt, obtained in her absence a decree of divorce *à vinculo matrimonii*. **[564]** The case of *Urquhart* v. *Flucker* (Fac. Coll. 25 January 1787; S. C. Ferg. Cons. App. 259), in 1787, was still stronger in relation to the present case. There a Scotchman in the army married at Boston, in New England, a native of that place; they cohabited there, and afterwards at Halifax, and lastly in London. The husband, finding proofs of adultery committed

by the wife in all these places, brought his action for divorce in Scotland, and obtained a decree accordingly. In none of these cases was the objection made that the Court in Scotland had not jurisdiction, because the marriage was solemnized or the adultery committed abroad. No doubt was entertained of the jurisdiction, upon proof of the adultery, until the year 1789, when the case of *Brunsdon* v. *Wallace*, or *Dunlop* (Fac. Coll. 9 February 1789; S. C. Ferg. Cons. App. 259) occurred. The parties there were married in England; the question of domicile was the only point contested. The Consistorial Court proceeded to entertain the action, brought by the wife in absence of the husband, who was cited edictally; but on his appearance, and appeal to the Court of Session, the action was ordered to be dismissed, on the ground that the parties were not domiciled in Scotland. Up to that period the decisions in the Scotch Courts were uniform, and so they continued afterwards; as in the case of *The Duchess of Hamilton* v. *The Duke of Hamilton*, in 1794 (Fac. Coll. 7 February 1794; S. C. Ferg. Cons. App. 260). That was an English marriage, according to the English law and ritual; sentence of divorce *à vinculo* was nevertheless pronounced by the Scotch Courts, on proof of adultery. Next came the case of *Lindsay* v. *Tovey* (Fac. Coll. 27 January 1807; S. C. Ferg. Cons. App. 265), in Scotland, in 1807, which was brought by appeal to this House about the time that Lolley's **[565]** case was decided by the twelve Judges of England. In consequence of doubts entertained by Lords Eldon and Redesdale, and the great importance of the question then raised for the first time, as to the jurisdiction, the case of *Lindsay* v. *Tovey* (1 Dow, 117) was remitted for further consideration. The pursuer in that case unfortunately died, and no further proceedings were taken. The Courts in Scotland, however, continued to sustain and exercise the same jurisdiction; as appears by a series of cases, which are briefly stated in Ferguson's Consistorial Reports, and Appendix: as, *Utterton* v. *Tewsh; Rodgers* v. *Wyatt*, in 1811; *Hilary* v. *Hilary*, and *Sugden* v. *Lolley*, in 1812; *Pollock* v. *Russell Manners*, in 1813; *Homfray* v. *Newte*, and *St. Aubyn* v. *O'Brien*, in 1814. All these cases were uniformly decided according to the law and practice of Scotland. Then came the case of *Gordon* v. *Pye*, in 1815, which I mention for the purpose of showing a difference of opinion between the Judges of the Consistorial Court in Scotland, the majority of whom came to the conclusion, that in consequence of what was done by the Judges of England, in Lolley's case, the Courts of Scotland ought not to interfere with English marriages. But afterwards came the case of *Edmonstone* v. *Lockhart*, or *Edmonstone*, in 1816; in which the question was raised as to the validity of a defence to an action of divorce in Scotland, that the marriage took place in England. That case was brought before the fifteen Judges of the Courts of Scotland—the very thing which Lord Eldon desired, in remitting the case of *Lindsay* v. *Tovey*—and they were unanimously of opinion, that according to the law of Scotland, notwithstanding the marriage was **[566]** had in England, it was competent for the Courts of Scotland to pronounce sentence of divorce *à vinculo*. The arguments of Lord Robertson, one of the Judges of the second division of the Court of Session, delivered by him in support of his opinion, and printed in Mr. Ferguson's Appendix (p. 393) to his report of that and other cases, have satisfied my mind that it is the law of Scotland that the Courts there have, without reference to the country where the marriage was contracted, been used from a very remote period to pronounce sentence of divorce for adultery. The decisions of the Courts of a country are the best proofs of the law of that country, and they are our best guides. There was no doubt, or suggestion of a doubt, what the law of Scotland was on those questions, until Lolley's case brought it into question, and the doubts raised by that were removed very soon after by the fifteen Judges, in *Edmonstone* v. *Edmonstone*. Though only an English lawyer, and only picking up Scottish law during the three years that I had the honour of attending to cases that came before us, sitting here in a Court of Appeal, yet I am quite satisfied with the decision of the Scottish Judges in the present case, and I should act very inconsistently if I should advise your Lordships to reverse their judgment. I am clearly of opinion that the domicile is established: the husband's is clearly so, as admitted; the wife's follows the husband's. The deed of separation does not affect the rule of law. The objection as to citation has been virtually abandoned, and the law of Scotland gives the remedy of divorce without reference to the country in which the marriage was contracted or the adultery committed. If my noble and learned friend thinks that your Lord-**[567]**-ships' judg-

ment will affect the decision in Lolley's case, then, whatever inconvenience may be sustained, it would be advisable to call in the aid of the learned Judges; but my opinion is, that it does not break in on that case. As to a reconcilement of the conflict of the laws of the two countries, Parliament must effect that, for it alone is competent to interfere, as it has done from time to time, to remove other inconveniences. I shall, therefore, advise your Lordships to affirm the decision of the Court below.

Lord Brougham:—I think that this judgment does not break in on Lolley's case. This is a decision in reference to the law of Scotland; a judgment founded on which, we now, as a Court of Appeal, confirm. Lolley's case refers to the law of England. The note of what I said in Chancery, in *M'Carthy* v. *De Caix*, read from the printed case by my noble and learned friend, may or may not be correct: I did not correct this note, nor did I know of it until I saw it in these papers. Whatever opinion I may have entertained of Lolley'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.

The interlocutor of the Court below was affirmed.

Lolley's case, and *M'Carthy* v. *De Caix*, having been so often referred to, the Reporters think it may be useful to add here a brief notice of the main facts of both.

ANN SUGDEN, otherwise LOLLEY *v.* WILLIAM MARTIN LOLLEY.

[1812. R. and Ry. 237. See note to *Warrender* v. *Warrender*, 2 Cl. and F. 488.]

Mrs. Lolley, whose maiden name was Sugden, raised an action of divorce against her husband in the Consistorial Court of Scotland. She stated in her summons, that in the **[568]** year 1800 she was married to the defender at Liverpool, where they afterwards cohabited for some time as man and wife. She afterwards accompanied him to Carlisle, and thence to Edinburgh, where he alleged that he had business. They lived together there in lodgings for some short time. She then charged the defender with having been guilty of adultery both in England and Scotland, and concluded for a divorce in the usual form. The defender appeared, and admitted the marriage and cohabitation in Liverpool, etc., but denied the adultery. The Commissaries, in respect that the parties appeared to be English, and the marriage an English contract, appointed the pursuer to state in a condescendence the grounds in law and fact on which the Court was competent to entertain the action. A condescendence and answers were accordingly given in, and various acts of adultery by the defender were proved. The Commissaries suspecting collusion, examined both parties judicially, but finding no proof thereof, decreed for a divorce.—(Extracted from Fac. Collection, 20th March 1812.)

Lolley was afterwards tried at the Lancashire summer assizes, 1812, for having married Ann Hunter at Liverpool, his former wife, Ann Sugden, being then living. The marriages, and the fact that Ann Sugden was alive a week before the assizes, were proved. The prisoner's defence was, that he had been divorced from Ann Sugden in Scotland, and that his present wife knew the fact. The decree of divorce was produced.

The prisoner was found guilty, but sentence was respited to the then next assizes. The case was afterwards argued before all the Judges, at Serjeants'-inn Hall, and the conviction was affirmed.—(See Russ. and Ryan's C. C. 237.)

M'CARTHY *v.* DE CAIX.

[1831. 2 Ru. and My. 614. See note to *Warrender* v. *Warrender*, 2 Cl. and F. 488.]

A person of the name of Tuite, a domiciled Dane, was married in England to an Englishwoman. They left England and went to Denmark, where they were subsequently divorced. The wife returned to her relations in this country and died, leaving Mr. Tuite her surviving, in Denmark. After his death a suit was instituted in England between his and her personal representatives, respecting some property the right to which accrued to her subsequently to the divorce.

[569] Lord Brougham, Chancellor, in giving his judgment on the points in issue, said:—A gentleman of the name of Tuite, contracted a marriage, which was legally solemnized in England. He was himself a Dane by birth and by domicile. He removed immediately the person whom he had made his wife, from this country—the