

stand this Judge as saying that personal or threatened personal violence, are the only facts which could afford the evidence necessary to establish this state of things in any and every case.

In *Neild vs. Neild*, 4 Haggard, Consistory Reports 265, Dr. Lushington, the presiding Judge, held, that "the main test to be applied to the consideration of the libel was whether all the facts, assuming them to be true, with which Mr. Neild was charged, were of a nature and description to satisfy his mind that cohabitation could no longer subsist between the parties without personal danger to Lady Caroline Neild." "Where," said he, "a strong conviction exists in the mind of the Court that the personal safety of the wife is in jeopardy, or where even it may see reasonable ground to apprehend such a consequence, it is its bounden duty to protect the wife from such risk and danger." It is true that to this principle, which is in harmony with the previous doctrines of Sir Wm. Scott, he adds: "that in these suits the species of facts most generally adduced are:—First, personal ill treatment which is of different kinds—such as blows or injury of any kind. Secondly, threats of such a description as would reasonably excite in a mind of ordinary firmness, a fear of personal injury. For causes less stringent than these, the Court has no power to interfere and separate husband and wife."

In *Dysart vs. Dysart* 1 Robertson's Ecclesiastical Reports, 106, the same Judge decided against the wife apparently applying these principles. But in the same case (page 111) he holds that the refusal by a husband, to furnish a wife with "necessaries and comforts" within his pecuniary means, and suitable to the wife's education and habits, was an act of legal cruelty. He very correctly confines himself to "necessaries and comforts," not luxuries and enjoyments. And holds that as to everything beyond "necessaries and comforts," the husband, so far as the law is concerned, is the sole Judge; that no human tribunal has authority to interfere, and none could interfere with real benefit to the public interest.

The judgment in *Dysart vs. Dysart* came before the Court of Arches on an appeal; when it was reversed by Sir H. Jenner Fust, and the Countess of Dysart held to have established an adequate cause of divorce. The Judge, after stating the general doctrine, previously laid down by Sir William Scott in *Evans vs. Evans*, that "mere austerity of temper, petulance of manner, rudeness of language, even occasional sallies of passion, if they do not threaten bodily harm, do not amount to legal cruelty," says—"From this I deduce this inference; if austerity of temper, petulance of manners, rudeness of language, a want of civil attention and accommodation, occasional sallies of passion, do threaten bodily harm, they amount to legal cruelty." (See London Jurist, March, 1848, page 492.)

The general doctrine of the English Ecclesiastical Courts, with regard to the divorce for the cause of cruelty, has received the approbation of the most eminent jurists, and the most learned Courts of the Union. In New York, it was recognized and adopted by Chancellor Kent in *Barriere vs. Barriere*, 4 Johnson Chancery Reports 189, and by Chancellor Walworth in *Perry vs. Perry*, 2 Pages Chancery Reports 502. By the Supreme Court of Connecticut in *Shaw vs. Shaw*, 17 Connecticut Reports 189. By the Supreme Court of Kentucky in *Finley vs. Finley*, 9 Dana's Reports; and by the Supreme Court of Massachusetts in *Warren vs. Warren*, 3 Massachusetts Reports 321.

Divorces, or rather separations for cruelty, *saevitia*, were proceedings familiar to the Courts of Continental Europe, and were regulated by principles similar, though not as stringent, as those of the English Canonical Code. The system under the code of the old French Monarchy before the Revolution is treated of by the learned Pothier in his "Traité du Contrat du Mariage," Partie 6 Chapitre 3, page 269. "The separation of habitation," says this writer, "is the relief which, for just causes, is accorded by the Judge to one of the parties, from the obligation of living with the other, and performing conjugal duties; without, however, severing the marriage tie." Discussing the principles on which this law should be administered, he says: "The union of husband and wife which is formed by God, does not permit to a woman to demand the separation of habitation, if it is not for very great causes." What are just causes he admits is not easy to determine; but holds they are to be left to the arbitrament and prudence of the Judge. Proceeding to enumerate what causes have been held sufficient, he first refers to cases of bad treatment, where the husband has struck or attempted to strike his wife; these being the most ordinary causes of separation. Second, to cases of bad treatment which had not gone to this extent. As an example of this kind ade-

quate to authorise a divorce, he gives the case of the wife of a public officer.

The husband, he says, had never struck his wife or offered to strike her; but from the first year of their marriage, and during all those which followed, he never ceased to testify towards her the greatest contempt; on all occasions, before persons who frequented his house, before the domestics, and even before their children, whom the father excited to ridicule their mother. Third, cases of the refusal by the husband, through inhumanity towards his wife, to furnish to her in a state of infirmity the necessities of life, although he had the means to do so. Fourth, the accusation of a capital crime prosecuted calumniously against his wife by the husband.

The modern French code of divorce approximates very nearly to our own. The absolute divorce, among other causes, is given by the Code Napoleon for "violence, ill usage, or grievous insults of one of the spouses towards the other." The words of the code are "*Les excès, services ou graves injures, de l'un époux envers l'autre.*" These words, like those of our own statute, are somewhat vague and general. But the French tribunals have assigned to them definite meanings. "*Les excès*" are said by Poulhier (Le Droit Civil Français, vol. 2, p. 41) to be acts of violence which exceed all measure, and may put the life of the spouse in danger. "*Les services*" are acts of cruelty which do not put the life in danger. "*Injures graves*," such insults as tend to destroy the reputation of the outraged spouse, that attack her probity, her morals;—and that harsh words will not suffice.

These citations are of value in showing the practical construction given by an enlightened nation to a code analogous to our own. And so far are useful aids in the construction of kindred enactments.

Aided thus by the lights derived from foreign and domestic jurisprudence, we approach the construction of our own Statute with less diffidence. And that construction in our opinion is this: That the cruelty within our Statute which entitles a wife to a divorce from her husband, is actual personal violence or the reasonable apprehension of it; or such a course of treatment as endangers her life or health and renders cohabitation unsafe. The latter may exist without the former. The denial of "necessaries and comforts" by a husband to his wife, he having the means to furnish them, would certainly endanger her life and health, though done in the blindest way. Of course, "luxuries and enjoyments" are different things from "necessaries and comforts" within the compass of the husband's means. What luxuries and elegant enjoyments a husband shall extend to his wife, are matters referable to his own generosity and liberality, with which no Court can interfere on any rational or practical principle. The case of *Dysart vs. Dysart*, 1 Robertson 111, shows this to be the present doctrine of the English Canon Law Courts, and was that of the French Code a century ago as we have shown by Pothier.

Again, a husband may, by a course of humiliating insults and annoyances, practiced in the various forms which ingenious malice could readily devise, eventually destroy the life or health of his wife, although such conduct may be unaccompanied by violence, positive or threatened. Would the wife have no remedy in such circumstances under our divorce laws, because actual or threatened personal violence formed no element in such cruelty? The answer to this question seems free from difficulty, when the subject is considered with reference to the principles on which the divorce for cruelty are predicated. The Courts intervene to dissolve the marriage bond under this head, for the conservation of the life or health of the wife, endangered by the treatment of the husband. The cruelty is judged from its effects; not solely from the means by which those effects are produced. To hold absolutely that if a husband avoids positive or threatened personal violence, the wife has no legal protection against any means short of these, which he may resort to, and which may destroy her life or health, is to invite such a system of infliction by the indemnity given the wrong doer. The more rational application of the doctrine of cruelty is to consider a course of marital unkindness, with reference to the effect it must necessarily produce on the life or health of the wife; and if it has been such as affect or injure either, to regard it as true legal cruelty. This doctrine seems to have been in the view of Sir H. Jenner Fust, in *Dysart vs. Dysart*, when he states he deduces as an inference from what Sir William Scott ruled in *Evans vs. Evans*, that "if austerity of temper, petulance of manner, rudeness of language, a want of civil attention, occasional sallies of passion do threaten bodily harm, they do amount to legal cruelty." This idea expressed axiomatically would be no less than the assertion

of this principle. That whatever form marital ill-treatment assumes, if a continuity of it involves the life or health of the wife it is legal cruelty. The principle of *Dysart vs. Dysart* is not only important, as being the most recent expression of opinion on this subject in a high Ecclesiastical Court, but because the principle on which that cause is placed is considered by the Judge as a just and necessary deduction from those settled by Sir William Scott in the earlier cases.

If these views are well founded, there is no real difference between our opinions on the question of legal cruelty, and those of the English Canon Law Courts as now understood and administered. But were it otherwise, we should still with all becoming deference to these high authorities, adhere to our own convictions. In limiting our intervention in matrimonial causes, in which cruelty is charged, to cases in which life or health are in any way involved, we occupy safe and prudent ground. A case of this kind would present a different state of things from one of matrimonial discord produced by mere acerbity of temper, or rigidity of domestic discipline. In such cases Courts have most wisely refused to interfere, referring the parties to their domestic forums for the adjustment of their differences, and recommending to the aggressor, the improvement of his manners, and to the aggrieved, the remedies of decent resistance or prudent conciliation. The discrimination of mere domestic discords, from the species of malicious cruelty, on which we have perhaps too long commented, can readily be made by any tribunal to whom a trust of such magnitude is confided.

It was ingeniously argued by the respondent's counsel, that the words "indignities to the person," in our statute, were words equivalent to *personal indignities*; and that therefore acts which could be classed under that category, were acts for which a divorce could be granted under our law. If this argument is sound, then undoubtedly personal insults and reproachful language, would be causes of divorce, because they rank among the grossest personal indignities. This construction, it will be perceived, would introduce into our code as a cause of divorce the "*injures graves*" of the code Napoleon: for to this exactly would the result of such a construction arrive.

It is quite certain that our law does not, in terms, make this one of the causes for the dissolution of the marriage bond; and it seems to us clear that no just principal would authorize the Courts to do so under the pretext of construction. The words "shall offer such indignities to her person," are the equivalents of the offered or threatened violence of the English Canon Law, or the "*services*" of the Code Napoleon, and do not embrace the causes of "*injures graves*"—grievous insults. The English Canon Laws, like our own, have always refused to regard mere personal insults as adequate causes for the separation of husband and wife; regarding such a doctrine as tending too greatly to relax a social bond, which, from before the time of Tacitus, the Saxon Race have considered a sacred institution. "When," says that Roman historian, speaking of the manners of the Germans, "the bride has fixed her choice, her hopes

The Butler Divorce Case.

¶ We learn that this long contested suit is now finally settled. The Judges of the Court of Common Pleas have decreed a divorce between the parties—Pierce Butler and Mrs. Frances Anne Butler. The language of the decree is in these words:

"And now, the ninth day of August, in the year of our Lord 1849, the return of Thomas Dunlap, Esq., Examiner of the depositions of the witnesses, taken before him on the part of the libellant, was presented and filed. September 3rd, 1849, on motion of George M. Dallas, Esq., rule to show cause why divorce should not be decreed—whereupon the Court, on the 22nd day of September, 1849, after mature and solemn deliberation, being satisfied therewith, and Proclamation being duly made for the respondent to come forth, and she not appearing, the Court do order adjudge and decree, that the said Pierce Butler, the libellant, be divorced and separated from the bond of matrimony contracted with the said Frances Anne Butler, the respondent, and that all and every the duties, rights and claims accruing to either of the said parties by reason of the said marriage, shall henceforth cease and determine—and the said parties be severally at liberty to marry again, in like manner, as if they never had been married."