[HEARD 29*th July*—JUDGMENT 9th August, 1850.]

DUNCAN CAMPBELL PATERSON, Esq., of Lochgair, Argyleshire, *Appellant*.

MRS. ELIZABETH RUSSELL or PATERSON, Spouse of the said D. C. PATERSON, *Respondent*.

Marriage.—Husband and Wife.—Separation a Mensa et Thoro.—Separation of married persons is not justified by conduct on the part of the husband rendering the wife's life miserable and uncomfortable, but unaccompanied by violence, actual or menaced, to her life, limb, or health, or cruelty and maltreatment, rendering it impossible for her to live with him.

Ibid.—Appeal.—Expenses.—Where a married woman fails in supporting upon appeal a decree of separation *a mensa et thoro*, she cannot have the costs of the appeal; but the reversal of the decree will not be extended to that part of it which gave her the expenses in the Court below.

IN the month of May, 1844, the Respondent brought an action against the Appellant by a summons, in which she set forth that she had been married to him in the month of July 1843: "That notwithstanding of the marriage between the Pur-
"suer and Defender, and that by the laws of God and man, he,
"the said Defender, was bound to protect and cherish the
"Pursuer, yet true it is, that the said Defender shaking off
"all regard to his conjugal vows, instead of behaving himself
"towards the Pursuer with tenderness and humanity, has con-
"ducted himself towards her in a cruel manner, so that her
"life has been rendered a burden to her, and might have been
"endangered if she had continued to live with him: That his
"whole conduct towards the Pursuer has been influenced by a
"desire to expel her from his house: That, in particular, he
"has never discharged the duties of the marriage-bed, or of a
"husband to a wife, and since about six weeks after the date

" of the celebration of the marriage, the Defender ceased to " hold any intercourse with the Pursuer, insomuch, that although " he resided in the same house with her, he did not speak to or " with her, and withdrew himself entirely from her bed, and " never entered her apartment, nor held intercourse with her in " any way whatever; and in his whole conduct in regard to her, " he treated her in the most contemptuous and insolent manner; " and he did so openly in the presence of the domestic servants " and others: That he has not only ceased to associate with the " Pursuer, but he has prevented her acquiring the society and " friendship of his acquaintances and neighbours, and has also " prevented her from making visits to or receiving visits from " them, although he was in the habit of making such visits him- " self, or with his sister: That the only occasion when she has " been permitted to be in his own presence were at and during " the hours of breakfast and dinner, and even then he held no " converse with her, but treated her with utter silence and con- " tempt, and upon the meals being finished, he left the house, or " retired to his own room by himself or with his said sister, and so " secluded himself from the Pursuer till next dinner or breakfast " hour, when the same scene was again gone through; and he " was also in the practice of taking tea and refreshments in his " own room, either alone or with his sister, without permitting " the Pursuer to be present: That the Defender has repeatedly " left the house for three or four weeks at a time, or for other " shorter periods, and gone to Ireland or elsewhere, leaving the " Pursuer at home without a single farthing wherewith to furnish " necessaries required during his absence: That, even when at " home, he never allowed her money for any purpose whatever, " and she has been all along, since her said marriage, entirely " dependent on the bounty of her father, who has been under " the necessity of providing her money for various domestic pur- " poses: That the Defender has openly and frequently, both by " word and in writing, and *inter alia*, in his letters to the Pur- " suer's father, avowed that he has not, and never had, any

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" affection for the Pursuer—that, indeed, he has an utter and " unalterable dislike of her; and has acknowledged not only that " he has given her cause for unhappiness, but also that he is " aware that in his house 'she neither was nor can be happy:' " That the Defender has declared himself separated from her " and that he never will again return to her: That, accord- " ingly, following out that declaration, and for the purpose, " as it would appear, of making the misery of the Pursuer " even more felt, he has not only altogether forsaken her society " in the house, but has made it a practice openly to walk out " or drive with his said sister, to whom he has directed all his " attentions; and this he did while he knew that the Pursuer " was by herself in bitter solitude, and far from any friends or " relations who could, in any way, contribute to her comfort: " That he never once, since said marriage, has been in church " with the Pursuer, nor on any occasion has he agreed to accom- " pany her there, or allowed her any opportunity of enjoying " church ordinances: That he has prohibited all her relations and " friends from visiting her, and, indeed, from entering his house, " and has threatened personal violence against all of them who " should attempt to do so: That the Pursuer, in consequence " of these threats, and his utter want of affection, and harsh, " undutiful, and cruel conduct towards her; of never having " received the treatment of a wife in any one respect, and of " being exposed to the scorn, contempt, or pity of her own " servants, and finding her life altogether made miserable and " endangered, felt compelled to quit the Defender's house, and " did so upon the 6th of April last, 1844 years."

Upon these allegations, the summons concluded for decree of separation *a mensa et thoro*, and for yearly aliment.

The Appellant pleaded in defence, that the action was both groundless and irrelevant. The record having been closed on summons and defences, the Lord Ordinary (Cuninghame), on the 25th June, 1845, " in respect the libel is laid upon a series " of insults and indignities said to have been offered by the

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" Defender to the Pursuer, unaccompanied with personal vio-
" lence, or any menace thereof,—and that, without an allegation
" to that effect, it appears to be settled, on authorities which the
" Lord Ordinary is not entitled to question, that a libel at the in-
" stance of a wife against a husband, founded on such averments
" as those now urged, is not relevant," dismissed the action.

The Respondent reclaimed against this interlocutor. The Court remitted the cause back to the Lord Ordinary, with instructions to open up the Record and appoint the Respondent to give in a special condescendence of the facts she averred in support of her summons, and decerned against the Appellant for 25*l.*, towards defraying the Respondent's expenses.

A condescendence and answer were accordingly lodged; and upon advising these, the Lord Ordinary allowed the parties a conjunct proof of their averments.

Under this leave, the parties produced certain letters which had passed between them and the father of the Respondent, before and subsequent to their marriage.

This correspondence began in April, 1843, with a letter from the Appellant to Mr. J. Russell, of Limerick, the Respondent's father, upon the subject of pecuniary difficulties in which the Appellant was involved. Mr. Russell, on the 14th April, after speaking of these money matters, wrote the Appellant, " You
" ought to think of settling yourself. One of *W. S.* letters
" mentioned something of such as likely, then you would be
" relieved from all your difficulties."

The Appellant, taking this observation as a hint, wrote Mr. Russell on the 27th April, authorizing him to make for him a proposal of marriage to his daughter, the Respondent. On the 1st May, the Respondent answered this proposal, through her father, by a message to the effect that she had a pleasant remembrance of her former acquaintance with the Appellant; but as it was some years since they had seen each other, she would be glad to renew their acquaintance before giving a decisive answer.

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The subsequent letters arranged a meeting in London, whither the Respondent was about to proceed for medical advice to one of her brothers. This meeting took place in the beginning of June, 1843, and the result of it was, that, after a few days of renewed acquaintance, the Respondent accepted the offer of the Appellant, and their marriage took place at London on the 8th of July, 1843.

Agreeable and friendly letters then passed between the Appellant and the Respondent's family. In one of these, written in the end of July, 1843, to her brother, the Appellant thanked him for his wishes and congratulations "as the offerings of a sincere "and deeply valued friend and connection, coupled with my "own knowledge of those estimable qualities which you have "so justly ascribed to your sister."

In the month of October, 1843, the correspondence between the Appellant and the Respondent's father took an unpleasant turn, in consequence of some reference in it to disputes between the Appellant and members of his own family. On the 2nd of October, the Appellant wrote to Mr. Russell, after allusion to these other subjects;—"Now, my dear sir, having disposed of ". this subject, I come more particularly to your note of the 14th, "and must freely acknowledge that I have been in a truly "miserable and depressed state of mind ever since my visit to "London. I need not remind you, my dear sir, of our previous "correspondence from the commencement, or of the very pecu-"liar position in which I found myself on my arrival there; "suffice it to say, that immediately on renewing my acquaintance "with your daughter, which, I may remark, had never been "much extended, I began to feel the most powerful misgivings "as to the prospect of happiness to myself, and would, at the "time, have given worlds to have unbosomed my apprehen-"sions to yourself, or some member of your family; but how "could I at that time have done so? The same letter which "covered my proposal for your daughter, covered a most urgent "solicitation to be relieved of some pressing pecuniary embar-

" rassments which were adjusted by you, and my proposal at " same time formally accepted by your daughter, whom I had " been the means of bringing specially to London; when there, " I found my pecuniary resources so low as to render it absolutely " necessary for me to lay myself under further pecuniary obli- " gations to your sons, who no doubt supplied my wants on the " strength of the position in which I then stood to them. What, " my dear sir, would have been said or thought of me, if, at that " period, after having my pecuniary wants supplied, and after " being formally accepted, if I had ventured, unsolicited, to " explain my depression of spirits, or mention the state of my " feelings? It would have put an end to my union with your " daughter; but what, my dear sir, would have been said or " thought of me? It was too fearful to contemplate; and I " was only left to proceed in the fond and anxious hope, that " when I got quietly settled at home, and the first impulses of " disappointment subsided, I might still, by the exercise of goo " sense, and the imaginary strength of my own mind, restore ' peace to my then convulsed heart. The state of mental unhap- " piness and depression under which I laboured, became visible " to your entire family, from the date of my arrival; my cold- " ness of manner, avoidance, and general deportment, were too " apparent to be misunderstood, and became the subject of " remark amongst them: but no explanation was sought from " me; I had no private conversation or intercourse with any " member of them, beyond the mere business preliminaries. " I fondly and anxiously looked for your arrival, in full expec- " tation that, under all the circumstances of our previous cor- " respondence, your assiduities, as a fond and attached parent, " would have caused you (more particularly on account of our " not having met for five years) to have indulged in a little " private conversation with the man to whom your daughter was " about to be united, to have ascertained the true state of his " feelings, and the grounds upon which you might rest your " hopes of happiness for us both. Had you afforded me such

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" an opportunity, painful as the task would have been, my appre-
" hensions would have been unbosomed, and I would have
" relied on your kindness and known discernment to have taken
" such a course as might, under the circumstances, seem best.
" But, my dear Sir, I was grievously disappointed; from the
" moment you arrived to the moment of my departure, there
" was an evident avoidance on your part—you never communi-
" cated or held an instant's conversation with me, beyond the
" common-place observations at table; the last, and I might
" almost say the only remark in reference to my marriage,
" which fell from you on my taking my departure, being, that
" 'you need not say what reliance you placed on my honour.'
" Would that it were on the strength of my attachment to your
" daughter that you could have so expressed your reliance! It
" would be wretched indeed for me to say that I had no hopes
" of happiness; had such been the case, feelings of respect for
" your daughter alone would have impelled me, at all risks, to
" break off, but as I previously observed, in the midst of my
" distress, I was not without hope, and placed a fatal reliance
" on the strength of my own good sense, stability of mind, time,
" and circumstances, to bring about a happy change of sentiment
" and feeling—is it too much for me, my dear Sir, to say, that
" you also relied chiefly on the same fatal grounds? I have
" now done with my sojourn in London, and I regret to say,
" without any disparagement to the naturally good and kind
" dispositions of your daughter, that the occurrences on our
" journey thither did not at all tend to improve my hopes of
" happiness, which at best was but a tender plant; every
" hour, every incident, every sentence uttered, tended more
" and more to convince me how entirely unsuited we were to
" each other; my depression of spirits continued, and I regret
" to be obliged to say, that I see not the most remote prospect of
" any change calculated to restore even a shade of happiness to my
" mind. It is in vain to talk to me of exertion; no man has ever

" struggled harder than I have to overcome the fixed depression " of heart and mind which hangs upon me; and if there is any " circumstance which can aggravate my pain, it is the con- " sciousness that I have removed your daughter from among a " widely-extended circle of attached relatives and friends into a " house of sorrow, where, I am aware, she neither is or can be " happy. It must be evident to you, my dear Sir, that I would " not for any idle or senseless whim or caprice, allow myself to " shrink from the performance of duties which I freely ac- " knowledge to be due of me, when the result of my incapacity " to resist this depression is the sacrifice of all that is dear in " life, the ruin of my prospects, and the utter annihilation of all " interest in this place and property, where all is now a blank " to me, and only serves as a monument of that bitter disap- " pointment which I am inevitably doomed to suffer. Circum- " stances which, when properly weighed and considered by the " members of a just, amiable, and upright family, will, I trust, " render me rather an object of pity than reproach.

" You are of course aware that Francis Russell has been " here for a few days, having, as I understood from him, come " specially in consequence of the unhappy state in which " Elizabeth very justly represented herself to be; and further " to expostulate respecting some portions of my conduct of " which she complained. I need scarcely tell you that, with " the exception of some few remarks unjustly involving the " name of my unoffending sister, he urged all that could be " said by a gentleman and a Christian. Would to God my " diseased mind were in a state to adopt the suggestions " advanced by him, founded as they were, upon all that is " amiable and good in the performance of Christian duties; " but alas! my dear Sir, he knows not the canker-worm which " gnaws my vitals."

Again, on the 20th of November, 1843, the Appellant wrote Mr. Russell.

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"That there exists now, as at all previous times, an involuntary avoidance and coldness, I cannot deny; everything she says, and everything she does, is so distasteful to me, that I almost imperceptibly shrink from those attentions which may be expected from me. I have declined all invitations, and wish to be left as much to myself as possible, to be permitted to bear my sufferings in private; and did encourage a hope, that though I might be condemned, the acuteness and depth of my mental misery and disappointment might have enlisted some portion of commiseration at the hands of your family, who were witness to the same cold avoidance before my marriage, which now characterizes my conduct, and which was so plainly and so broadly indicated to Elizabeth herself, that she must have possessed more than ordinary resolution to encounter that which evidently lay in the path chosen for her."

On the 26th December, 1843, the Appellant again wrote Mr. Russell.

"I observe what you say respecting the family in Cork, but as we cannot regulate our hearts and feelings by rule or precedent, it is needless for me to mark the distinction between cases which, in my opinion, bear no analogy to each other. You have very justly, as you say, looked upon me as a man, and not a boy; but you must be aware that the feelings and passions of a man are more obdurate, more fixed and unalterable, than are those of a boy, who can hate to-day and love to-morrow; and if I had ever loved or ever breathed affection for your daughter, you might justly accuse me of boyish caprice and want of steadiness, but, my dear Sir, you know well that such was not the case, but the very reverse, and I ought therefore to be treated with consideration, if I cannot now make feelings for myself, and manufacture an attachment to suit my pecuniary views. As to a separation, to which you have more than once alluded, I can only say, that we are as much separated now as if she were living under the roof of

" her parents; we have separate apartments, separate feelings, " and, I may add, separate interests, for she declares herself " openly against my interests, views, wishes, and intentions, " upon all occasions; separate correspondence, for we know not " to whom the other writes, or from whom they hear, and are " constantly guilty of writing the same day to the same parties, " ignorant alike of the facts or the contents. This, you will " admit, is by far a more discreditable separation than if distance " were added. It would be doubly cruel in me to act the " hypocrite, and make a temporary display of an opposite feeling " for the purpose of obtaining from you those advantages which " you have held out. I therefore openly avow the truth, and declare " at once the utter impossibility of my *ever again returning to her* " *apartment.* There can be no restoration of happiness which " never existed. I never knew a moment, either prior or sub- " sequent to our unfortunate marriage, when there existed a " union of thought, feeling, or action; had there ever been, " there might be hope, but there never was. There is no resti- " tution in my power, no sacrifice that I would not willingly " make to alleviate your feelings and those of her family, for " any injury I may have done by the steps to which I have " been led by the wretched state of my affairs; but my heart " or my feelings I cannot command."

On the 19th January, 1844, in consequence of having learned that some of the Respondent's family intended paying her a visit, the Appellant wrote Mr. Russell:

" You Sir, on your part, have violated all your solemn " written promises and engagements; you have not fulfilled the " conditions held out to me previous to my marriage, and upon " the faith of which I was induced to accept your daughter; " under these circumstances, I must now tell you for the last " time, that I will not receive your party, or permit one of them " to enter my door. I proceed direct home, and shall, with the " blessing of God, make such arrangements as will enable me

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" to defend my house from any invasions that might be " attempted. I shall be glad to see the person who will dare " attempt to force an entrance into my dwelling. As a matter " of duty and caution, you will, of course, hand this letter to " any member of your family who may think of venturing on " this ill-judged expedition, so that they may at least be pre- " pared for the reception that awaits them."

The Respondent likewise examined the domestic servants who had lived in the Appellant's house, from the time of her marriage until she left her husband's house.

One of these servants, who had waited at table, deposed that for a short time after the marriage, the Appellant occupied the same bed with the Respondent, but that after a few weeks he went to a separate bed-room, and never again returned to sleep in hers. That the Appellant and his sister usually sat throughout the day in the library, the Respondent being left in the dining-room; that when the Appellant went out he was accompanied by his sister, and the Respondent was left alone in the house, and she appeared to be distressed at being left alone in that way.

Another servant who also waited at table said she saw the Respondent crying every day; that when she first went to the house, the Appellant and Respondent talked a little during dinner, but not afterwards; and while she was in the house they did not converse together: that the Appellant sometimes talked to his sister during dinner, sometimes not: that one time when the Appellant had been from home, the Respondent when he returned, went to the door and offered to shake hands with him, but he passed on and would not shake hands with her, and she went half an hour afterwards to the dining-room, and found the Respondent there crying: that the Appellant's sister went away and returned with him, and she came in first and shook hands with the Respondent: that during the Appellant's absence the servants had no occasion to complain as to the supply of

provisions, but whether the Respondent had reason to complain she did not know; she, the Respondent, kept the keys herself: that when she first went to the Appellant's service he and his sister used to sit in the dining-room after dinner till about bed-time with the Respondent, but before they went from home they gave up that practice and left her alone invariably immediately after dinner and before the dishes were removed, or whilst she was taking them away; that the Respondent appeared distressed at being so left, and she had seen her crying, both in the evenings and in the mornings very often, and sometimes she was not able to speak for crying, but she did not recollect ever seeing her crying in the Appellant's presence; that there was a piano-forte in the dining-room, where the Respondent sat, on which she used to see her playing, and she was also in use to play on an accordion. That the Respondent acted as a mistress, and took the management of the house; she had the keys of the store-room and of the dairy; she told her anything she wanted done about the house, and she obeyed her as mistress. She sat at the head of the table opposite to the Appellant, and he helped her just as he did his sister. That while the Appellant and his sister were away, the Respondent went to visit some families in the neighbourhood in a carriage and pair, which she got from the hotel at the neighbouring village.

Other female servants who were in the Appellant's service at the same time, and for some time afterwards, gave accounts very similar in character of the intercourse between the Appellant and Respondent, and its effects upon the Respondent's spirits. One female servant swore in particular that the Respondent had charge of the household matters, and kept the keys, and gave out what was necessary to the servants, and ordered things required for the house by directing the cook to send for them, and there was always plenty in the house. She never heard the Appellant oppose anything the Respondent wished for. She never heard high words between them. The

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Respondent was always treated by the servants respectfully as mistress of the house, and always sat at the head of the table at meals; that the Appellant read the Church of England service on Sundays, and the Respondent and the servants were present, the parish church being eight or nine miles distant. Another female servant, after confirming the previous testimony as to the Respondent's position as mistress of the house, swore that she never saw the Appellant ill-use the Respondent.

Upon considering this evidence, the Lord Ordinary made avizandum with the cause to the Inner House, and accompanied his interlocutor by a note, in which were the following observations?

"I. It is submitted that the first question for consideration "is, whether any case of maltreatment has been made out to "justify the interference of the Court between the parties, to "any effect? And on that part of the case, if the facts before "detailed, as established on the face of the parole and written "evidence, be correctly deduced, it is supposed that little doubt "can be entertained. It is true that the Defender did not "actually turn the Pursuer out of his house; but he did what "was worse, he deserted her bed, wrote to her father that this "was a deliberately formed and perpetual alienation, which, in "the state of his mind and feelings he could not control, and "he showed by every act in his demeanour, from hour to hour, "and from day to day, that his wife was to him an object of "aversion, hatred, and scorn. No woman is bound to submit "to such a system of insult and downright barbarity, which, as "remarked by the Defender himself, is all the worse that it "was inflicted at home, and not at a distance. Indeed, it is "obvious that no wife, with the feelings of a woman, could "endure such treatment for any length of time, without sinking "under it. It can only be assimilated to the remorseless "cruelty said to be practised in savage nations, where their "victims are said to be destroyed by constant drops of water

" poured on their head, until they expire by the agony and " exhaustion of unceasing torture. It is manifest that great " effect is due to any rules or analogies of law that afford " protection to parties against a wrong so grievous and insup- " portable.

" II. In considering the species of redress appropriate to " such a case, it is supposed to be only necessary to enquire, " whether the law of Scotland does not of itself afford principles " amply sufficient for the relief that is sought, without regard " to the practice in other systems, different in their policy and " enactments from our own ? Under this head in particular, it " is apprehended that no reference can be safely made to the " English law and practice, which have been chiefly founded on " by the Defender. There is no subject on which the laws of " the two countries so widely diverge, as on the subject of " marriage, which a short view of the two systems will suffi- " ciently demonstrate.

" For many centuries, when the Catholic religion prevailed " throughout Europe, marriage was regarded as a sacrament, " and on that account the tie was held indissoluble by any civil " magistrate or Court. The union might, in rare cases, be " dissolved by a dispensation from the Pope, but not otherwise. " At the Reformation, the English, though not recognizing " marriage as a sacrament, did not enlarge the powers of their " Courts in that class of cases ; and hence neither their Civil " nor Consistorial Courts had any jurisdiction to divorce married " parties, however aggrieved, *a vinculo matrimonii* : their powers " being limited to divorces *a mensa et thoro*, and that only for " adultery or cruelty. The power of dissolving the matrimonial " tie to every effect was afterwards assumed in England by " Parliament in cases of adultery, under their paramount powers " of legislation. A divorce, however, for desertion or non- " adherence was unknown in the sister kingdom, and incom- " petent in any tribunal.

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"But marriage was always a civil contract in Scotland. At "the Reformation, the Presbyterian reformers in this country and "in Holland, and perhaps in a few other places in Europe, dis- "sented more widely on this subject from the Church of Rome. "Stimulated, perhaps, by a more fierce opposition than the "Lutherans to all the dogmas of Catholicism, they not only did "not regard marriage as a sacrament, but held the tie dissoluble "on just cause by the competent tribunals; and they allowed "divorces both for adultery and for non-adherence, holding the "latter remedy to be warranted by the divine law, in a chapter "of St. Paul (1 Cor., c. 7), which has given rise to much contro- "versy. The Scottish legislators put their own construction "on the Scriptures, and passed the Act 1573, c. 5, enacting that 1573 "in all time coming a divorce (according to certain forms unne- "cessary to be detailed), should be competent before the Civil "Courts on the ground of non-adherence, after a desertion of "four years, and that the offending party should forfeit all "interest in the goods in communion. This statute is daily "acted on with us; and it is believed that it has not been found "prejudicial to the morals of the people, by affording too much "facility for the dissolution of marriage. At all events, as the "English have no such law, the questions arising under our "statute must be determined by the principles of our own law, "and not by those of another system, which does not recognize "the same conjugal rights.

"The authorities in our practice, in cases of separation, are "generally fully detailed by Mr. Fergusson in his Commentaries "on Consistorial Law (p. 175, &c.), and by Mr. Lothian in his "short and valuable Treatise on the Law and Practice in Con- "sistorial Actions (pp. 196—201), to which it is sufficient "generally to refer. The present, however, is a case, *sui generis*, "not precisely parallel in its circumstances with any of the "reported cases on record. But it is to be considered, if the "principles of our law of marriage do not clearly support the

" action now brought in name of the Pursuer, under the cir-
" cumstances here established, more especially when confirmed
" by the documents under the hand of the Defender himself?
" This leads to the last head of inquiry now to be suggested.

" III. On the assumption that no wife could be required to
" live in her husband's house exposed to his persevering dis-
" regard of his marriage vows, and to the daily contumely and
" insult with which she was treated, her departure from the
" house must be held, not as voluntary or capricious, but as a
" compulsory expulsion which she could not control, and was
" bound to yield to. When that also is accompanied by an
" acknowledgment under the Defender's hand, that 'it is an
" 'utter impossibility' that he can ever restore the Pursuer to
" her conjugal rights, it is thought that she acquired rights
" from the peculiar tenor of our laws, to which it is difficult to
" refuse effect.

" Whatever may be the law of England, it has long been
" established with us, that desertion or non-adherence by either
" of the spouses to the other, is a high crime and misdemeanour
" in matrimonial law. It is in fact a *delict*, in which, if the
" guilty party persists for four years, his crime is placed in the
" same category with adultery, and entitles the injured party to
" the last and highest remedy competent to a married party
" against an offending spouse. But if so, when the offence of
" non-adherence is commenced, and when it is proved under
" the hand of a Defender himself, that he is never to adhere,
" from that time and thenceforward, it is apprehended that the
" wife is not bound to reside in the house with her husband,
" slighted and insulted by him and his family every hour. And
" hence, the husband is bound to provide suitable aliment for
" the wife in a separate residence.

" Different analogous cases may be figured, but one will
" suffice. Suppose the Defender, then, had followed a different
" course, evidently more consistent with delicacy and duty to a

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" lady whom he had so grossly injured, than that which he " took, and that he had, after his desertion of her, assigned a " separate house to her, on the declaration that he could no " longer fulfil his marriage vow, and had resolved not to do so; " surely it cannot be doubted, that in that case the Defender " must have paid an aliment to his wife, in another house, " suitable to his fortune and station. That was admitted in the " case of Sir James Colquhoun in 1804 (*Mor. App.*, *voce* " husband and wife, No. 5); and, indeed, it was the chief " ground of the decision, that the husband could provide a " separate house for his wife, and exclude her from his own, " though the remedy of an action for aliment and afterwards of " non-adherence would be always open to her.

" But can any husband make a profit to himself, by with- " holding a separate residence and aliment from an injured wife, " and giving her in lieu thereof a grudging sustenance at his " own table, with contumely and insult? This would be " shocking in any case, but more especially is it so in one " where the wife was inveigled into the marriage in the first " instance, on mercenary views by the offending party, who " keeps her dower, and will not give his unfortunate wife a " farthing out of it for her maintenance. According to every " principle of law and honour, he was bound, in the circum- " stances, to give a most ample aliment to a wife whom he had " so deceived, though he himself had lived on a crust of bread.

" It may be argued, however, that the present is not an " action of divorce for non-adherence, commenced under the " Act 1573, on the elapse of four years after desertion,—but a " process of aliment and separation, *a mensa et thoro*, brought " within less than a year after desertion (May, 1844). But this " action was adapted to the wrong sustained and to the neces- " sities of the Pursuer,—at the date of the action. She then " required aliment; and if there was any objection or doubt, as " to the conclusion for separation, up to that period it is

" apprehended that the Pursuer was, at all events, entitled to " aliment, superseding the conclusion for separation, till the " expiration of four years.

" That period has now elapsed; the Defender has been " guilty of four years' desertion of his wife; so that the con- " clusion for separation as well as aliment, in respect of the " non-adherence, seems now to be relevant and unexceptionable.

" It cannot be successfully maintained, it is supposed, that " the statute 1573 does not authorize separation, but divorce " only. It is sufficient to answer that *minus inest majore.* " When a divorce is competent, the spouse is not obliged to " pursue for the greater forfeiture. Accordingly, though a " divorce may be sued for adultery, the injured party may, " nevertheless, rest satisfied with the lesser remedy of sepa- " ration *a mensa et thoro.* Such cases have often occurred, and " been entertained without objection, so as to make their com- " petency part of the common consistorial law of Scotland. " See the cases on this point perspicuously abridged by Pro- " fessor Bell in his *Illustrations*, Vol. II., p. 257.

On the 24th of January, 1849, the Court pronounced the following interlocutor, "decern against the Defender, in terms of " the conclusions of the summons, for having it found and de- " clared that the Pursuer may have full liberty and freedom to " live separately from the Defender, and for ordaining him to " separate himself from the Pursuer, *a mensa et thoro*, in all time " coming: Find the Pursuer entitled to the expenses of process " hitherto incurred, in so far as not already decerned for: Ap- " point an account of expenses to be lodged, and remit to the " auditor to tax the same, and to report; and before answer as " to the question of aliment, ordain the Defender, within four- " teen days from this date, to give in a special condescendence " of the amount of his means and estate."

The Appeal was taken against this interlocutor and the previous one, recalling the interlocutor of the Lord Ordinary, which dismissed the action.

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Mr. Rolt and *Dr. Harding* for the Appellant.—Mr. Rolt had opened the pleadings, when he was interrupted by the House.

[*Lord Brougham.*—There is no allegation whatever, on which the judgment can be supported.—The House would rather hear the other side, as at present there is nothing for it to attend to. —We will hear Dr. Harding in reply, should it be necessary.]

Mr. Turner and *Mr. Anderson* for the Respondent. The law of Scotland is different from that of England in regard to marriage. In Scotland it is a contract, which the Courts carry out accordingly. The separation, *a mensa et thoro*, is merely a temporary arrangement when the conduct of the husband is such that the wife cannot reasonably be expected to live with him. Even in England, cruelty short of actual violence has authorized divorce, *a mensa et thoro*. And in Scotland the cases are clear upon the subject. In Gordon *v.* Gordon, *Mor.* 5902, the complaint of the wife was that the husband refused her money for necessary uses, that he debarred her from interference in her daughter's education, that he shut her out of his lodgings at night, and held scandalous and familiar intercourse with a waiting-woman, and the Court allowed the aliment and maintenance.* In Letham *v.* Letham, 2 *Sh.* 284, separation was decreed because the husband allowed a woman to continue in his house, although he had had carnal intercourse with her before marriage. And in Shand *v.* Shand, 10 *Sh.* 384, the Lord Justice Clerk observed, "I "never can accede to the proposition, that the only legal "ground of matrimonial separation must rest on personal "violence. That is not the law of the country—and I will "venture to say it is not the law of any civilized land. A "train of maltreatment may occur in the married state— "to be viewed and weighed according to the *status* of the

* As reported in *Mor.* there does not appear to have been any judgment at all.

" parties in society—perfectly sufficient to found a claim of " judicial separation, without an approach to personal violence."

These cases, and the doctrine laid down in Fergusson, *Con. Law*, p. 182, show that conduct short of personal violence will justify separation. In Baillie *v.* Murray, referred to by Fergusson, the ground of separation was groundless and incurable jealousy, accompanied by accusations and inquiries of the most injurious description; and Lothian, *Prac. of Con. Courts*, says, there are cases in which separation has been pronounced, where there was no violence, but threats, degrading restraints or accusations, or licentious and insulting conduct. *Ersk.* I. 6, 19, says, if the husband offer such indignities to the wife as must render her condition quite uncomfortable, separation and aliment will be allowed, till there be either reconciliation or a divorce. *Bell's Prin.*, sec. 1540, speaks of continued annoyance wearing out and exhausting the party. All these authorities show that violence or adultery are not the only causes which will authorize separation.

Such being the law, the facts in the present case show an avowed determination not to perform the contract, by a system of conduct, not amounting to violence certainly, but, in truth, of a worse character. The Appellant avoids contumelious or insulting expressions, that he may not bring himself within the Scotch cases, and endeavours, as he supposes, to keep himself within the limits which the law allows him with impunity; but his conduct is one of silent cruelty, intended, sooner or later, to break the heart of the Respondent.

The principle of the law of Scotland, however, is that the contract shall be honestly performed, by the discharge of those duties and obligations undertaken at entering upon the marriage state, and which are the grand objects of the contract; otherwise there shall be a separation, not for ever, but as a temporary measure, which leaves it open to the party, upon a change of his conduct, to sue for adherence. It never can be

said, where a husband refuses cohabitation with his wife, or to hold conversation, or any kind of society with her, that he is performing the contract of marriage.

LORD BROUGHAM.—My Lords, in this case I wish very much to have the benefit of hearing Dr. Harding upon one point. I am quite clear that this case cannot stand. I have no doubt whatever about that—but it may be well to hear Dr. Harding upon the point I shall mention—and if it would suit his convenience to come to-morrow morning, it would be more convenient, I presume, to the other learned counsel, that we should not go further to-day.

This is a very important case in point of principle, and although I shall, as at present advised, move your Lordships to reverse the interlocutor complained of, yet I am by no means prepared to set up the interlocutor of Lord Cuninghame, the learned Lord Ordinary, pronounced in the first instance, dismissing the suit upon the ground that, by the law of Scotland, as well as by the law of England, the ground of the remedy is confined to personal violence. That is not the opinion that I have, either of the law of Scotland, or of the law of England, but it must be such maltreatment generally, such cruelty of conduct, not confined to mere battery, or assault, or threats of battery or assault, but grossly cruel conduct and maltreatment, and which may, after all, in the cases I have put, be confined merely to words, may rest in parole, but yet may make it utterly impossible for any woman, having the feelings of a woman, to live with her husband. That is the impression that I have of the law of England, and I am quite clear as to the law of Scotland; therefore I cannot go along with Lord Cuninghame in the reasons which he gives for the interlocutor as recorded.

I must, therefore, take care that your Lordships do not, in reversing the ultimate decision of the Court below, set up

that erroneous interlocutor. The judgment may be to reverse, and to dismiss the suit, without setting up that interlocutor. I shall, when I move the judgment, state the grounds of my opinion, and I don't now feel it necessary to call upon Mr. Rolt for a reply. But, meantime, I should like to have the benefit of Dr. Harding's arguments, confined to one point, namely, how far the law of England is as I have stated my impression of it—not strictly confined to the case of actual corporal violence, but extending to cases of other maltreatment of so gross and grievous a nature as to make it impossible for any woman to live with her husband—and I do not know that the husband might not have the same remedy reciprocally against the wife; but into that question it is unnecessary now to go. Dr. Harding, you will be able to go on to-morrow morning?

Dr. Harding.—I am afraid, my Lord, that I shall be hardly able to establish the point that bodily violence is necessary in England to make a ground of divorce.

Lord Brougham.—Do you say that you shall not be able to establish that point?

Dr. Harding.—Yes, my Lord.

Lord Brougham.—Then I shall not trouble you. If you were able to establish that point, it would lead me to reconsider Lord Cuninghame's interlocutor. I am convinced that the law is nearly, if not altogether, the same in the two countries. We have not gone so far here in any one case as they have gone in one or two cases in Scotland; but I am confident, if you examine it, there will not be found any very material difference between the two systems.

Dr. Harding.—Danger to life and health may be a ground in Doctors' Commons. Health and life may be endangered without bodily violence.

Lord Brougham.—Would not you go a step further, and say, suppose a man were continually charging his wife with

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serious offences against morality—suppose even worse—that he charged her with theft, with attempts to murder him, with adultery, with fornication, in short, with every sort of criminal as well as grossly immoral conduct, and that there was not the shadow of a foundation for those charges—that they were only the results of a determination to wear her out, and to "break her heart," according to the expressive phrase used by Mr. Turner (but which I do not think applies in this case), accompanied with declarations that he would see the end of her—not by killing her, but by making her a broken-hearted woman, I should say that it would be utterly impossible for a woman to live with a man under such circumstances, for no promise of amendment could be at all relied upon by your Lordships, or any Court, in such a case. I admit, however, there is no case, as far as I know, that comes up to this. Just consider this view of the matter, before to-morrow morning. Then as to costs. You know it is not, in Doctors' Commons, the same when the wife sues as when the husband sues; he must pay the expenses of the wife's defence, and also of the wife's appeal against the judgment.

Mr. Anderson.—Perhaps your Lordship will say nothing upon that point, because there may be a question here as to whether or no (as in several cases the Courts have held), there is anything like a probable case.

Lord Brougham.—Is that the rule in Scotland?

Mr. Anderson.—Yes, my Lord—so that, perhaps, your Lordship will say nothing about that.

Lord Brougham.—I will save that point.

Mr. Anderson.—If your Lordship pleases.

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LORD BROUGHAM.—My Lords, this case comes by appeal from two interlocutors of the Court of Session, one of which

altered the interlocutor of the Lord Ordinary, and remitted the case to him to proceed and take proof, he having decided against the relevancy of the summons, and against going further, and having dismissed the suit. I shall presently state in what way I differ from the view taken by his Lordship. The other interlocutor is that which was pronounced by the Court after the case had been remitted to the Lord Ordinary with instructions to proceed, and after the proof had thereupon been taken by his Lordship, and reported to the Court. The Court decreed for the remedy prayed, and not only ordered a separation *a mensa et thoro* in terms between the parties as prayed, but likewise postponed the consideration of the question of alimony, to follow upon that decree of separation, until an account should have been taken of the means of the Defender, the present Appellant, to pay that alimony. These two interlocutors are appealed from; and it is now for your Lordships, after having heard the case argued at the bar fully for the Respondent, not so fully for the Appellant, in consequence of my wishing to hear what could be said in support of the decision below, which had been impeached by the argument of the leading counsel for the Appellant, and after having had the assistance of the learned civilian, who also appeared for the Appellant, on the bearing of the English law on questions of this kind, it is now for your Lordships finally to dispose of the case.

My Lords, I agree with the learned Judges of the Court below, if on no other matter in the cause, at least in this, that the cause is of a somewhat novel description. I have never known either in English or in Scotch judicature any one at all similar to it. I also agree with the learned Judges that it presents features of a somewhat painful aspect, and shows in a somewhat repulsive form the conduct of one of the parties, in extenuation of which, however, there is not a little to be urged.

It appears that Mr. Paterson, having been laid under obligations to Mr. Russell of a pecuniary nature, had, in the course of

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the communications which took place in consequence of his embarrassments, bccome attached, or at least apparently attached, to Miss Elizabeth Russell, the daughter of his benefactor; that he proposed marriage to her, and having gained her affections, was accepted by her family as a husband; that the marriage was solemnized; that it was consummated, and that they lived together as man and wife for somewhere about four months. It appears that some degree of disgust, or at least great coldness, almost amounting to a dislike, arose in the mind of the husband soon after the marriage. If we take his own word for it as given in a letter to his father-in-law, we find that he had, even before the marriage was solemnized, begun to entertain feelings towards his future wife very different from those with which he had presented himself before her when he sought her hand; that he looked upon the contemplated match as not likely to give him happiness or even comfort, and that he nevertheless, instead of frankly disclosing the change which had thus taken place in his mind—instead of letting the father know that he no longer expected happiness from the connection which he had sought—instead of disclosing, too, that it could no longer conduce to the happiness of his wife, he kept all this to himself, and was married. In explanation of what cannot be justified, he says that he wished to see the father, but by accidental circumstances was prevented from obtaining an interview, as if there were no paper to be had upon which he could write, or as if it were a matter too delicate to be committed to paper, and which could only be communicated personally. He makes no effort to save this unfortunate lady from the misery of a connection which he knew must lead to no other result. The marriage is solemnized, and the parties cohabit for four months. Then begins a separation entirely from the society of his wife. Then begins a correspondence with the father-in-law, in which he attempts to explain his conduct, further making the assertion that he can no longer endure his wife's society, avow-

ing, without imputing any blame to her, that he will never again on any account be induced to cohabit with her, but must for ever separate himself from her. He adds many other expressions respecting the misery which he feels, the state of low spirits, his mental depression, for which, though he may be the object of pity, yet is he certainly greatly to blame, because he most imprudently brought his partner as well as himself into the misery resulting from this; his only excuse being, that he was under pecuniary obligations to Mr. Russell, and did not like to interrupt an intercourse which he found gainful, by breaking off the match, and in all probability, also, losing the source of those accommodations derived from the kindness of his wife's father.

Now all this may be accounted for, though it cannot be excused, by the peculiarity of the man's constitution, and his necessities at the time, but undoubtedly he alone is not the only victim of those circumstances, and of his grossly imprudent conduct (to give it no harsher name); she is the victim also—she, to whom no blame whatever, even for indiscretion, can be imputed; she is the innocent sufferer in this case; and with respect to her the feelings of the Court below appear to have been, not unnaturally, I may say almost unavoidably, awakened. In those feelings I heartily concur. But, my Lords, a Judge has no right to indulge his feelings—no right to entertain any feelings, which can in any, the slightest degree, affect his judgment. He must not feel for one party or the other, nor know any desire, any sentiment, except a fixed resolution to administer justice, stern and unbending, between the two; justice, according to the stern and unbending letter of the law, whose organ he is.

If their Lordships in the Court below had thus viewed the nature of the judicial office, I do not think it possible that we should have read the opinions of three of the four learned Judges who have decided this cause as we now read them, and

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I do not think it would have been possible to pronounce the interlocutor now appealed from. I yesterday stated in the course of the argument an example of the exaggerated language in which one of their Lordships states the facts of the case. I need not recur to it; a supposition is made, not borne out by any one part either of the proof or even of the allegations in the summons and condeseendence, clearly showing that the natural feelings of the very learned Judge carried him away in his comments upon the cause.

But I have now the task of dealing with the foundations upon which this judgment must rest, and of stating, with your Lordships' permission, what the law is, in order to show that the Court below has widely departed from an accurate view of it. Personal violence, as assault upon the person of the woman; threats of violence, which induce the fear of immediate danger to her person; maltreatment of her person, so as to injure her health; these are, both by the law of Scotland and the law of England, a sufficient ground of divorce, *a mensa et thoro*. Furthermore, any conduct towards the wife which leads to any injury, either creating danger to her life, or danger to her health, that, too, must be taken as regarded by the law of Scotland and by the law of England, a sufficient ground of divorce. It is not true, as the learned Judges have stated in the Court below, that the law of England stops short at personal violence, and requires either actual injury to the person, or a threat of such injury, in order to constitute a ground of divorce. Although there be no actual violence offered, and no menace of violence held out, the wife may yet obtain a divorce from the bed and board of her husband, if he shall, by such conduct as places her life, or even only her health, in jeopardy, render it impossible for her safely to consort any longer with him in the marriage state. How far the Consistorial Courts of England could go beyond that, I am not prepared to say, because when I find it laid down by that most learned and eloquent Judge,

Sir William Scott, that something short of personal violence, something short of even menace of such violence, may be sufficient ground of divorce, yet when he goes forward to state what cruelty short of that may be sufficient, he appears almost to consider that injury to the life or health, in short, some grievous bodily injury, either inflicted or immediately approaching from the party's conduct, is necessary to sustain the divorce. For example, in Evans *v.* Evans, 1*st Haggard*, 69, he says, "It "is pleaded, that while Mrs. Evans was in a very weak and sickly "state, Mr. Evans accustomed himself, in the most unfeeling "and cruel manner to distress her, and increase her pain, by "making a violent noise with a hammer, close to her. I had "very great doubts," he says, "about admitting this article. "I admitted it upon an idea suggested naturally enough by the "words, that this gentleman came, without any reason whatever, "with a heavy massive instrument, to make a loud noise, quite "close to the head of a very sickly and infirm person." "I do "not believe that it could have entered into the conception of the "most ingenious person in this Court to have imagined that "this meant Mr. Evans making a very slight noise, only "tormenting her." And in another part of the case the learned Judge says, that in all these instances (and the Court, he adds, has never yet gone beyond it), there has been, as an ingredient in the alleged cruelty, an actual danger to either life or health, or something which tended to endanger the health, as a parcel of the cruelty. He says, in page 37, "What is cruelty? In the "present case it is hardly necessary for me to define it; because "the facts here complained of are such as fall within the most "restricted definition of cruelty; they affect not only the "comfort, but they affect the health and even the life of the "party. I shall therefore decline the task of laying down a "direct definition. This, however, must be understood, that it "is the duty of Courts, and consequently the inclination of "Courts, to keep the rule extremely strict. The causes must

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" be grave and weighty, and such as show an absolute impossi-
" bility that the duties of the married life can be discharged.
" In a state of personal danger no duties can be discharged;
" for the duty of self-preservation must take place before the
" duties of marriage, which are secondary, both in commence-
" ment and in obligation; but what falls short of this is with
" great caution to be admitted. The rule of '*per quod con-*
" '*sortium amittitur*' is but an inadequate test; for it still
" remains to be inquired, what conduct ought to produce that
" effect? whether the *consortium* is reasonably lost? and whether
" the party quitting has not too hastily abandoned the *consor-*
" *tium?* What merely wounds the mental feelings is in few
" cases to be admitted, where they are not accompanied with
" bodily injury, either actual or menaced. Mere austerity of
" temper, petulance of manners, rudeness of language, a want
" of civil attention and accommodation, even occasional sallies of
" passion, if they do not threaten bodily harm, do not amount
" to legal cruelty; they are high moral offences, in the marriage
" state, undoubtedly; not innocent, surely, in any state of life,
" but still they are not that cruelty against which the law can
" relieve." " And if it be complained that by this inactivity of
" the Courts much injustice may be suffered, and much misery
" produced, the answer is, that courts of justice do not pretend
" to furnish cures for all the miseries of human life. They
" redress or punish gross violations of duty, but they go no
" farther; they cannot make men virtuous; and as the happiness
" of the world depends upon its virtue, there may be much
" unhappiness in it which human laws cannot undertake to
" remove." " In the older cases of this sort," he says, " which
" I have had an opportunity of looking into, I have observed
" that the danger of life, limb, or health, is usually inserted as
" the ground upon which the Court has proceeded to a separa-
" tion. This doctrine has been repeatedly applied by the Court
" in the cases that have been cited. The Court has never been

" driven off this ground. It has been always jealous of the " inconvenience of departing from it, and I have heard no " one case cited in which the Court has granted a divorce, " without proof given of a *reasonable apprehension* of bodily " hurt."

The cases to which I have been referred by the learning of Dr. Harding, lead me to this general conclusion, that the matter rests now upon the decision, as far as the authorities go, in Evans *v.* Evans, and that portion of it which I have now read, not on the principal point in the case. Negatively, we may say there is no case which in decision goes further than Sir William Scott there goes; but nevertheless there is so much *dictum*, there are so many opinions or inclinations of opinion ventilated, which have a tendency to go further, that if a case were to arise such as that which the ingenuity of some of the learned Judges in Scotland supposed, I have very little doubt that we should find the rule considerably extended, and that that which only now rests upon opinions more or less distinctly expressed in the shape of *dicta*, would assume the form ultimately of decision, namely, that if the husband without any violence, or threat of violence to the wife, without any maltreatment endangering life or health, or leading to an apprehension of danger to life or health, were to exercise mere tyranny, constant insult, vituperation, scornful language, charges of gross offences utterly groundless; charges of this kind made before her family, her children, her relations, her friends, her servants; insulting her in the face of the world and of her own domestics, calling upon them (which is one of the cases put below), to join in those insults, and to treat her with contumely and with scorn; if such a case were to be made out, or even short of such a case, any injurious treatment which would make the marriage state impossible to be endured, rendering life itself almost unbearable, then I think the probability is very high that the Consistory Courts of this country would so far relax the rigour of their negative rule, at

present somewhat vague, as to extend the remedy of a divorce *a mensa et thoro*, to a case such as I have put.

Nevertheless, how can I, as some of the learned Judges below have done, conclude at once, even from assuming the existing law to cover such a case, that therefore in the case at bar the remedy is competent, merely because circumstances have been figured in which it would be competent, when none of these circumstances are here to be found proved, or even alleged? Let us, however, look to the law of Scotland, for it is by no means clear that even now the law of Scotland takes so strict a view of this subject as the English law. Let us examine, therefore, the authorities of that law, which must decide the present case, supposing the facts to exist. And first with respect to the text-writers, I need hardly speak of them, for the authority cited by Mr. Anderson of Bankton is really exceedingly vague, and appears to throw very little light upon the subject. He says, in Book I., Title 5, Section 132, she may be divorced "upon account of the husband's cruelty or maltreat-"ment." Now it depends upon what is meant by "cruelty or "maltreatment" whether this passage applies to the case at all or not. The expression may be confined in the writer's eye to physical maltreatment, injuries to the person or threats of such injuries, in which case the authority would have no bearing whatever upon the present case.

Then Mr. Erskine is cited. He says, "As it is the wife's "duty to live in family with her husband, he cannot be compelled "to maintain her in a separate house; yet if he should either "abandon his family or turn his wife out of doors, or by bar-"barous treatment endanger her life, or even offer such indig-"nities to her person as must render her condition quite uncom-"fortable, the Judge will, on proper proof, authorize a separation "*a mensa et thoro*." This proves very little; for "indignities "to her person" may mean such indignities as we call here personal violence, or threats of immediate violence. If, on the

other hand, are meant only indignities of language, or of not associating with her, or of leaving her in a room by herself and not speaking to her; indignities which render her life uncomfortable, then I can only say that this is not the law laid down in any of the cases, save perhaps one, that of the Duke and Duchess of Gordon, and which I take to be clearly unsustainable as law in Scotland.

Then comes the authority of a very able text-writer, Mr. Bell, who, in his *Principles*, has said that judicial separation may take place if life is endangered, or on "fair and "reasonable ground of apprehension of personal violence," or from "continued annoyance wearing out and exhausting the "party." Now that is abundantly vague. Clearly no continued annoyance, without threats, and without making it utterly impossible for the woman to live with and endure the society of her husband, no annoyance of an ordinary kind, however continued, can, even by the authorities of the law of Scotland, be maintained as a sufficient ground for divorce.

Next, we have Mr. Bell's *Illustrations*, in which he refers to one or two cases, and among others, to that of Colquhoun *v.* Colquhoun, in which the Court actually found that the husband had a right to make the wife quit his house and repair to another which he had prepared for her reception—a thing to be very much kept in view here, where we find that this case has been mainly decided on the grounds that the husband did not frequent his wife's society, but made her live in a different part of the same house.

We are now to consider the cases; and that of the Duke of Gordon in the first place. Can any man pretend that it is the law of Scotland at this day (certainly the Judges themselves do not so state it,) that the following is a sufficient ground of separation, *a mensa et thoro?* Refusing to allow the wife money for her necessary uses, as mourning at the Queen's death; debarring her from superintending the education of her

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children, especially her daughters, when young; shutting the doors of his lodgings, and keeping her out at night, and thrusting away the coachman for opening the same. Clearly all these form no ground of separation; no one can contend it; and the learned Judges did not contend it. Therefore the case of the Duke and Duchess of Gordon, if it proves anything, proves a great deal too much; and I take upon me to say, if the decision went upon the ground stated, it is not now law. To be sure, there follows in the Report a very material addition to the facts—an addition upon which the case must have proceeded, and without which it never could have been rightly pronounced. I mean the interlocutor overruling the judgment of the Commissaries, and directing the cause to go on. "His scandalous "and familiar converse," it is stated, "with one Mrs. Needham, "her waiting-woman, and protecting her after the Duchess had "discharged her the house." "Scandalous and familiar con- "verse" can only mean one thing—can only mean illegal connection with that woman. I have no manner of doubt that the Court thought so, and that the case turned upon this material circumstance.

There are one or two other cases relied upon, Letham *v.* Letham is on "maltreatment and adultery." Now, what does the Lord Ordinary say as reported there? "That during the "dependence of the action of aliment brought by the Respondent, "the Representer raised a counter-action of adherence, and that "those actions upon his own motion were conjoined, and there- "fore finds it unnecessary to determine whether the action of "aliment was competent. Finds that a maid-servant with "whom the Representer had had a criminal intercourse, was "allowed to continue in family with him at the time of his "marriage, and that, after the Respondent, on knowing the fact, "had justifiably withdrawn from his society, the same person "was retained in his family, or was brought back to it, and finds "that this gross dereliction of his duties as a husband entitled

" the Respondent to withdraw finally from his society." I take it to be clear, then, that the Court proceeded upon the belief that the adultery before the marriage inured afterwards; that it was continued by his keeping the adulteress, the servant, in the house with his wife.

As for the case of Shand *v.* Shand, which is the only other having any bearing upon the present, I find that the point there decided is foreign to the present question. Indeed, the case was not stated by Mr. Turner in any other way than because of the *dictum*. A case of constant maltreatment is said to have been alleged upon the Record; but let it be observed, that we are left wholly without any detail, any specification of the particulars of which that constant maltreatment was stated to consist. Accordingly, the case seems to be adduced only for the *dictum* of the Lord Justice Clerk, who says, " I never dreamt that we " were now to go into all this mass of correspondence—we are " not in a concluded cause—no proof has yet been allowed, and " in the meantime I shall reserve my opinion upon the merits " and bearings of the evidence, into which I will not enter at " present. But I never can accede to the proposition that the " only legal ground of matrimonial separation must rest on " personal violence. That is not the law of the country, and I " will venture to say it is not the law of any civilized land. A " train of maltreatment may occur in the married state to be " viewed and weighed according to the *status* of the parties in " society." And he then says that she is not " to be precluded" " from her entire proof when the treatment becomes unbearable." This case, therefore, really proves nothing except the opinion of the learned Judge, that the law of Scotland does not require, and I do not say that it requires, proof of actual personal violence, or even threats of immediate infliction.

But then, my Lords, the question is, whether the facts before us bear us out in saying that the case at bar comes up to the cases put by the learned Judges, and upon which their opinion

seems entirely to have turned? When Lord Jeffery puts the case, which he imagines, for the purpose of showing that not merely violence, but things far short of violence, will justify the Court in pronouncing a separation, such as the holding her up to scorn before her own servants, ordering her servants, not only to disobey her, but to join in the chorus of hissing against their mistress, his wife, the mother of his children, at the head of his family—when Lord Jeffery puts that as a case, I have only to answer it by saying that it is a very good case to support a proposition which I do not deny, viz., that it is not necessary there should be personal violence to constitute a ground for divorce. But it is anything rather than a confirmation of the judgment here pronounced, because it is enough to say that case is not this case. Not only that case is not this case, but this case has nothing like that case. What have we here? Withdrawing from her society, coldness towards her, leaving her apartment, telling her father that he will on no account ever renew his cohabitation with her, stating that he is wretched in consequence of his marriage, all things very painful to the feelings of the woman,—all things very unhappy for the man, but anything rather than those things which Lord Jeffery supposes in the case put, and which case put, and others of a like kind, appear to have been working more or less in the minds of the learned Judges during all the time that they were applying their minds to the consideration of the facts of the case before them, and to have seduced, as it were, their attention from that which ought alone to have occupied it, the facts proved in evidence before the Court. I remember among other things in that evidence a statement that he walked out very much with his sister, that he frequently was seen in her company—never with his wife; that the gardener observed the sister and the brother together, and when they saw the wife coming in sight they would turn round so as to avoid a meeting. Painful to the wife, no doubt, all this; painful that he should prefer his sister's society to his wife's, but anything

rather than such cruelty as would justify a sentence of divorce. As for the lesser matter of his not going to church with her; his even not allowing her to attend Divine service; his preventing her family from associating with her, and his giving a threat to the father that if they came they should understand that it must be at their own peril, of course all this might be very improper in his circumstances, considering the relations of the parties, but it is anything rather than the cruelty required to support an application for divorce. With regard to the treatment of her before the servants, he says distinctly, and it is not traversed on the Record, it is not even denied at the bar, that during all the time he remained alienated from her and suffering from his own depression of mind, he never used a single spiteful, or violent, or scornful expression towards her. That is not denied. Nay, it is asserted, and no such expressions are proved. Nor is there anything of the kind in his correspondence with the father observing upon the state of his feelings, and endeavouring, I think unsuccessfully, to excuse his own previous conduct. It may be further observed, and especially with reference to the cases put below of a husband calling on his servants to join in showing disrespect to their mistress, that the evidence here is the very reverse. It is proved that the servants took their orders from her, habitually treating her as mistress of the house, always with her husband's knowledge and assent, and sometimes by his express directions.

Then, my Lords, this judgment being of a nature that the law neither of the one part of the island nor of the other can support, what remains for us to do but to reverse, and to take care that in the reversal we do not set up the first interlocutor of the Lord Ordinary, which appears erroneously to lay down that nothing but actual personal violence will suffice as a ground of divorce. I should be sorry that such a view of the law of Scotland should go forth as implied the propriety of dismissing the action "in respect the libel is laid upon a series "of insults and indignities said to have been offered by the

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" Defender to the Pursuer, unaccompanied with personal violence, " or any menace thereof, and that, without an allegation to that " effect, it appears to be settled on authorities which the Lord " Ordinary is not entitled to question, that a libel, at the instance " of a wife against a husband, founded on such averments as " those now urged, is not relevant." That, my Lords, is not the law of Scotland; it is not the law of England; it is an inaccurate statement of the law in both countries. I will not say that the law of Scotland, as far as decided cases go, may not extend somewhat further than our law in favour of the remedy. Therefore, I shall propose to your Lordships this course—to reverse the interlocutor appealed against of the 13th of January, 1846, in so far as it remits the case to the Lord Ordinary with instructions to open the Record, and proceed in the cause; but to affirm that interlocutor in so far as it alters the interlocutor of the Lord Ordinary with respect to the grounds of his dismissing the action. It will, therefore, stand thus—that you, giving the same judgment as the Court below ought to have given, alter the interlocutor of the Lord Ordinary in respect of the restricted view which he takes of the grounds of a sentence of divorce, but affirm the interlocutor of the Lord Ordinary in so far as, independently of those reasons, it dismisses the suit. Then, in respect of the ultimate decision of the Court below, the second interlocutor appealed from of the 24th of January, 1849, which grants a " remit to the auditor to tax " the account of expenses and to report, and before answer as " to the question of aliment, ordains the Defender within " fourteen days to give in a special condescendence of the " amount of his means and estate," that must be reversed altogether.

In thus moving your Lordships, I must add, that I sincerely lament the unfortunate fate of this lady, to be wedded to such a prospect. I view, with a disposition charitably to extenuate, if I could justly, the conduct of Mr. Paterson. He appears to have

been led on from one thing to another, without due reflection upon the necessary consequences of what he was doing. From his pecuniary views, coupled with the attachment which he seems for a moment to have formed for Miss Russell, he appears to have been drawn into a course of proceeding which is wholly indefensible, of which he must in part pay the penalty, but from which the wife, the more innocent party, must be still more a sufferer.

With these observations, I move your Lordships to reverse the one interlocutor altogether, and to alter the other interlocutor in the way which I have stated.

Mr. Turner.—Before your Lordship proceeds to put the judgment of the house, you will be aware that the case is a peculiar one with reference to costs. Your Lordship observes the nature of the suit.

Lord Brougham.—We cannot give her the costs when she sues her husband and fails.

Mr. Turner.—Ordinarily speaking, the husband pays all the costs in suits of this description.

Lord Brougham.—In Doctors' Commons, when the husband sues, he pays all the costs even of an appeal to the Arches.

Mr. Turner.—So it is in Scotland.

Lord Brougham.—But does the wife ever in this country receive her costs when *she* applies for a separation from her husband, and fails?

Mr. Turner.—I apprehend so, my Lord.

Lord Brougham.—Dr. Harding, when the wife fails in an attempt to obtain a separation *a mensa et thoro*, do you ever allow her costs from the husband who succeeds?

Dr. Harding.—I do not remember any such case, my Lord, on application to the Court at all. I do not remember a case of any such application being made; and for this reason, if your Lordship would permit me.—In Doctors' Commons, the wife takes care to get her costs out of the husband, *de die in diem.*

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Lord Brougham.—Do you mean when she sues him?

Dr. Harding.—When she sues him for a divorce, she may do it.

Lord Brougham.—When she sues for a divorce, does she get her costs, supposing she fails?

Dr. Harding.—She does not make an application after having failed, that I ever remember, my Lord.

Lord Brougham.—But does she before failing? If she succeeds, of course she will get costs; but suppose it remains *in dubio* whether she may succeed or not, does she then get her costs *de die in diem?*

Dr. Harding.—Yes, my Lord, I believe she does if she chooses, on the ground that she has nothing of her own—that she has not wherewith to sue.

Mr. Turner.—It is more strongly, my Lord, the rule in Scotland.

Lord Brougham.—They have given the costs below.

Mr. Turner.—Yes, my Lord, but if your Lordship reverses the interlocutor, we shall not recover those costs.

Lord Brougham.—It must be reversed with the exception of the part of it, which awards her her costs.—She will, of course, have no costs here.

Mr. Turner.—Probably your Lordship will reserve the costs of the appeal.—We have come here supporting the judgment of the Court below.

Lord Brougham.—Yes, but you never get costs at all when you fail—the Respondent never gets the costs of the appeal when he fails.

Mr. Turner.—No, My Lord, excepting from the peculiar nature of the suit.

Lord Brougham.—All we have now to do, is to reverse the interlocutor complained of, with the exception of the portion of it which allows costs to the wife.

Mr. Turner.—I should apprehend that your Lordship would

look at it with reference to what the case would be in the Privy Council. Supposing the wife had succeeded in the Court below, and there had been an appeal to the Privy Council or to the Delegates, the course of the case there would have been——

Lord Brougham.—There is a peculiarity in that jurisdiction. We there give costs to the party who succeeds in reversing—that we never do in this House, our rule is a perfectly peremptory one.

Mr. Turner.—I am quite aware of that, my Lord. This is almost the first case of this description that has ever come up to this House. I am not aware of any other which has come up to this House.

Lord Brougham.—We will look into it. But in Doctors' Commons and at the Delegates, and that which is substituted for the Delegates, the Judicial Committee, we constantly, both in Indian Cases, and also in Consistorial Cases, direct the costs of the Appellant to be paid by the Respondent when the Appellant succeeds, but here no such thing is ever done.

Mr. Turner.—Your Lordship observes that this is the first case.

Lord Brougham.—Nor is it done in the Court of Chancery.

Mr. Turner.—No, my Lord, I quite agree, but the principle which governs the case is this, that the wife has nothing to sue with, and therefore the Court awards her the costs.

Lord Brougham.—Yes; but you may just as well say that if the wife indulges in any other luxury than law, if she goes into a shop and buys that which is beyond her degree, the husband has a duty imposed upon him to pay.

Mr. Turner.—Your Lordship observes that the luxury of your Lordship's judgment against her is not her seeking.

Dr. Harding.—Your Lordships have decided that she had no grounds at all for originally suing; we ought not to be made to pay the costs of that.

Lord Brougham.—We decide that she had no grounds. One

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thing I ought to have taken notice of, that her conduct or that of those who have advised her, is highly reprehensible. I never saw a more scandalous matter introduced upon a Record than those charges, those foul charges, wholly unsupported, wholly unproved, nay, I may say, negatived, the charges against this gentleman and his sister. That is a feature in the case which it is exceedingly painful to contemplate, and a consideration of it will govern my discretion as to giving costs if any we have.

Mr. Turner.—On the other side, your Lordship must take into your consideration the conduct of the husband, and the general rule which gives the wife the costs. The first interlocutor appealed from, my Lord, gives the same direction upon costs.

Lord Brougham.—Are there costs upon the first interlocutor?

Mr. Turner.—Yes, my Lord.

Lord Brougham.—Then we must make the same exception. But we allow the first interlocutor appealed from to stand, except so far as I have stated.

Dr. Harding.—That interlocutor protects itself.

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LORD BROUGHAM.—After hearing and considering this case there was a reversal of the interlocutor of the Court below, but as there is no instance of the costs of the appeal being given in a case of this kind, I do not see how it is possible to do so here.—We do it in the Judicial Committee of the Privy Council, but we do it because it used to be done in the Court of Delegates, and the Judicial Committee has come in the place of the Court of Delegates; and we also do it in Indian Cases which fall within the scope of a like rule, but we never give the costs in an appeal from any Colonial Court. It is no doubt a very hard case.

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It is Ordered and Adjudged, that the said interlocutor of the 13th of January, 1846, complained of in the said appeal be, and the same is hereby affirmed, but only so far as it recals so much of the therein-mentioned interlocutor of the Lord Ordinary, of June 25th, 1845, as states the grounds of dismissing the action, and so far as it decerns against the Defender for the sum of 25*l.* to be paid to the Pursuer towards defraying her expenses, and for the dues of extract, and allows interim extract to go out accordingly, and that, *quoad ultra*, the said interlocutor of the 13th January 1846, be, and the same is hereby reversed; and that the said interlocutor of the Lord Ordinary, of the 25th of June, 1845, dismissing the action, be, and the same is hereby affirmed, except so far as it states the grounds of such dismissal; and that the said interlocutor of the 24th of January, 1849, also complained of in the said appeal, be, and the same is hereby affirmed, so far only as it finds the Pursuer entitled to the expenses as therein mentioned, and appoints an account of expenses to be lodged, and remits to the auditor to tax the same, and to report, and that, *quoad ultra*, the said interlocutor of the 24th of January, 1849, be, and the same is hereby reversed: And it is further Ordered, that the cause be remitted back to the Court of Session in Scotland, to do therein as shall be just and consistent with this judgment.

ALEXANDER DOBIE—LAW, HOLMES, ANTON, and TURNBULL.