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lation, than from the enforcement of that just authority. The dependence of the wife upon the husband, as of the child on the parent, is the great source of conjugal and parental affection; and whatever weakens and diminishes that dependence, is fatal to both. To allow a partition of power between the husband and wife, and a liberty of resistance of the latter to the will of the former, in the regulation of the household, would induce perpetual discord, and prove destructive of domestic happiness, and the best interests of society. Nor could this authority be controlled by any civil tribunal; as this intrusion upon the sacred privacy of domestic management, must have been greatly worse than the evil to be prevented: For if, on every difference of opinion, an appeal could be made to the laws, it would be highly inexpedient indeed; as such public and decided hostility would only widen the breach, the offspring, perhaps, of an unthinking moment of passion, which otherwise might be easily healed. It is only where the wife has suffered personal injury that the courts of law will interfere with the husband in the regulation of his household: The more delicate, though not less acute sufferings of the mind, come not within the cognisance of any earthly tribunal.

By the law of Scotland, no other remedy is pointed out for this case, but a claim for aliment, and the right of suing for adherence, which, after a certain period, will terminate in a divorce for wilful desertion; and it is only because there is no means of compelling to actual adherence, that our statutory law has interposed to grant a divorce in case of wilful and continued separation. The wife cannot, however, insist, that she shall retain possession of any particular house, independent of her husband's consent. When a husband desires his wife to remove to a separate house, without assigning any reasons for his conduct, it may in many cases be the plan most delicate and affectionate even to her. His reasons for discontinuing his present connection, may be amply satisfactory to his own mind. But these he would willingly conceal from the world, and from himself if he could, unless he be driven to a disagreeable investigation in proof of his suspicions, and a still more painful disclosure of his own and his wife's dishonour.

The bill was refused.

Lord Ordinary, <i>Cullen.</i>	Act. Lord Advocate <i>Hope, Jo. Clerk.</i>	Agent, <i>Alex.</i>
<i>Duncan, W. S.</i>	Alt. Solicitor-General <i>Blair, Robertson, Monypenny.</i>	
Agent, <i>W. Callender.</i>	Clerk, <i>Walker.</i>	

F.

Fac. Coll. No. 155. p. 347.

1807. December 18.

LADY PULTENEY *against* MISS CHRISTIAN ANN STUART and her GUARDIANS.

No. 6.
Moveables
falling to a
wife during

In July 1799, while the pursuer, Margaret Stirling, afterward Lady Pulteney, was the wife of Mr. Steuart of Torrence, her father, Sir William Stirling

of Ardoch, died, and left moveable property of considerable value. Certain questions having occurred among his daughters and co-executors, Mrs. Steuart, and her three sisters, in regard to it, a submission was entered into; and, in the mean time, no confirmation or possession of the property by them took place. While things were in this situation, Mr. Steuart died in May 1801; and, in July of the same year, a decree-arbitral was pronounced, on which his widow took possession of her share of her father's moveable subjects. A doubt having arisen whether one half of this property did not fall to her daughter, Miss Christian Ann Steuart, as representative of her father; a multiplepinding was raised by Thomas Graham, debtor in a personal bond, which formed part of the subjects in question, and a declarator was brought by Mrs. Steuart, then Lady Pulteney, against her daughter, to have it found that she had right to the whole succession derived from her father, Sir William Stirling. The Lord Ordinary conjoined these two processes, and reported the cause on informations.

Argument for the pursuer of the declarator.

The moveable property in question was never vested in the pursuer during the subsistence of the marriage. It fell to her in the way of succession, and could not be vested without confirmation. If the pursuer had died without confirmation, the property would have remained *in bonis* of her father, and could only have been taken up by her sisters as *his* next of kin. Her husband could have had no right to it if he had survived her, nor can his representatives, now that he has predeceased, have any right, because, without being vested in her, it could not fall under the *jus mariti*.

Argument for the defender.

The *jus mariti* is, in the words of Lord Stair, "a legal assignation to the wife's moveable rights, needing no other intimation but the marriage." It is therefore equivalent to a voluntary assignation, and it is an onerous assignation, *ad sustinenda onera matrimonii*. It should therefore receive the most liberal interpretation, and be held to include every moveable right which it is in the power of the wife to bestow.

Having made this assignation, the wife is under an obligation to give it full effect, by adhibiting every form which is necessary and in her power. If she should refuse, the husband may himself take the necessary steps for this purpose, the marriage being equivalent to a mandate to that effect; but though this be omitted on his part, the obligation on the wife is not extinguished, nor can she take advantage of her own failure in implementing it. She is still bound, as in the present case, to do it after the death of her husband in favour of his representative.

If, instead of this tacit assignation, an express postnuptial contract had been entered into, by which the petitioner assigned the property in question to her husband, she could not have refused, after his death, to allow his representative the use of her name in completing titles to the subject. Yet this would only

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her husband's lifetime by the death of her father, but not being vested in her by confirmation till after her husband's death, yet are affected by the *jus mariti*, and shall be shared by the representatives of her husband.

No. 6. have been a written expression of the tacit legal contract, which is equally binding without writing, and must have the same effect.

The pursuer, therefore, having now made her right complete, she is bound to make it over to the defender. But this is unnecessary, for the principle here applies *jus superveniens auctori accessit successori*. By this principle, conveyances, originally ineffectual from want of right in the grantor, become valid when the grantor's right is afterward completed, and are held to be in all respects as if valid from the beginning, 22d Dec. 1738, Neilson against Murray, No. 23. p. 7773. &c.—and 10th Dec. 1742, Paterson against Kellie, No. 24. p. 7775. which shew the application of this rule to heritable rights, and Lord Stair, B. 1. Tit. 4. § 9. expressly applies it to assignments. As then, in this case, the pursuer has now completed her right, it must operate *retro*, and give legal effect to the assignment to her husband.

A right falling to a wife by succession, but not confirmed, is very similar to a right assigned to her, of which the assignment has not been intimated; yet, in the latter case, if the husband die before intimation, it has been found that the right fell under the *jus mariti*, 29th January 1663, Scot against Dickson, No. 37. p. 5799.

Replied for the pursuer.

The principle, *jus superveniens*, &c. does not apply, because it is founded on the obligation of absolute warrandice. Accordingly, when the conveyer is not liable in warrandice, as when the transmission is not voluntary but judicial, this principle does not apply. A legal conveyance, not by voluntary act of the party but by the act of the law, transmits the right *tantum et tale*, and any right afterward acquired cannot accresce. Such was the conveyance in the present case. This legal assignment of marriage contained no absolute warrandice, but carried the right *tantum et tale*. There was no obligation on the wife to complete her right, nor had she it in her power to complete it so as to bring it under the *jus mariti*.

The case of non-intimation of an assignment is very different from that of non-confirmation of succession. Without confirmation there is no right vested; but intimation is not necessary to vest a right, though it is necessary to put the debtor *in male fide* to pay to the assignee.

A case more analogous to the present, is that of a conditional debt due to the wife, the condition of which does not exist till after the marriage is dissolved. This subsequent purification of the condition, it might be said, would operate *retro*, but the contrary has been found, 18th Nov. 1694, Fotheringham of Pourie against Earl Home, No. 3. p. 5764, and laid down by Lord Bankton, B. 1. Tit. 5. p. 87.

There was some division of opinion in the sentiments expressed by the Bench, the minority adopting the arguments of the pursuer, the majority those of the defender. The interlocutor of Court was, "The Lords, in the declarator, sustain the defences, assoilzie the defender, and decern; and, in the multi-

„ plepointing, find Christian Ann Steuart, eldest daughter of the late Andrew
 „ Steuart, Esq. as his executrix, entitled to her mother's share of the moveable
 „ estate of her grandfather, Sir William Stirling, the same having belonged to
 „ her father *jure mariti*; and that she is entitled to complete her right thereto
 „ by confirmation, or otherwise, in her mother's name, if necessary; and re-
 „ mit to the Lord Ordinary to proceed accordingly.”

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Lord Ordinary, *Glenlee*.Act. *David Monyhenny*.Alt. *David Douglas*.*Will. Wilson and James Dundas*, W. S. Agents.Clerk, *Scott*.

M.

*Fac. Coll. No. 21. p. 61.*1808. *March 5.* ISABELLA MAXWELL *against* ALEXANDER WALLACE.

No. 7.

ISABELLA MAXWELL brought an action of separation before the Commis-
 saries against her husband Alexander Wallace. In the course of this action
 she presented a petition to the Commissaries, praying them “to ordain Mr.
 “ Wallace to pay to her, or to her solicitor, the sum of £200 Sterling, or such
 “ other sum as might seem proper, towards interim aliment and defraying the
 “ expenses of this process.” This petition the Commissaries refused. On
 this she presented a bill of advocation to the Court of Session, which Lord
 Craig, Ordinary on the bills, appointed to be answered. The answers not
 being given in during three weeks, she presented a note to Lord Cullen, then
 Ordinary on the bills, praying for an immediate remit to the Commissaries to
 grant her the interim allowance she had demanded. His Lordship appointed
 the bill to be printed; and reported the case. It was pleaded for the pursuer,
 That she was ill used by her husband, and could not live with him, so that she
 required a separate aliment: That if she were defender in an action of divorce,
 she would have an interim allowance for that, and expenses of process; and
 it would be hard to deny it to her when she was pursuer in an action of separa-
 tion: That if this were refused, such actions could not be maintained by wives
 at all.

An interim
 separate al-
 lowance will
 not be given
 by the Court,
 to a wife who
 has only com-
 menced an
 action of se-
 paration.

The defender denied the ill usage; and stated, that he was willing to re-
 ceive her into his family, so that she had no need of separate aliment; and that
 it was contrary to the established rules of the Commissary Court, which had
 always been followed in such actions, to grant any interim allowance in such
 cases.

The Court thought the demand premature; and therefore remitted to the
 Ordinary to refuse the bill.

Lord Ordinary, *Craig*.*Joseph Gauvin*, W. S. Agent.

M.

Fac. Coll. No. 36. p. 126.