

1776. December 13. DAVID GORDON against ROBERT SEMPILL.

No. 4.

A husband who had inhibited his wife, and paid her analiment during the dependence of a process of divorce he had brought against her, in which he prevailed, found not liable to a person who had furnished provisions to her.

See No. 79. p. 446.

DAVID GORDON, residenter in the town of Edinburgh, brought an action before the Sheriff of Mid-Lothian against Sempill, for furnishings to Jane Mann, Sempill's wife, against whom a process of divorce was pending in the Commissary Court at the instance of her husband. Sempill defended himself upon this ground, that before the period of contracting this account, he had inhibited his wife, and that during the depending of the action before the Commissaries, an interim aliment from time to time had been modified. For Gordon it was answered, that although an inhibition against a wife has the effect to make a *præpositura rebus domesticis* fall, so as to free the husband from any general claim on account of his wife's contractions, yet during the existence of the marriage, he still remains liable for necessary furnishings to her, such as aliment, lodging, &c. unless he can show that he has *aliunde* made provision for her; and that the sums modified by the Commissaries were not sufficient both for interim aliment and expense of process. The Sheriff "assoilzied the defender."

An action of reduction of this decree was brought by Gordon in the Court of Session. The Lord Alva Ordinary, after some procedure, "repelled the reasons of reduction, and assoilzied the defender."

And to this interlocutor the Court adhered, upon advising a petition and answers.

Lord Ordinary, *Alva.*

Actor, *Crosbie.*

Act. *Ilay Campbell.*

J. W.

1804. March 7. COLQUHOUN against COLQUHOUN.

No. 5.

A husband having required his wife to leave his house, without assigning any reason, the Court refused to interpose by an interdict, to keep her in possession.

A bill of suspension and interdict was presented by Dame Mary Falconer, wife of Sir James Colquhoun of Luss, Baronet, complaining that she had been ordered to quit her husband's house in Edinburgh, and repair to another house which had been provided for her reception, and praying for an interdict to prevent her husband from turning her out of his family.

The Lord Ordinary appointed the case to be stated to the Court in memorials; and as the question seemed to be of general importance, the Judges delivered their opinions at great length on the subject. In support of the application, it was observed,—

Every contract affords mutual rights and mutual obligations. A husband, by marriage, acquires certain rights, but at the same time comes under corresponding obligations, and he cannot avail himself of the one without submitting to the other. A woman, by entering into the contract of marriage, leaves her own family, gives up her person, surrenders her fortune, and reduces herself to the situation of a minor. She comes under an obligation to follow the

fortunes of her husband : She gives up the right of chusing her place of residence, and binds herself to obedience in all things lawful. In return for what she thus surrenders to the husband, she obtains from him not merely certain pecuniary benefits, but the *status* of a wife, and the right of living in his family. But if a husband were entitled to deprive her of this right, and to turn his wife out of doors when he pleased, a married woman would in fact receive nothing in return for all that she surrenders but a claim against him for aliment ; and, while the husband is furnished by law with full powers to obtain implement of the contract on his part, the wife would be denied the protection of the law in making effectual her part of the obligation. But the matrimonial contract stands upon a more equal and more rational footing, as indeed it is the most onerous and the most important of any, and each party must of course have a right to insist that it shall be performed by the other.

A husband, as the head of the family, is indeed entitled to chuse the place of its residence. But this right of regulating the domicile of the wife arises from her obligation to live in his family. The husband cannot invert the principle, by turning it to the opposite purpose, and by compelling the wife to have a separate domicile. Accordingly, the law of Scotland, while it makes every provision to preserve marriage, " as the conjunction of man and woman in the strictest society of life, until death shall separate them," makes no mention of the despotic right here claimed by the husband, of turning his wife out of doors at his own pleasure, without even assigning any reason for his conduct.

It is not enough that Sir James has provided another for the reception of his wife. Had he not done so, she might have procured one at his expence. But the evil of which she complains, is the degradation from her rank and condition in life, and the injury done to her reputation in the eyes of the world. If Sir James had shown any cause for a separation, or had established any charge against her in the competent court, the case would have been very different, and his order to remove would have proceeded on the warrant of a judge. But she is made to suffer the punishment of a guilty woman, without having her conduct investigated, and Sir James is at once the accuser, the judge, and the executioner in his own cause.

It cannot be pretended that this is a question with regard to the property of a house. Sir James is certainly the proprietor of his house, and may sell it or dispose of it as he thinks fit ; and whenever he does so, the suspender must leave it, and repair to the place of residence he appoints for his family. But it is not alleged that this has been done ; and on the contrary, the only motive assigned for ordering the suspender to quit the house, is, that the charger may reside in it with the other members of his family, but without his wife.

Although the law affords redress to a wife who may be abandoned by her husband, by an action of adherence, sentence of excommunication, and decree of divorce, this does not imply a right in the husband to turn his wife out of doors. On the contrary, legal redress, reparation and punishment, are provid-

No. 5. ed for wrongs done, and for rights violated ; nor does a party acquire a right to do an illegal act, by incurring the penalty.

And as the wrong in this case has not been actually perpetrated, but is only threatened, the competent mode of proceeding *in hoc statu* is by a bill of suspension and interdict, to prevent any change of possession, till the merits of the case can be tried in another form.

J.

The majority of the Judges, on the other hand, reasoned in this manner.

The question at present before the Court is, Whether, as head of his family, and proprietor of his house, the husband, in the exercise of his powers of administration over his family, is entitled to direct that his wife shall remove from the house which she inhabits, to another which he has provided for her, suitable to her rank and situation in life.

The right of administration, which in every society must exist somewhere, in the married state, both by nature and by law, resides in the husband. Among uncivilized nations, he is always the domestic judge, exercising uncontrolled authority, and enforcing it by punishing even to life and death. As society advances, this unreasonable power is abridged, but a wife is still considered as a minor under the curatory of her husband. She has no person in law distinct from him. The husband is in some measure answerable for her behaviour ; so that his right of curatory confers on him, for his own safety, the power of restraint over her person ; the right of control of her conduct, and a claim to the disposal of her property. This necessarily comprehends the right to prescribe to the wife her place of residence. The *jus mariti*, so far as it relates to the property belonging to the wife, may now, by the law of Scotland, be renounced and excluded, though formerly it was otherwise ; but so necessary has it always appeared for the good order of families, that the husband should retain his natural right of ruling his family, that, in the opinion of lawyers, this right he can in no circumstances whatever waive or relinquish ; and, in particular, it seemed to be an absolute perversion of the natural laws of social life, to allow the husband to transfer it to the wife, even by the most solemn contract ; Lord Collington, 9th February 1667, No. 50. p. 5828.

The contract of marriage cannot, in its legal effects, be assimilated to ordinary contracts, in which the courts of law will ordain specific performance of the obligations of parties. From marriage arise rights of various kinds, some natural and some civil ; the latter only can be specifically enforced by courts of law. To provide the wife with a comfortable residence, and a competent provision, suited to the circumstances of the parties, an action at law will be sustained ; but while it is equally the duty of the husband to cherish and comfort his wife, and continue to cohabit with her, can any court enforce these obligations ? yet these are especially the end and object of the contract. Still because they are not fulfilled, the contract is not therefore dissolved. Now, can the suspension of these natural rights, which the law cannot enforce, invert the order of society, and give the wife the right of being her own curator, so

as to regulate her situation in life, and fix her domicile, contrary to the will of her husband? So long as the marriage subsists, with it exists the curatory of the husband.

While the husband exercises this right of control, so far as to prescribe for his wife the place of her residence, he neither dissolves the marriage, nor degrades her from the station she has hitherto held in society.

To every right arising to her from the marriage, which courts can enforce, she still has a legal title: She retains her claims as his wife, and the rights over the children, which the law has given her. Till natural or civil dissolution, the marriage subsists, though the parties may live in a state of separation. But it cannot be maintained, that the wife, if she even had obtained a decree of adherence against the husband, could have personal execution thereon against him, so as to compel him to live under the same roof with her, and much less to keep her society at bed and board. Nor in this respect does his situation differ from her's; for in case of her desertion, as little could he command the diligence of the law to recover her person, and place it under his roof. Yet, without this, there is a separation of the parties just as much as when the husband, preferring his own house, assigns to the wife another for her residence.

But an injury, it is said, is done to her reputation, if no cause is shown for forcing her to leave the house of her husband. To whom, however, must the husband show the justice he is exercising? Must he obtain the sentence of a Court before he avails himself of his prerogative? If so, it is the prerogative of the Court, and not his own, he appeals to. A servant may be turned out of doors by his master; his reputation is hurt, and he may even suffer a patrimonial loss on the occasion, from the difficulty he may have in finding a new situation; but the Court will not interfere with the head of the family in his domestic arrangements, or grant an interdict prohibiting him from dismissing his servant, without establishing his reason for doing so. The only remedy is a claim of damages. If a child is banished from the house of his father, upon whom nature and religion impose the duty of protection and assistance, will the law interpose to reinstate him? Must not his claim be restricted entirely to a suitable aliment? Yet his prospects in life are blasted, by the necessary conclusion which the world draws from such unnatural conduct, which can originate only, it is supposed, in the faults of the child.

But, again, if the husband separates from his wife, he is assuming, it is said, the character both of judge and party; punishing, by his own authority, an offence against himself. He equally does so, in turning to the street his servant or his child. They are all consequences of his right of undivided control over his family. This, in the view of expediency, is absolutely necessary for the support of morality and the great interests of society; as the injury to social order, and the evil consequences to the domestic peace of families, are much more to be dreaded from the establishment of that right which the wife here claims of resisting her husband's authority in matters of domestic regu-

No. 5.

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