

such custom as the Roman restitution of the tocher, either *in specie*, or as it was *dos æstimata*. And Groeneveg. *de Leg. Abrogat. ad l. 30. D. de Jur. Dot. et tit. Instit. de Donat.* and Gudelin, *de Jure Novissimo, lib. 2. c. 8.* show that the civil law is gone into desuetude as to this privilege of the wife's: and the Emperor Charles the Fifth abrogated the same.

It was **CONTENDED** for the widow,--That the general stream of decisions ran for her, for sixty years together, and was never controverted till the interlocutor in 1688; *et una hirundo non facit ver:* and the Lords had regard to this privilege in the practick marked at the *8th February 1662, Crawford* against the *Earl of Murray*; and it is founded on the old law of the Majesty,--*lib. 2. cap. 16. et Statut. Alex. II. cap. 22.*

The Lords considering the weight of the case, and though there was but one decision in 1688, for the creditors against the widow's preference, yet that it seemed rational; they resolved to hear it in their own presence, ere they fixed it either way.

Vol. I. Page 825.

1698. *February 19.* ALEXANDER FORBES *against* PATRICK REID.

ALEXANDER Forbes, goldsmith in Edinburgh, as assignee by Elizabeth Ogilvie, late spouse to Mr Patrick Reid, against the said Patrick; being a reduction of the contract matrimonial past betwixt them, on this reason, That it was not truly subscribed by her, but Mr Patrick had led her hand, whereas there should have been notaries, seeing she could not write herself, and it was not read to her; and that he promised he should afterwards mend any faults in it, but never did it, having circumvented the poor woman of all her means, and yet grudged her an aliment when on life; which moved her to raise a reduction of her contract on fraud and circumvention; and, seeing the pursuit was against her husband, to get herself authorised with a *curator ad litem*, by a warrant of the Lords, as is also practised in the French law: and, before her death, she assigned the process to Mr Forbes, her nephew. And the instrumentary witnesses being examined, both of them depone, that though they saw her take the pen in her hand, yet none of them saw her subscribe her name. One of them says he heard her say, she could not write. The other qualifies it, that her words were, to his remembrance, that she could not write well; that it was not read, at least all, because they were in haste to go to the church to be married, being a weekly-sermon-day, and the preaching was near ended, and therefore Mr Patrick Reid said to her and the witnesses, if there were any faults in the contract he should help them afterwards. This coming to be advised, the pursuer further adduced five several papers, some before, and others of them after that contract, signed by notaries for her, bearing, she could not write; all which show these subscriptions at the bottom and margin of the contract are not hers, but at best affixed in her presence, or by leading, though not a notary: and though he were, it would not convey of her means assigned (which were all bonds bearing annualrent, and so fell not under the *jus mariti*.) above 100 merks.

ANSWERED for Mr Patrick,---That the witnesses' depositions prove nothing

against him ; for, *non memini* whether she signed or not never improves : and witnesses in contracts do not always look on at the parties' signing ; it is enough they do not contradict or reclaim.

The Lords thought the witnesses had minced and concealed the true matter, for fear of being found liable when they sign as witnesses to one whom they saw not subscribe, nor own the subscription ; as was found in 1691, between *Peady, Young, and Mr Hugh Blair*, upon the 5th Act of Parliament 1681, discharging all witnesses to subscribe, except in one of these two cases ; and yet this case did not afford sufficient evidence of her subscription's being false : therefore they only declared the contract of marriage null ; seeing the witnesses confessed they did not see her subscribe, as was their duty to have done.

Vol. I. Page 826.

1698. *February 22.* THE EARL OF DALHOUSIE CHOOSING CURATORS.

THE present Earl of Dalhousie, (his elder brother being murdered in Flanders,) compares before the Lords to make a nomination of his curators, and choosed Brigadier Ramsay, his uncle ; but, in regard he was not present to give his oath *de fidei*, it was desired that Sir John Ramsay might be allowed to swear for him, as is practised in some other places ; and the doctors call it *in animam alterius*, where they have a special letter of procuracy and warrant under his hand to that effect.

The Lords considered that had not been allowed in our practice ; but they granted a commission to take his oath in England or Holland, where he was ; and empowered the Clerk of the Bills, in the vacance, for the time, on the returning his oath, to consider and accept the caution that should be offered.

The week before, the Lord Elcho choosed his curator in the Inner-House, *in presentia* of the Lords ; and so did Sir James Inglis of Cramond.

Vol. I. Page 827.

1698. *February 22.* HARY BARCLAY, PETITIONER.

HARY Barclay, son to Barclay of Hilton, being a minor, and having some heritage beside Kirkaldy, which came to him by his mother, gave in a petition, representing, that his father was his administrator and tutor of law, but was bankrupt and in prison, and would dilapidate his means and rents if he were suffered to intromit ; therefore craved he might be allowed to choose another curator in place of his father, who might manage his affairs, and find caution.

The Lords thought it reasonable there should be a remedy in such a singular case ; but, not to divest him of his parental right without a trial, they ordained the father to be heard before the Ordinary on the Bills ; even as a husband, though curator to his wife, yet, if he be *vergens ad inopiam*, and she having an action against him, for securing her liferent, the Lords will authorise another to be her curator in such a circumstantial case.

Vol. I. Page 827.