

They failing to procure a disposition, and Mr James dying abroad within two years after the minute, or thereby, whereby the thing became imprestable, Deacon Milne pursues them either to obtain a right from Mr James's sisters, his nearest heirs, or else to refund his damages, as succeeding *loco facti*.

ALLEGED, *1mo*. You were first to peruse the progress; and accordingly, having got in the writs, you never declared your satisfaction therewith; without which we were not obliged to proceed any further.

ANSWERED,—His throwing down the houses, and rebuilding on the ground, and his joining with them in sending up the scroll of a disposition to London to Mr James, was declaration enough of his acceptance.

REPLIED,—It ought to have been explicit and intimated to them, else they needed not notice it. The Lords repelled the defence.

2do. ALLEGED,—Their obligation was to procure a valid disposition from their constituent betwixt and a limited day, which can imply no more save to use their endeavours, which they offer to prove they did; but Mr James stuck both at the warrandice and price; and, in all such cases, *verba non sunt Judaice sed civiliter interpretanda*; as Faber shows the Parliament of Savoy found in 1695, in *lib. 8. codic. tit. 26. definit. 14. promittens se curaturum tenetur solummodo ad diligentiam ut res fiat*. Yet there he acknowledges, if there be a *pæna adjuncta, qui factum alienum promittit tenetur præcisè ad effectum præstandum*. Vide *Matthæum de Afflictis Decis. 195. et l. 8. D. de In diem addict.*

ANSWERED,—There is a great difference between a positive obligation to procure a disposition, and an obligation only to use their endeavours; and though thir factors were rash in undertaking on the assurance they had of obtaining it from their constituent, yet their failing cannot exoner them at Deacon Milne's hands.

The Lords thought it hard on the factors, but they behoved to find them liable in the precise terms of their own minute; and Robert Milne having followed their faith, they must make a valid right to him, and those who have bought from him: besides, it would discourage all such public works for the decoration of the Town, especially upon the High Street. *Vol. I. Page 823.*

1698. February 18. MARY BALCANQUALL *against* LADY BAVILAW, &c.
Patrick Fermor's Creditors.

IN a competition between Mary Balcanquall, relict of Patrick Fermor, merchant in Edinburgh, and the Lady Bavilaw, and his other creditors, this point came to be controverted,—What preference a relict had in her husband's executry, for her jointure and liferent provisions. The Commissaries had indeed preferred her to all the creditors in the confirmation of the testament; and it was ALLEGED, it was the practice through all the Commissariots of the kingdom, and had grown up to a consuetude, till President Lockhart, in a case decided *supra*, 16th February 1687, between *Keith of Lentush* and *Marjory Keith*, found, that relicts had no such prerogative at all; and though the Roman law gave them a hypothec and prelation *in bonis mariti ob dotem et donationem propter nuptias*, yet it was a mistake to translate and adapt that to our law, who had no

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.

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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