

DIVISION VIII.

The Wife how far *valens agere* without concurrence
of her Husband.

S E C T. I.

Cannot pursue without being authorised by her Husband,
or a *curator ad lites* if the Husband decline.

1581. *May.* LADY COLLUTHIE *against* MAXWELL.

No 244.
The Lords refused to sustain process at the instance of an heiress without concurrence of her husband, altho' his fraud in declining to concur was manifest.

THERE WAS a gentlewoman called C. Lady R., heretrix and portioner of the lands of R., that gave in a supplication, and desired her husband, the Laird of F. Maxwell, to concur and authorise her in her pursuit in an action and cause against the Laird of C., because the party sought process against her, and alleged against her, That she had no person to stand in judgment without her husband, *quia fraudulenter et malitiose actum fuit ex parte viri, et maxime apparebat nonnullis dominorum consilii.* THE LORDS would not grant the desire of the supplication, and found, by interlocutor in making answer to the bill, that she had no place to stand in judgment without the consent of her husband. *Ego tamen, et Dominus C. in contraria fuimus opinione, nam succurend, fuit mulieri in hoc casu propter apertam viri fraudulentiam; et ita in suprema parisi curia iudicatum fuisse, ut vir cogi potuit auctoritatem in causa civili et criminali uxori imperitare, affirmat Joannes Jubertus in contractu suo de jure gallico de uxoris titulo et viri mutua successione.*

Fol. Dic. v. 1. p. 405. Colvil, MS. p. 299.

No 245.
The Lords sustained an action at the instance of a wife without consent of her husband, implement of a contract in her own favour.

1623. *January 9.* MARSHALL *against* MARSHALL and YULE.

IN a suspension raised by Marshall *contra* Marshall and his Son, and Yule spouse to his son, for suspending of the charge raised at their instance, upon the contract of marriage, wherein the supender was obliged to procure to his son during his lifetime, and to the said Yule his son's future spouse during her lifetime, a rental of certain lands, as the contract of marriage bears, the LORDS found, that the spouse might seek implement of that part of the con-

tract conceived in her own favours, and raise charges thereupon at her own instance, or at the instance of any person whom she would constitute for her to that effect, and which procuratory the Lords would authorise, and sustained the charge so raised and action so intended, or to be intended thereupon; albeit the husband should refuse to concur with the spouse, or to authorise her, and albeit the husband, and the wife also with him, had discharged that contract in that part, and granted the same fulfilled; for the LORDS declared, that the discharge, if it was granted by the husband's self alone, could not prejudice his wife; and if it was granted by her with her said husband, it sicklike ought not to prejudice her, being done *ob reverentiam maritalem*, they living then together, and now she coming against the same, and revoking it; therefore sustained the charges raised at her instance. See VIS ET METUS.

Act. Hamilton.

Alt. Nicolson et Miller.

Clerk, Gibson.

Fol. Dic. v. 1. p. 405. Durie, p. 40.

* * Haddington reports the same case :

John Yule being bound by contract of marriage, to purchase from the Lord Semple, a sufficient rental of a 14 shilling land in Glasfurd, to his son John Yule, and his future spouse, was charged to do it by Marshall, assignee constitute by John Yule younger, and his wife; the suspension bore that the charger could have no right, because it was not transmissible. He answered, that he only sought execution, to the behoof of John Yule younger, and his wife, because the son being unwilling *propter reverentiam paternam* to charge his father, had used the charger's name. It was then replied, that no charge could have execution to the son's behoof, because it was offered to be proved by his oath, that he had discharged his father of that part of the contract, which was found relevant. Next it was alleged against the charges for the wife, that none could be used to her behoof, *stante matrimonio*, without her husband, who concurred not, and she could not infest, not being authorised by her husband, without whom she could not stand in judgment. I proponed to the LORDS, that the husband was naturally obliged to give his consent, and authorise his wife in her lawful pursuits, not hurtful to him, and in effect was *loco curatoris*, who refusing to authorise his minor in his lawful causes might be removed, or another might be offered by the Judge, to assist the minor judicially in his lawful and profitable pursuit, and the like reason was militant betwixt the husband and wife, chiefly since the delay of her action might make her condition worse in case her debtor died, or because irresponsible, and that in France, wives requiring their husbands to authorise them, persuit being refused, were allowed by the Courts of parliament to pursue *proprio nomine, itiam reluctantante marito*, he shewing no reason of his refusal; and that this assignee declaring his charges to be to the behoof of the contractors, his assign-

No 245. nation was only *procuratio in rem constituentis*, which THE LORDS found just and expedient ; because the assignation being that they made the pursuer assignee to charge, to obtain them rentals, and my (Lord of Chester added judiciously,) that the assignation made by the husband and her, and to obtain them rentalled, was a legal authorising of the pursuit to her behoof. In respect whereof, THE LORDS found the letters orderly proceeded.

Haddington, MS. No 2718.

1667. November 16. GARDINER against COLVIL.

No 246.

IN an action Gardiner against Colvil, the pursuer being ejected during her husband's absence out of the country, and when it was supposed he was dead,

THE LORDS sustained the pursuit, though the time of the advising the probation, it was offered to be proved that he was living; and did declare, that albeit the husband were at the bar, they would give the wife the benefit of *juramentum in litem*, in respect of the wrong done by the defender, and the particulars and quantities could not otherwise be proved.

Act. Longformacus.

Alt. Wallace.

Reporter, Castlebill.

Fol. Dic. v. 1. p. 405. Dirleton, No 105. p. 44.

. Stair reports the same case.

CHALMERS and her children pursue Hugh Colvil and others, for ejecting them out of their house and lands of Ladykirk, and spuilzie of their goods therein. The libel being admitted to probation, not only a witness deponed, that he saw the defender open the pursuer's doors, they being absent in Edinburgh, and the keys with them, and cast out their goods and enter in possession, who was admitted, *cum nota*, as being interested as tenant, and concurring with these pursuers, in a pursuit with the same defenders before the council, upon the same ground ; the rest of the witnesses proved, that the pursuers were in possession at or about the time libelled, and that they went to Edinburgh, and locked their doors and took away the keys ; and some of them deponed, that the night before the defender's entry, they saw the doors locked, and that the next day after they saw Hugh Colvil and several others in the house, and several goods that were in the house cast out of the door, and that Hugh continued in possession, and took in the goods again.

Which the LORDS found sufficient to prove the ejection and spuilzie, seeing the defender did not instruct that he entered by authority of law.

The defender alleged at advising the cause, that the pursuer had a husband, who within this month was seen at Air, and offered to prove by his oath, that