

1766. July 24. JEAN and ELIZABETH HUNTERS *against* JANET BROWN.

No 374.
A disposition
to a 'betroth-
'ed wife,'
found good,
though the
marriage dis-
solved within
eight months.

ANDREW HUNTER, having returned from the East Indies in an infirm state of health, disposed, upon the narrative of pure love, favour, and esteem, his whole effects to Janet Brown his betrothed wife, under the burden of his debts, and reserving his own liferent, with a clause, whereby he excluded and debarred all his friends and relations from having any interest in the subject.

Some days after, Andrew Hunter married Janet Brown, and died within eight months of the marriage, without issue.

Jean and Elizabeth Hunters, his sisters, brought an action against Janet Brown for the value of the effects, arguing, that all provisions granted in contemplation of marriage, were extinguished by its dissolution within the year, and without a living child.

In support of the general proposition, the pursuers referred to the authority of Balfour, p. 95. c. 12. and p. 112. c. 27; Spottiswood, Tit. HUSBAND and WIFE, p. 157; Craig, II. 22. 23; Stair, I. 4. 19; with several decisions, as 16th November 1633, Grant *contra* Grant, No 24. p. 1743; 16th July 1678, Lord Burleigh *contra* Ld. of Fairnie, No 382. p. 6172; 26th February 1751, Somervell *contra* Bell, No 373. p. 6161.

It was *argued*, That the rule, being so firmly established, must obtain in all deeds granted *intuitu matrimonii*, unless it be expressly excluded. And that this deed was granted *intuitu matrimonii* was said to appear from the designation of 'betrothed wife,' which is applied to the grantee.

Answered; The forfeiture incident on the dissolution of marriage within the year, and without issue, is rigorous and unfavourable; and, being introduced by custom, ought not to be extended. But, neither practice nor authority has applied it to any other deeds, but those which are granted in contemplation of marriage.

In the case of Bell *contra* Somervell, the deed proceeded on the narrative, 'that no marriage-articles had been executed,' and contained a provision to the wife in liferent, and the children of the marriage in fee. Hence it was obvious, that it was granted in contemplation of marriage.

The deed now in question bears to be granted for love and favour; it makes no provision for children, and appears to be a testamentary donation from two circumstances: *1st*, That it is burdened with debts, and reserves the disponent's liferent. *2dly*, That it was not delivered to the disponent. The irritancy therefore has no place; for a testamentary bequest by a wife to her husband was sustained, though the marriage dissolved within the year. Haddington, 6th February 1605, Ld. Covington *contra* Veitch, No 378. p. 6166.

"THE LORDS sustained the defence, and assolizied."

Act. Macqueen, John Douglas.

Alt. G. Buchan-Hepburn, Geo. Fergusson.

G. F.

Fac. Col. No 43. p. 270.