

1776. November 21.

NEILSON.

No 375.

FOUND that a claim for the widow's mournings, where the marriage dissolved within year and day, was not good against the husband's creditors. See PRIVILEGED DEBT.—APPENDIX.

*Fol. Dic. v. 3. p. 289.*

1781. February 7. JAMES CUMING against ANNA GARDEN.

IN 1775, Anna Garden was married to Alexander Cuming, who soon after purchased certain lands, and took the disposition of them 'to himself, and Anna Garden, his spouse, the longest liver of them two in conjunct fee and liferent, for the said Anna Garden her liferent-use allenary, and to the child or children to be procreated betwixt them in fee; whom failing, to the said Alexander Cuming, his own nearest heirs and assignees whatsoever.'

The marriage dissolved by the death of Alexander Cuming before a year after it took place had elapsed, and without any children having been procreated of it. A competition respecting the rents of the subjects above mentioned then arose, between James Cuming, the brother of Alexander, who had entered heir to him, and Anna Garden, his widow.

*Pleaded* for Anna Garden; It is admitted that contracts of marriage, or settlements made solely *intuitu matrimonii*, fall, if it be not otherwise conditioned, by the dissolution, 'within year and day,' of a marriage, of which no child has existed. But this rule, being an unfavourable and ungracious one, is to be limited to those circumstances which, with strict propriety, fall under it. Hence it will not be extended to such a case as the present, in which there is no proper marriage-contract or settlement, but merely an unilateral deed, importing a donation by a husband to his wife, and which ought to be considered as a *donatio mortis causa*. Haddington, 6th February 1606, Lord Covington *contra* Veitch, No 378. p. 6166; Clerk Home, 6th November 1739, Hood *contra* Jack, No 383. p. 6175; and 24th July 1766, Hunters *contra* Brown, No 374. p. 6164.

*Answered* for James Cuming; The form of the deed was necessarily different from that of a contract of marriage; but, as the provision it contains is not only in favour of the wife, but likewise of the children of the marriage, it must be held as granted *intuitu matrimonii*.

*Observed* on the Bench; It appears that the husband had made no other settlement on the wife. It was not in his power to have revoked the deed. This, therefore, was not a pure donation, and, consequently, must have been granted in contemplation of the marriage.

No 376.

A man purchased a house, of which he took the disposition to himself and his wife in conjunct fee and liferent, for her life-sent-use allenary, and to the children to be procreated of the marriage in fee; whom failing, to his own nearest heirs. The marriage dissolved within year and day by the death of the husband, without children. The Lords found the disposition void in so far as respected the widow's liferent.

No 376.

" THE LORDS found, that the disposition in favour of Alexander Cuming, and Anna Garden, his spouse, and longer liver of them, for her life-entire use alienarily, in so far as it provides the life-entire of the subjects therein mentioned to the said Anna Garden, became void by the dissolution of the marriage between the said Alexander Cuming and Anna Garden, by the death of the husband within year and day of their marriage, without a living child having existed thereof."

Reporter, Hailes.

Act. Buchan Hepburn.

Alt. Russel.

S.

Eol. Dic. v. 3. p. 289. Fac. Col. No 28. p. 50.

## S E C T. II.

Rights flowing from third parties in contemplation of the marriage.

1562. January 30.

ROBESON against JACKSON.

No 377.

TAK and assedatioun set to ane man and a woman as his future spouse, for all the dayis of ather of thair lifetimes, be vertue, and in contemplatioun of marriage to be solemnizat betwix thame, and thairefter the man deceis befor the completing of the said marriage; the woman may crave na richt nor titill to the said tak, nor alledge the samin to pertene to hir induring hir lifetime, albeit scho be in possessioun be vertue thair of befor his deceis quha sould have bene hir husband.

Eol. Dic. v. 1. p. 413. Balfour, (ASSEDATION.) No 5. p. 201.

1606. February 6.

LAIRD COVINGTON against VEITCH.

No 378.

A person granted to his sister a bond of provision, bearing love and favour, and in satisfaction of her bairn's part of gear, payable the first term after her marriage. She leaving

THE Laird of Covington pursued William Veitch, son to umquhile Patrick, to hear and see him decerned to refund and pay back to him the sum of L. 1000 which he received in name of tocher with the said Covington's sister, whom William Veitch married, conform to his contract of marriage and acquittance given thereupon, because his said wife died within year and day. It was *alleged* by the defender, That the summons was not relevant, because albeit *in dote profectitia*, the father, of the law, has repetition of the tocher, his daughter dying within year and day; yet, *secundum L. 4. C. soluto matrimonio quemadmodum dos petatur*, that has not place *in dote adventitia*, which the woman obtains by other