could not in such cases have been punished had he not been convicted by contrary evidence.

On the 19th July 1766, "the Lords ordained the depositions of Margaret Oumston and Christian Thomson to be expunged."

On the 2d August they adhered, upon advising a reclaiming petition and answers.

Act. G. Cockburn, H. Dundas. *Alt.* T. M'Claurin, R. M'Queen.

OPINIONS.

AUCHINLECK. The point does not concern the *initialia* of the oath: it is not sought to prove malice, but to prove that the witness has perjured herself, by denying that she had said she harboured ill-will against Martin.

COALSTON. There are three questions put in the *initialia:* Have you been instructed;—have you received a reward to swear;—do you bear malice against the parties? The meaning of a protest for reprobators is, that the party may be allowed to disprove the *initialia.* Here the proof may detract from the credibility of the witness.

PRESIDENT quoted the case of *Fulton's Children* against *Malloch,* where the Justiciary Court would not allow witnesses to be examined, in order to prove that a witness had said one thing before he was examined in Court, and another when examined in Court.

Diss. Pitfour, Gardenston. *Non liquet,* Coalston.

1766. *August* 5. JEAN HUNTER, Relict of David Gray, Mariner in Dundee, and ELIZABETH HUNTER, Spouse to John Jaffray, Writer in Forfar, *against* JANET BROWN, Relict of Andrew Hunter, Residenter in Forfar.

HUSBAND AND WIFE.

What Deeds are extinguished by Dissolution of the Marriage within Year and Day.

[*Faculty Collection, IV.* 270; *Dictionary,* 6164.]

ANDREW Hunter had three sisters, Margaret, Jean, and Elizabeth. Margaret died: Andrew intromitted with her effects, but made up no title to them. On the 7th January 1764, Andrew Hunter gave up his name for having the bans proclaimed between him and Janet Brown: It appears that the bridegroom had few effects; the bride, none. On the same day Andrew Hunter executed a deed in favour of Janet Brown: Its narrative bears "for the pure love, favour, and esteem I have for Janet Brown, lawful daughter of the deceased James Brown, sometime messenger in Forfar, my betrothed wife, and for her better living in the world after my decease." By this deed he made a general disposition of moveables in her favour, reserving his own liferent right: he

empowered her to intromit after his decease, and he took her bound to pay his debts and funeral charges. He added the following clause,—" I hereby debar and exclude all my friends and relations from having any interest in the subject above disponed, or troubling and molesting the said Janet Brown in the peaceable possession thereof." He warranted this disposition " from his own proper fact and deed done or to be done." The marriage was soon after solemnized, but it appears that it did not long subsist; for, on the 29th August 1765, the register of burials bears, that Andrew Hunter was buried on that day. Thus the marriage dissolved within year and day: there was no child of the marriage. On the 27th October 1764, Jean and Elizabeth, the surviving sisters of Andrew Hunter, obtained themselves confirmed as executrixes *qua* nearest in kin to their brother. In consequence of this title they insisted, in an action before the Sheriff of Forfar, against Janet Brown, the widow, concluding for a delivery of the goods which belong to their sister and brother.

Janet Brown pleaded on Andrew Hunter's deed as a preferable and exclusive title.

On the 27th November 1764, the Sheriff-substitute " found, that besides the common and proper designation given to Janet Brown, the disponee, for the gratuitous cause therein mentioned, that the additional appellation given her, viz., my betrothed wife, point out clearly, that the reason for granting was in consideration of the intended marriage, which being dissolved within year and day, as appears by the certificates produced, therefore sustains the pursuers' claim, as set furth in the libel and pleadings on their titles, as nearest of kin to their deceased brother the cedent, produced; and decerns accordingly."

Janet Brown reclaimed, and pleaded that Margaret had, by a nuncupative testament, left her effects to Andrew, and that Andrew had a daughter; so that the pursuers could not be his nearest in kin.

On the 13th December 1764, the Sheriff-substitute " found that the deceased Andrew Hunter, granter of the disposition in question, has a daughter in life, is *jus tertii* to the petitioners; and refused the petition."

On the 5th February 1765, Janet Hunter having reclaimed to the Sheriff-depute, he advised the process, gave an instruction to adhere, but to find no expenses due. Upon this she advocated the cause.

On the 23d January 1766, " The Lord Kennet, Ordinary, remitted the cause to the Sheriff, with this instruction, that he sustain the pursuers' title; and appoint the defender to give in an account of charge and discharge of her intromissions with her husband's effects, and afterwards to proceed in the cause as to him shall seem just."

On the 4th February 1766, the Lord Ordinary " refused a representation and adhered."

ARGUMENT FOR THE DEFENDER:

The severe law, annulling all deeds in favour of husband and wife, when the marriage subsists not for year and day, is introduced by custom not statute. This has not been extended to any deeds but those whereof marriage is the efficient cause, as the rights of terce and courtesy, marriage-contracts, and

tacks set to husband and wife. Such deeds alone can be said to be executed *intuitu matrimonii;* for such only would be null were marriage not to follow. Agreeable to this are the opinions of our lawyers. Craig, in treating of this question, *l. 2, tit. 22,* § 23, mentions only *dos et donatio propter nuptias;* Spotiswoode, p. 155, speaks only of tocher good; Lord Stair, still more fully, *B. 1, tit.* 4, § 21,—"By our custom, if marriage dissolves within year and day after the solemnizing thereof, all things done in contemplation of the marriage become void, and return to the condition they were in before the same; and in this our custom agrees to the civil law: and so the tocher returns back to the wife, or those from whom it came; and she hath no benefit of any interest, either in his moveables or heritage, by law or contract provided to her; nor hath he any interest in hers." The deed in question is precisely upon the same footing as an absolute disposition granted by a father to a son, whereof the inductive cause appeared from circumstances to be the enabling the son to make settlements in a marriage contract. If the marriage subsist not for year and day, the marriage contract will be null, yet the disposition will be good. The law distinguishes between deeds *inter sponsum et sponsam,* and *inter virum et uxorem.* The latter are revocable, while the former are not. *2dly,* Supposing this deed to be a marriage contract, yet the clause whereby Andrew Hunter excludes his nearest in kin must be understood as equivalent to a dispensation with the law of year and day. No particular mode of such dispensation is required, and here the intention of the disponer is clear. If the wife be excluded by the law, and the relations by the deed, then the subject would become caduciary, which can never be the intention of one executing a settlement of his affairs.

3dly, The deed is in truth not a marriage-contract, but a testament. By it the liferent is reserved; its effects are suspended until the death of Andrew Hunter; it is burdened with the payment of his debts and funeral charges. Besides, it never was delivered, and although it contains a clause of warrandice, that is not inconsistent with the nature of a testament, however uncommon it may be. If then this deed is a testament, it must be effectual; for there is no law which deprives a bridegroom of the *libera testandi facultas,* in favour of his bride or of any one else.

ARGUMENT FOR THE PURSUERS:—

The law concerning the consequences of marriage dissolving within year is established by custom, in the same manner as many other peculiarities of our law are established. Neither is it rigorous; for settlements made *intuitu matrimonii* and *ad sustinenda onera matrimonii* are properly set aside when the marriage subsists for a short space and is not attended with children.

This law has been found to relate to deeds done *intuitu matrimonii,* other than marriage-contracts. See the case *Grant* against *Grant, 16th November* 1633, observed by Durie,—where the infeftment granted by a husband to a wife was set aside upon account of the dissolution of the marriage, although the infeftment, as Durie observes, bore no relation to the contract. The words used by Stair, *all things,* show that he did not mean to restrict his position to marriage-contracts. The words *in contemplation* may as properly relate to what follows as what precedes the marriage. The expressions in this deed, "be-

trothed wife," and " for her better living after my death," are clearly descriptive of a marriage-contract, or obligation *intuitu matrimonii.*

2do, The clause excluding the nearest in kin is exegetical and superfluous: the same thing would have been implied although not expressed; for whoever alienates from his heir, or executor, virtually excludes them. Had the marriage dissolved within year and day by the predecease of the wife, her subjects would have fallen to her own executors, and it would have been unjust to give this interpretation to the clause whereby the wife and her executors would be sure of gaining, and have no chance of losing in any event.

3tio, This deed is not of a testamentary nature: Every marriage-contract reserves the husband's liferent; for the wife's jointure takes not place till the husband's death. Were a marriage-contract to be conceived in such form as to give the surviving wife the whole of her husband's effects, she would be liable for the whole of his debts. The style of the deed, as has been already shown, points it out to be a marriage-contract, not a testament; and this case resembles, and will be determined upon the same principles as that of *Bell* against *Somerville, 16th July* 1751,—observed by Falconer.

On the 14th June 1766, the Lords adhered.

On the 24th July 1766, upon advising a reclaiming petition and answers, the Lords " advocated the cause, repelled the objections to the deed in question, assoilyied the defender, and decerned."

On the 5th August the Lords refused a reclaiming petition and adhered.

Diss. Kennet, Auchinleck, Hailes, President. *Non liquet,* Justice-Clerk.

Act. J. Douglas. R. M'Queen. *Alt.* G. Fergusson. G. Buchan.

OPINIONS.

PITFOUR. I do not know the origin of the law as to year and day. This deed however is not in contemplation of marriage. Parties may dispense with the law as to year and day; here it is a *quæstio voluntatis* whether Hunter meant to dispense with the law. Here the argument in law is brought in to prevent a man from doing what he intended to do. The rule of law relates to mutual contracts only,—this is a testamentary deed because it remained in the man's custody. In the case of the widow of Mr Gilbert Stewart, mournings were allowed to the widow, although the marriage dissolved within year and day.

KAIMES. The deed is *intuitu matrimonii,* but not *ad sustinenda onera matrimonii.* It is a testamentary deed. Can we suppose that the husband meant that his wife should draw nothing?

KENNET. Although the deed is not *ad sustinenda onera matrimonii,* it is as much so as a jointure.

AUCHINLECK. It is a provision *intuitu matrimonii,* although in the event of death.

HAILES. This is just such a marriage-contract as must be executed when the husband has effects and the wife none. The clause of warrandice does not look like a clause in a proper testament. The clause, *for her better living in the world after my decease,* implies that during his life she was to live by him, that is, be his wife and be maintained by him.

BARJARG. Doubts of this deed being *intuitu matrimonii.* The case of *Bell* and *Somerville*, 16*th July* 1751, was much stronger, for there a formal narrative occurred of a prior marriage-contract.

GARDENSTON. This is a testimentary deed. The clause debarring his relations is a clause never used in a marriage-contract.

COALSTON. I never could find a foundation for the law which rendered all deeds null if done *intuitu matrimonii* when the marriage dissolved within year and day. I shall never be for extending a peculiarity in our law inconsistent with reason. This is a testament, not a marriage-contract.

PRESIDENT. I cannot get over the law in the case of the widow of Mr Gilbert Stewart. The claim for mournings was as a wife, not as one continuing a wife for year and day. The case of *Read* proceeded on this specialty, that the provision was in favour of the son, not of the wife, The law has made the rule as to year and day: a man's will often is to dispense with that law; but, if he omits to dispense, the Court cannot supply the omission. The narrative of the deed, and all its circumstances, concur in showing that it was executed *intuitu matrimonii.*

1766. *August 5.* DAVID MODREL of Muirmill *against* JOHN DIN, Portioner of Easter Craigannet.

IRRITANCY.

Lands being disponed in security of a debt, with a declaration, that, if the debtor did not redeem, before a certain term, the lands should be held as sold to the creditor irredeemably, without necessity of declarator; *found*, notwithstanding, that the irritancy was purgeable before declarator.

The ten-shilling land of Easter Craigannet, called Glendales, belonged to Andrew M'Clay. On the 7th November 1731, Janet Adam, mother of Andrew M'Clay, granted a bond to John Liddel for 1390 merks; and, although her feudal right in those lands does not appear, yet she became bound to infeft Liddel in them for the further security of his debt, principal and interest. At the same time Andrew M'Clay, the proprietor, granted an heritable bond to John Liddel for 600 merks upon the same lands. John Liddel, having been infeft upon those two bonds, did, on the 10th August 1737, obtain a decreet of poinding the ground, before the Sheriff of Stirling, against the tenants and possessors, as well as against Janet Adam and Andrew M'Clay. Liddel being about to adjudge the lands, a disposition was executed in his favour by his two debtors: The question in issue turned upon the import and consequences of that disposition. The disposition recites the two bonds, and the decreet of poinding of the ground; that Liddel had raised and had executed a summons of adjudication for adjudging the lands; that M'Clay was liable in both the bonds, and that the sum due on them, together with expenses, amounted to L.1600 Scots; and that " the said Janet Adam and Andrew M'Clay, foresee-