

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.