N.B.—The other defences in this case were so involved in fact, that it would serve no purpose to state the reasonings of the Lords upon them.

1771. *December 5.* ELIZABETH PRIMROSE *against* ROBERT CRAUFURD.

COURTESY.

The right of the husband sustained over the lands which the wife had got by a disposition, but in which she was *alioqui successura*, and held to have acquired *præceptione hæreditatis*.

[*Faculty Collection, V. p.* 345; *Dictionary, Appendix I.; Courtesy, No.* 1.]

PITFOUR. There is a decision, not in the Dictionary, but observed by Forbes, 12*th December* 1712, *M'Cauly of Arncaple*, which determines that provisions in a marriage-contract do not exclude the *jus relictæ*. A point settled so long ago, as to *jus relictæ*, will not be unsettled now. The same rule applies to *courtesy*. Many opinions have been given by lawyers of eminence: many judgments, in the Outer-House, have been pronounced and acquiesced in upon the footing of the decision of *M'Cauly*. It is a fixed point, that courtesy extends not to conquest. The reason of this may possibly be found in the civil law, whence we derived the courtesy; but, be that as it will, *servate terminos quos patres vestri posuere*: it is certainly a part of our consuetudinary law. As to the present question, there may be *heritage* when there is a *præceptio hæreditatis*. If a father dispone to three daughters, they will be liable *passive* for his debts. In so far as the wife, *here*, took *præceptione hæreditatis*, will the husband take by courtesy. I also think that the wife's holograph deed will be effectual, although some of the subjects mentioned in it are not mentioned in the marriage-contract. The holograph deed was rational. I doubt how far she could alter it: it must be proved to have been executed *in liege poustie*.

GARDENSTON. The marriage-contract might be, in so far, in implement of the holograph deed, as it contains subjects mentioned in the holograph deed. But its omitting any subjects will not invalidate the obligation in the holograph deed.

HAILES. The nature of this holograph deed is misunderstood: it expressly relates to a contract to be extended, and contains a warrant for extending such contract. The contract followed, and was regularly signed by the parties. From that time its warrant must be held as out of the question. The husband cannot plead upon the warrant, while the deed itself, made out in consequence of the warrant, exists. If the last deed contains fewer particulars than the first, *that* must be imputed to a change of will in the parties; for it is impossible to suppose that the parties themselves did not know the one meant to *give* and the other to *receive*.

JUSTICE-CLERK. If there had been first a formal deed conveying the whole lands, and then a marriage-contract, conveying only a part of the lands, there might be a doubt of the marriage-contract vacating the formal antecedent deed; but this is not the case *here*: The first deed was informal, and the marriage-contract must be considered as the final declaration of the will of the parties. It is impossible that any error could have happened by the mistake of the writer; for both parties knew the extent of the subjects, and must have been possessed of the rights of the one parcel as well as the other. All the reasoning which applies to the right of courtesy in heritage will apply to *præceptio hæreditatis*. The husband ought not to be in a worse situation than if the subject had descended as heritage.

COALSTON. The holograph deed goes upon the narrative that a marriage-contract had not been executed. Afterwards, a marriage-contract was executed: that must be the rule. As to the question of courtesy in the case of *præceptio hæreditatis*, I see no difference between succession by *præceptio* and by service. In a matter arbitrary, like this, the opinion of writers is of great weight with me: In this question, both Lord Stair and Lord Bankton agree.

KAIMES. It is very dangerous to alter a marriage-contract in consequence of any prior declaration of will concerning a marriage-contract. There is no difference between succession in heritage by service or by *præceptio*. What we call *præceptio*, is only a method devised to save expense.

On the 5th December 1771, "The Lords found that the husband was entitled to the courtesy of the lands to which the wife succeeded *præceptione hæreditatis*; but found that no action lay on the holograph deed;" varying Lord Kennet's interlocutor.

Act. J. M'Laurin. *Alt.* R. M'Queen.

Diss. As to holograph deed, Gardenston, Pitfour.

1771. *December 5.* THOMAS and ANDREW SORLIE *against* ELIZABETH ROBERTSON.

JUS RELICTÆ—HUSBAND AND WIFE.

Power of the husband over the goods in communion does not authorise him to execute a deed, with the evident design of disappointing the relict's legal claims.

[*Faculty Collection, V. p.* 338; *Dictionary,* 5947.]

PITFOUR. I understand the deed to have been delivered, and irrevocable; yet I think that the wife cannot be deprived of her legal provisions and beggared by this device.