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.

PRESIDENT. The deed was gratuitous, obviously and avowedly calculated to defeat the widow's claim.

HAILES. I add, proceeding upon a false narrative of an obligation in which the husband was not really bound.

MONBODDO. This deed is, in so far, a testamentary deed, that it does not take place till after the death of the granter; at the same time, it is not a testament because irrevocable: but it is a gratuitous deed, and must come off the dead's part. A man cannot be allowed to make deeds of this kind, to the effect of impairing the legal claims either of wife or of children.

KAIMES. I can conceive many deeds not to take place till after death, and having an obligation of warrandice, and yet good against the wife; *this* is one of the few cases of civil right where intention is to be considered: the intention was not so much to honour the brother as to disappoint the wife. The cloven foot appears throughout.

On the 5th December 1771, "The Lords found that the deed can only affect the dead's part."

Act. D. Græme. *Alt.* D. Smyth. *Rep.* Pitfour.

1771. *December* 10. WILLIAM and HENRY KNOX, &c. *against* WILLIAM LAW of Elvingston.

FIARS.

The mode of striking the Sheriff-fiars of the county of Haddington, and a reduction of them as erroneous, and as not in terms of the Act of Sederunt, 24th December 1723, dismissed.

[*Fac. Coll. V.* 349; *Dict.* 4420.]

KAIMES. Without entering into the merits of the cause, I rest my opinion upon the preliminary point, that the pursuers have no title to reduce the fiars, and that they are barred therefrom *personali exceptione*. Messrs Knox, merchants in Dunbar, could not fail of knowing that the sheriff was wont to strike the fiars by a particular rule, and without the interposition of a jury. Their correspondents in Glasgow could not fail of being informed of this: They also knew that the fiars in East Lothian were higher in 1768 than those in Mid-Lothian,—as 13s. 4d. to 11s. 8d. In such circumstances they bargain by the East-Lothian fiars, which they knew were to be struck without a jury, and which, *they had reason to believe*, would be considerably higher than those of Mid-Lothian. It comes out, that, in fact, the difference between the fiars of the two counties was not so great in 1769 as in 1768, and yet the pursuers, contrary to their express obligation, seek to set aside a rule which they knew would be followed at the time of entering into that obligation.