

1632. July 20.

STEWART OF ANDERSON *against* IRVINE.

No 3.

Although the children die before the mother, and both within the year, yet the husband has right to the courtesy.

ALEXANDER IRVINE is obliged, by contract of marriage, to pay in tocher with —, his half-sister, a certain sum to her future spouse; the heir of the husband pursues registration of the contract against Irvine. *Excepted* the marriage dissolved within year and day be the wife her decease. *Replied*, There was a bairn born and christened. *Duplied*, The bairn died before the mother, and both within the year, and bearing of a bairn gives only by practice the benefit of curialitie, but not of tocher nor conjunct-fee, this never being practised. Finds I. P. the contract to be registrate, and repells the exception and duply, and finds the reply relevant.

Fol. Dic. v. 1. p. 205. Nicolson, MS. No 57. p. 38.

1636. January 19.

M'AULAY *against* WATSON.

No 4.

A husband having claimed his right of courtesy during his life, his executors could not claim it in prejudice of a singular successor from the heir of the heiress. See No 20. p. 1740.

AGNES WATSON executrix confirmed executrix to Robert Watson her brother, obtained a decret before the commissaries of Edinburgh, against James M'Aulay heritor of certain lands within Edinburgh, for payment to her of the mails of the saids lands from the 1604 to 1628; which mails as she alleged, did of right belong to the said Robert all these years, by reason of the courtesy of Scotland, in regard he had married the heritrix of the said lands, and consequently did now appertain to her as executrix to her brother. The said James M'Aulay intended a reduction of this decret upon this reason, that this courtesy is only personal, and died with the person of the said relict, who having neglected it all his lifetime, his executors can claim no right thereunto after his decease; even as in a Lady tercer, who albeit she had never so good right to a terce, yet if she be not kenn'd to it in her own time, in vain should her executors sue for it. And this pursuer being infeft in the saids tenements by disposition from the heritor thereof, and having brooked them *bona fide* all the years libelled unquarrelled, cannot now be drawn in question *post tanti temporis intervallum et post fructus bona fide perceptos*; no more than if the said Robert were yet alive himself, who would not be heard to seek the bygones of so many years, which the heritor had intromitted with *bona fide*. *Alleged*, The reason was no ways relevant, for the mails being due to the defunct, his executors had good right to seek them, neither was the *simile* of lady tercer to the purpose, because by the ordinary practice, before a woman can have right to a terce, she must be first served by a brieve, and after that kenn'd to it by the Sheriff's precept; before which be done, if she happen to decease, it is true that her executors have no place to call for the profits of the said terce; but it is otherwise in a curiality, whereunto he that has right needeth no previous declarator of the same, but may summarily, by virtue of his right, enter to the possession of the lands,

whereunto he hath right during the courtesy: And the pursuer's possession cannot maintain him against the defender's uncontrollable right, nor can he be thought to have possessed *bona fide* where another had a good right standing. THE LORDS found the reason of reduction relevant.

No 4.

Spottiswood, (CURIALITAS.) p. 78.

1702. February 20.

ROBERT DARLEITH and his Tutor, *against* MR ALEXANDER CAMPBELL.

MAGDALEN EDMONSTON, only child to James Edmonston, merchant, being first married to one Darleith, and by him had the said Robert, her son; she afterwards marries the said Mr Alexander Campbell, by whom she had likewise a son, but he died a little after his birth; and when she is on death-bed, Mr Alexander, her husband, serves her heir to her father in some houses in Edinburgh, and infefts her by hesp and staple, *more burgali*, and then procures a disposition from her in his own favour; but Robert, her son of the first marriage, serving heir to his mother, raises reduction of that disposition *ex capite lecti*. *Alleged, 1mo*, He had acquired a right to some debts, which would make the disposition as onerous *pro tanto*. *2do*, He had right to liferent the whole by the courtesy of Scotland, his wife being an heiress infeft, and there having been a living child heard weep and bray. *Answered*, No husband of a second marriage can claim the curiality, where there exists an heir of the former marriage. *2do*, She died not in the fee, being denuded in his favour. *3tio*, The serving her heir and infefting her being all done when she was on death-bed, cannot prejudice her heir. *4to*, It takes no more place in burgage-lands, no more than a terce does. *Replied*, Our law and custom have made no distinction whether the heiress be a maid or a widow, or whether the husband be the first, second, or third, and whether there be heirs of a former marriage or not; for, if he exclude the last husband from a courtesy, why does not a brother, or other remoter heir succeeding, as well exclude him, which we know is not pretended. *2do*, This pursuer quarrels the disposition *ex capite lecti*; and if he prevail, then her fee revives, and consequently the curiality takes place. *3tio*, The serving her heir, and infeftment *in lecto*, were not alienations, (which are only prohibited at that time), but rather an acquisition, and so not quarrellable. To the *4th*, Stair, tit. LIFERENT INFESTMENTS, and our other lawyers, are clear, that courtesy holds in burgage, as well as in country-lands. *Duplied*, The courtesy being local, and peculiar to Scotland and England, is not to be extended, and has been given to the father as administrator to the apparent heir, but not to a step-father, and is only due to a husband where his child would have been heir to the estate, which did not exist in Mr Campbell's case; and though the infefting her on death-bed was no alienation, yet it was in order to capacitate her to make a very unnatural and unkind one by her own son, to her second husband.

No 5.

The second husband of an heiress cannot claim the courtesy where there is a son of a former marriage alive.