

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 infest, 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.

No 5. Several of the LORDS thought there was no difference whether the heir was the husband's son, or of a prior marriage, and that the curiality was due in either case, and was not given *intuitu* of the heir, but to make the husband live honourably, and suitable to the heiress's estate and circumstances after her decease: But the case being new, the LORDS resolved to hear it in their own presence in June next, before they would determine it.

December 1.—THE case mentioned 20th February 1702, between Robert Darleith and Mr Alexander Campbell, being heard in presence, was this day advised and determined; being an abstract point in law, Whether a second husband has right to the courtesy, where the heiress, his wife, has a son by a prior marriage? Craig, lib. 2. dieg. 22., is for the affirmative, though it was answered to his authority, that, as to these words, *Etiam si primus maritus habuerit hæredem, tamen secundo debetur*; that *habuerit* must be so taken as to import the child that is now dead, otherwise, if it were alive, he would have said in the present time, *etsi babeat*, and not *habuerit*; and *Regiam majestatem, lib. 2. cap. 58.* seems to clear this, that a husband shall liferent his wife's heritage, *si ex eadem hæredem habuerit*; so that it is due to her husband, not under the reduplication *qua* husband, else every husband would have right to it, though he procreate no child by her at all; but was under the reduplication as parent to the heir. Yet, *vide Leg. burgorum, cap. 44.* which requires not the procreation of the heir, but only *si ex ea genuerit masculum vel fœminam*. *Skene de verb. significatione, voce Curialitas*, thinks its original was *ob reverentiam prioris matrimonii, quod quis cum uxore hærede contraxerit, ne, ea mortua, ad egestatem maritus redigatur*; though Craig derives it from the Emperor Constantine's rescript, *l. 1. C. de bonis maternis*, giving the parent the usufruct of his children's heritage, derived to them by succeeding to their mother: And seeing this custom differs from the common law, the LORDS have been in use to interpret it strictly; as Forbes *contra* the Earl of Marishal, No 2. p. 3111.; the courtesy was not extended to the liferent of a sum, which was the price of lands belonging to the wife in fee, though *surrogatum sapit naturam surrogati*. And 19th January 1636, Macaulay *contra* Watson, No 20. p. 1740. and No 4. *b. t.*, the husband's executors were secluded from the courtesy, because neglected to be pursued for by the space of thirty years, though that was ten years within prescription. THE LORDS, by a plurality, found the second husband could not claim the courtesy where there was an heir of a former marriage in life.

Fol. Dic. v. 1. p. 205. Fountainball, v. 2. p. 149. & 162.

No 6.
The courtesy found to take place only where

1709. June 22.

LAWSON *against* GILMOR.

JANET WHITE being married to one Lawson, in her widowity, buys a tenement in Anstruther, and some acres, and then marries Charles Gilmor. She