

No 6.

*Alleged* for the defender ; His wife having died infeft in the said house, he had a right of courtesy, and so could not be dispossessed.

*Replied* for the pursuer ; The courtesy could not take place in this case ; in respect the house belonged not to the wife as an heiress, but was purchased by her, and courtesy is only due to the surviving husband of an heiress, *Reg. Majest. Lib. 2. cap. 58. Skene de Verb. Curialitas. Craig, Lib. 2. Dieg. 22. Vers. Fin. Mackenzie Instit. Lib. 1. tit. 6.*, the reason is, because an heiress is supposed to have a rank and dignity to be kept by her husband after her decease, which a woman purchasing is not supposed to have.

*Duplied* for the defender ; Probably the courtesy was brought into Scotland from the practice of England, as several other feudal customs and observations were ; and Littleton, the great English lawyer, *Instit. lib. 1. ch. 4. sect. 35.* holds a courtesy to be due, if the wife was seised in fee, and there was issue alive of the marriage, without distinguishing if she had the right by succession or by singular titles. Again, *Leg. Burg. cap. 44.*, no such distinction is made : Nor doth Craig, *lib. 2. dieg. 22.*, mention the word *hæres*; in contradistinction to a proprietor by singular titles, but only as what falls out most frequently, that womens heritage comes by succession. And it is equally reasonable, that a husband should liferent the wife's lands that she acquired *singulari titulo*, as those she succeeded to as heiress ; especially considering, that law gives her a terce of all lands wherein he died infeft, without distinction, whether the same came by purchase or succession. It is of no import, that the courtesy is more extensive than the terce, seeing the nature of the subject, and not the quantity, is debated.

*Duplied* for the pursuer ; There is no arguing in this case from a terce to the courtesy, which not only differs from it in quantity, but also was introduced upon a different account ; the former being in place of a marriage provision to the wife, and the latter a mere favour indulged by law to the husband of an heiress.

THE LORDS found that the courtesy doth not extend to lands acquired by the wife by singular titles, but only to those she succeeded to as an heiress.

*Forbes, p. 332.*

1715. June 16. ANDREW GORDON and his Factor *against* JAMES CLARK.

No 7.

Courtesy not due in burgage lands, because female succession has no place in burgage holding.

IN a process of mails and duties at the said Andrew Gordon's instance, against the possessors of some houses in Aberdeen, belonging to him as heir served to his mother, who was infeft therein on a disposition from her father, while her brother was alive ;—compearance being made for the said James Clark, who had been married to the mother ; and it being *alleged* for him, that the decreet could not go out, because he possess by virtue of the courtesy, which indefinitely takes place in all heritage, wherein the wife died infeft ;

It was *answered* for Gordon, *imo*, That here the wife was no heiress, her right being only acquired *singulari titulo*, and the law says (heiresses), and these have

a rank and dignity to be kept up by their husbands, which singular purchasers have not; and this was found in Lawson against Gilmour, *supra*. 2do, The lands in question are burgage lands, wherein no courtesy takes place.

No 7.

THE LORDS, in respect the tenements were burgage lands, repelled the defender's allegiance founded on the courtesy, and found he could have no title thereto.

Act. Alex. Falconer.

Alt. Leith.

Clerk, Robertson.

Fol. Dic. v. 1. p. 205. Bruce, No 101. p. 123.

1716. June 15.

HAMILTON against BOSWELL.

AN heiress's infestment, upon a service to her predecessors, being quarrelled by a reduction after her death, upon alleged nullities, in order to disappoint her husband of his right of courtesy, the LORDS found, that the heiress's infestment not having been quarrelled in her lifetime, was sufficient to support the courtesy, upon this ground of equity, that had it been quarrelled during her life, these nullities might and would have been supplied. See APPENDIX.

Fol. Dic. v. 1. p. 205.

No 8.

Courtesy may have place where the defunct heiress was not habilely infest.

1717. January 3.

ANNA MONTEITH against Her nearest of KIN and CREDITORS.

ANNA MONTEITH being heiress of certain lands which descended to her by her mother, and there being several personal debts to which she would be liable as heir, she, and her father as tutor and administrator, pursue a declarator, 'That it is necessary to sell the above inheritances, or a part thereof, for discharging the debts.'

It was *alleged* for the pursuer's friends on the mother's side, That there was no necessity of a sale, because, by a scheme of the debts and inheritance, it appears that there was a sufficient fund for payment of the yearly annualrents, and a valuable superplus.

It was *answered*, The pursuer's father had right to the inheritance by the courtesy of Scotland during his life, and was not in law obliged to pay either principal or annualrents of personal debts, whereby the inheritance would come to be affected with debts, and wholly exhausted, unless a part were sold; and the father, for the good of the pupil, was willing to concur in the sale, and lose the benefit of his courtesy of such lands as should be sold: Whereupon the question arose, 'Whether a husband possessing by courtesy was obliged to pay the current annualrents of his wife's personal debts?' And the father did allege, that it was of his own good-will, for the advantage of his pupil, that he

No 9.

A husband possessing by the right of courtesy, is liable for the annualrents of the personal, as well as real debts.