

# APPENDIX.

## PART I.

### COURTESY.

1771. December 10.

ELISABETH PRIMROSE, Spouse of Thomas Brown, *against* ROBERT CRAWFORD  
in AIRTH.

JAMES CLUB, by an only daughter, had three grandchildren, Elisabeth, Anne, and Mary Primroses. He disposed to Anne, his house and yard in the town of Airth, and his lands of Potterfield, which amounted to one half of the heritage; the remainder of his lands he disposed to Elizabeth.

Anne was infest in the subjects; and having been married to Robert Crawford, she, in the year 1760, granted a holograph missive, subsuming, that as there had been no contract, she then disposed to him, as long as he lived, every thing that belonged to her as her grandfather gave it.

Thereafter, in a contract of marriage, she disposed to herself and husband, and the longest liver of them, in conjunct fee and liferent, the survivor always liferenting the whole, her houses and yards in the parish of Airth; but, in this disposition, the lands of Potterfield were omitted. This marriage was dissolved by the death of the wife in 1767, and all her children were dead soon thereafter.

Upon this event, Elizabeth Primrose, as apparent heir of her sister, having brought an action against the tenant in the lands of Potterfield for the rent, compareance was made for Robert Crawford; who contended, 1<sup>st</sup>, That as there had been several living children of the marriage betwixt him and Anne Primrose, he had a right to the rents of the said heritable subject by the *courtesy* of Scotland; 2<sup>dly</sup>, Independent of the courtesy, he had a right to the liferent of the whole subjects that had belonged to his wife, in virtue of the holograph missive in 1760.

The Lord Ordinary, by one interlocutor, found Elizabeth Primrose entitled to the rents of Potterfield since the death of the last surviving child of Anne Primrose; to which he thereafter adhered, "in respect that Anne Primrose was not *alioqui successura* to her grandfather in the subjects disposed by him to her, and that the contract of marriage, and not any previous writing, must be the rule to determine what Robert Crawford had right to."

In a reclaiming petition, Robert Crawford, the defender, pleaded:

By the mode in which Club the grandfather had disposed his property, which was by making an equal division, he had done the same thing as if he had disposed the whole to his two grand daughters Elizabeth and Anne, equally *pro indiviso*. If he had disposed his whole lands in this manner, the interest which each sister had, in the half conveyed to her, would, *quoad* two thirds, fall to be considered as a *præceptio hereditatis*; and they could be held as taking no more than the other third, the share which, independent of the settle-

No. 1.

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

No. 1. ment, would have fallen to the third sister Mary, by a singular title. When the grandfather therefore allotted to Anne the subjects in Airth and lands of Potterfield, in lieu of the half of his whole heritage, Anne was truly to be considered as taking two thirds of Potterfield under the character of heir.

As the defender's wife was accordingly, to a certain extent, *alioqui successura* in the grandfather's heritage, and could have been connected therewith by a service, in which event it was unquestionable that the courtesy would have taken place, there was no solid reason for excluding that right; where, to save the expense of a service, she had taken infestment upon a disposition from her predecessors. This doctrine was expressly acknowledged by Stair, B. 2. T. 6. § 19. Bankton, B. 2. T. 6. § 2; and hence the right of courtesy now claimed must, at all events, extend to two thirds of the lands of Potterfield; because so far it was in effect a *præceptio hereditatis*, and which, independent of the disposition, the wife could have taken up as heir at law to her grandfather.

The pursuer answered:

By the consuetudinary law of Scotland, the right of courtesy to the husband was only sustained over subjects in which the wife died infest as heiress. Skene, *voce* CURIALITAS. From this it followed, that the defender had no claim to the courtesy of the lands in which his wife died infest; because she died infest therein, not as heiress, but as *disponée*; characters perfectly different; and as to which it had been found, that the condition of succeeding as heir was not purified by the heir's obtaining a disposition; 25th June 1701, Borthwick, No. 46. p. 2997.

The disposition, in the present instance, by the grandfather, had not been granted merely to save a service; as, had that been the case, it would have conveyed the whole subjects to both the daughters *pro indiviso*; nor would such a disposition have sufficed, as the daughters would not, even in that case, have been infest as heiresses to their father. The disposition founded on had no connection with the succession that would have been carried by a service to him *ab intestato*. He had thereby made a distribution of his property different from what would have been made by law; there was no ground accordingly for arguing that what had been taken was *præceptione hereditatis*; so that, as the wife's title to these lands was singular, the right of courtesy was excluded.

Some argument was used by the defender upon the import of the holograph missive granted by his wife in his favour; but as the contract of marriage did not confirm, and even differed from that obligation, no regard was paid to it.

The following interlocutor was pronounced: "Find that the petitioner cannot be found on the holograph note subscribed by the deceased Anne Primrose, in respect of the subsequent contract of marriage betwixt him and her, which does not give him right to the liferent of the lands of Potterfield; but find that he has right to the liferent of two thirds of these lands in virtue of the courtesy, as Anne Primrose succeeded thereto *præceptione hereditatis*."

Lord Ordinary, *Kennet*.  
Clerk, *Ross*.

For Primrose, *J. MacLaurin*.  
For Crawford, *Macqueen*.

R. H.

*Fac. Coll. No. 117. p. 345.*