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, *Etiamsi 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 habeat*, 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. *Fountainhall, 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

No 6.
the wife succeeded in lands to some of her predecessors, bnt not where she acquired them herself *ex titulo singulari*, and this because of the uniformity of all our authors and decisions on this head.

being deceased, and he refusing to cede the possession of the lands, Thomas Lawson, her son of the first marriage, and her heir, upon a warning pursues Gilmor, his step-father, to remove. *Alleged*, He must have the liferent in right of the courtesy, his wife having died last vest and seased in these lands. *Answered*, No courtesy in this case; because that only takes place, where the wife succeeds in lands and heritage, as heiress to some of her predecessors; but here she has it by purchase and acquisition, as a singular successor, where the courtesy was never claimed; and there is scarce any principle wherein our lawyers are more clear and positive than in this. *Vide* Skene *de verbor. Sign. voce Curialitas*, and his notes on *Regiam majestatem, lib.* 2. *cap.* 58.; Craig, *lib.* 2. *Feud. Dieg.* 22. Stair, *lib.* 2. *tit.* 6. who citing the foresaid Skene and Craig, joins with their opinion; and Sir George Mackenzie, *tit.* MARRIAGE, who states the courtesy to arise by marrying an heretrix; so the vouchers being so unquestionable, it is wondered how it comes to be debated. *Answered* for Gilmor, the husband, that the origin of this courtesy, may either be derived from Constantine's rescript, *L.* 1. *C. de bonis matern.* giving the husband the liferent of all the wife's heritages; or from the Norman feudal constitutions, where the wife being vassal, and unfit to perform the military services, and other duties to the superior's court, the husband was substitute in her place, and in compensation of that burden liferented her fees, without distinction whether she succeeded therein, or otherways purchased and acquired them; and the famous English Lawyer Littleton, in his institutes and tenures, speaking of the courtesy, he does not restrict to the case of succession only; and though some of our own lawyers incline that way, yet the word *hæres* made use of by them in a large sense not only signifies an heiress, but comprehends any fiar or proprietor of lands; so Gilmor may claim the courtesy, though it came to his wife *titulo emptionis et venditionis*, even as a terce is due to a wife out of her husband's lands, whether he got them by succession or acquisition. THE LORDS remembered, that in the case of Campbell and Edmiston, (*supra*) they had preferred the wife's son of a former marriage to his step-father claiming the courtesy, which some thought a great stretch; but however, in this case the LORDS were all clear, that the authorities were so pregnant and uniform, besides the decision founded on, they could not recede from so fixed a rule; and therefore found the courtesy only took place where the wife succeeded in lands to some of her predecessors, but not where she acquired them herself, *ex titulo singulari*; and so repelled Gilmor's claim to the courtesy, and decerned him to remove.

Fol. Dic. v. 1. *p.* 205. *Fountainhall, v.* 2. *p.* 505.

*** Forbes reports the same case:

IN the action of declarator and removing, at the instance of Thomas Lawson, as heir to Janet White his mother, against Charles Gilmor her second husband, for removing him from a house purchased by Janet in her widowhood;

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 seased 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 possest by virtue of the courtesy, which indefinitely takes place in all heritage, wherein the wife died infeft;

It was *answered* for Gordon, 1*mo*, That here the wife was no heiress, her right being only acquired *singulari titulo*, and the law says (heiresses), and these have