

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. I. 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. I. 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.

No 9.

passes from his right to so much as shall be sold ; but that a husband possessing by a courtesy, is only subject to real debts : In which Lord Stair expresses his opinion very plainly, and makes a parallel betwixt a courtesy and a terce ; and it is certain that a tercer is subject to no personal debts ; and the right of courtesy is a full usufruct, which is subject to no personal burdens.

It was *answered*, The present question is not stated, nor did occur to Lord Stair, nor is there any decision upon record that can clear it ; and therefore it must be determined according to the nature of the husband's right, and the analogy of law. And, *imo*, Although a terce and courtesy do in many things agree, yet not in the present question ; for, by our ancient law, the provision to wives was very much qualified and restricted. The husband could not anciently make a larger settlement upon the wife than the *rationabilis tertia*, which was the liferent of the third part of the heritage he had at the time of his marriage ; he might by paction give her less, as appears by the 16th chapter of the 2d book of the Majesty : And therefore it was very reasonable, that this *rationabilis tertia* should be free of all burdens which did not really affect the subject at the time. On the other hand, the courtesy of the husband was very ample by our ancient law, whereby the husband did not only enjoy the liferent of the wife's heritage, but did even enjoy the honour and dignity of the family, if any did belong to the wife, and had seat in Parliament, and all other privileges that would have belonged to her if she had been a male, both in her life and after her death : So that the husband, by the courtesy, represents the wife's family. From which it necessarily follows in reason and equity, that he should leave the family as he got it ; and if it were not so, the family would be subject to diligences for personal debts, and sunk. And seeing the law or practice have expressed nothing upon this subject, the decision falls to be made according to reason and equity. And the learned Skene, in his notes upon the said 16th chapter of the 2d book of the Majesty, says, ' That the courtesy is *forma cujusdam successionis*.' It is not a proper succession, otherwise the husband would be liable to the principal sums, as well as the annualrents ; therefore he calls it *forma cujusdam successionis*, a kind of succession [which subjects him to the payment of all current yearly burdens, where there is not another subject or debtor, out of which or by whom the same may be paid.

' THE LORDS found, That the husband, in possession of the courtesy, was liable in the payment of the current annualrents of personal as well as of real debts, to the value of the rents he enjoyed by the courtesy ; reserving to him relief against executors, or other heirs or successors to any other part of the wife's estate, heritable or moveable, which he did not enjoy by virtue of the courtesy.'

*Fol. Dic. v. 1. p. 205. Rem. Dec. No 2. p. 3.*