

1740. January 11. JOHN HODGE *against* JAMES FRASER.

THE question betwixt these parties was, whether a husband had right to the courtesy of lands which were acquired by his wife by singular titles, and in which she died infest?

For John Hodge, the husband; it was *argued*, That the right of courtesy was introduced by the common law, founded upon ancient immemorial custom; so that, in order to find in what cases it takes place, recourse must be had to our old law-books, and the opinion of such writers as treat of this subject. In the book of Majesty, this right is treated of; but no distinction is there made betwixt lands to which the wife succeeded as heir to any of her predecessors, and such as she had right to by singular titles; but it is there laid down in general terms, 'When ane man receives with his wife lands, in name of marriage, and begets upon her ane heir, son or daughter, heard cryand, within four walls of the house, and the wife happen to decease, the lands and heritage which pertained to the wife shall remain and be possessed by the husband in- during his lifetime;' 2d. b. of Majesty, chap. 58. It was a common thing of old, for the wife's father, or other friends, to give with her a part of their lands and estate, in name of tocher, as appears from the 18th chapter of the same book; and if in such cases the courtesy took place, where the wife's right was no more than a disposition from her father, &c. it follows, that the wife's being an heretrix is not essential, provided she dies infest in the lands.

In like manner, in the burrow-law, chap. 44, 'Giff ane man receives with a woman, in name of tocher, ane burgage, and with her begets son or daughter; and it happens the wife to decease, &c. the man or husband shall braick and possess that burgage, during all the days of his life.' There is not the smallest insinuation here, as if the right to this burgage behoved to be by succession to some one or other of her predecessors, in order to entitle her husband to the courtesy. What is observed by all our writers, touching the affinity betwixt the courtesy and the terce, which likewise took its rise from ancient custom, serves further to illustrate and strengthen this argument. Of old, the wife's terce was a third of the heritage, in which the husband was vest and seased the time of the marriage; but now the terce due to the wife is a third of the heritage in which he died infest, tenements within burgh excepted; and it makes no difference as to the terce, whether the husband's infestment proceeded on singular titles, or in the right of succession, provided, as Craig says, *In feudo eorum diem obiat supremum*; and the same author says, that the courtesy only differs from the terce with regard to the quantity. But *in reliquis eadem lege et paritate terminantur*. In the same manner as a relict claiming her terce is only bound to instruct that she was lawful wife to the defunct, and that her husband died in the fee of the lands, without condescending in what manner the fee was con-

No 10.

The courtesy does not take place in lands acquired by the wife by singular titles. See No 6. p. 3114.

No 10. stitute in the husband ; so the husband claiming the courtesy, is not bound to instruct any thing further, than that a living child was procreate of the marriage ; and that his wife *tempore mortis obiit vestita* in the lands of which he claims the liferent ; and if the courtesy is likewise considered as taking its rise from the rescript of the Emperor Constantine, *lib. 6. tit. 60. cod. de bonis maternis*, which is the opinion of most of our writers, there can remain little doubt. See Wood's Inst. book 2. chap. 1. § 4. And a decision observed by Haddington, where it is said, He who marries a woman who had heritage or annualrent heritable, and procreates a living bairn upon her, will get the curiality, as well of her annualrents, as of her lands, No 1. p. 3111.

The defence for James Fraser was, That seeing the wife acquired the feu herself, and did not succeed thereto as heir to any of her predecessors, the pursuer could have no claim to the courtesy out thereof, as was evidently the opinion of all our lawyers. See Skene *verbo curialitas*, § 2. Craig, *lib. 2. dieg. 22. § 42.* Sir George M'Kenzie, *lib. 1. § 6.* Stair, *lib. 2. tit. 6. § 19 ; 22d June 1709, Lawson, No 6. p. 3114.* This being the case, it was needless to enquire into the law of England upon this head, seeing they have their own law in that respect, which it was no wonder should differ from ours in some circumstances, even though ours was derived from it, of which, however, no vestige appears ; for instruments of sasine were introduced into our law and custom by King James I. ; and yet our infeftments differ vastly from their feoftments. And it is in vain, in such cases, to argue on the rationality of the thing, namely, that the courtesy ought to take place, without distinguishing how the feu came : for it is a law introduced by our particular customs, and therefore termed the *courtesy of Scotland* ; and whatever the learned Craig may labour with respect to the reason thereof, namely, that it had its rise from the civil law, whereby the liferent of the child's estate belongs to his father, the reason does not apply almost in any shape ; for that the birth of a living child, though it instantly die, founds the courtesy, when it is impossible to pretend that any thing belonged to it ; so that it may justly be said of this, as of many ancient customs, that *non omnibus quæ a majoribus, &c.*

THE LORDS found, That the courtesy only takes place in lands and heritages to which the wife succeeds as heiress, but not in those purchased by her, although she dies infeft therein.

Fol. Dic. v. 1. p. 205. & v. 3. p. 165. C. Home, No 138. p. 236.

* * * Kilkerran shortly mentions the same case in the following words :

FOUND, That the courtesy takes place only in the wife's lands, to which she succeeded as heiress, and not in lands purchased by her.

Kilkerran, (CONSUEUDE.) No 1. p. 149.