1781. *February* 1. Sir JOHN PATERSON *against* JOHN ORD, Esq.

COURTESY—MEMBER OF PARLIAMENT.

The courtesy does not take place in lands acquired by the wife by singular titles.

[*Dictionary*, 3121.]

MONBODDO. It is established that courtesy does not take place when the wife is not an heiress. The Act 1681 has no relation to courtesy: it respects the right of voting during the lifetime of the wife.

BRAXFIELD. As to the question of courtesy, I cannot find a good reason for the distinction between lands taken by succession or by singular titles; yet, since this is established in practice, it must not be altered. No law says that a husband shall vote in right of his wife. When she ceases, by death, to have any infeftment, the husband cannot vote on the infeftment of his son.

On the 1st February 1781, "The Lords found that Mr Ord is not entitled to be enrolled.

Incident. Inner-house.

Act. J. Swinton. *Alt.* H. Erskine.

1781. *February* 13. FERGUSON of AUCHINSOUL *against* HUGH MITCHELL.

PERSONAL AND REAL.

[*Fac. Coll. VIII.* 60; *Dict.* 10,296.]

MONBODDO. Here the price was honestly paid; possession was held for seven years; and the purchaser was in the course of completing his titles: a personal creditor steps in, adjudges, is infeft, and now seeks to carry off the subject. This is unjust. The original seller could not have conveyed to that creditor, without a crime. Can the law do that for a man which he could not do himself? If both rights had remained personal, the minute of sale would have been preferable, as being prior in date; and therefore the only ground of preference claimable is on account of the infeftment. What can be the effect of that infeftment? The disponee contracted on the faith of the records, but the adjudger did not. When men lend money on the faith of the records, it is not on personal security that they lend: when they lend money on the faith of the records, they take heritable security. The infeftment here is no more than a completing of the diligence, which, before infeftment, was only inchoated. I do not say that the infeftment has no effects. No: it makes the person infeft the first effectual adjudger, and it prefers him to any posterior real right. If transferred to a third party, it would be preferable to the minute

of sale; because *there* the assignee acquires on the faith of the records. This would be mere speculation, were it not for the opinion of lawyers, and the series of decisions to the same purpose as my argument. There is a series of decisions, from 1670, *Kennedy*, to 1775, *Neilson*. In the last case there was probably an infeftment; and there was no minute of sale, but merely a ground of eviction. The case of *Roseberry* is also to the same purpose, and also the case of *Gib*, in 1763. I see nothing on the other side except the case of *Bell of Blackethouse*, in 1737. That case went far, but we must not go any farther.

BRAXFIELD. If the doctrine now advanced were to be held as law, strange consequences would ensue and exceedingly hurtful. Innumerable frauds would take place. For example, a man borrows money on an heritable bond: no infeftment follows. Other creditors go on trusting him; they at last adjudge, and take infeftment. According to the doctrine now pleaded, this would be good for nothing: the heritable bond would exclude them all: the first creditor would carry off the kernel, and leave the shell to the adjudgers. Again, suppose that, in a marriage-contract, the estate is conveyed to trustees, for behoof of the heirs of the marriage,—the trustees, instead of taking infefment, suffer the father to continue in possession: the father contracts debts to the value of the estate,—his creditors will be cut out by the trustees. A second disponee, with first infeftment, is preferred to the first disponee. This is admitted: but it is said that the case is different as to adjudications, which take the estate, *tantum et tale*, as it was in the author. It is answered,—The principle is, that *feudal* rights are not to be affected by *personal*. As to *bona fides*, although *mala fides* may cut down a right, *bona fides* cannot establish a right. The act 1617 says nothing to the contrary. Reversion qualifies an infeftment, however latent it may be. To prevent that inconvenience, the clause was thrown in in favour of purchasers. Dispositions are not mentioned in the statute, for they do not affect the feudal right. The judgment in the case of *Blackethouse* was solemnly determined. The distinction now sought to be made was not made *there*, because the lawyers thought it not tenable. The difficulty *there* was, that these were only personal rights. The principle of the decision is, that a feudal right is not affected by a personal deed. It is much insisted on that the debtor himself could not have granted a disposition to Mitchell, and therefore that the law could not grant such disposition by adjudging. *Answer*,—A bankrupt cannot grant a disposition to any particular creditor, but any particular creditor may adjudge. There is no occasion for impugning former decisions: all of them apply to the case of conjunct persons adjudging. *That* is a fraudulent right; and he who adjudges must take the estate *cum sua labe*: that also is the case in Dirleton.

GARDENSTON. I know no safety to the feudal law, unless you prefer infeftments; for otherwise an imperfect right would be better than a complete one. There is great danger in departing from this feudal principle, but none in adhering to it. The disponee is safe, unless he is supinely negligent; for an adjudication cannot be taken on a sudden, and without the knowledge of many.

ELLIOCK. In the cases of *Neilson* and *Gib* the argument struck at the radical right.

PRESIDENT. If a different decision were given, it might not shake the faith of the records, but it would shake the practice of the nation. The case of

Blackethouse was held by all the great lawyers of that generation to have been well judged. There is a case in Stair, *Livingstone* against *Forrester*, 1674, decided in the same way; and there is no decision to the contrary.

On the 13th February 1781, "The Lords found that the adjudication, with infeftment, is preferable to the prior minute of sale;" altering Lord Monboddo's interlocutor.

For the adjudger,—E. M'Cormick, T. M'Laurin. *Act.* D. Rae, G. Ferguson.

Diss. Monboddo.

1781. *February* 14. ROBERT EWING *against* WILLIAM M'KINLAY.

CAUTIONER.

Act 1695 does not apply to Caution in Suspensions.

[*Fac. Coll. VIII.* 63; *Dict.* 2154.]

BRAXFIELD. The Act 1695 makes the seven years to run from the date of the obligation; but this will not apply to the case of cautioners in suspensions, for a cause may frequently remain undetermined for more than seven years.

PRESIDENT. The Act 1695 respects not prescription at all; it imports a liberation after a certain time. How can a man be liberated who is not bound in any thing specific until the issue of the cause? A conditional obligation falls not under the sense of the statute.

KENNET. We cannot extend a correctory law to cases not mentioned in the law.

On the 14th February 1781, "The Lords repelled the objection on the Act 1695, but found that there is no regular attestation which can bind the defender;" varying the interlocutor of Lord Westhall.

On the 7th March 1781, Adhered.

Act. E. M'Cormick.

N. B.—As to the form of attesting, the clerk of the Bills was called to report, which he did candidly.
