1781. *February* 1.

SIR JOHN PATERSON *against* JOHN ORD.

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Found in conformity with Hodge against Fraser, *supra*; in consequence of which, the husband had no title to be enrolled a freeholder upon his wife's lands.

To Mr Ord's claim of being enrolled as a freeholder of the county of Berwick, various objections, of little moment, were offered, which became the subject of a petition and complaint to the Court. When, however, they were thus under consideration, a new *objection* was raised, on this ground : That the claimant's wife had succeeded to the lands in question, not as an heiress, but by singular titles. The Court having ordered memorials on the point, it was

Insisted by Sir John Paterson the objector; That, in these circumstances, the courtesy did not belong to the claimant, as appeared from a numerous train of authorities, and, consequently, that he had no title to be enrolled. The authorities referred to are, Skene, De Verb. Signif. *voce* Curialitas; Craig, lib. 2. D. 22. § 42.; Stair, b. 2. t. 6. § 19.; Bankton, b. 2. t. 6. § 19.; Ersk. b. 2. t. 9. § 54.; 11th January 1740, Hodge *contra* Fraser, *supra*.

Answered; 1mo, In the most ancient treatises on the law of Scotland, the husband's right of courtesy is laid down, independent of any distinction arising from the wife's having acquired her estate by succession, or by sigular titles; Reg. Majest. lib. 2. c. 22.; and Leg. Burg. c. 44. As this distinction, therefore, did not anciently obtain in our law, so, whether we consider the origin or the design of the courtesy, there appears no rational ground for its subsequent introduction. The authority of Craig, when properly understood, is adverse to the distinction. In lib. 2. dieg. 22. § 41. he states the comparison between the courtesy and the terce, in such a manner, as clearly shows he was a stranger to that idea. His words are these :—' Quod ad quantitatem attinet (Curialitas) ' a Triente differt, quod Triens sit tantum *tertia pars* ususfructus totius : At ' Curialitas sive Curtesia est, *totius patrimonii quod ad uxorem pertinebat, dum* ' *moreretur. In reliquis eadem lege et paritate terminantur*.' Lord Stair, indeed, has interpreted this author's meaning in a different manner ; an interpretation which has been copied after by succeeding writers ; and, in the same train, the decision quoted seems likewise to have followed. Thus the weight of these authorities appears to be removed.

Accordingly, in the statutes regulating the election of members of Parliament, particularly the acts 1681, and 12th of Queen Anne, in both which mention is made of husbands rights of voting *by virtue of their wives infeftments*, no such distinction is recognized by the legislature; nay, it is plainly excluded. But,

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2do, The last of these statutes seems to confer on husbands the right of voting, in virtue of their wives infeftments merely, without any respect to their own patrimonial interest, and independent of the *jus mariti*, or of the courtesy.

'The Court sustained the objection.' *See* Member of Parliament.

Act. *Swinton et Ilay Campbell.* Alt. *Lord Advocate et H. Erskine.* Clerk, *Menzies.*

Fol. Dic. v. 3. *p.* 165. *Fac. Col. No* 26. *p.* 48.

See Husband and Wife.

See Appendix.