No 16. who muſt be unknown to the granter, and conſequently cannot be the objects of a particular *delectus* or truſt repoſed in them.

The inſtance of the offices of the King's taylor or ſmith do not apply; ſeeing, if theſe were granted to aſſignees, they behoved likewiſe to fall to adjudgers. Neither is the caſe of a burgeſs, or member of an incorporation, to the point, unleſs it could be ſhown, that ſuch privileges were transferrable to aſſignees: At any rate, it is *jus tertii* for the defender to make this objection to his own creditors.

THE LORDS found the office of King's printer adjudgeable.

Fol. Dic. v. 3. *p.* 9. *C. Home, No* 68. *p.* 116.

1747. *July* 10. SIR ALEXANDER COCKBURN *against* CREDITORS of Langton.

No 17.
The office of principal Uſher to the King, found to be adjudgeable.

THE office of principal Uſher to the King, was granted heritably to the predeceſſor of Sir Alexander Cockburn of Langton. What was the preciſe date of the original grant, does not with certainty appear; but there is, in the records, a a grant by King Robert the II. ratified in Parliament, to *Alexander de Cockburn*, therein deſigned, '*dilecto noſtro armigero*.' This grant diſpones to him the three baronies of Bolton, Caridden, and Langton, in free foreſtry and warren, with the burgh of barony; and then adds, '*Itaque quod dictus Alexander, hæredes vel aſ-*
'*ſignati ſui interſit vel interſint tres ſectas capitales*, viz. *Sectam itineris juſticiarii*
'*tent. inter vicecomitatum de Berwick ſuper Tuedam, ſectam itineris juſticiarii tent.*
'*apud Edinburgh, et Parliamentum noſtrum tent. apud Sconam: et quod dictus*
'*Alexander vel hæredes ſint principales oſtiarii noſtri ad noſtra Parliamenta, gene-*
'*ralia concilia, et feſta, capiendo de nobis et ſucceſſoribus noſtris per dictum tempus,*
'*liberationem pro duobus armigeris, duobus arcutenentibus, cum gladiferis et equis*
'*pertinentibus eiſdem*.' And the charter contains a *reddendo* of a pair of gilded ſpurs of blanch farm, *pro omni alio onere*. From the 1647, downward, there is a connected progreſs of grants from the crown, of the ſaid office, to Sir Alexander's prodeceſſors, and their heirs-male; with this variation, by charter under the great ſeal in the 1674, that there is a fee, or yearly penſion of L. 250 Sterling, annexed to the office, in place of the livery, or maintenance formerly given to principal uſher's attendants, to his eſquires, archers, ſword-bearers, and his and their horſes, and their grooms.

The creditors of Langton, who had adjudged the office, as well as the land eſtate, having brought a ranking and ſale of the eſtate, comprehending the ſaid heritable office, and the fees thereof, Sir Alexander, apparent heir male of the family, being adviſed that this office was a right annexed to the perſon, and not to the eſtate, and conſequently not tranſmiſſible by voluntary conveyance, nor by legal diligence, brought a declarator to have it found and declared, 'That this 'office is not a patrimonial eſtate, capable to be aliened from the family, or to

No 17.

'be affected by creditors; but that it muſt deſcend to the heirs of the family in 'their right of blood, and that the purſuer's taking and holding this office cannot 'ſubject him to the debts of his predeceſſors.'

In ſupport of theſe concluſions, the arguments urged for the purſuer were what follow. Property, no doubt, implies a power of diſpoſal, whether the ſubject of the property be land, moveables, or an office. But, by the eſtabliſhment of the feudal law, which comprehended offices as well as lands, the ſuperior was underſtood proprietor, and the vaſſal had nothing but the *uſusfructus*, or the uſe of the ſubject. The grant made to the vaſſal of the land was not underſtood an alienation of the property, but only a right to enjoy the fruits inſtead of wages, to enable him to perform the ſervices contained in the grant. At firſt, theſe grants were during pleaſure; they were afterwards continued for life; and at laſt extended to the grantee's male deſcendents. Accordingly, when a vaſſal died, his right of uſufruct died with him; and his ſon had no other right to the land, but what depended upon the ſuperior's obligation, contained in the original feudal right, to renew the grant in favour of the grantee's male deſcendents. This claim was competent to the heir, not as deriving any right from his anceſtor, but as creditor to the ſuperior. *See* 2d of Statutes, Rob. 1. cap. 6. which directs the manner of laying this claim.

Among the Romans, where lands were allodial, an heir claimed the land in right of his anceſtor; and there was neceſſary an *aditio hæreditatis*, to be a legal and public teſtimony of the heir's will, to ſubject himſelf to all the anceſtor's debts and engagements, which was a neceſſary conſequence among them of an heir's taking up an anceſtor's eſtate. An *aditio hæreditatis* was not neceſſary among us, nor is ſuch a form known in our old law. With regard to moveables, if they were not conveyed by teſtament, the church had the management and diſtribution. And as to land, the heir might ſafely demand a renovation of the feu from the ſuperior, without any form of *aditio*; becauſe an heir, by this new grant, became only ſubjected to perform the feudal ſervices to the ſuperior, without being liable for any of his anceſtor's debts. As he took nothing in the right of his anceſtor, there was no foundation in law nor equity, to burden him with his anceſtor's debts. After the Roman law was introduced into Scotland, the great regard paid to that law among the modern nations in Europe, led us by degrees to vary the principles of our old law, ſo as to accommodate them, as much as poſſible, to this new adopted law. Thus, a ſpecial ſervice is commonly held to be the form of *aditio* in land eſtates. But when we conſider the thing attentively, we will find, that a ſpecial ſervice is not at all of the nature of an *aditio hæreditatis*, to tranſmit the defunct's right into the perſon of his heir: The whole procedure of it ſhows, that it is intended for no other purpoſe, but to obtain a renewal of the feu from the ſuperior, and to derive a right from him, not at all from the defunct.

By the feudal law, and by the practice of this country, an heir of ward-land is not entitled to demand a renovation of the feu from the ſuperior, till he be of

No 17.

full age for performing the ſervices for which the land was granted to his family. By the common principles of law, a minor is entitled to take up his father's right, as well as a major is. Here a minor has no claim to the land; which proves that he derives no right from the predeceſſor. His claim lies againſt the ſuperior, who, in the original covenant, gave the land to the vaſſal and his male deſcendents, upon condition of his military ſervice, and for maintaining them during their ſervice. But it is implied in ſuch a grant, that the ſuperior is not bound to give his land to an heir who is not capable to bear arms; and therefore he is not bound to give the heir poſſeſſion till he be of full age, when he is underſtood fit for war.

Thus a vaſſal, by the feudal law, is in reality but a liferenter, or *uſufructuarius*, as much after heirs were introduced into feus as before. The heir is called to be ſervant to the ſuperior, and he gets his wages or fee from the ſuperior, who aſſigns him the ſame portion of land that his father formerly had, for the ſame ſervice. But, in this matter he is to be conſidered as heir *deſignative* only. He derives no right from his father, if it be not birth and blood. After the father's death, the land returns to the ſuperior, who beſtows it of new upon the ſon, according to his promiſe in the original grant.

To come cloſe to the preſent point, when the feudal law came to be in vigour, grants of all kinds were formed upon the plan of it, not excepting grants of honour and of offices. The office-bearer was the vaſſal, and he held his office of the granter his ſuperior, under the condition of performing the duties of his office, of whatever nature theſe were. Dignities, originally, were always granted along with land, or with juriſdiction; and even, at preſent, where they are granted without relation to either, they imply a *reddendo* of the being the King's counſellors, and of attending him in Parliament.

It is no wonder then, that by the original conſtitution of feudal holdings, the ſubjects or privileges thereby held, were put altogether *extra commercium*. Many things concurred: There was a *delectus perſonarum;* there was a ſtanding contract betwixt the ſuperior and his vaſſal; a ſubject granted for ſervices to be performed by that very vaſſal, which ſubject could not be taken from the vaſſal without the ſuperior's conſent, as being deſtined for a certain purpoſe; and laſtly, there was properly no ſubject in the vaſſal, which could be alienated, every vaſſal being properly an *uſufructuarius*, and the heir deriving right not from his predeceſſor, but from the ſuperior.

But in progreſs of time, when nations were civilized, and the arts of peace cultivated, military proweſs was of leſs importance. Peace produced induſtry, and induſtry produced commerce: Money came to be of general uſe; and, by the increaſe of money, land acquired a value which it had not originally. Vaſſals were willing to alien their land for money, and ſuperiors were eaſily brought to conſent. upon getting a part of the price. Thus the commerce of land crept in by degrees; and when a man purchaſed land for a full price, it was a natural conſequence, that he ſhould have more power over it, than if he had got it, as a

gratuity for military ſervice. In proceſs of time, feus came to be conſidered as *patrimonial*, which originally were *beneficiary* only: They came to be granted without limitation, to the purchaſer, and to his heirs whatever. In a word, they are now in England in every ſhape allodial; and equally ſo in this country, except as to the form of tranſmiſſion. No. 17.

To this day, traces of our old law ſo far remain, that land cannot be directly alienated without the ſuperior's conſent. But then, there is a remedy provided againſt this reſtraint by an adjudication. So ſoon as land came to be *patrimonial*, it was a natural conſequence, that it ſhould be attachable, for payment of the vaſſal's debt. This gave riſe to appriſings and adjudications; which the ſuperior is bound to complete, by granting a charter to the creditor. And, under the notion of debt, every ſort of conveyance may be thus made effectual.

Land is the moſt natural ſubject of commerce; and a deſirable purchaſe, as being the moſt permanent commodity of any that is deſigned for the uſe of man: and this natural aptitude for commerce, could not fail, in time, to get the better of the feudal law. But offices, and dignities, are of a quite contrary nature. It is, in a great meaſure, inconſiſtent with the policy of a well-governed country, that theſe ſhould be *in commercio*. It is, even, a ſtretch, to make them hereditary; of which our legiſlature was extremely ſenſible, in the reign of James II., when the evil was, in part, remedied, by forbidding heritable offices to be granted in time coming. It would be ſtill a wider ſtretch, to make ſuch rights ſaleable, and adjudgeable by creditors; which might well deſerve to be repreſſed by law, had it ever crept into uſe. But, whatever faint attempts have been made, every good man muſt be pleaſed to find, that ſuch a groſs corruption has never gained an eſtabliſhment among us; and, every good man muſt heartily wiſh, that it never may.

Thus, the ſtrict rules, of the feudal law, continue, among us, in their original force; ſo far, as they concern offices and dignities. Theſe cannot be alienated, without conſent of the ſuperior. And, though, by ſtatute, the ſuperior is bound to accept a creditor, for his vaſſal, who adjudges land for payment of debt; yet, adjudgers of offices and dignities, have no ſuch privilege. The ſtatute takes place, only in lands, and other *patrimonial* ſubjects; and, neither the ſpirit, nor letter of the law, can be ſtretched, to comprehend offices and dignities, which, are ſtrictly *beneficiary*, not at all *patrimonial*.

It is very true, that the office, of heritable uſher, is not of the firſt magnitude: Perhaps, it does not require any particular ſkill, or activity, to perform the duty of the office. But, then, it is a grant, from the Crown, to a certain family, ſelected to ſerve as uſher; and, the King cannot have other uſhers impoſed upon him, but whom he has choſen. Every heir is entitled to the office, as called to it perſonally, by the grant; and not as deriving any right from his predeceſſor. At the ſame time, it cannot paſs obſervation, that the defenders ſeem to give little attention to conſequences, when they urge, the meanneſs of the office, as an argument in their favour. Were the judgment, in this caſe, to affect the purſuer only, it

No 47. would not deſerve any regard, further than ſo far as juſtice is concerned. But, it makes the preſent queſtion of the utmoſt importance, that it is a leading caſe; for, whatever judgment is here given, muſt be applicable to offices of the higheſt truſt and importance, as well as the loweſt. If the office of uſher be found adjudgeable, the Court cannot ſtop ſhort; but muſt find the ſame, as to all the hereditary offices in the kingdom; the greateſt in power and dignity not excepted.

This train of reaſoning may be reduced, into a narrow compaſs. The nature of theſe offices preſerves them from being *in commercio;* and, when we conſider the manner of their eſtabliſhment by feudal holding, it muſt be yielded, there was a time when they were *extra commercium*, as much as land was. Land is now *in commercio*; and it is good policy it ſhould be ſo. The direct contrary obtains, in dignities and offices: It would be a groſs abuſe, to bring them into commerce. Theſe things being yielded, (and there is no diſputing any of them,) it remains, upon the defenders, to make out, that this abuſe, however groſs, is ſanctified by practice and cuſtom. If they can bring full evidence of this, there is no help for it; they muſt gain their cauſe. But, if they can only give a few inſtances, where heritable ſheriffſhips have been adjudged, and, at beſt, acquieſced in, without challenge, (not one ſingle inſtance, where the ſame, upon challenge, has got the countenance, and authority, of a court of law,) ſuch inſtances can only ſhew, that the abuſe is creeping in; which, inſtead of being a favourable circumſtance for the defenders, ought to rouſe the attention of the public, and engage the Court of Seſſion, by a judgment, upon the point of right, to put an end, at once, to this encroachment upon law and good policy. What an appearance muſt it have, to ſee the twofold power of a magiſtrate, and of a judge, put to ſale in a market, under the title of a ſheriffſhip? A thing, that would be remarked, as uncouth, even in the hiſtory of ſavages. And yet, the conſequence is evident; for, if a ſheriffſhip be found adjudgeable for debt, ſuch a judgment muſt pave the way, to bring it abſolutely into commerce. In a country, where offices are venal, it is no wonder, that every thing elſe ſhould be bought and ſold. But, the purſuer reſts, in the humble aſſurance, that the Court of Seſſion will never give countenance to ſuch a groſs corruption.

As the defenders laid great weight, upon the many inſtances, produced by them, of heritable offices paſſing by *retours*, (concluding, from thence, that heritable offices are conſidered, in our practice, to be *patrimonial*, and, conſequently, attachable, for payment of debt,) the purſuer endeavoured to remove the weight of theſe inſtances, by obſerving, that there is no inſtance of a ſervice, where nothing was intended to be taken up but an office, or a dignity. The inſtance of Charles II.'s ſerving heir to the Duke of Lennox, in order to carry the heritable offices of high admiral, and high chamberlain, does not hold true in fact: The brieve was taken out to ſerve the King heir in the earldom of Lenox; and theſe offices went into the retour, as being annexed to the earldom, and contained in the charter from whence a deſcription of the lands was taken. And it muſt be

obvious, that inſtances of retours of lands where offices and dignities are alſo engroſſed, can be of no weight to prove, that, in our practice, retours are neceſſary to connect the heir's title to an office, or dignity; ſince the retour, at any rate, is neceſſary for the land. But, as this matter is of importance, the purſuer will conſider it a little more at large. No 17.

There can be little doubt, that the renovation of the feu, in the perſon of every heir, was requiſite, in dignities and offices, as well as in land. What was the preciſe form of the renovation, in theſe caſes, is a little dark. Our lawyers are ſilent upon this head; probably becauſe the thing has not often occurred: For, originally, offices, and dignities, were always annexed to land; and the renovation of the feu, by infeftment, upon a retour, carried, along, the whole connected rights. In England, at this very day, we find traces, of the renovation of the feu, in dignities: The heir of a peer cannot take his ſeat in Parliament, at ſhort hand, but muſt be introduced, by two other peers, in a form preſcribed by cuſtom; and, probably, there has been ſome ſuch thing in Scotland. But, however this be, one thing is extremely plain, that a ſervice, and retour, can never be requiſite, for making up the heir's title, in a dignity, or office, unleſs where annexed to land. It is obvious, that a ſervice and retour is calculated for land only. The queſtions, which are put to the inqueſt, do, all of them, regard the land, in which the predeceſſor died infeft; and the verdict, or anſwers, made by the jury, are adapted to the queſtions. At the ſame time, in giving the heir poſſeſſion of his father's dignity, or office, there was no neceſſity of an inquiſition, as in the caſe of land. The King, though he is not ſuppoſed to know the condition and circumſtances of every one of his vaſſals, can ſcarcely fail to be perſonally acquainted with every one of his nobles, and with every one of his office bearers; and, therefore, for ought appears, the heir was admitted in theſe caſes, whatever was the form of the admiſſion, without any preceding inquiſition.

And this is the true reaſon, and foundation of the rule, that ſervice is not neceſſary in dignities, and in offices. An heir-apparent, of a peer, may, without any ſolemnity, aſſume his predeceſſor's title; which, of courſe, gives him all the privileges belonging to it. The caſe is the ſame, with regard to an office. And it would appear, that, if there has been any particular form, in theſe caſes, of renewing the feu in the perſon of the heir, the ſame has worn out of practice, as the ſtrict forms of the feudal law are univerſally wearing out. And ſo, with regard to dignities and offices, the caſe, among us, at preſent, comes to be much upon the ſame footing with what has always been the law of France, lands not excepted, that *mortuus ſaſit vivum*; which, in plain Engliſh, is, that the heir is entitled to take up his predeceſſor's right at ſhort hand, without needing a renovation of the feu from the ſuperior.

The purſuer thought it neceſſary, to explain this matter at large; both as tending to ſupport one branch of his libel, viz. that he is entitled to take up the office of uſher, without a ſervice, and, conſequently, without being ſubjected to the debts of his predeceſſor; and alſo, as furniſhing, in his apprehenſion, a ſtrong

No 17. additional argument, in support of the first branch of his libel, viz. *that the subject is not adjudgeable.* For to say, A subject may be taken up by an heir, without incurring a passive title, and to say, That a subject is not adjudgeable, are propositions intimately connected; the one must be a consequence of the other: The reason is, that a man can withhold from his creditors no subject, which he can turn into money, for their payment: Every such subject may be attached by legal execution; and the heir, who takes up such a subject, must be liable in a passive title, as intromitting with a fund which ought to go to creditors for their payment. If, therefore, there be a subject which is not attachable by creditors, we may safely conclude, that the heir may take up the same, without incurring a passive title; as *e converso*, if there be a subject which the heir may take up without incurring a passive title, we may as safely conclude, that the same is not attachable by creditors. This seems to be resting upon a secure foundation: Let us apply. It is *tritissimi juris*, that an heir may take up his predecessor's peerage, without danger of incurring any passive title; *ergo*, a peerage is not adjudgeable, It was never dreamed, that the taking up an hereditary office makes the heir liable to his predecessor's debts; *ergo*, an hereditable office is not adjudgeable. It is said, that the Earl of Moray purchased the shirrifship of Moray from Dunbar of Westfield. Let us suppose the family-estate to be quite gone, and the heir of the family of Moray reduced to his peerage and shirrifship: Will it be said, that he cannot take up the shirrifship, without incurring a passive title? Such doctrine is not to be met with, in our law books; and the pursuer will take the contrary for granted, till the proposition be proved from principles, or from authority. But he has no occasion to rest upon the negative proposition: He has the express authority of the Court of Session for him. A process, upon the passive titles, was brought against the Earl Marishal; and the passive titles, condescended on were, his using the title, and exercising the office. 'THE LORDS found peerages and 'and offices not to be *in commercio;* and, therefore, that the defender's using the 'title of Earl, and exercising the office of Marishal, infer no passive title, 2d February 1682, Bower of Kilmidrum, *contra* Earl Marishal.' (*See* PASSIVE TITLE.) Here is a judgment in point, that an heir's taking up, and exercising, a hereditary office, makes not a passive title. The reason given, in the decision, is, that offices and dignities, are not *in commercio*, cannot be bought and sold. And it is a necessary inference, that they are not adjudgeable for payment of debt. This direct authority, of the Court of Session, in the pursuer's favour, is worth a hundred instances, if so many could be brought, of heritable offices being sold privately, and connived at, without challenge.

It has been urged, by the defenders, 'That the jurisdiction of a baron, or of a 'lord of regality, are merely territorial; are inherent qualities, or privileges, be-'longing to the land; and go, along with the land, to every purchaser.' The nature of an office, which has no relation to land, is very different. It may, occasionally, be annexed, or united, to land; as any two things may be united by a charter; however incapable of natural union: But such an union is as easily dis-

No 17.

ſolved as it is eſtabliſhed. Alienation of the land, by the vaſſal, diſſolves the union; and, therefore, an adjudication of the land will not carry, along with it, the office: On the contrary, the adjudging the land is one of the ways by which the union is diſſolved.

The caſe being reported by Lord Arniſton, 'THE LORDS found the office in 'queſtion adjudgeable.' The purſuer reclaimed; and, with the anſwers, was given in, a large excerpt from the records, tending to ſhew, that offices had deviated from their original nature, as well as land, to become *patrimonial*, in place of being *beneficiary;* and, therefore, that, by practice, offices were become the ſubject of commerce, as well as land; though the former was not ſo thoroughly eſtabliſhed as the latter. When this cauſe came to be conſidered, upon the petition and anſwers, with the ſaid excerpts, the judges were all of opinion, that it was an irrational practice to ſubject offices, like this in queſtion, to be diſtrained for payment of debt. But, then, it was thought, that the practice had gone too far to be altered; and that it might be of dangerous conſequence, to many, who poſſeſs ſuch offices, by legal, or voluntary conveyance, to find this office not adjudgeable. And, for that reaſon, they adhered to their former interlocutor, the Preſident alone diſſenting. But they ſtopt there; and refuſed to find, that the office muſt be carried by a ſervice, ſo as to ſubject the heir to all the debts of his anceſtor.

This judgment was affirmed, upon an appeal to the Houſe of Lords, in the following terms:

'ORDERED and ADJUDGED, That the appeal be diſmiſſed, and the interlocutors 'complained of, be affirmed.'

Fol. Dic. v. 3. p. 9. Rem. Dec. v. 2. p. 125.

*** This caſe is alſo ſtated by Mr D. Falconer, under the title, Sir JAMES COCKBURN *againſt* Sir WILLIAM COCKBURN, and under date, 23*d July* 1747, in the following manner:

KING Robert II. granted to Alexander Cockburn, Eſquire, the baronies of Bolton, Carriden, and Langton, '*Itaque quod dictus Alexander hæredes vel aſſig-*
'*nati ſui interſit vel interſint tres ſectas capitales, viz. ſectam itineris juſticiarii tent.*
'*infra vicecomitat. de Berwick, ſectam itineris juſticiarii tent. apud Edinburgh &*
'*Parliamentum tent. apud Scoon, & quod dictus Alexander vel heredes ſint principales*
'*oſtiarii noſtri ad noſtra parliamenta, generalia concilia & feſta, capiendo de nobis &*
'*ſucceſſoribus noſtris, per dictum tempus liberationem, pro duobus armigeris, duobus*
'*arcutenentibus, cum gladiferis, & equis pertinentibus iisdem, reddendo inde annuatim*
'*par calcarium deauratorum.*'

James IV., on the reſignation of William Cockburn of Langton, granted, to 1509.
Alexander, his ſon, the baronies of Langton and Carriden, with the office of

No 18. uſher; which he united into one barony, and annexed thereto the office; all to be held in *libera baronia*, reſerving the father's liferent.

1595. Sir William Cockburn of Langton, who held the barony containing the office to him, and his heirs-male, reſigned the ſame, and took it to the heirs-male of his body; which failing, to Cockburn of Clarkington, and the heirs-male of his body; 1609. which failing, to his own heirs-male whatſoever. This charter contained a *novodamus*; and it is to be obſerved, that Sir William's immediate predeceſſor had held to heirs and aſſignees whatſoever.

1642. The office of uſher, and caſualties thereof, was granted to Sir William Cockburn, '*Reſervata omnimodo libertate & plena poteſtate Jacobo Maxwell de Innerwick, &* '*Willielmo Maxwell de Kirkhouſe, eorumque alteri diutius viventi, dict. officium, tan-* '*quam conjunctos oſtiarios, cum omnibus privilegiis, feodis & divoriis dict. officio ſpec-* '*tantibus, ſecundum eorum jura ſeparata & poſſeſſionem, durant. omnibus eorum vitæ* '*diebus, aut cujuſlibet eorum.*'

As, by this laſt charter, the office appears to have been alienated in liferent, ſo there were ſeveral ſubſequent ones to the proprietor and liferenters; and it was 1662. again granted and confirmed to Sir Archibald Cockburn, and united with the barony, reſerving to the liferenter the office of uſherſhip; and, the liferent being 1674. purchaſed in, the lands and office, and a fee of L. 250 ſterling, all united into a barony, were granted to Sir Archibald, and his heirs-male, and aſſignees, whatſoever.

1686. Upon Sir Archibald's reſignation, the barony, office of uſher, and perquiſites, were granted to Archibald, his ſon, reſerving the father's liferent, and a faculty to burden with 50,000 merks Scots.

1711. Sir Alexander Cockburn was ſerved heir to his brother, Archibald, in the lands and barony, office of uſher, penſion, and whole caſualties, particularly mentioned. Theſe were the moſt remarkable parts of the progreſs.

1690. Archibald Cockburn, above mentioned, diſponed the office of uſher to Sir James Cockburn, for relief of certain engagements he ſtood bound in; and, other creditors having adjudged, a competition enſued, in which Sir James was preferred; ſince which time, he, and Sir William, his ſon, have poſſeſſed the fees; the duty of the office being, in the mean time, performed by the heirs of the family.

Sir Alexander Cockburn, heir of the family, inſiſted in a declarator, concluding, that it was not a patrimonial eſtate, alienable by his predeceſſors, or affectable by their creditors; but that it muſt deſcend to the heirs of the family, in their right of blood; and that his taking and holding this office, could not ſubject him to the debts of his predeceſſors.

Pleaded for the purſuer, That there had been many heritable offices in the kingdom, ſome of which yet exiſted, and no creditor had hitherto attempted to adjudge them; that all feus were originally perſonal, after which they were granted to heirs, but were ſtill unalienable; that on the decline of the feudal law, as Craig called it, they came to be purchaſed for money, to be bought and ſold by the vaſſal, and appriſed for his debts; but it was not till 1469, that the ſu-

perior was obliged to receive the appriſer on payment of a year's rent, or pay the debt; this was the effect of a poſitive ſtatute, relating indeed to all things properly patrimonial, but not to offices which were granted by the King, from a perſonal regard to the officer, and thoſe of his blood, and for ſervices, which brought no patrimonial advantages to the ſuperior; they were therefore not alienable, and the Crown was not obliged to admit an appriſer, ſince the reaſon failed on which appriſings were introduced, to wit, that the ſubject was bought with the vaſſal's money, and ought to be ſubject to his debts; nor had the ſuperior reaſon to complain where the *reddendo* was chiefly a pecuniary patrimonial intereſt, which any perſon might pay. That offices conferred by the Crown, carried alongſt with them a dignity, a kind of nobility, as was obſerved by Craig, l. 1. D. 10. § 9., which was not *in commercio*; and hence titles of honour were deſcendible to heirs in right of blood, but were not *in commercio*; they were anciently feus given for life, afterwards hereditary, Craig, l. 1. D. 4. § 4. & ſeqq. & D. 10. § 12. But as theſe noble feus had nothing pecuniary or patrimonial, they were not ſubject to diligence. No 17.

The ſame rule applied to heritable offices, which were feus conveying dignity, whereof many were mentioned by Craig, l. 3. D. 1. § 2., of this ſort was an heritable Sheriffſhip; it deſcended to heirs in right of blood, but was not alienable, nor ſubject to diligence; and of this ſort alſo was the office of uſher to the king, in his parliaments, conventions, councils, and feſtivals: It imported a truſt about the king's perſon; and the attendants he was bound to have, demonſtrated the dignity which belonged to him; it therefore was unalienable, and deſcended to the heirs by blood of the officer, without ſubjecting them to any paſſive title, 2d February 1682, Bower of Kileondrum *againſt* the Earl Mariſhal, (*See* PASSIVE TITLE); from which it followed, that no ſervice was neceſſary, or if it was, it ought not to ſubject him to a paſſive title.

Pleaded for the defender, That originally the office was part of the ſervice due for the baronies of Bolton, Carriden, and Langton, and behoved to paſs with them; afterwards, though it was granted in fee and heritage, in the manner as the baronies, with a *reddendo* for the whole, yet it was annexed and incorporated with that of Langton; and therefore might be tranſmitted in the ſame manner as the barony; the deſtination was ſometimes to heirs whatſoever, ſometimes to heirs male of the fiar's body; whom failing, to an extraneous perſon, and the heirs male of his body; whom failing, to the fiar's heirs male whatſoever, and ſometimes to heirs male and aſſignees whatſoever; and theſe alterations were made without any ſpecial warrant from the Crown, ſometimes without ſo much as a *novodamus*, but upon common reſignations. The office was granted with reſervation of liferents; there were liferents conſtituted upon it; it had been taken up by ſervice and retour; and therefore, it was not eaſy to conceive how the nature of it ſhould be ſo far changed, as now not to be tranſmiſſible in the ſame way as other rights of property.

No 17. In the caſe of the preſent office, there was no *delectus perſonæ*, nor indeed could there be any, ſince feus went to heirs; but, in this, no great qualifications could be requiſite to open and ſhut a door.

There was a difference between dignities of peerage, which were agreed not to be alienable, and ſuch offices as an *oſtiarius* or door-keeper, the firſt ennobled the blood, and for that reaſon were carried with the blood, without any ſolemnity; but, ſuch an office conferred no dignity, and the feu thereof, by the modern cuſtoms, was alienable and affectable by diligence, by the nature of the grant, veſting the property, and the expreſs quality therein, giving it to heirs and aſſignees.

All the great heritable offices in the kingdom had been taken up by retours. King Charles II. was ſerved heir to the Duke of Lennox, in the offices of high admiral and high chamberlain. Heritable ſheriffſhips, had been conveyed by voluntary and legal tranſmiſſions; and many inſtances there were of the other offices to the ſame purpoſe.

It was a miſtake, that appriſings were only introduced in James III.'s time, ſince they were mentioned in the ſtatutes of Alexander and Robert I. And though it might be true, theſe ſtatutes concerned only land, they had been extended to all patrimonial intereſts, and to ſome as indiviſible as this; and this difficulty was eaſily remedied by rouping the ſubject for the benefit of all concerned. Indeed, the preſent queſtion had been already determined in the competition concerning this office, amongſt the creditors of Langton, wherein the defender was preferred, and though the parties there, all concurred to make it alienable, yet if it was not ſo, it was *pars judicis* to notice it.

As the defender in pleading, needed not make his cauſe weaker than it was, he behoved to notice a diſtinction betwixt the greater and the leſſer offices, one whereof, viz. that of King's printer, had lately been found adjudgeable; the firſt carried a dignity alongſt with them, which it were abſurd to attribute to the other, though it had never been decided, that even the greateſt were not adjudgeable, when they came to be patrimonial; and Craig, l. 3. D. 2. fol. 255. nov. edit. expreſsly ſaid, *Idem ſi debitor aliquod officium ſive adminiſtrationem publicam, quæ ei eſt hereditaria, habuerit, nam & ea ut ejus propria poteſt licitari.*

There was produced for the defender, a condeſcendence, from the records of charters, relating to this office; the chief of which have been noticed; alſo of retours of ſeveral heritable offices, particularly ſheriffſhips, alongſt with lands, and of charters of heritable offices, upon adjudications and judicial ſales, and voluntary tranſmiſſions, without any *novodamus*, ſome of which without any lands annexed.

Pleaded for the purſuer, The argument for the defender, that the office was part of the *reddendo* of the three baronies, proved too much; for then part of it muſt have paſt from the family, when two of them were alienated, which it did not; and this was alſo contrary to the decreet, whereby Sir James Cockburn, who had right to the office alone, was preferred to creditors infeft prior in the barony.

2*do*, Charters had not then received a determinate ſtyle, nor were the clauſes diſtinguiſhed; and therefore, though the office was not in the diſpoſitive clauſe, it would not follow that it was a part of the *reddendo*; and in all the after charters, it was granted as a diſtinct feu. The annexation thereof to the barony, did not alter its nature; anciently, titles of honour were given together with lands, erected into *feuda nobilia*; and ſtill when one is poſſeſſed of a title of honour, it is ordinary to erect his lands into an earldom or lordſhip, which is a ſtrong annexation of the dignity to the eſtate, particularly King Charles II. gave the title of Earl to Gilbert Earl of Errol, and erected the ſaid title, office of conſtabulary, lands and baronies, into an haill and free earldom; in which, and ſeveral other inſtances that might be given, the lands were ſubject to legal and voluntary alienation, without affecting either the titles or offices. No 17.

The alienation by one of the fiar's to his ſon, reſerving the liferent, was no proper alienation, but like a reſignation by a peer to his heir, who did not thereby become a peer, the reſerved liferent being in all reſpects equal to a fee, and the other liferents conſtitute upon it, did not appear to be done by the fiar, but by the king *per* recital of the ſubſequent grants to Sir William Cockburn, in 1642 and 1647, by which, upon that account, he obtained a fee of L. 400 Scots, with a declaration, that theſe grants in liferent ſhould be no precedent.

The occaſion of taking up offices by retour, had been, their being annexed to lands for which the retour was neceſſary, as King Charles was ſerved to the Duke of Lennox, in the lands and dukedom thereof, and offices annexed, but this did not prove a retour neceſſary for a ſimple office. It might be true they had been adjudged, becauſe adjudications paſt without enquiry, the ſubjects being copied by the writer from the debtor's infeftment. The caſe of the King's printer, ſtill liable to review, differed in many circumſtances; 1*mo*, the office itſelf, which was only a monopoly, and might be reckoned wholly patrimonial, was not like an office about the King's perſon; 2*do*, It had no dignity annexed; and 3*tio*, was always granted to aſſignees.

In the decreet of preference, obtained by Sir James Cockburn, there was no compearance for the proprietor, the parties were all creditors; the point was never ſtated to the Court, and the whole determined by one interlocutor of an Ordinary; ſo far was this from a *res judicata*, that it ought not to be allowed the force of a deciſion or precedent.

The Lords, 14th December 1744, 'Found that the office in queſtion was adjudgeable.'

A reclaiming bill being preſented and anſwered, before any determination could be given thereon, Sir Alexander was killed in the battle of Fontenoy, after which the cauſe lay over, till it was taken up by Sir James the heir male; and the defender having, in the mean time, ſearched carefully the records, gave in a condeſcendence, which may be ſaid to have taken away all queſtion, as ſeveral Lords who differed from the interlocutor, and thought the point in abſtract argument, with the purſuer, without heſitation, agreed to adhere; and therefore,

No 17. the heads of this condeſcendence, as divided into chapters by the defender himſelf, ſhall be ſubjoined. Voluntary titles, cap. 1. Charters and infeftments of heritable offices *per ſe*, cap. 2. Retours and infeftments in heritable offices *per ſe*, cap. 3. The King's officers accountable for the non-entry duties of heritable offices *per ſe*, cap. 4. Gifts of the ward and non-entry of heritable offices *per ſe*, cap. 5. Heritable offices *per ſe*, granted by the crown to ſingular ſucceſſors, upon the reſignation of the former proprietors, cap. 6. Charters of ſale of heritable offices, *per ſe*, by ſubjects for a price paid, confirmed by the Crown, cap. 7. Heritable offices limited by the Crown to the grantees and the heirs of their body, whom failing to return to the Crown, cap. 8. Heritable offices limited to the grantees and the heirs of their bodies, whom failing to return to the granters; with prohibitory, reſolutive, and irritant clauſes, cap. 9. Offices given in liferent and fee, with power to the liferenter, to ſell and diſpoſe thereof at pleaſure, without conſent of the fiar, cap. 10. Wives provided to the liferent of heritable offices, and entitled to a terce of the profits thereof, cap. 11. Heritable offices ſold, purchaſed, and diſponed by the Crown, in way of mortgage, and under reverſion, cap. 12. A proportion of the taxed duties payable to the crown for lands and heritable offices jointly, is laid upon the offices when diſponed ſeparately, and engroſſed in the *reddendo* accordingly, cap. 13. Shewing that the offices of high admiral and chamberlain, are patrimonial, and the charters thereof, proper feus, cap. 14. Shewing, *1mo*, That the office of high conſtable of Scotland is patrimonial, and the charters thereof feudal; *2do*, That this office was alienate to Francis, the ſecond ſon of the Earl of Errol, and the ſons of an after marriage, excluding Alexander, his then eldeſt ſon, and Thomas his third ſon, and their deſcendants. *3tio*, That the office and fees thereof were ſet in tack to William Henderſon, and, upon his forfeiture, Andrew Maſter of Errol, obtained a gift of the eſcheat of ſaid tack, cap. 15. Progreſs of the titles to the office of the keeper of the park of Holyroodhouſe, cap. 16. Office of uſher or door keeper of the King's chapel, cap. 17. Progreſs of titles to the office of macer and King's ſerjeant, cap. 18. Progreſs of the titles to the office of uſher of exchequer.

Legal Titles, Cap. 1. Shewing, that when a debtor had obtained a charter, but taken no infeftment upon it, the King was in uſe, upon the creditor's ſupplication, to iſſue letters, commanding the debtor to take infeftment within forty days, to the end the creditor might obtain the heritage, appriſed for payment of his debt, with certification if he failed, the King would enter the creditor; and when the debtor neglected to obey the charge, the lords of the King's council, then the judges, adviſed the King to diſpone to the creditor, as much of the debtor's heritable eſtate as was equivalent to the debt; whereupon the King diſpones to the creditor certain lands and offices belonging to the debtor, redeemable to the creditor within ſeven years, conform to act of Parliament. Cap. 2. Shewing, that before general appriſings were introduced, heritable offices as well as lands, were appreciate upon oath by the jury, and thereafter offered to public ſale: and when no offerers appeared, the ſame were judicially diſponed to the

creditors in satisfaction of their debts, in whole or in part, according to the value put upon them. Cap. 3. Heritable offices, as well as lands, universally appriſed and adjudged to creditors, and diſponed to them by the King, in execution and implement of the act of Parliament. Cap. 4. Lands and certain fees belong to heritable offices of juriſdiction, appriſed during the time of the uſurpation (when offices themſelves were ſuppreſſed), and accordingly diſponed to the creditors by charters under the Great Seal, *vide* Scobell's Collection of the acts of Parliament, from 1640 to 1656, cap. 2. anno 1652, and cap. 9. anno 1656. Cap. 5. Heritable offices adjudged by creditors after the debtor's death, upon the apparent heirs renouncing to be heirs to the debtors their predeceſſors, and the adjudgers ordained to be infeft in the offices by decree of the Lords of Seſſion, upon precept under the quarter ſeal, and alſo upon charters under the Great Seal. Cap 6. Heritable offices, judicially ſold by public roup, by the Court of Seſſion, and poſſeſſed by the purchaſers upon theſe titles. No 17.

Acts of Parliament, cap. 1. confirming charters of offices to the grantees, and declaring the ſame to be good and effectual rights. Cap. 2. Heritable offices are the property of the owners as much as lands or any other inheritance, and have been always excepted from general public laws as rights of property, and as ſuch, ſuppoſed by the Legiſlature, to be alienable by the proprietors; and, in conſequence of this, the act 1681, declaring a cumulative juriſdiction, and the impoſing judges, where there were heritable offices and juriſdictions, are declared illegal by the claim of right; and heritable officers diſpoſſeſſed by the crown, have been reponed by act of Parliament to the enjoyment of their offices, as their property veſted in them by their rights and infeftments.

THE LORDS adhered.

Act. *R. Craigie, W. Grant, & H. Home.* Alt. *Graham & Ferguſon.* Clerk, *Kirkpatrick.*
D. Falconer, v. 1. p 373.

1749. *February* 17. EARL of CAITHNESS *againſt* SINCLAIR of Ulbſter.

No 18.
The privilege of ſuperintending the election of a town, found to be adjudgeable.

THE town of Wick was erected into a royal burgh, by a charter from the Crown, *anno* 1589, containing regulations for electing the magiſtrates and council, in the following words: 'Cum ſpeciali et plenaria poteſtate liberis inhibitantibus et burgenſibus dicti burgi, et ſuis ſucceſſoribus in futurum, cum expreſſo aviſamento et conſenſu dicti noſtri conſanguinei Georgii comitis de Caithneſs, et ejus hæredum et ſucceſſorum, et non aliter ſeu alio modo, præpoſitum et quatuor balivos, dicti burgi incolas, ſeu inhabitatores, una cum theſaurario, gildæ decano, conſulibus, burgenſibus, ſerjeandis, aliiſque officiariis neceſſariis intra dictum burgum, pro gubernatione ejusdem, faciendi, eligendi, conſtituendi et creandi, eoſque, toties quoties expediens videbitur, pro cauſis rationalibus, deponendi.'