In a competition of the creditors of Stenhope, the queſtion occurred, Whether the mines were carried by the adjudication which mentioned the lands only? No 19.

Pleaded for Oughterlony, who adjudged both the lands and the mines: He who has right to lands, may, in terms of the act 1592, demand a charter of mines. This faculty of demanding will be carried by an adjudication of lands: But after this faculty has been exerciſed, and a charter of mines obtained, the lands and the mines are held under different titles, and muſt be ſeparately adjudged. Thus an adjudication of lands may carry the right which the proprietor has of purchaſing the teinds of thoſe lands; but ſuch adjudication will not carry the teinds already belonging to the proprietor of the lands.

Pleaded for the Earl of Selkirk, who adjudged the lands only: By the act 1592, the proprietor of lands may demand a charter of mines, and he alone may work them; he cannot work them after the lands have been adjudged from him. Unleſs, therefore, the adjudication of lands carry the mines, the grant of the mines muſt become ineffectual, and the intention of the act 1592 be fruſtrated.

'THE LORDS found, That the adjuſtication of the lands comprehends the mines.'

Reporter, *Strichen*. For Oughterlony, *Sir D. Dalrymple & Lockhart*. Alt. *Miller & Brown*. Clerk, *Juſtice*.

Fol. Dic. v. 3. p. 9. Fac. Col. No 167. p. 249.

Dalrymple.

1759. *December 7.* MARION WILSON *againſt* ALEXANDER FALCONER.

No 20.
The office of keeper of the regiſter of ſaſines, granted during life, with power to name a deputy, found not to be adjudgeable.

ALEXANDER FALCONER, keeper of the regiſter of ſaſines for the ſhire of Berwick, in which office he had a power to name a deputy, being debtor to the purſuer, ſhe raiſed an action of adjudication of this office.

Pleaded for Falconer, The office is not adjudgeable; becauſe it is not a patrimonial eſtate. The defender has only his commiſſion during life, or ſo long as he executes the office properly; it does not go to heirs; and it cannot be aſſigned: But an adjudication is a legal aſſignation.

In the nomination of a perſon to this office, there is a *dilectus perſonæ*. Diligence and fidelity are requiſite in the execution of it, for which there can be no ſecurity, if it may be attached indiſcriminately by any creditor of the officer. The Crown has inveſted him with certain powers. His regiſter, and extracts from it, bear faith in all courts. Theſe powers he may commit to a deputy; but no court has a power to transfer them to creditors. Some few inſtances may indeed be given, where offices of truſt have been adjudged; ſuch as that of ſheriff, uſher, and printer to the King, &c. But the principles on which theſe deciſions were founded, are not void of difficulty. Beſides, theſe were caſes very different.

No 20. from the preſent. In each of them there was an heritable patrimonial intereſt; they paſſed by charter and ſaſine, as land-rights do, or deſcended to heirs. They were granted in perpetuity, or for a certain term of years; and might be aſſigned, bought and ſold, without the approbation or acceſſion of the Crown, as any other thing in property may. But this office is of uncertain duration; it is granted for life, or *quamdiu ſe bene geſſerit*; it cannot be transferred from one perſon to another, without a new commiſſion from the Crown; and it is not in any ſhape given by the Crown as a patrimonial eſtate or property.

Pleaded for the purſuer, That in law and reaſon every perſon's eſtate, whether heritable or moveable, whether in liferent or fee, whether it is an eſtate veſted for a long or a ſhort endurance, ought to be ſubjected to the diligence of his creditors. It is admitted, that many heritable offices of truſt, in which a *dilectus perſonæ* was proper in a very high degree, and which were veſted by the Crown with great powers, and a public character, ſuch as thoſe of Conſtable, Juſticiar, Chamberlain, Sheriff, Steward, Mayor, Bailie, Foreſter, Coroner, King's Uſher, and King's Printer, have been ſo far conſidered as property, that they have been adjudged; and, as ſuch offices have been adjudged, when granted heritably, or for a term of years, a good reaſon does not occur, why they might not have been adjudged, had they been granted only for life.

There is no difference in the nature of the thing betwixt an heritable office, and an office for life, except in the endurance. The terms of the grant, in other reſpects, are the ſame, the duties of the offices are the ſame. A prohibition to alienate is not more implied in the one than in the other; and an heritable office is not more the property of the poſſeſſor than a liferent one is, for the terms of their reſpective endurance. It appears then incongruous, that the one ſhould have it in his power to with-hold his eſtate from his creditors, and that the other ſhould not have the ſame power. In other ſubjects, this diſtinction is not obſerved; a terce, a courteſy, the liferent of an heir of entail, or any other liferent of a land-eſtate, may be adjudged as well as the fee of it. Suppoſe the liferent of an office is granted to a man, and the fee of it to his ſon, it will not be diſputed, that the liferent of this office would be adjudgeable for the debt of the father, as his property. By parity of reaſon, the liferent of an office ought to be ſubjected to the diligence of creditors, although the fee of it is not given away, but remains in the Crown.

Every objection ariſing from the importance of this office, from the *dilectus perſonæ*, the care and diligence requiſite in executing it, and the powers veſted in the officer by the Crown, ought to have applied with more weight againſt the adjudication of the high heritable juriſdictions already mentioned. Beſides, the nice choice of a perſon to officiate in this office is not neceſſary, it requires only a faithful tranſcriber. The defender, by his commiſſion, is impowered to name any perſon he pleaſes to be his deputy; and the creditors may be as capable to officiate, or to appoint a proper deputy, as the officer himſelf. By act 6, Parl. 1424, it is provided, That where officers of the law are incapable, others may be

appointed in their places;—but what greater incapacity can there be than bankruptcy? and who are ſo well entitled to enjoy the office during the incapacity, as the creditors of ſuch officer? This queſtion has been formerly determined in the Court of Seſſion. The creditors of Hugh Crawford, keeper of the regiſter of ſaſines for the ſhire of Renfrew, led ſeveral adjudications of his office from the 1750 to 1753. No 20.

Replied, The argument founded on the act of James I. does not apply. The power granted of naming perſons to officiate during the incapacity of officers of the law, or other officers, was only in the caſe of heritable offices, of which the poſſeſſor, though minor, or otherwiſe incapable, could not be deprived. But this is an office *ad vitam aut culpam*. If the officer is incapable of officiating, he may be deprived. The adjudications led againſt Hugh Crawford were pronounced by the Lord Ordinary in the outer-houſe, and no appearance was made for Crawford the debtor.

'THE LORDS found the office not adjudgeable.' *

Act. *J. Dalrymple.* Alt. *P. Murray.*

Fol. Dic. v. 3. p. 9. Fac. Col. No 201. p. 359.

Campbell.

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* On this caſe Lord Kames makes the following obſervations:—In the year 1742, Alexander Falconer, town-clerk of Lauder, obtained a commiſſion from his Majeſty to be keeper of the regiſter of ſaſines and reverſions for the town of Lauder, bailiery of Lauderdale, and ſheriffdom of Berwick, with the fees and emoluments thereof. The commiſſion is for life, and empowers Alexander Falconer to appoint a deputy or deputies to act for him.

His creditor Marion Wilſon, raiſed a proceſs of adjudication, in order to affect this liferent-office. And it was urged for her, that all offices of profit are adjudgeable, liferent-offices as well as what are hereditary. The defender admitted, that any ſubject deſcendable to heirs, is to be underſtood patrimonial; and, therefore, in its nature is attachable by legal execution. But he contended, that a liferent-office is of the nature of a truſt, implying a *dilectus perſonæ*, that it cannot be transferred by will, and therefore is not adjudgeable. This is the reaſon why the office of a Judge of the Court of Seſſion is not adjudgeable; and the ſame reaſoning is applicable to the office of keeper of the regiſter of ſaſines. The Court refuſed to ſuſtain the adjudication.

This deciſion deſerves ſcarce to be conſidered an an authority. The point was but ſuperficially handled by the purſuer, and the Court took up with the topics that were ſet before them, without piercing to the foundation. It ſeems clear, that the office itſelf is not adjudgeable. It was certainly not in the power of the Court of Seſſion, by means of an adjudication, or by any means, to forfeit Falconer of his office, and in his ſtead to name Marion Wilſon keeper of the regiſter of ſaſines. This power is inherent in the Crown, and does not belong to the Court of Seſſion. Next, to transfer the office to the creditor, is repugnant to the very nature of an adjudication, conſidered as a ſecurity only, which is the caſe during the legal. A ſecurity upon land may be granted voluntarily, in order to levy the rents; and the ſame ſecurity may be eſtabliſhed by adjudication. But ſuppoſing a liferent office to be alienable by will, ſo as to put the diſponee in the place of the diſponer, we can form no idea of a ſecurity granted upon an office; for the right to an office is in its nature indiviſible, and cannot be ſplit into parts like a right to lands, of which one may enjoy the property, and another a real ſecurity; and for that reaſon, a ſecurity upon an office cannot be eſtabliſhed, whether by conſent or by authority of a judge. But, as there is nothing in law to bar a voluntry conveyance of the emoluments of an office in ſecurity and payment of debt, as little is there to bar an adjudication of theſe emoluments. This leads to

1779. *January* 23. COLVILLS PETITIONERS.

No 21.
An entailed eſtate may be adjudged.

MESSRS COLVILLS, being notour bankrupts, a creditor brought an adjudication againſt them, in which a term taken for producing a progreſs, was circumduced. Decree was pronounced and extracted; all was done regularly, but as quickly as the forms of Court would admit of. Meſſrs Colvills, by petition, ſtated, That they were in danger of incurring an irritancy, as their eſtate was ſtrictly intailed: And they complained of the precipitancy with which the decree had been taken.

THE LORDS refuſed the petition; not only becauſe the decree was irregular; but in reſpect that the petitioners being bankrupt, were not entitled to produce a progreſs; and that creditors are entitled to adjudge their debtors eſtate, whether it be entailed or not.

Fol. Dic. v. 3. *p.* 4.

1629. *February* 26. ANONYMOUS. *Durie, p.* 430.
See ADJUDICATION, *Contra hereditatem jacentem.* *No* 3. *p.* 44.

1639. *January* 29. GRAHAM *againſt* PARK. *Durie, p.* 870.
See HUSBAND and WIFE.

1684. *February* 1. ANDERSON *againſt* Anderſon's TENANTS.
Preſident Falconer, p. 51.
See COMPETITION.

1743. *June* 10. ——— *againſt* The E. of LAUDERDALE.
Fol. Dic. v. 3. *p.* 9.
See HEIR APPARENT.

See the General Alphabetical Liſt of Names, for the caſes of STAIR, CASSLLIS, and SUTHERLAND.

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the true ſtate of the matter in debate. And the queſtion ought to be, not whether the office be adjudgeable? but whether the emoluments be adjudgeable? When the caſe is conſidered in this light, all difficulties vaniſh. The *jus mariti* as far as perſonal, conſidered as the authority a man has over his wife, is certainly not adjudgeable. But the emoluments of the *jus mariti* may be adjudged. Preciſely in the ſame manner, the office of keeper of the regiſter of ſaſines being perſonal, is not adjudgeable. But the emoluments of that office may be adjudged. And if ſuch adjudication be competent, it follows, that the deputy, inſtead of accounting to Mr Falconer for the emoluments, muſt account to the adjudger. Poſſibly no depute may be named; but in that caſe, it is Mr Falconer's duty to name a deputy with conſent of the adjudger. And if Falconer refuſe to do this act of juſtice to his creditor, it becomes the duty of the Court of Seſſion in his place to name a depute. To conclude, it appears to me that wherever there is power of deputation, the emoluments may be adjudged however perſonal the office may be. Otherways, where there is no power of deputation, which is the caſe of the ſupreme Judges.
Select Decisions, No 159. *p.* 219.