

1782. *January 17.*JOHN STEWART *against* Lieutenant-Colonel ARCHIBALD CAMPBELL.

THE office of Heritable Usher to the King has belonged, for several centuries, to the family of the Cockburns of Langton. A fee, or yearly pension, of L. 250, was lately annexed to this office; the emoluments of which formerly consisted in the livery, or maintenance afforded to the Usher's attendants; such as his Esquires, Archers, and Sword-bearers.

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An heritable office, pertaining to the King's household is transmissible by base infestment.

The progress of the titles, by which the Ushership has passed from one possessor to another, is that of charters, sasines, and retours; and these, which are extant for two centuries back, are of the same nature with those concerning lands, or other feudal subjects.

In 1747, as a patrimonial subject, this heritable office was found by the Court to be adjudgeable.

Sir James Cockburn, in security of a large debt, disposed the office to Mr Stewart, who took infestment on the precept contained in the disposition; of which, a considerable time afterwards, he obtained from the Crown a charter of confirmation.

After the date of the infestment, but previously to the charter of confirmation, Sir James, in security of another debt, executed a new disposition of the same office, in favour of Colonel Campbell, upon which the Colonel, likewise prior to the confirmation, exped, and was infest on a charter of resignation under the Great Seal.

A competition for the profits of the Heritable Ushership, accordingly, ensued in a process of multiplepinding before the Court; and the point, on which the decision depended, was, Whether this office had been effectually conveyed by the prior infestment, being a base right; or, If the public right, though posterior, were not the only competent mean of transmission?

Pleaded for Colonel Campbell, Though feudal rights are generally capable of being transmitted by base, as well as by public infestment, yet this is not any of their essential qualities. Various instances occur, in which they do not admit subinfeudation; and, among these, the case now in question is to be classed. Thus, the right of superiority cannot be communicated to a subvassal. In the same predicament were our jurisdictions, though often constituted by feudal grant, and hereditary, and though some of them were necessarily connected with lands. Of the last sort were those of regality, and of barony. The Lord of regality, or the Baron, might indeed subfeu his lands, but could not thus transmit his jurisdiction. When he appointed a bailie, or deputy, the jurisdiction was still exercised in his own name. Such, too, was the case of those feudal jurisdictions, that, in their nature, were independent of lands, sheriffships, bailiaries, constabularies, stewardries; Craig, lib. 2. dieg. 8. § 30. Stair, B. 2. tit. 3. § 45. Erskine, B. 1. tit. 4. § 27. Bankton, B. 4. tit. 16. § 6.

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The same principle regulated hereditary honours and distinctions; as those of bearing the Crown at coronations; of leading the van of the King's armies in battle; or of possessing the first seat in Parliament. Inferior offices, like those of Carver, Cup-bearer, Armour-bearer, or that of Usher, now in question, likewise granted in fee and heritage, were equally incapable of subinfeudation. Nothing, indeed, could be more incongruous with the nature of all these offices, whether superior or inferior, than such a constitution as would render them independent of the Sovereign, about whose person, or in whose household they were exercised.

Moreover, offices, in general, being in their nature indivisible, do not, like lands, admit a partition of interests, as that between superior and vassal, one of whom may hold the *dominium directum*, while the other possesses the *dominium utile*. Besides, with respect to the Ushership in particular, if the right to that office were divided between a superior and his vassal, with what propriety could either of them receive the denomination of principal and sole Usher to the King, by which the office is distinguished?

Among the writers on the law of Scotland, not even the faintest traces are to be discovered of the notion of subinfeudation of offices; and as little can any be found in the systems of the foreign feudalists; of England, for example; or of France, that kingdom where probably first arose the practice of conferring offices in fee and heritage; *Le Droit des Offices, par* Loyseau, liv. 2. chap. 2. Nor, indeed, is there any kind of evidence that such a practice has ever obtained in Scotland.

Pleaded for Mr Stewart, That the office in question is patrimonial, and *in commercio*, is a point established by the decision in 1747. Being a feudal subject, it must, therefore, be necessarily transmissible by infestments *de me*, equally as *a me*. Every patrimonial right which is *in commercio*, and adjudicable, may be acquired by any person, or number of persons; or may be attached by creditors, whether more or less numerous, and in whatever condition of life, women or children not excepted. Nor can it make any difference, whether rights thus acquired have been completed by base or by public infestment.

No just example of a contrary principle can be given. The right of superiority has been referred to erroneously. This feudal subject being *in commercio*, is not the less capable of subinfeudation, that the vassal has a title and an interest to object to the multiplication of superiors. With his consent nothing hinders the superiority from being subfeued, and an additional superior interposed between him and the former; in the same manner as vassals in church lands have it in their option, either to hold their lands of the Crown, or of the Lords of Erection. Neither is the other instance, that of jurisdictions, well founded, of the subinfeudation of which many examples have actually occurred.

With respect to the intrinsic impropriety, or incongruity, of offices being held in different respects, by different persons, or by any other than those nominated *ob delectum personæ*, such a topic might have been properly urged against their being considered as patrimonial subjects; but now, when this is admitted, that, being its necessary consequence, as already observed, must follow of course.

The Court considered this last conclusion as unavoidable, and decisive of the question; a feudal subject's being *in commercio* implying that it is transmissible by base infestment.

THE LORDS, therefore, upon advising a reclaiming petition and answers, adhered to a former interlocutor of the Court, thereby brought under review, which was as follows: ' Upon report of the Lord Westhall, Ordinary, and having advised the mutual memorials for John Stewart, Esq; and Lieutenant-Colonel Archibald Campbell, and heard parties procurators in their own presence, upon what is above represented; the LORDS repel the objection to the said John Stewart's interest, and prefer Captain Archibald Stewart, his brother-german, and heir therein, to the sums now in the hands of the raiser of the multiplepinding, and to the sums to fall due in time coming; and remit to the Lord Ordinary to proceed accordingly.'

Reporter, *Lord Westhall.* For Mr Stewart, *Wight, Blair.*

For Colonel Campbell, *Ilay Campbell, Rolland.* Clerk, *Robertson.*

Fol. Dic. v. 3. p. 318. Fac. Coll. No 21. p. 39.

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1782. *March 1.* MARSHALL & RUTHVEN *against* JEAN WIGHT.

CUMING having right by disposition, containing procuratory of resignation, to a house in Edinburgh, disposed it, in the year 1771, to Beveridge; and, for completing his right, assigned to him the unexecuted procuratory.

Messrs Marshall and Ruthven, creditors of Cuming, in the year 1777, deduced an adjudication against this subject, and thereon obtained infestment from the Magistrates of Edinburgh.

In the year 1779, Mrs Wight, as representing Beveridge, the disponee, executed the procuratory, and was infest. A process for selling Cuming's subjects, including this house, having been commenced, Mrs Wight insisted that it should be excepted; and

Pleaded, The common debtor's right to this house was only personal, consisting of a disposition, and an unexecuted procuratory. An adjudication against him could only carry that right, and could no more warrant the infestment which followed, than a disposition containing a procuratory could entitle the disponee to take infestment, without resigning on the procuratory. The

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How an adjudger of a disposition, containing a procuratory of resignation, but no precept of sasine, must obtain infestment.