

No 117.

The interlocutor of the Court, 25th January 1792, was in these words :
 ' THE LORDS having resumed the consideration of the petition and complaint of the Right Honourable Bazil William Douglas, commonly called Lord Daer ; and having advised the same, with the answers thereto by the Honourable Keith Stewart, and others, freeholders of the county of Wigton, replies for the complainer, duplies for the respondents, and writings produced ; and having heard parties procurators upon the whole, they sustain the objection to the complainer's claim to be enrolled ; find the freeholders of the county of Wigton did right in refusing to enrol him ; and therefore dismiss the complaint, assoilzie the respondent, and decern : Find the complainer liable to the respondents in the statutory penalty of L. 30 Sterling, and decern against him therefor : Find him also liable in full costs of suit, and appoint an account thereof to be given in to Court.'

For Lord Daer, *Dean of Faculty, Solicitor-General, Cullen, Morthland, et Cha. Hope.*

For the Freeholders, *Wight, Geo. Ferguson, Montgomery, et Busby Maitland.* Clerk, *Hume.*

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Fac. Col. (APPENDIX.) No 4. p. 16.

* * * This case was appealed :

THE House of Lords, 26th March 1793, ' ORDERED and ADJUDGED, That the appeal be dismissed, and the interlocutors complained of be affirmed.'

1796. February 24.

MACKAY against HOUSTON.

No 118.

IN the county of Sutherland, where enrolment is competent on lands held of a subject superior, the freeholder having refused to enrol a claimant, in respect his charter had been granted by a factor *loco tutoris*, for the superior, who was fatuous ; it was *urged*, That such act was beyond the ordinary powers of a factor, and moreover his nomination by the Court of Session had not been produced.—THE LORDS, on a complaint, ordered the claimant to be enrolled.—*See APPENDIX.*

Fol. Dic. v. 3. p. 417.

1802. March 9.

HONOURABLE GEORGE ABERCROMHEY against SPEIRS, and other Freeholder of Stirling.

No 119.

The eldest son of a British Peer may be enrolled among the freeholders of Scotland.

THE freeholders of the county of Stirling having refused to enrol the Honourable George Abercromby of Tullibody, advocate, because he was the eldest son of a British Peeress, he presented a complaint to the Court of Session, and *Pleaded* ; From the earliest periods of the Scottish Parliament to the reign of James VI. it appears, that every vassal of the Crown was entitled to a seat

in Parliament; and as in those days the honour of a seat in the Great Council of the nation was conceived to be greatly counterbalanced by the hardship of attendance, the various statutes which, from time to time, were passed during that period, with respect to the constitution of Parliament, were framed either for the purpose of enforcing the attendance of all, or of dispensing with the presence of those vassals of the Crown, whose estates were too inconsiderable to make it easy for them to defray the expense of attending. Eldest sons of Peers, if they possessed lands holding immediately of the Crown, were nowise exempted from the duty of giving suit and presence in the King's Great Council, to which they were bound, by the tenure by which they held their estates. And accordingly, from the rolls of Parliament, it appears, that the eldest sons of Peers attended upon many occasions. They did not appear as proxies for their father; for there are instances of a Peer and his eldest son sitting in the same Parliament; and as they often seem to have attended during the minority of the Sovereign, the presumption is, that they were not called by special summons, but that they sat like other Barons, in virtue of their freeholds, as vassals of the Crown. The act 1587, c. 114. which introduced the representatives of the minor Barons, neither directly nor indirectly altered the situation of the eldest sons of Peers, who must be conceived to have been left with the same privileges with which they were invested before that enactment. Nor do any of the acts of Parliament, from that time to the Union, deprive the eldest sons of Peers of voting upon their freeholds; on the contrary, the act 1661, c. 35. confers that right in the most general terms upon all heritors holding lands of a certain extent, with the exception only of noblemen and their vassals. In point of fact, however, it does appear, that from the passing of the act 1587 to the year 1685, no instance is to be found of the eldest son of a Scottish Peer having a seat in the Parliament of Scotland. In that year, an attempt was made by them, in the case of the Viscount of Tarbat, and afterwards in 1689, in the case of Lord Livingston, (See p. 8707.) to be returned as Members of Parliament, both of which were unsuccessful. These cases were decided, not upon the common or statute law, which afforded no disqualification, but upon the general understanding of the nation at large, of the Peerage, and of their eldest sons, as displayed by the disuse of that privilege, ever since the act 1587, which gave in some measure a new form to the Scottish Parliament, by the introduction of representatives.

By the treaty of Union, it was provided, 'That none shall be capable to elect or be elected to represent a shire or burgh in the Parliament of Great Britain, for this part of the united kingdom, except such as are now capable by the laws of this kingdom to elect or be elected Commissioners for shires or burghs to the Parliament of Scotland.' In consequence of the above clause, it has been found, first in the case of Lord Charles Douglas in 1755, again, in the case of Lord Elcho in 1787, (See p. 8713.) and, last

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of all, in the case of Lord Daer, 24th January 1792, No 117. p. 8692. that the eldest sons of Scottish Peers were incapacitated from voting for Scottish representatives to the British House of Commons. The investigation which took place in that latter case, which underwent the most ample discussion, established beyond doubt, that every free tenant of the Crown was originally entitled to a seat in Parliament; that in conformity with this, the eldest sons of Peers, who happened to hold lands *in capite* of the Crown, were in use to attend; that the act 1587 did not introduce any new incapacity against them, and that they lost their right merely by the negative practice or disuse between that period and the Revolution.

But while it must be admitted, that in consequence of these judgments, the eldest sons of Scottish Peers cannot be entered upon the roll of freeholders, it does by no means follow, that a similar disqualification is to be extended to the British Peerage. Every disqualification, by which a person is prevented from the exercise of any right, and especially from the privilege of elective franchise, demands a strict interpretation, and is not to be extended by implication or analogy. As it has been by disuse alone, and not by common or statute law, that the eldest sons of Scottish Peers were disqualified, it must be shown by those who object to the claimant's right, either that the eldest sons of British Peers have also lost their right to elective franchise, by a similar disuse, or that they are excluded by some express statute. If they are not able to establish one or other of these points, the complainer, who is possessed of a qualification, in other respects unexceptionable, is entitled to a place in the roll of freeholders.

Even if analogy were allowed to afford a sufficient ground of disqualification, it must hold in a much stronger degree in the case of the grandson and heir apparent to a Scottish Peer, who unquestionably falls under the general spirit and intention of the disqualification; yet so strong is the principle of such exceptions, being *strictissime juris*, that the grandson and heir apparent of the Earl of Sutherland by a deceased eldest son, not only stood upon the roll of freeholders, but for many years previous to 1733 sat as Representative for the county of Sutherland in the British Parliament. The clause in the articles of Union merely declares, that none shall be capable to elect or be elected, "except such as are now capable;" which can only apply to the Peers of Scotland as they stood at that time; for, as the power of conferring the privilege of a Scottish Peer no longer exists in the Sovereign, he can never, by conferring a different honour, impose the corresponding disqualifications.

With respect to the argument arising from disuse, it was strongly contended, that the practice, so far from being against the right of the complainer, was decidedly in his favour, and that the eldest sons of British Peers not only were in

use to be admitted upon the roll of freeholders, but had frequently represented the counties and the burghs of Scotland. * No 119.

Answered, It is not necessary to enquire into the early constitution of the Scottish Parliament to determine the present question. The decision previous to the Union, in the cases of Viscount of Tarbat, and of Lord Livingston, clearly show, that whatever might have been their situation before the enactment of the statute in 1587, from that time downwards the eldest sons of Peers laboured under a personal disqualification. By the articles of Union, the election law of Scotland is preserved entire, and those only are entitled to elective franchise in this part of the united kingdom, who at that time were capable to elect or be elected Commissioners to the Scottish Parliament. Accordingly, the eldest sons of Scottish Peers, as they were disqualified before the Union, remained in the same state after it, and neither can elect, or be elected members of the British Parliament. And so it was found, after the fullest investigation, Lord Daer *contra* Stewart and others, January 24. 1792, No 117. p. 8692. ; which decision being afterwards affirmed by the House of Lords, all doubt with respect to this disqualification must be considered to be at an end for ever.

As this is admitted to extend to the eldest sons of all those who have a right to the privilege of the Peerage, it assuredly comprehends the honourable complainer. It is a mistake to say that the king cannot create a Scottish Peer. The articles of the Union do not divest him of this prerogative. The separate privileges of Peerage, which before the Union might have been limited to one or other of the kingdoms, are indeed at an end. But the Peerages which were afterwards created, extended to both parts of the united kingdom. A British Peer being created since the Union, is a Peer of England, and a Peer of Scotland; having a right in Scotland to the rank and precedence of nobility, with the privilege of a seat in Parliament. From the nature of the Union, British Peers must necessarily possess all the privileges of the Peerage in England; but these, when added to the privilege of Peerage in Scotland, cannot qualify their eldest sons to be admitted as freeholders in this country. British Peers do not vote as Peers of Scotland in the election of the sixteen Peers who sit in the House of Lords; because, as they sit themselves, there is no use for their sending Representatives; but although it had been provided in the articles of Union, that the whole of the Scottish Peers should be entitled to sit in the House of Lords, it would never have put their eldest sons upon a different footing with respect to the House of Commons.

* The Honourable Mr Damer, eldest son of Baron Milton, some time ago represented the eastern district burghs in Fife. In the Parliament summoned to meet in 1796, the eldest son of Lord Salterford, sat as Representative for the burghs of Linlithgow, &c. The Honourable Laurence Dundas, the eldest son of Lord Dundas, is upon the roll of freeholders for the county of Fife; and the eldest son of Lord Douglas stands upon the roll of freeholders of Lanerk and Renfrew.

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In regard to the fact, that since the Union, the eldest sons of British Peers have been upon the roll of freeholders, and been elected Representatives for Scotland in the British House of Commons, the freeholders maintained, that a few instances of this sort proved only the fact that they did sit, without establishing their right of sitting. The objection in these cases happened not to be brought forward; but it might as well be argued, that persons under age are entitled to sit as Members in the House of Commons, because instances can be produced of minors who have been allowed to hold their seats without being questioned.

The Court, by a great majority, found, That the freeholders did wrong in refusing to enrol the Honourable George Abercromby, and ordered him to be put upon the roll of freeholders.

It was conceived by one or two of the Judges, that the disqualification expressed in the articles of Union, should be interpreted as applying not merely to the eldest sons of the Scottish Peers, as they then stood, but as comprehending all those who might afterwards attain to the same *status*; and that there was no substantial difference between a British Peer created now, and a Scottish Peer before the Union, during that period in which his eldest son was excluded. But the great majority of the Court seemed to hold, that this ineligibility in the eldest sons of Scottish Peers was a disqualification peculiar to their order, and being unfavourable in its nature, was not to be extended by implication to any other description of persons, than those who were expressly excluded by the constitution of the Scottish Parliament.

For the Complainer, Lord Advocate *Hope*, Solicitor-General *Blair, Bruce, Boyle*.
Agent, *Alex. Abercromby, W. S.* For the Respondent, *Erskine, Campbell*.
Agent, *R. Hill, W. S.* Clerk, *Home*.

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Fac. Coll. No 36. p. 73.

No 120.

The county collector of the window-duties and of the income-tax, not disqualified from voting at elections.

1803. February 11. HERON against MAXWELL.

PATRICK HERON of Heron having, as Parliamentary preses at the meeting of freeholders for choosing the Member for the stewartry of Kirkcudbright, called the roll for the choice of preses and clerk, declined to count the vote of Mr Maxwell of Barncleugh, as being disqualified, by the act 22d Geo. III. c. 41, because he was collector and assessor of the house and window duties for Dumfries-shire, and had also been collector of the income-tax for the same county, within twelve months preceding the election.

Against this proceeding Maxwell complained.

The Court were unanimous in considering the purpose of the disqualifying act to be solely to prevent the patronage of Government from influencing elections, consequently that its principle and provisions relate exclusively to those