vine and Robert Kinnear, his tenant, must remove from the said farm at the term of Martinmas then next, without prejudice, however, to any point which may arise thereupon; and that, with these variations, the said interlocutor be affirmed; and it is further ordered That the said appeal be dismissed as to the said interlocutor complained of, dated the 9th July 1791, but without prejudice to the several matters herein before remitted, or to any consequence which may arise from thence: And it is further ordered and adjudged, That the said interlocutor of 28th February 1792, complained of in the said appeal, be and the same is hereby affirmed, without prejudice to any other questions which may arise.

For Appellants, *W. Grant, Thomas Macdonald.*

For Respondent, *Allan Maconochie, Wm. Tait, Chas. Hope.*

The Right Hon. Basil Wm. Douglas, commonly called Lord Daer, Eldest son of the Earl of Selkirk, - - - } *Appellant;*

The Hon. Keith Stewart and Others, Freeholders of the Stewartry of Kirkcudbright, } *Respondents*

House of Lords, 26th March 1793.

Member of Parliament.—Held the eldest son of a Peer ineligible to be elected a Member to sit in the Commons House of Parliament.

The present question relates to, Whether the eldest son of a peer can represent a Scotch county in the British House of Commons?

The appellant, conceiving he had such a right, lodged his claim for being enrolled a freeholder of the Stewartry of Kirkcudbright, at Michaelmas head court in 1791, in respect of his standing infeft and seized in the lands of Over Mains of Twynham of 50s. old extent, by charter or grant from the crown, and other titles set forth in his claim, and exhibited at the meeting.

To his right to be put upon the roll, it was objected, That the claimant, being the eldest son of a peer of the

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realm, is incapable of being enrolled as a freeholder, or of electing, or being elected, a member of parliament.

The appellant having given an answer satisfactory to a majority of the freeholders, his name was put on the roll of freeholders by their order. But against this order the respondents complained to the Court of Session, in terms of the act 16 Geo. II. c. 11.

They contended, that by the law and constitution of Scotland, the eldest sons of the peers of parliament, were considered as of an order different from the commons or freeholders under the rank of nobility; and were not meant to be comprehended in the class of lesser barons or freeholders, to whom the privilege of electing or being elected commissioners of the shires was given by the act 1587, and subsequent statutes; for evidence of which they relied on the following transactions in parliament, viz. an entry in the journals of parliament of Scotland, of the 23d April 1685, which is in the following words: "In respect that Viscount "Tarbet's eldest son, elected one of the commissioners for "the shire of Ross, by reason that his father is nobilitated, "cannot now represent that shire, warrant was given to the "freeholders of that shire to meet and elect another person "in his place." 2. They also founded on an entry in the journals of the meetings of the estates, or convention of parliament 1689, in the following terms: "Edinburgh, 18th "March 1689. The Meeting of Estates having heard the re-"port of the committee for elections, bearing that in the con-"troverted election for the burgh of Linlithgow in favour of "Lord Livingston and Wm. Higgins, it is the opinion of the "committee that Wm. Higgins' commission ought to be pre-"ferred; first, in regard to Lord Livingstone's incapacity to "represent a burgh, being the eldest son of a peer; secondly, "in respect that Wm. Higgins was more regularly and formal-"ly elected by the plurality of the votes of the burgesses: "They have approven and approve of the said report in both "the heads thereof, and interpone their authority thereto." 3. The following entry in the Journals of the Commons of *Great Britain*, 3 Dec. 1708, made on hearing the matter of several petitions complaining of the election and return of four eldest sons of peers of Scotland, to represent different places in that part of the United Kingdom, in the first parliament after the Union. A motion being made, and the question put, "That the eldest sons of peers of Scotland "were capable, by the laws of Scotland at the time of the

" Union, to elect or to be elected as commissioners for " shires or burghs to the parliament of Scotland; and there- " fore, by the treaty of Union, are capable to elect or be " elected to represent any shire or burgh in Scotland to sit " in the House of Commons; it passed in the negative."

4. The entry in the Journals of 1755, ordering a writ to issue for electing a member for the county of Dumfries, in the room of Lord Chas. Douglas, become the eldest son of the Duke of Queensberry; and a similar entry in 1787, in the case of Lord Elcho. The respondent further maintained, that there was no instance since the passing of the act 1587, of the eldest son of a peer voting, or attempting to vote, in the election of the commons, or being elected, except in Lord Livingstone's case 1689, and in the case in 1708 just mentioned. The conclusion thence was, 1. That the law was against the right of a peer's eldest son enjoying such a privilege. 2. That if they had ever any such right, it was lost by disuse.

The appellant, on the other hand, pleaded the statutes 1587, 1661 and 1681, as bestowing, in express and clear terms, the right of being enrolled and voting at elections for the shires upon the eldest sons of peers in common with all other persons possessed of lands of tenure and extent therein mentioned, *not being Lords of Parliament, or noblemen.* This last term being used as synonymous with Lords of Parliament. He further contended, that if the sons of peers were entitled, and in use to sit in parliament as lesser barons or freeholders *before* the act 1587, it followed that *after* it, they were electors, and eligible to be elected members of parliament, for that act had no other object but to introduce representations in place of personal attendance. In evidence that they were entitled so to sit, and in many instances exercised the right, the appellant produced extracts, or certified copies of the rolls of parliament 1478, 1481, 1488, 1503, 1525, 1526, 1546, 1567, 1568.

The Court pronounced this interlocutor: " Sustain the Jan. 24, 1799.
" objection to the appellant's claim for enrolment; find the
" freeholders did wrong in enrolling him in the roll of free-
" holders for the Stewartry of Kirkcudbright, and grant war-
" rant to and ordain the Stewart clerk to expunge his name
" from the roll.

Against this interlocutor the present appeal was brought to the House of Lords.

Pleaded for the Appellant.—The only question in this

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cause (as the appellant apprehends) is, Whether his being the eldest son of a peer of Scotland, was in law a bar to his claim to be enrolled in the roll of freeholders of the Stewartry of Kirkcudbright? To this precise question the freeholders and the Court of Session ought to have confined themselves. What may result from his being put on the roll is in the meantime problematical. If elected to serve in the House of Commons, the present is not the time, nor this Court the place, to judge in, and determine such a matter.

The statute 1587 enacts, "That *all freeholders* of the "king, *under* the degree of *prelates* and *lords of parliament*, "shall be summoned to attend the election of the commis- "sioners for the shire, and have voices, provided they are "possessed of a 40s. land." The appellant is possessed of a 40s. land held of the king, and he is a person under the degree of prelates and lords of parliament. The act 1661 enacts, that all heritors who hold a 40s. land of the king *in capite*, shall be and are capable to vote in the election of commissioners to parliament, excepting noblemen and their vassals. The appellant is not a nobleman. The third statute 1681, refers to the two former for the description of persons who were to be put upon the roll, these being generally, "The whole freeholders, having election of commissioners." Besides, the act 16 Geo. II., under the direction of which the Court of Session acts, does not say a syllable to countenance the idea that a peer's eldest son is not entitled to be put on the roll; and there is not one legal authority in the law of Scotland who lays down such a doctrine.

Pleaded for the Respondents.—Although the only question between the parties is, Whether the noble appellant had or had not a right to be admitted to the roll of freeholders? the solution of that question must necessarily depend upon his eligibility to elect or be elected, the right to elect and be elected going hand in hand; and unless where, by particular statutes, a disqualification in one respect only is imposed. The act 1587 ordered the freeholders to elect freeholders. The act 1661, c. 35, declares that persons of a particular description "shall be and are "capable to vote in the election of commissioners of parlia- "ment, and to be elected commissioners to parliament." The act 1681 calls the roll of freeholders the roll of elections. Fountainhall, when mentioning an election for the county of Mid-Lothian that took place upon the 12th March 1685, observes, that "the King's Advocate and Justice "Clerk should not have voted in this election because, being

" officers of state, they were not capable to be elected *sunt* " *correlata quorum uno sublato tollitur et alterum.*" The act of 12th of Anne, cap. 6, constantly joins together the right to vote and the right to be elected. The act 16 Geo. II. also provides, in the same manner; so that it would not do to attempt, as is here done, to separate the right to be put on the roll of freeholders from the right of being elected a commissioner to parliament. They are identically one and the same right, and the one necessarily involves the other. But the constitution of almost every country is the creature of usage. It is seldom to be found in any written code, and the principles upon which it in part depends, are often difficult to be traced in history, and sometimes cannot be at all discovered. It suffers alterations by degrees, and owing to a change of manners and of sentiments, as it were imperceptibly; but when moulded by long usage into *a system*, no innovation, however expedient it may be, can be introduced by courts of law, or in any other manner than by the general voice of the people, collected and declared in a constitutional manner. It is in vain for those who have had no seat in the legislative assembly for a long tract of time, to attempt to claim it on the pretence that they enjoyed it in a more ancient time, and could not lose by disuse what was their acknowledged right. Such disuse, in matters of national concern, becomes contrary usage, which is of itself sufficient not only to alter the constitution of parliament, but also to impair the prerogative of the crown. It is, however, an admitted fact, that for more than two centuries not one instance can be traced of the eldest son of a Scottish peer representing a county or borough in Scotland, either in the Scottish or British parliament. Nay, the appellant has completely failed in bringing proof, notwithstanding all his research, that such eldest sons *did at any period* sit in the parliament of Scotland, in virtue of their possessing lands held of the crown, and of their making *part of* the freeholders or libere tenentes. But the question does not rest upon the usage of no sons of peers sitting in parliament since 1587. There is the evidence of positive acts done, not only to indicate the law, but also the mind of the legislature on the subject. Such are the cases of Livingstone, Tarbet, and others, whose claims to be elected to sit in the Commons House of parliament were rejected, on the ground of their being the eldest sons of peers.

After hearing counsel,

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LORD STANHOPE said,

MY LORDS,

"I refer you to the proceedings in parliament of Scotland, which had been founded on by the respondents in the case of the Master of Tarbet in 1685, and of Lord Livingstone in 1689, as well as to the decision of the House of Commons of Great Britain in 1708; the two first of which cases, I maintain, do not apply to the precise case in question; and, at all events, as none of them had been sanctioned by any enactment of the legislature, they could not be considered to constitute law, so as to bind either the Court of Session or your Lordships as a Court of appeal. He had heard it laid down, upon the decision of an appeal from Scotland respecting nominal and fictitious votes, by a noble and learned Lord (Thurlow), to whose judgment and abilities the greatest deference was due, that a train of decisions even in the Court of last appeal, were not binding as precedents, if such decisions appeared palpably erroneous; and in that sentiment, expressed in so guarded a manner, I perfectly concur. In the present instance, the judgment of the Court of Session did not appear to him to be founded on any principle of sound reason; and, unacquainted as he was with legal knowledge, he would not have presumed to deliver his sentiments in this House, on a point of this kind, if the acts of parliament on the subject had not appeared to him so clear as to be obvious to every person." (His Lordship then entered into a detail of the acts of parliament 1727 downwards, and concluded by moving) "That the freeholders had done right in ordering Lord Daer to be enrolled, and that the Court of Session had done wrong in altering their judgment."

LORD THURLOW said, "That were I now considering this question as a legislator, I would most probably agree entirely with the noble Earl who had just sat down, that there is no good reason why the eldest sons of Scotch peers should not be eligible as representatives in the Commons House of Parliament of Great Britain for counties and burghs in Scotland, in the same way that the eldest sons of peers of England are, for English counties and burghs; but nothing could be more dangerous than that their Lordships should allow themselves to act upon any idea of legislation when sitting as judges in a Court of appeal; in which case, it was their duty to place themselves exactly in the situation of the court from whence the appeal comes; and they should not consider what the law ought to be, but what it really is.—When this case came before the Court of Session, they found an uniform practice of more than 200 years, taking its rise in the act of parliament 1587, which established in fact a new constitution in Scotland; by that act, the parliament was made to consist of four distinct branches, "viz.—the Prelates, the Greater Barons or Lords of Parliament, the Commissioners from the lesser Barons, and the Burgesses; and it seems to me clear,

that the eldest sons of peers were exempted from being sent as commissioners to parliament, which was then considered as a burden. In this the matter originated; and, when the being chosen as a commissioner of parliament was considered as a privilege, instead of being a burden, what was formerly an exemption, operated then as a disability." (His Lordship then supported this view by reference to the acts of parliament and constitutional history of Scotland); and said, "That although such would have been his opinion, as an historian or antiquarian, upon the meaning of the act of parliament 1587, and on the law as it stood at that time; yet, had the subsequent practice been different, he would have yielded that opinion; but when, on the contrary, he found it supported by the uniform invariable practice of 200 years, and by the opinion of every writer on the law of Scotland: when he saw the proceedings of the parliament of Scotland in 1685 and 1689; and saw also the decision of the House of Commons in 1708, proceeding upon a full hearing and mature consideration, so recently subsequent to the act 1707, it appeared to him that the consequence would be dreadful indeed to all the rest of the law of Scotland, if their Lordships should allow themselves, upon any fine spun reasoning, to alter such established law." He therefore moved to affirm.

It was therefore ordered and adjudged that the interlocutor be affirmed.

For Appellant, *Sir J. Scott, Geo. Hardinge, T. Erskine, Fra. Hargrave, Wm. Adam.*

For Respondents, *Alex. Wight, George Ferguson.*

NOTE.—This disability was abolished by the Reform Act, 2 Wm. IV. c. 65, and now the eldest sons of Scotch Peers may represent any county or burgh in Scotland.