teration of the acts of sederunt 1748, which by 20th Geo. II. had been declared unalterable, except in Parliament. No 107.

THE LORDS "found, that the Court had no power to vary, alter, or make any addition to the fees established by the acts of sederunt 1748, and therefore refused the petition."

For the Sheriff-clerks, *Crosbie, Blair.* Clerk, *Home.*

C. *Fol. Dic. v.* 3. *p.* 342. *Fac. Col. No* 136. *p.* 214.

1790. *February* 2.

Sir WILLIAM DUNBAR, and Others, *against* Sir JAMES SINCLAIR.

No 108.
The Court of Session is competent to try a party's right to a peerage, when stated as an objection to his continuance on the roll of freeholders.

SIR WILLIAM DUNBAR, and other freeholders of the county of Caithness, made this objection against Sir James Sinclair's remaining on their roll, that, though he had not assumed the honours of the Earldom of Caithness, he had acquired, by succession, the right of that peerage.

The objection having been repelled by the Court of Freeholders, a petition and complaint against that judgment was preferred, and followed with answers; after which a hearing in presence took place, the chief subject of debate being, whether it was competent for the complainers to produce evidence of their allegation. In support of the affirmative, they

Pleaded, The Court, by various statutes, has power, and is required, to take cognizance of all questions respecting inrolment of freeholders, in which are comprehended such as relate to the disqualification arising from the state of a peer. By the statute of 1661, cap. 35. *noblemen* are expressly prohibited from acting as freeholders.

A peerage is *jus sanguinis*, which inheres in the person, and cannot be abandoned. It was so determined in Lord Ruthven's case, in 1640, and in that of the Viscount of Purbeck, in 1678. Peerage is, no doubt, a *privilege*; but it is likewise in the nature of an indispensable *office*.

The right to a peerage, then, as soon as it has devolved, though not yet assumed by the party, creating a bar to inrolment, that point comes necessarily under the cognizance of the Court. Without such incidental cognizance, the jurisdiction conferred and enjoined by the statutes would be frustrated.

It is not extraordinary that matters should be indirectly judged of in Courts which, with regard to them, have no original jurisdiction. The English statute of 7th and 8th William III. has enacted double damages, as a penalty, on officers making a false return of the election of a Member of Parliament, action for such damages "being brought within *two years*." As the matter, however, might not be tried in the House of Commons during those two years, it has been found, that the merits of an election could, to that effect, be judged of by the Courts of law; Wynne *versus* Middleton, *anno* 1745; Wilson's

No 108. Reports, I. 125. In the same manner, a Committee of the House of Commons, lately, in Mr Douglas's case, heard evidence of his right to the peerage of Angus.

In such cases, the maxim of law is, that *cui jurisdictio data est, ea quoque concessa esse videntur, sine quibus jurisdictio explicari non potuit, l.* 2. *D. De Jurisdic.* and it is obvious, that jurisdiction could not be explicated, were the cognizance of Judges not to extend to questions incidental to the matters at issue, though these would not have fallen under their original judicature. For example, suppose an estate conveyed, or a legacy bequeathed to a party, under the condition *si Titiæ nupserit*, or *non nupserit*; or, suppose in the Court of Justiciary, the invalidity of a marriage were pleaded against the charge of bigamy; it is evident, that the question of legal marriage, though proper to the consistorial Court, would then be judged of as relative to the point at issue. In the same way, Sheriffs are competent to the incidental trial of forgery, and the Commissary Court to the cognizance of *idiotry*, Erskine, b. 1. tit. 2. §. 8.; Kames's History of Courts; Blair against Blair, No 11. p. 6293. And it is also manifest, that even Courts of Freeholders cannot judge of the claims for inrolment, made by persons in the characters of apparent heirs, or of husbands, without determining concerning the legality of marriage.

Nor is there any reason why this collateral cognizance should not comprehend rights of peerage as much as any other matters. If a bond be granted, or a legacy bequeathed, payable when the debtor or the heir shall succeed to a peerage; or, in the frequent case of entails, as those of the estates of Cumbernauld and of Panmure, where succession to a peerage is made to infer a forfeiture, it is plain, that justice could not be administered, were this very point not discussed.

A remarkable instance of a Court of law giving judgment in regard to the right of peerage occurred in England, in the case of the Earl of Banbury, who being brought to trial for murder before the Court of King's Bench, pleaded the privilege of a peer, which that Court, after cognizance of his right, sustained, though in opposition to a judgment of the House of Lords. Skinner, 517.; Salkeld, 509.

Answered, It is admitted, that, even the lowest Court in the kingdom may try incidentally the fact of possession of peerage, when this is notorious and incontestible. But the formal cognizance of the state of a peer, is peculiar to the House of Lords, acting in virtue of a reference by the King.

Accordingly, were a person in the acknowledged possession of the rights of peerage, to claim, nevertheless, on the ground of some alleged defect in his patent, or failure in descent, the incompatible privilege of inrolment as a freeholder, it seems certain that the Court would not enter into such an investigation. It is evident, that the same rule which would govern in that instance, must likewise regulate the present, the two cases being convertible; and that rule is founded on the circumstance of notoriety.

No 108.

Thus, since in certain cases peers are exempted from making oath, nor can they, or even their widows, be apprehended under caption or second diligence, every individual, on any occasion, may lay claim to such privileges; or, on the same ground, he may refuse to serve as a juryman, or to submit to trial as a commoner; but if his claims be not founded on notorious possession, it is obvious, they will not be permitted to interrupt the course of justice: Of which an instance lately occurred in the case of Sir Walter Montgomery, who having brought a suspension of a bill of caption, on the footing of his claim to the honours of Lord Lyle, which he offered to support by a long detail of pedigree, the Court refused to enter into the investigation, and repelled his plea.

The same circumstance of notorious right seems to have been the ground of judgment in Lord Banbury's case.

It has been supposed, that the Court would not hesitate to try the right of peerage, though only in remote pretence, as a condition of forfeiture under an entail. But that case involving a patrimonial interest, ought, at any rate, to be distinguished from the present, which respects only the franchise of a freeholder.

In consequence of this distinction, it has been often found, that it is *jus tertii* to freeholders to state or entertain the objections, that the deeds laid before them for enrolment were contrary to the prohibitions of an entail, or that, by those conveyances, superiors were unlawfully multiplied over the vassal.

Replied, With regard to the distinction between such rights of peerage as are obvious or incontestible, and those *in remote pretence*, it is truly no other than that of an easier, as opposed to a more difficult investigation; a criterion that was never recognised.

It is true, indeed, that the course of justice ought not to be impeded by a person, not in possession of the state of a peer, claiming in that character an exemption from juries, captions, or the like, when it is his own fault that his *status* remains doubtful. But from this it will not follow, that one who has succeeded to a peerage should be permitted to avail himself of that very fault, in order to continue the exercise of a right to which he could otherwise have no claim.

The instances given of irritancy in entails, or of the unlawfulness of multiplying superiors, to which may be added the plea of death-bed, and the power of revoking donations, *inter virum et uxorem*, all respect cases where the sole title of challenge being personal to an individual, his acquiescence renders the right complete and unexceptionable. While the party interested abstained from the objection, it was no wonder that it was held to be *jus tertii* as to freeholders.

" THE LORDS allowed the complainers to prove, that Sir James Sinclair of Mey, the person complained upon, has succeeded to the title of the Earl of Caithness."

No 108. A petition reclaiming against this judgment was presented, to which answers, by appointment, were given in; but the question was not again brought to a decision.

For the Complainer, *Tait, et alii.* Alt. *Dean of Faculty, & G. Fergusson.* Clerk, *Home.*

S. *Fol. Dic. v.* 3. *p.* 341. *Fac. Coll. No.* 107. *p.* 199.

1793. *May* 28.

COUNTESS of LOUDON, and Others, *against* The TRUSTEES on the High Roads in Ayrshire.

No 109.
Trustees acting under a turnpike act, which allows an appeal from them to the next meeting of the Quarter Sessions, whose judgements are declared to be final and conclusive, shut up a road, after a sist upon a bill of advocation, complaining of their procedure, had been intimated to them. The Court sustained its own jurisdiction, ordained the road to be again opened, and decreed expenses against the trustees.

By the Turnpike Act for the county of Ayr, the Trustees are authorised 'to suppress any *by-roads* that do not appear to be *of importance* to the public;' and an appeal from their judgment is declared competent to the next general meeting of the Quarter Sessions, when it shall be 'heard and determined, and the order and sentence shall be final and conclusive.'

The trustees, by the vote of a majority, resolved to suppress the road from Rosefenwick by Crawfordland Bridge; upon which the Countess of Loudon, and others, presented a bill of advocation to the Court of Session, and also entered an appeal to the next meeting of the Quarter Sessions. At that meeting, as the sist granted on the bill of advocation had been intimated to them a doubt arose, whether the discussion of the appeal should not be superseded, till a final judgment of the Court of Session was obtained.

The point being put to the vote, the Gentlemen present were equally divided in opinion. The Preses, who, in his individual capacity, had voted "not "to proceed," now gave a casting vote in the same manner. His right to a second vote being disputed, he quitted the chair, protesting against the after proceedings of the meeting, and, along with several other Gentlemen, left the room.

The resolution complained of was then unanimously affirmed by those who remained; it being understood, however, that the road should be kept open, till the advocation was discussed.

In the advocation, besides the propriety of suppressing the road, the competency of the complaint was disputed. And, upon that point, the complainers

Pleaded, Any statute which introduces an unusual and peculiar jurisdiction, and excludes the cognizance of the ordinary Courts, must be strictly interpreted; Blackstone, b. 3. c. 6. § 10.; and wherever the Legislature intends that the sentences of inferior Judges shall not be subject to review, the jurisdiction of the superior Courts is in use to be expressly excluded; Erskine, b. 1. tit. 2. § 7. Of this many instances might be given from English sta-