INQUIRY

INTO

THE LAW AND PRACTICE

IN

SCOTTISH PEERAGES,

BEFORE, AND AFTER THE UNION;

INVOLVING THE QUESTIONS OF

JURISDICTION, AND FORFEITURE:

TOGETHER,

WITH AN EXPOSITION OF OUR GENUINE, ORIGINAL

CONSISTORIAL LAW.

BY

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"'Tis an unweeded Garden."

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CHAPTER VII.

CONTINUATION OF THE LAW AND PRACTICE IN OUR PEERAGES, AFTER THE UNION.

THE Scottish Peerage that has been more directly the subject of Consistorial Law in modern times, is that of Strathmore, as will be evident in the sequel; and to ascend higher, the question of the legitimacy of the Stewarts, under its various phases, has afforded due scope to the talents, and ingenuity of lawyers,—especially in the Latin Dissertation by John Gordon, advocate, in 1749, incorporated in Goodall's Fordun. I need hardly add, that by the English law, where legitimation *per subsequens matrimonium* is allowed in no event—even independently of the aggravated *incestuous* bar—whether cured by "*ignorance*," or not,—a circumstance that has not been at all weighed—though truly here, the sole antidote—the Stewarts would irretrievably be illegitimate.[1]

Recapitulation as to the case of the Stewarts.

There was a curious Consistorial question affecting the succession of the noble family of Kinnaird, before the Commissary Court in 1747-8, through an attempt of Charles Lord Kinnaird and his lady, who had no genuine issue, to ingraft two supposititious sons, Patrick, and Charles upon that stem; but after an action by Charles Kinnaird, (subsequently Lord Kinnaird,) as next collateral heir, to the honours and estates, in defence of his own right, and to expose the *contrivance*, the alleged children could *not* be produced, and *it* at least died in the

Case of supposititious issue affecting noble family of Kinnaird, in 1747-8.

[1] See here also Pref. p. xvi.

Singular case of Rohan in France, in the 17th century.

birth.[1] The imposition had the same fate with the parallel one of the Duchess of Rohan in France, which, however, no effort could induce her to confess; and even Louis XIV. good naturedly, allowed this lady, a daughter of the great Sully, to bury her cherished supposititious Tancred—the visionary Duke of Rohan—in quality of *their* offspring, in the grave of the deceased Duke, her husband,—under a suitable inscription, which was removed at her death.[2]—Upon the noted Douglas cause,—ever the most curious, and engrossing of the kind,—Lord Hailes, long ago, strikingly, and *questionably (?)* predicated "quicquid *sub terrâ* est, *in apricum proferet ætas*."[3]

Lord Hailes's prophecy as to the Douglas cause.

To revert to the main topic,—after this rather detached "episode," though bearing likewise upon honours,—the next Peerage case to be noticed, following Stair in 1748,[4] is the Cassilis claim, discussed and decided in 1760, and 1762.

Case of the Earldom of Cassilis in 1760, and 1762.

The constitution of the Earldom of Cassilis, like those of many of our old dignities, is not extant. The first indubitable legal notice of its existence, in the person of the original holder, we derive from a royal charter, dated February 5, 1511, in favour of "David (Kennedy) Earl of Cassilis, Margaret Boyd, his wife," &c. and "*heredibus suis*," of the Fief of Cassilis and other lands.[5] It was thus taken to heirs-general; and it is besides important, that numerous grants of land to the same disponee, at different times, both before, as well as after the above date, comprising a *great* estate, are uni-

[1] Act and Decree Register of Commissary Court of Edinburgh.

[2] Les Plaidoyers de Gualtier, 4to. Paris 1663, p. 291, &c. Plaidoyers &c. de Patin, Paris 1681, &c. &c.

[3] Among his MSS. Remarks upon some of our noble families, *Ad. Lib.*

[4] See pp. 386-7-8.

[5] Great Seal Register. Among the alleged productions of the Nobility of Scotland previous to the decree of ranking in 1606, upon the credit of MSS. excerpts by Sir James Balfour and Lord Pitmedden, in the Advocates' Library, from the Record that does not now exist, the above charter, under the head of Cassilis, is also given. There follows a notice of "David Kennedy, Earl of Cassilis," from an asserted Roll *Ballivorum ad extra*, 6th of August 1510; but the mere reference, thus unauthenticated, cannot fully suffice, and we may mainly rely *in hoc statu*, upon the former. Certainly, at least before the last date, the family, as yet known, had only the dignity of Lord Kennedy.

formly limited in the same way.[1] When it is therefore instructed that he was the first acquirer of the dignity that was never in John his father, who continued Lord Kennedy (the older family title) until the day of his death,[2] an unavoidable presumption arises, at least in the minds of all properly imbued with our institutions and laws, that the Earldom stood to the heirs who were hence preferred on every other occasion, and necessarily to heirs-general. In those days, what would a nobleman have been without lands?—an anomaly, a mere nonentity. The irremediable want would in fact have led, as could be illustrated, to the suppression of his dignity; and yet such would be the consequence, if we admitted the crotchet of Lord Mansfield, that honours with us after 1214 ceased to be territorial, or to be identified with the fief, and in the absence of their constitution went only to heirs-male of the body. Besides, his Lordship, even contradictorily, asserts in his speech in the Cassilis case, that if, at the time of the original creation, "the lands were limited to heirs male, the title of honour *cannot* be supposed to descend in a different channel."[3] He here makes the descent of the lands a relevant test; and, by every law of justice and consistency, the presumption must *relatively* obtain, if they were limited to heirs-

[1] This is proved by royal confirmations in the Great Seal Register, dated July 9, 1489—penult of March, and January 28, 1506, &c.

[2] In support of this I may refer to a civil process in 1533, at the instance of "*Mergret Boyd*," Countess of Cassilis, (who has been instructed the *wife* of David, *first* Earl of Cassilis), against "Elizabeth Kennedy, spouse to William Power, allegiand hir relict of *umquhile* John *Lord Kennedy*, *fadir* to umquhile David erle of Cassilis, *spouse* to ye said *Mergret*, to preif yer wes contractis and bandis maid betwix ye said umquhile Johne Lord Kennedy, David erle of Cassilis, and ye said *Elizabethe*," when she took certain lands "in contentatioune of hir gret terce." (Acts and Decrees of Council and Session.) Earl David fell at Floudon, in 1513. This Power match is unknown to "Peerage writers."

[3] See the late publication of the Speech, by James Maidment, Esq. advocate, (p. 48), containing also those of the other Lords who delivered themselves on the occasion, from the authentic copy in the Ailsa or Cassilis Charter-chest, and concurrent unexceptionable authorities. They shall in the sequel be there referred to under the title of Mr. Maidment's publication, which has likewise the printed cases of the parties.

general, as in the present instance. The Earldom of Cassilis, which, upon this principle—from the solution afforded by the relative landed grants—must have originally stood to them, descended, in regular course, to John eighth Earl of Cassilis, both the direct heir-male, and heir-general. He died without issue in 1759, when two claimants started for the dignity, namely, William Douglas, Earl of Ruglen and March, the lineal heir through a female, and Sir Thomas Kennedy of Culzean, Baronet, the heir-male, by reason of his descent from Sir Thomas Kennedy, younger son of Gilbert, the third Earl. Their respective claims came before the House of Peers, through petitions to the Crown, in 1760 and 1761,[1] and they involved the consideration of two royal charters, in the 17th century, which fall first to be disposed of. The earliest, dated September 29, 1642, and proceeding upon the resignation of John sixth Earl of Cassilis, conveys the "Comitatum et Dominium de Cassilis," comprehending the lands, &c. "secundum præcedentiam, et prioritatem loci illis per eorum jura legesque et praxin dicti regni nostri Scotie," to the disponee, and the heirs-male of his body, whom falling, to certain heirs-female.[2] The honours, though the description is not so direct or explicit as should be, are yet in effect comprised under the words "precedence, and priority of place," that obviously of the family in right of their peerage. This especially follows, backed as they are by "Comitatum," &c. however *alone* insufficient for the purpose at the *period*. But it so happens that the charter is only dated "at *Edinburgh*," and was instructed not to be warranted by the Sovereign. The conveyance therefore, so far as regards the honours, was inept; nor could things be mended by a parliamentary ratification under the circumstances, which, it is now agreed, cannot cure or homologate such original defect. The other charter contemplated, is dated April 24, 1671, and carries by way of *Novodamus* in like manner, "Comitatum, et *Dominium*[3] de Cassilis—secundum *precedentiam*, et *prioritatem loci ipsis* (the disponee and his heirs) debitam," &c. with the addition of

The two Cassilis charters in 1642, and 1671, inept as to the honours.

[1] Lords' Journals

[2] Great Seal Register.

[3] *Lordship*, or *superiority*.

"*title* and *dignity*"[1] in the *quequidem*, in alleged conformity to the charter 1642, in favour of John seventh Earl of Cassilis and the heirs-male of his body, whom failing, to the eldest heir-female of the marriage between him and his wife, Lady Susan Hamilton.[2] Under this last denomination, William Earl of Ruglen and March, the female claimant, was the heir in 1759. But then the grant again, though dated at Whitehall, and under the sign-manual, also laboured under objections. First, it may be contended, that it merely transmitted, by way of repetition, in regard to the landed rights—as follows by its own reference and import—what is mentioned in the charter 1642, which was ineffectual as to the peerage, and has, besides, no notice of "*title*" or "*dignity*," thus inducing suspicion and distrust. And secondly, what is still more important in peerage law, in the docquet of the signature,[3] intended for the express eye and sanction of the Sovereign, the sole fountain of honour, and as a guard against interpolation, there is as little specification of them,—which there should have been, with a view to a just conveyance, fully and unequivocally. The title and dignity, therefore, must be presumed to have been unduly, and surreptitiously inserted afterwards—figuring, as they do, but in Scotland[4]—as in certain noted instances. Neither were they resigned in 1671; and I need not add, that more precise and solemn forms were then required, on such occasions, than formerly, which gives conclusive force to the objections. There followed a parliamentary ratification of the charter in question, in 1672, which matter has been already spoken to; while it was moreover qualified by an act, *salvo jure cujuslibet*, that reserved entire the rights of third parties.[5]

[1] The singular and amusing import Lord Hardwicke was inclined to give to what is thus specified, by words plain enough, will be shewn in the sequel.

[2] Great Seal Register.

[3] In her Majesty's State Paper Office.

[4] In the *quequidem*, and clause besides obliging the heirs-female to take the dignity of Cassilis. The latter loose practice and form, is also discoverable in other invalid grants; but honours can never be affected in such an indirect and counterband manner.

[5] Acts of Parliament, last Edit. vol. VIII. pp. 116—207.

Descent of the honours must be otherwise determined.

Hence the two charters referred to, cannot legally be considered to convey the honours; and there is nothing subsequently to affect them. In 1511,—for we must necessarily retrogade,—that is, at the period of the constitution of the Earldom, the fief of Cassilis, as was remarked, stood to heirs-general; in whose favour, likewise, there were grants of lands before and after, although, as in the instance of Lovat,[1] there past eventually a charter of the fief, in 1540, to heirs-male.[2] In these circumstances, the landed charters in 1642 and 1671, or rather the latter only, as having exclusively the warrant of the sign-manual, being too modern for the purpose,—if we adopt the principle of the Lovat decision in 1730,[3] however narrowly countenanced,—the honours in question might descend to heirs-male, according to the last relevant conveyance of the fief; but if we adopt the strong presumable bias of *our* law, to heirs-general. This last conclusion is especially corroborated by the striking precedent of the Earldom of Athol, in the 17th century, where the right of the heir-female was admitted by the Crown on August 6, 1628, though even the investitures of the "Comitatus," by a charter in 1480, and progressively, in the 16th century, stood to heirs-male,[4]—as well as by high legal authority even last century[5]

Ratio of decision by Lord Mansfield in the Cassilis case.

Lord Mansfield, in his decision of the Cassilis case, (for he may be mainly accounted to have decided it,) in favour of the heir-male, on January 22, 1762, adopted, as the relevant *ratio*, what he conceived to be the original, unbiassed construction and descent of our dignities, as founding the legal presumption in the alternative. This, no doubt, in a great measure, was a fair criterion, in absence of the constitution of the

[1] See p. 371.

[2] Great Seal Register.

[3] See again p. 371.

[4] Proved by the relative charters and grants, in the Great Seal Register; and see also pp. 177-8.

[5] Such as that of President Craigie, in reference to the Ross claim. (See pp. 192-3.) The Barony of Ross, it is to be observed, in virtue of investitures of the fief to heirs-male, twice passed the heir-female; so his opinion there, in favour of such heirs, is the stronger. It was not, too, until the 17th century, that the ultimate settlement of the same to heirs-female passed. See also p. 374.

Peerage, if properly and truly followed; but he erred most lamentably, and stumbled, as I have remarked, in the attempt. Blindly assuming that we adopted of old the pure Longobardic feudal law, and that hence, even at no *very* remote era, with us, Earldoms, offices, and lands, went exclusively to heirs-male, he arbitrarily and irrelevantly concluded that such also must be the rule of descent in respect to honours, the constitutions of which are not preserved, even comparatively at a modern juncture;[1] and that therefore, while he most *consistently* held the Earldom of Cassilis to be but a *personal* dignity,[2] and the territorial principle to have long antecedently ceased,[3] it could only descend to heirs-male. It is almost superfluous to notice the glaring fallacy, as must be now obvious to every Scottish legal antiquary, of the premises here, which has been so fully and victoriously refuted by Lord Hailes in the Sutherland case. So far from the above, that able legal authority has fully proved to demonstration, from the earliest period that can now be traced, and downwards, that female succession, with us, in dignities, offices,—however high and masculine in their nature and characteristics,—and in lands, and every real subject, universally obtained. Nay more, that at least ten[4] out of our thirteen original Earldoms, (whose constitutions are unknown,) coeval with the 12th and 13th centuries, and comprising the entire number,—besides other such dignities, and lesser ones of a subsequent date,—repeatedly, as in the simple case of lands, devolved to heirs-female.[5] Neither do the three remaining Earldoms of March or Dunbar, Orkney and Caithness, and Strathern, oppose the doctrine, or form an exception; for the first, until the noted forfeiture by James I., went always to heirs-general, though they happened to be heirs-male; and the two last, as to which Lord Hailes could not decisively or satisfactorily pronounce, for want of due information, may

Quite adverse in fact, and cuts the other way.

[1] See Mr. Maidment's Publication, *ut sup.* pp. 44-5, *et seq.*

[2] *Ibid.* pp. 52-3. [3] *Ibid.* p. 45.

[4] Buchan, Athole, Angus, Menteith, Carrick, Fife, Ross, Marr, Lennox, Sutherland. (See Sutherland case, Chap. V. Introd. p. 3, *et seq.*)

[5] The title of course, like the principal messuage and superiority, going to the eldest co-parçener.

be now likewise held, in virtue of the additional evidence I submit, to have repeatedly descended to female heirs.[1] The allegation in the formal attestation I have appealed to, by

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Caithness, with the *dignity*, descended to Alexander de Ard, in right of his mother, the eldest co-heiress, "*jure* et *consuetudine* regnorum *Scotie*," is especially observable, and corroborative of the female descent in dignities by our peculiar legal practice. The voice of the fifteenth century is thus clearly against that of Lords Mansfield and Rosslyn only in the nineteenth. It is hence impossible to conceive a more copious induction, so *congruent* in details, or such conclusive and striking evidence of a fact in ancient times. It is also remarkable, that, although constituted by patent, our highest dignities, such as Dukedoms, at this day, agreeably to the original rule, are mostly descendible as above. Such being the

Succession of heirs-*female* clearly the old law,—which is indisputably in their favour.

Earl of Caithness and Orkney,—so that he could have alone taken—as he is explicitly stated to have done—as his heir-*female*. Hence we have now the irresistible fact, that *all* our old Earldoms, even including March, as was observed, went, like lands, simply, to *heirs general*. It appears that Malise Earl of Strathern, &c. in the reigns of Robert I. and David II. was vacillating in his politics, and had forfeited Strathern, (see Rob. Ind. p. 56), at least that it had escheated to the crown in consequence of a transaction, who therefore gave it, as can be legally proved, in 1343, to Maurice Murray, and the heirs-male of his body. After his male failure, and a separate conveyance, the forfeiture, it is clear, was either found invalid, or rescinded; for otherwise, there could have been no occasion for the resignation of the Earldom by Alexander de Arde, the heir-general, in 1374, (see above). It was natural, in the interval, to grant it to Maurice, a loyal person, and descended *too* (though more *remotely*) in the *female* line, as can be proved by deeds in the Abercairny Charter-chest, from the Earls of Strathern. His family never *claimed* the Earldoms of Strathern or Caithness, &c. I state this because the Murrays of Abercairny, of whom Earl Maurice was, have been represented erroneously to be the nearest heirs-general of Strathern. It is a fable likewise, that Malise Earl of Strathern had a daughter married to John Earl of Warren and Surrey, as has been asserted, although the last, an Englishman, had a grant of the Earldom of Strathern. The old Earldom of Menteith, as Lord Hailes has shewn, was held by two *female* heirs in the 13th century, the wives respectively of Sir John Russell, or "*Russellus*," and of Walter Stewart. Their Christian names, formerly unknown, were *Isabella* and *Mary*, as I can prove by authentic deeds in the Douglas and Grant Charter-chests. Both their husbands are also there specially mentioned. The devolution of the Moray Earldom to the coheiresses in the 15th century, one of whose names, as usual, is misrepresented by "the Peerage writers," will be afterwards noticed.

case, how much it must astound, nay, even petrify us, when we find it assumed, and conclusively founded upon in the Cassilis case,—shewing, nevertheless, the stress put upon ancient practice,—that there *was* (of old) *only* ONE PRECEDENT of the *female* descent of an Earldom,[1] merely of Buchan in the sixteenth century;[2] and that although the Earl of Ruglen and March, the heir-female, justly condescended upon nine of the old Earldoms that have been noticed to the same effect,[3] Lord Mansfield (as also Lord Hardwicke after him) chose utterly to shut his eyes against them, (for it is indeed difficult to suppose they could have escaped him, having been adduced in the previous Lovat claim in 1730, at least they *ought* not,) and most erroneously to affirm, that his Lordship "has *only* been able to *bring* ONE *instance* of an *Earldom (Buchan)* descending to a female!!"[4] What must be now

Glaring error and misrepresentation here of Lords Mansfield and Hardwicke.

[1] Lord Hardwicke generally asserted, "There has been *only one instance* proved of the descent of a Peerage to an heir female, where no patent appeared, *therefore* when the *instrument (of creation)* is lost, I think there is the *strongest* presumption in favour of the heir *male*, and I think this is by much the SAFEST method of proceeding in cases of ancient Peerages." (Mr. Maidment's Pub. p. 58.) He alludes, as will be seen immediately, to the later instance of Buchan. There can hardly be conceived, I submit, a more rash and unfounded conclusion.

[2] When the fief was altered in favour of heirs-female, and Christian, Countess of Buchan, succeeded, about the middle, as heir of John Master of Buchan, her father, and Earl John, her grandfather. The honours also went to the female heir of line at the beginning of the 17th century. Buchan was exactly *in pari casu* with the cases premised.

[3] Those of Athole, Angus, *Buchan (anciently)* Fyfe, Lennox, Mar, Menteith, Ross, and Strathern. (See case for the Earl of Ruglen and March, *ut sup.* p. 29.) The noble claimant besides appealed to other later female descents of honours. (*Ibid.*)

[4] He then adds, "But the force of this instance (in the 16th century) was taken off by the resignation and new grant of *the honour* in favour of the heir female, with the express consent of the heirs male." (*Ibid.* p. 49.) But he is here again, as almost constantly in such matters, signally incorrect, for there was no resignation of the *honour*, as he would have found upon inquiry. There was only so, of the fiefs and lands, which *he* even, at a far *earlier* period, chose to affirm, in the Sutherland case, (as will be immediately seen), had *no* influence upon the honours. The allegation, too, even affected grants of a "Comitatus," and of the former simply. It in fact appears, as may be further afterwards evident, that the conveyance of a fief or *comitatus*

thought of the fairness, accuracy, and precision, with which our Peerage claims were then canvassed? Or what reliance can be placed in the main, upon what has been termed "Lord Mansfield's Law," so much lauded by his creatures and dependants, the foundations being so faulty and *bad?* He is here, indeed, driven to great straits; for, contrary to the just state of things, as Lord Hailes has instructed,[1] he would inculcate that the Earldom (*"Comitatus"*) of Strathern, in the 14th century, under a grant, "*hæredibus suis*," went to heirs-male,—boldly seeking to identify then *hæredes suos* with *hæredes masculos*;[2] when, in fact, the heir-female legally *did* succeed, was not only Countess in her own right during her entire lifetime, but gave the dignity both to her husband (by the courtesy) and to her son.[3] And he would support this by the *veracious* testimony of *Buchanan* in the 16th century,[4] so little, as every antiquary knows, to be trusted in such details, and so often inaccurate and faulty in *minutiæ*, who states, that Strathern was considered a masculine fief! His Lordship here, moreover, admirably illustrates the confident proposition of some English lawyers, that in a Scottish Peerage claim the House of Peers only decide upon the strictest evidence, and never upon a printed book, such as Buchanan's History, that was hence relied on; while his thus founding upon the grant of Strathern in question, though simply of the "*comitatus*,"[5] as including the dignity, is in *excellent* keeping with his *recondite* and *apposite* finding, subsequently in the Sutherland claim in 1771, that such identical grants in the case of Sutherland, and in the very same century, do *not* "affect the title, honour, and dignity of Earl, —but operate as conveyances of the estate *only*."[6]

Other such, of Lord Mansfield.

The ancient, or Longobardic feudal principle in succession,

sometimes carries honours, and sometimes not, just as may suit, in Lords Mansfield's and Rosslyn's estimation, (see p. 259, *note*), in order to aid their argument.

[1] See Sutherland case, Chap. V. Sec. 13, pp. 55-6-7-8.

[2] Mr. Maidment's Pub. pp. 48-9.

[3] Lord Hailes, *ut sup.* [4] Pub. *ut sup.* p. 49.

[5] Being that formerly alluded to, by Robert II. to David Stewart, his son, upon the resignation of Alexander de Ard.

[6] Lords' Journals.

in favour of males only, came, as is well known, to be soon infringed upon, while the feudal law continued in other respects, even supposing, what *cannot* be instructed, that the former was ever recognised in Scotland. It is amusing, and shews the extreme difficulty to which the impugners of this doctrine were here reduced, that they, including Sir Robert Gordon, the unsuccessful counter claimant in the Sutherland case,[1] can alone ground their argument upon the *general* feudal treatise of Craig, who, besides, seldom troubled himself with Scottish illustration, and which, even when he attempts, he often so signally perplexes and misrepresents. And hence from all that has been premised, grounded, as it is, upon the general and concurrent understanding of law,—illustrated, indeed, by the very descent of the Crown, that could not have been overlooked, from the earliest epochs, even down to the present moment,—the ratio or test proposed by Lord Mansfield,—that of our original practice, instead of aiding him, makes glaringly the other way;[2] and instead of defeating, ought to have been conclusive in favour of the Earl of Ruglen and March, the female claimant.[3] Certainly, with the greater reason, as he admitted, quite at variance again with his doctrine in the subsequent Sutherland claim,[4] where he draws so wide and preposterous a distinction between such, that the title of honour "cannot be supposed to descend in a different channel from the lands,"[5] at the time of its constitution; while we have seen that, at that very period, the fief of Cassilis, and the entire family estate, then most large and affluent, stood to heirs-female.[6] His Lordship, in fine, I submit, has displayed the utmost ignorance and misapprehension of our peculiar laws and institu-

Old Longobardic feudal law never here applied in Scotland.

Ratio adopted by Lord Mansfield in Cassilis case, should have justly given the Peerage to the heir-*female*.

[1] See his printed cases.

[2] Lord Bankton also presumed directly in favour of heirs-*female* in the case of honours, under the present circumstances, (see p. 371, *note*.)

[3] Afterwards Duke of Queensberry, well known on the turf. He had talents, but not those of his political predecessors, and was less anxious for the honours than the estate of Cassilis, which he likewise unsuccessfully claimed, being excluded from it by a modern entail.

[4] To be afterwards stated.

[5] See Mr. Maidment's Pub. p. 48.

[6] See also here, Lord Bankton, *ut sup.* p. 371.

tions, and ancient doctrine and practice, sacrificing all to an unnatural and arbitrary modern rule, little pardonable in a Scottishman; and falls into the error that not unfrequently misleads our lawyers, owing to their proneness to foreign and irrelevant illustration,[1] in exclusion of our own, which ought alone to be consulted, and to govern when discoverable.

Old constitutions of our dignities, so far as can be seen, also decidedly against him.

So far as any thing has reached us, touching the constitution and descent of our earliest Earldoms, we are still fully justified in the main conclusion. There is a charter of confirmation simply, not proceeding upon a resignation, by Alexander II. March 1, 1224, to Malcom of Fyff, the son of Earl Duncan of Fyfe, of the "Comitatum of Fyfe," with "socco, et sacca—furca, et fossa—Tol et Them et infangenthef," the higher feudal prerogatives,—to be held, *not* by the heirs-male of his body, as Lord Mansfield would have insisted, but "sibi, et *heredibus suis*, de nobis, et *heredibus nostris*." This last adjunct, if any doubt could be entertained upon the subject, inevitably fixes that heirs-general were called by the limitation under "heredibus," because, independently of the natural and technical import of the term, it is here employed to denote the heirs to the crown, who were incontestably so. But this is not all, for the confirmation states that the tenure is to be in the same terms as the original grant and confirmation respectively of the "Comitatus," by the Kings David and William, which first succeeded in 1124, and died in 1153, to the family; and from whence we may conclude, that this the original cardinal title—as far as is yet known—was also *heredibus suis*.[2] Nor can it escape attention that the lands given,

[1] This was evident, in reference to part of our Bench and lawyers at the close of the 17th century, and afterwards,—from their founding upon the old Longobardic doctrine, as influencing, and ruling in the question of precedency between the Earls of Crawford and Sutherland, &c.; and it is singular that that was the only feasible Scottish precedent Lord Mansfield could appeal to in the Cassilis decision. As may be shewn in a future place, the error even operated in conveyances at the period, and perverted the true and natural import of our law diction.

[2] The confirmation referred to, which is not noticed by Lord Hailes, is *verbatim* inserted in a volume of the Macfarlane MSS. in the Advo-

under royal authority, in 1214, by "Maurice *junior*," the successful competitor for the Earldom of Menteith, as an indemnity, or kind of compromise, to the *daughters* of "Earl Maurice *senior*," his brother, who had taken the dignity, are to be held by the *same* "et earum heredes qui de illis veniunt."[1] We, in short, everywhere meet at the earliest periods, in evidence that can be trusted, with the practice of the descent of lands, fiefs, dignities, and offices, to heirs-general instead of heirs-male alone, as Lord Mansfield and others have maintained. Nay, there has been no authentic trace yet found in Scotland of the Longobardic, or original feudal principle in this respect, discoverable elsewhere.

Various errors of the former, and Lord Hardwicke, in the Cassilis case.

In perusing the speeches of the legal dignitary in question, and of Lord Hardwicke in the Cassilis claim, there will indeed be found much to irritate, and astound a Scottish lawyer, and try his nerves and patience to the utmost,—perhaps as fully as the discordant sounds, the enraged harmonist, in Hogarth's noted delineation—while their jarring effects are more lasting. For instance, that Scottish honours were first but "*masculine* fiefs,"—that Peerages and offices were then "certainly" so,—that "territorial dignities ceased *long be-*

cates' Library. I many years ago gave an excerpt of it to Mr. Hamilton, then engaged in his unsuccessful, and unavailing case for Miss Lennox of Woodhead, in reference to the Earldom of Lennox. Lord Hailes also quotes, from the Chartulary of Lennox, the confirmation by Alexander II. in 1238, of the *Comitatus* of Lennox, to Maldoveny filio Alwini Comitis de Levenax, "et *heredibus suis*, quem pater ejus tenuit." (See Sutherland case, Ch. V. Sec. 10, p. 39.) The same authority (*ibid.* Sec. 8, p. 35) gives, from Selden, a renewal of the *Comitatus* of Mar by King William in 1171, in favour of Morgund, son and heir of Gillocherus Earl of Marr, to him "et *heredibus suis*;" but some objections attach to its credit, and it has been impugned by Chalmers in a printed statement.

[1] See p. 172, *note*. This curious illustration I some time ago discovered, and fortunately transmitted to us by the English Patent Rolls, (for otherwise, by the loss of our Records, we would have had no knowledge of it), was of course not known to Lord Hailes. The case in dispute between the two rival brothers is styled "loquela—inter *eos* (the *brothers*) de Comitatu de *Manenthe*" (*Menteith*), into which Maurice, senior, (probably spurious,) as turned out, had unduly entered.

fore the 1424," [1]—" that *hæredes*, without any addition, meant heirs-*male*,"—that to include heirs-female there must be the addition of *quicunque*, [2]—that in honours formerly there was " convincing evidence of the exclusion of females,"—that there was " only one instance proved of the descent of a Peerage to an heir female, where no patent appeared,"[3]—from which *very accurate* allegation it is forcibly concluded that all in *pari casu* should merely go to heirs-*male*, generally without redemption,—that " Patents of honour in Scotland, in the time of Queen Mary, and *afterwards*, were limited to heirs male," which therefore must enure to the same end, and *irretrievably* rivet the *male* succession,[4]—" that there was *no* creation of superior peerages, such as Dukes, &c. without some writ limit-

[1] Mr. Maidment's Pub. pp. 45, 58. To these assertions I may merely oppose the multiplied specific authorities to the contrary, in Lord Hailes's Sutherland case, without adducing various concurrent proof to the same effect, from the public Records and private Charter-chests, besides such in this performance.

[2] Mr. Maidment's Pub. pp. 49, 50. This broad assertion is a palpable delusion, fully disproved again by the Sutherland case, and our Records. Nay, the House of Peers decided very recently in direct opposition, in such identical abstract instance, as will afterwards be seen—that of the Barony of Polworth, created in 1690—that under " *hæredes*" simply, *without* any strict enlarging concomitant, heirs *female* were entitled to the Peerage.

[3] Mr. Maidment's Pub. p. 58. This has been already pointedly refuted, and could be additionally.

[4] Mr. Maidment's Pub. pp. 49, 50. What then becomes of the charter or patent by Queen Mary, dated July 20, 1565, of the Dukedom of Albany, with all " *Honours* and *Dignities* &c. belonging to the most noble rank of a Duke," in favour of Henry Lord Darnley, her husband, with limitation not to heirs-male, but " *hæredibus suis* de corpore suo." (Great Seal Register.) And the inauguration and act of creation can be proved to have followed on the ensuing 22d. In terms of the grant the honour is identified with the lineal representation of the Stewarts, now in the Archducal house of Austria Modena. Queen Mary also confirmed the Earldom of Marr by charter, dated June 23, 1565, to John Lord Erskine, and his heirs-general. *(Ibid.)* As to there being no grants of peerages " *afterwards* " to female heirs, we might as well deny the existence of the sun; indeed even the greater portion, as has been observed, of our modern Dukedoms are so limited.

ing *the descent*,"[1]—that resignations of Peerages "were only introduced to *let in* heirs-*female*!!"[2] &c. &c.

But Lord Mansfield, over and above, has made a brilliant discovery, that must convulse and electrify Scottish legal antiquaries, and create a much greater harmony than was thought between the political institutions of the two countries. He has found, in the course of his *elaborate* and *successful* investigations, that we had baronies "by *writ*," as in England; for he positively asserts that "the creation of the Lord of the Isles, in 1476, *was* by *writ*, though the Record only mentions "quo die factus fuit Dominus Parliamenti."[3] How he verifies this fact, however, is nowise discoverable, and must defy conjecture, only appealing, as he does, in the shape of authority, to the Record, which is no other than that of Parliament, and where certainly, under date July 1, 1476, there is an entry importing that James III. then "fecit, constituit, creavit, no-

Strange *conceit* of Lord Mansfield, that we had Baronies *by writ*.

[1] Mr. Maidment's Pub. p. 57. To this fancy of Lord Hardwicke, I might perhaps oppose the "*constitution*" of the Dukedom of Lennox, dated August 5, 1581, without express words of limitation, (see p. 99.) The same thing applies still more forcibly in the patents of the lesser dignities of Balfour of Burleigh, and Kinclevin, in 1607, (see pp. 100-1.) But the grants of the Dukedoms of Montrose and Ross, in 1489, and 1503 respectively, were only conceived for life, (see pp. 108-9); and pray, to come down to much more modern times, did Lord Hardwicke never hear of the patent of the Dukedom of Hamilton, dated Sept. 20, 1660, granted merely in this restricted way, *without* limitation of a "*descent*" to William Douglas or Hamilton, Earl of Selkirk. (Great Seal Register.)

[2] Mr. Maidment's Pub. p. 58. This glaring fallacy and absurdity will indeed astonish modern Scottish lawyers,—there being besides so many such resignations, especially in the 17th century, as proved by our Records, *vice versa*, "to let in" heirs *male*. Notwithstanding, I shall add a prior instance in refutation. James VI. of Scotland, by charter, dated October 28, 1581, created Robert Stewart *Earl* of Orkney, *Lord* Zetland, to him and the *heirs* generally of his body. (Great Seal Register.) In terms of this grant the *honours* descended to Patrick, second Earl of Orkney, his son and heir, who obtained, *upon* his *resignation*, a regrant of the *same*, dated March 1, 1600, to himself and the heirs *male* of his body, whom failing, to his brothers *nominatim*, and the heirs *male* of their bodies, quite to the exclusion of female heirs, who took before. *(Ibid.)* The resignation was thus, in manifest contradiction, to let in male heirs.

[3] Mr. Maidment's Pub. p. 48.

minavit, et ab *heraldis* nominari fecit, Johannem de Ila Dominum Insularum, baronem baronentem, et dominum Parliamenti sui."[1] But pray, is this all, did nothing more obtain? Most provokingly, again, for his Lordship's doctrine, and in manifest refutation of it, there is *there* likewise *independently*, a royal charter or grant, dated July 15, 1476, being the real and substantive constitution of the honour, whereby the King and Parliament make and create the same individual "dominum nostri Parliamenti, et baronem—Dominum Insularum perpetuis temporibus nuncupandum," conferring upon him at the same time Isla, and various lands, expressly limited to him and the lawful heirs-male of his body, whom failing, to Angus his natural son, and the heirs-male of his body, whom failing, to John, another bastard, and the same heirs, with an ultimate remainder to heirs *whatsoever*.[2] So much for this apocryphal barony constituted "by writ," of course, as

Quite apocryphal.

[1] Acts of Parl. last Edit. vol. II. p. 113. The creating the individual a Banneret or Baronent, as well as a Baron, was the form with us on these occasions, part of the ceremony consisting in the display of a banner, and such Barones *majores* were thereby entitled to the privilege of having one (borne by a retainer before them in the field) of a *quadrate* form. As indicative of the distinction, the antelopes, supporting his arms, on the seal of James Lord Hamilton, appended to his original Bond of Manrent to George Earl of Angus in 1457, (which I have seen in the Hamilton Charter-chest), bear respectively banners of such shape, containing the armorial alliances of the family. This is the more remarkable, being shortly subsequent to the creation of the nobleman in question as a Lord of Parliament, which occurred in 1445. (See Acts of Parl. last Edit. vol. II. p. 59.) The form of creating Barons also *bannerets* prevailed as late as the reign of James VI. To quote one instance among several, at the coronatiou of Anne of Denmark, his queen, in May 1590, "Sir John Maitland, knight of Thirlestane, (was '*creat*') Lord of Thirlestane baron, *banorent*, and Lord of his highnes Parliament, who past to receive ye honour in a red robe, his *standard* borne befoir him, conveyed by Sir William Murray of Tulliebardin, and Sir Archibald Napier of Merchieston." (From a MS. account I have seen of the solemnity.) There was *also* a patent.

[2] Acts of Parl. *ut sup.* pp. 189-90. From a consideration of the evidence in the matter, it now strikes me that the Macdonalds of Dunovaig and Glins, of whom the noble family of Antrim are represented as being sprung, came to have the right to the lawful male representation and chieftainship of these Macdonalds, Lords of the Isles. I don't know if any male descendant of the Antrim branch now exists.

held in such instance, without mention of heirs! On the contrary, it was constituted by an express charter, analogous to a patent in our days, though conveying also lands; and we cannot fail duly to appreciate the glaring oversight of Lord Mansfield, whom this important *extra* notice utterly escaped, —at the very part of the record, to which he specially referred. The previous entry quoted was the mere *accessory* form of inauguration, or solemnity, of the "Act of creation," as it was called, which sometimes obtained before, as well as after the grant,—as in the instance of the constitution of the Earldom of Winton, in 1600.[1] But clearly, at one time or other—*independently* of the grant or charter.

Lords Mansfield's and Rosslyn's apocryphal constitution of Peerages by belting *only*.

Under favour, however, of a manifest misconception of the constitution of our dignities, both Lord Mansfield and Lord Rosslyn were so wild as to inculcate, that belting, "*cinctura gladii*," a *single*, known element of the "act of creation," or ordinary form of inauguration, *alone* sufficed for that purpose! And further still, that by means of such cabalistic, though mute rite exclusively, an eloquent though mysterious Peerage sprung up, miraculously indicating its own descent, —namely, to heirs-male of the body! Such peerages, however, unfortunately—or rather fortunately, we must alone attribute to the fancy or incantation of these legal wizards; but how they should have been restricted to the latter, when the first Lord admits the constitution of baronies with us by writ of summons, which hence must largely descend to heirs-general, may be another difficulty and palpable contradiction, that we will leave his Lordship to explain. As to the rejection by him, of a dignity being attached or annexed to "the capital seat, or some other part of the fief,"[2] that has been already refuted.[3] Lord Hardwicke, and he also, in the Cassilis case, seem to have been unaware of a *Novodamus*, as our common Institutional writers would have informed them, being "an original right."[4]—But there is no end to

[1] See pp. 49-50. It *followed* in the Albany case, see p. 570, *n.* 4.
[2] See Mr. Maidment's Pub. p. 45. [3] See pp. 109-10.
[4] See Mr. Maidment's Pub. pp. 53—59. Erskine's Instit. B. II. Tit. III. § 23.

these errors, and inadvertencies, that bloat and disfigure nearly every part of the Cassilis procedure.

Amusing misconception of Lord Hardwicke in the Cassilis case.

Honest Lord Hardwicke was somewhat naturally scared at the sound of the strange and mystifying office of "*Kenkynol*," — the obsolete Gallowidian right of captainship, or chieftainship, and taking "*caupes*,"—thus explaining to our English neighbours, obscurum per *obscurius*,—carried by two charters to the Cassilis family, in 1405 and 1450.[1] But nothing, after all, is too difficult for an English lawyer in a Scottish Peerage claim, who at once, however, it may be, cuts the Gordian entanglement, and resolves the node. In the same way, Lord Hardwicke,—as he might have also done in the case of the peculiar and congenerous terms of "*Toscheager*," and "*Toischeuach darach*,"[2] and with equal relevancy, —*thinks* that the "Kenkynol" actually is the "precedence," and "*priority* of *place*," and "*title* and *honour*" in parliament, due to the Earls of Cassilis, conveyed with the *comitatus* of Cassilis, by the charters 1642, and 1671,[3] the meaning of which last terms, although the grant was not there warranted, is obvious![4] He thus seeks to explain, by his unaided intuition, and under the influence of Coke and Lyttelton, what is purely *ancient* Scottish, and derived from the remote institutions and manners of the barbarous *aborigines*, before the Saxon and Norman colonization. But any thing better than allow that honours, even in the faintest manner, were affected by a charter. "Kenkynol" denoted the right, with arbitrary ascendency, in

[1] Great Seal Register. "*Kean*" denoted the head, and "*Keanel*" a tribe or family, in Gaelic, thus corrupted into "Kenkynol."

[2] According to Chalmers, "the highest officer—among the *Gaelic* people of Galloway." (Caledonia, vol. I. p. 451.) That district was like Wales, where the older inhabitants still retained their institutions and customs, though conquered by the feudal Lords of the Saxon and Norman pale. In this respect, as in other conquered countries, the Kings of Scotland were for a time disposed to indulge them, the better to secure their obedience; and in the reign of David II. there was a charter to "the men of Galloway anent their lawes and liberties." (Rob. Ind. p. 33.) Malcolm Earl of Lennox, who figured in the 13th century, grants the Gaelic office of "*Tosheagor*" of Lennox, along with that of Forrester of the same, to Patrick Lindsay in fee. (Chartulary of Lennox, edited by Mr. Denniston, p. 49.)

[3] Mr. Maidment's Pub. p. 59.

[4] See pp. 558-9.

such estranged and savage fastnesses as Galloway, comprising Cassilis,—as an heir-loom of their otherwise exploded usages, —of exacting, under the name of "caupes," a substantial infliction and contribution, such as a horse, cow, and heifer,[1] &c. by a rabid chief or head of a sept or clan, from his abject and destitute dependents; who, however redoubtable, and feared by them, could never, in virtue of such petty tyranny, which was only privative to his quarter, have claimed, and been allowed rank and precedence within the walls of Parliament, in civilized districts. The perquisite could never, little respected as it was in Saxon and Norman-Scotland, which at length justly suppressed it, have, according to Lord Hardwicke, constituted public and national pre-eminence, or converted there, a collector of cattle in Galloway into a greater dignitary than the superior or ordinary Barons, many of whom, independently of regalities and paramount fiefs, had rather more important and ennobling offices. But what is here clenching, the taking of caupes, the essential right of the Kenkynol, *had* been abolished by Act 1489, c. 19, and still more by Act 1617, c. 21, which accounts for the latter not subsequently appearing in the Cassilis charters after 1450, and of course fully excludes its constructive conveyance, by the supposed terms in those of 1642 and 1671.[2] The misapprehension of Lord Hardwicke is similar to that of another English legal authority, as little

[1] See Skene, *sub voce*, "*caupes* in Galloway and Carrick," the precise locality of Cassilis; and Chalmers derives the term from "the Calpa of the Gaelic signifying a cow, or horse,—or Calpach, a heifer, a bullock, a colt." (Caledonia, vol. I. p. 448.)

[2] The Act 1617, c. 21, "Anent dischargeing of caulpis—by the cheffis of Clannis," justly states that the custom had been discharged in Galloway by an Act of James IV.; and in peremptorily abolishing it, gives a striking picture of the cruelty and barbarity of the practice, whereby horses and oxen had been pulled out of ploughs and harrows by the chiefs during their greatest need. And this was done repeatedly by rival chiefs, who happened to contest the privilege, one after the other. (Acts of Parl. last Edit. vol. IV. p. 548.) It transpires from the Act 1489, c. 19. that "the heads of kin in Galloway" had been summoned to instruct their right to the exaction, but had not appeared. (Acts *ut sup.* vol. II. p. 222.)

Of another English lawyer, &c.

at a loss, who rendered our "*umquhile*," (*quondam* or deceased,) by the term *humble*.[1]

The new date of our calendar, too, as subsequently holds, (instead of the 25th of March, the former commencement of the year,) by Act of Privy Council, the 27th of December 1599, in a Peerage claim *not extremely* recent, occasioned much surprise. And notwithstanding the circumstance is so notorious, certainly at least with us, it was regarded by some of the noble judicatory, after being premonished by a Scottish counsel, as curious and most important information. Nor is it less remarkable, that one, not the least distinguished of the English counsel engaged in Scottish Peerage cases, was equally surprised and electrified, when he learned that the Session decided Scottish Peerage claims instead of *our* House of *Peers*,—an epithet, it must be allowed, foreign to us, and adverse to our political institutions.

Natural conclusion from the above.

All this, again, forcibly evinces, in order to prevent undue *delay* by correction, which is there a material consideration, the importance of the facts and necessary explanations in our Peerage claims, being first adjusted and settled by the proper competent jurisdiction of the Court of Session, as Ordinaries, instead of being left, as has often obtained, and must more or less still do, in the present conceived unnatural and inexpedient state of things, to rumination, and the likely conse-

[1] It is to Lord Hardwicke we are indebted likewise for the arbitrary preference of the male to the female succession in our peerages. Lord Mansfield informs us, in his Speech on the Sutherland claim in 1771, that "it was *settled* with Lord Hardwick (in the Cassilis instance betwéen them) that in cases where no instrument of creation or limitation of the dignity appeared, the legal presumption was in favour of the heir male. The judgement was penned at his sight." (From the authentic copy, Sutherland Charter-chest.) It will be afterwards inquired whether even these authorities, *supposing* them to have had every qualification for the purpose, were thus entitled to coin or enact such new law; but with all due deference and respect for them, may we not question, after what has been set forth, their endowments and competency in this view, and their ability, even with any degree of safety or surety, to pronounce upon the *special* merits of a Scottish Peerage claim. At the same time it must be confessed, that Lord Hardwicke acquitted himself most sensibly and judiciously in the Oxenford claim, in regard to a *modern* matter. (See pp. 382-3.)

quence of palpable error and misconception. Lord Marchmont, a Scottish nobleman,—the only other Peer who spoke on the Cassilis occasion,—it must however be confessed, acquitted himself much better, which may be ascribed, as he himself intimates, to his "knowledge in the law of Scotland;" for while he justly observes that Craig's "notions were wrong," being "all (like those of some of our modern lawyers) derived from the feudal law of Lombardy,"—confirming what I have remarked,—he, with equal truth, contends, that "certainly our succession was always *lineal*, and always *female*; and where there was an heir-male, he was *no* heir of law, but an heir of provision."[1] This preference of heirs-general, in conformity, likewise, to Lord Hailes's precepts, ought to be an important and inevitable rule in favour of female claimants.

Pertinent doctrine of Lord Marchmont.

I have elsewhere remarked, that our Peerage constitutions had formerly always more or less of a territorial character. And the fact of there being no formal erection of the Baronial fief of Cassilis before the 17th century, cannot be instanced as peculiar or an exception; for lands, or a reference to them, might have been contained in the original grant of the dignity. Thus, the charter of constitution of the Earldom of Glencairn, dated May 28, 1488, confers upon Alexander Earl of Glencairn, the honour and dignity of Earl of Glencairn and Lord Kilmaurs,—a form more explicit than usual; but for their support, and increase of his means, there are, at the same time, conveyed the *lands* of Drummond and Duchray, to be held by him "et *hæredibus suis*."[2] And this limitation even Lord Rosslyn admitted, on the occasion of the Glencairn claim in 1797, fell to determine the descent of the honours in the same deed,—which hence had still a territorial connection, though not feudally erected into a *Comitatum*.

The old dignity of Lord Kennedy, conferred in the reign of James II. though the constitution *be* as little extant, was also claimed and allowed to the heir-male, upon Lord Mansfield's untenable *ratio*, in 1762. It is not in the most remote manner carried by any of the deeds referred to,—nor did it

Dignity of Lord Kennedy also claimed and allowed the heir-male, in 1762.

[1] Mr. Maidment's Pub. pp. 42-3.

[2] Original, produced at the claim subsequently noticed.

take its name from, or give it to a fief, however feudal the form of creation may have been; so that this Peerage, different so far from Lovat, may be the more argued to be affected by the principles of our common law, in favour necessarily of heirs-general, having never passed the latter, as directly warranted by the decision of the Session in 1633, in the case of Oliphant, the precedents of Salton, and Athol, &c. &c.

Curious remarks of Sir Adam Fergusson as to the Cassilis case.

The following curious notice is from an autograph account by Sir Adam Fergusson of Kilkerran, Baronet, (a distinguished and highly respectable lawyer in his day,) of a conversation he had with Lord Rosslyn, on July 13, 1797, in reference to Peerage matters:[1]—"*He (Lord Rosslyn)* said, Lord Mansfield was clearly wrong in his opinion on the case of Cassilis, in which he had been misled by William Gordon. He seemed, however, to limit this error, to his supposing a presumption in favour of males in the succession of lands, and to hint at a distinction between lands and honours. He avoided saying that the decision in the case of Cassilis was wrong, though Mr. Chalmers[2] assured me that he had said to him that the judgment itself was wrong; and Mr. Grant told me, that Mr. Anstruther had said the *Chancellor (Lord Rosslyn)* had spoken of it in the same terms to him."

Evidence of the male claimant in support of his pedigree.

Sir Thomas Kennedy, the heir-male, founded, in support of his pedigree, upon a general service, of the most recent occurrence, on January 28, 1760, as heir-male of John, last Earl of Cassilis, which was received without any direct attempt to extinguish nearer heirs of the same character, who had existed, and were not so discussed. The evidence of printed books was also held admissible. So much in behalf of the confident and rash assertion of some English lawyers, that the House of Peers only exact the strictest evidence in our Peerage claims. They have, it must be confessed, been extremely vacillating in this respect, owing to their conflicting procedure, placing our services especially in a strange predicament; but, in the present instance, the male descent of Sir Thomas, the successful claimant, being legally made out,

Laxity, and contradictory, practice of the House of Peers in matters of evidence, including retours, &c.

[1] In the Kilkerran Charter-chest,—not intended for the public view, but only as a private *memorandum*.

[2] James Chalmer, the solicitor formerly noticed; see p. 384, note 3.

while there was no contradictor, it sufficed, according to Scottish principle, which was therefore properly adopted. It was also positively maintained by the Earl of Ruglen and March, the heir-female, that what weighed with the Court of Session in the Lovat decision, was the descent of the Baronial fief to heirs-male, in full corroboration of what has been said under that head.

Case of the Barony of Borthwick, in 1762 and 1808.

But, said Lord Mansfield at a subsequent period, in 1771, in his Speech upon the Sutherland claim, though somewhat previously hesitating, and with just reason,[1] now gathering assurance and confidence after the successful disposal, according to his views, of the Cassilis case,—as a striking and final corroboration of my doctrine, I appeal to the case of Borthwick,—his own offspring, likewise, it may be held, claimed and maturely[2] decided, as he inculcates, immediately after Cassilis, in 1762.[3] Here was an old Barony, (created in the reign of James II.) the constitution of which is not extant; and judgment "went of course," to use his Lordship's words, in favour of the claimant, "as the heir-male of the body of the person first ennobled," while "no regard was had to the limitations of the estate;" and "the Crown supplied the claimant with money to prosecute his right." The general question is "therefore—solemnly determined."[4] If any thing were wanting, this weighty precedent, so fully and advisedly considered,—certainly as much as that of Mordington, formerly adverted to,[5] and to be *further* still, in the se-

Decision much lauded by Lord Mansfield.

[1] He prefaces the conclusion of his Speech on the Cassilis claim with intimating, that he delivered himself "with great diffidence." (See Mr. Maidment's Pub. p. 55 and p. 43.)

[2] In the same Speech, in 1771, upon the Sutherland claim, he takes credit for the circumstance of "an adjournment of the cause" being allowed, after "the *first* hearing," to enable the claimant to "supply the defect" in "the evidence of the pedigree—that did not satisfy the House,"—which was done to their satisfaction. This trivial delay was little indeed, and especially insignificant, considering the nicety and great importance of the matter.

[3] The claim, upon a petition to the King, was referred to the Lords on January 29, 1762, and decided speedily enough, on the ensuing 8th of April. (Lords' Journals.)

[4] From authentic copy of his Speech in the Sutherland Charter-chest.

[5] See pp. 385-6.

quel,—must open the eyes of all sceptics and unbelievers, and constrain them to my opinion.

The remarkable intervention of the Crown in this instance, for political and electioneering views, it must be confessed, was rather partial and indecent; and it is difficult to see how the fact, so *relevantly* introduced, can aid the argument: but what will be said, when it actually turns out that the House of Peers, by this lauded decision,—in reality bad, reckless, and precipitate,—adjudged the honour to one legally a stranger, nay, to one even in a worse situation, to a *natural* descendant of the house of Borthwick? And not only so, but to the prejudice of justice and of lawful heirs, whom it placed, in our days, in an unjust and embarrassing situation; while, being thus rotten at the core, it must be viewed as a very *Balaam-like* illustration indeed in relative matters, and little to be trusted in the present. The maxim, "*falsum* in uno falsum in *omnibus*," here relevantly applies, and with the greater likelihood, after the avowed hesitation in the instance of Cassilis. We again descry the same singular fatality that characterizes most of Lord Mansfield's illustrations and authorities; and the ill success that attends them, seems, we might almost say, to have been designed by providence to mark to posterity how signally and egregiously he erred, and the shattered and frail nature of his Peerage perceptions.

In fact reckless, and bad.

Henry Borthwick, the claimant, founded upon a male descent from Alexander, *son* of William Lord Borthwick, who figured towards the end of the fifteenth century, and fell at Flodden in 1513. He, *de facto*, was so descended; but then, again, this Alexander was illegitimate. His usual designation was, "*in Johnstone*," (in the parish of Keith, Humby, East Lothian,) where he and his family resided, and owned a subordinate interest. On December 5, 1489, he and Margaret Lawson, his wife, obtained a grant from Lord William, of certain husband lands in Nenthorn; and on three different occasions, not only in the charter, but in the precept of seisin and infeftment in that year, forming the entire conveyance, and the several stages of the investiture, he is specifically styled "son *natural*" of William Lord Borth-

The claimant of *illegitimate* descent,—as *subsequently* turned out.

wick.[1] While the epithet has never been shewn to be applied to any lawful member of the family, it was with us, as it indeed still is, the regular and approved designation of illegitimate offspring; "natural," coupled with "son," having such identical import in our civil records and deeds, when unqualified, and thus occurring.[2] But this is not all: for there is further, a legitimation of the same party, under the warrant of the Privy Seal, dated September 2, 1511, by his undoubted description of "Alexander Borthwick *in Johnstone.*"[3] The conclusive point, therefore, is irretrievably fixed, there having been only one "Alexander Borthwick in Johnstone" at the period, which has never been refuted, and must legally be presumed, in the absence of contrary evi-

[1] Proved by the original authentic deeds, only afterwards adduced in the House of Lords by an objector, and counter claimant, in 1808 and 1812.

[2] An attempt was made by the claimant to confuse and perplex the meaning of "*naturalis*," owing to its occasional conjunction with "*legitimus*," and hence marked qualification. But that is not "naturalis *tantum*," or standing alone, as technically explained in the Canon Law, and every European country, which when thus appearing, and as in the text, denotes illegitimacy; while "naturalis *et legitimus*," fixing blood, as well as civil relationship, for greater explicitness, in contradistinction—nay, even in England to this day, and abroad, where however there is no doubt as to the *former*—is oppositely interpreted. The epithets are *definitely voces signatæ*, and the rule is practically illustrated with us. No difficulty either arises from some grants to the natural son of a man and his wife in Papal times, as were likewise objected, owing to what was stated (see p. 516) as to dispensations for marriage, subsequently completed, between parties within the forbidden degrees not operating *retro*, or salving bastardy in the case of previous issue, who necessarily answered the same description. Even now there may be bastards between a man and his wife, but there were frequently indeed then. The above circumstances, therefore, can never attach legitimacy to naturalis. Inadvertence of specialties such as these, with the aid of modern impressions, is the bane of antiquarian discussion. "Naturalis" *(tantum)* has long indeed been the standard term for illegitimacy, even as far back as the Roman law, where it possessed that identical import.

Technical meaning of "*naturalis.*"

[3] Privy Seal Register. That peculiar designation of Alexander Borthwick, the *filius naturalis* of Lord Borthwick, acquirer of Nenthorn, as well as of his descendants, and the other material facts, can be duly instructed. The *above* Register is patent to *all.*

dence. Indeed, those who gainsay it must be necessitated to make out, what I suspect is not very probable, and may be rather of difficult probation, that upon the same narrow, bleak, and obscure spot, in the same house and steading,[1] there were, at the same time, two Alexander Borthwicks "*in Johnstone*," rentallers or farmers there,—indicated by the "*in*" Johnstone with us,—the one a legitimated bastard, and the other a natural son, holder of *husband* lands in Nenthorn, which, after all, would not really mend matters, owing to the still adhering *tache* of "naturalis;" while even the mutual *agricultural* calling, further exemplified by the occupation of the *husband* lands, might corroborate the identity.

Suspicious circumstance even at the time of adjudication.

Although these documents and authorities happened not to be adduced in 1762, it was sufficiently startling at that juncture, that another grant by the above William Lord Borthwick, without a date, but afterwards, (probably in 1495,) to the Alexander Borthwick in question, and Margaret his wife, of parts of the same lands of Nenthorn that had been produced by the claimant to instruct the material fact of the *filiation* of the former—was *mutilated*, and, by a singular fatality, had an *abrasure* directly following "*filio*," i. e. of Lord Borthwick in reference to him, where "*naturali*" fell to be inserted.[2] In the conveyance previously alluded to, *naturalis* constantly follows *filius*, agreeably to the usual form. The unfavourable and fatal epithet therefore, thus repeatedly attaching, as is to be presumed, and in the instance last noticed, precisely as before, may be held there to have been purposely destroyed. This striking and *significant* mutilation, as it appeared, ought to have riveted the attention of the House of Lords; yet neither did the circumstance, nor the certain existence formerly of many nearer heirs-male, (even throwing

[1] Johnstone was merely so, and never a hamlet or village, being within the estate of the Keiths, Earls Marshal, the proprietors of the district, and situated in the parish called *Keith* Humbie, after the latter. It was adjacent to the chill elevation of *Soltray* hill, which the family, increasing in their means, afterwards acquired, and thence derived their recenter designation of Soltray. Though possessors of husband lands in Nenthorn, (in Berwickshire), Johnstone was their residence.

[2] Proved by the original produced.

the illegitimacy out of view,) wholly unaccounted for, retard the precipitancy and extraordinary despatch on this occasion, so different from their procedure in certain others.

But, as has been already observed, and what renders the argument in support of the illegitimacy of the same Alexander Borthwick irresistible is, that *naturalis* even, without the clenching corroboration of the legitimation, fell legally to instruct it. This conclusion, besides, directly follows from the remarkable modern procedure of the same tribunal, upon the claim of Sir James Sinclair of May, to the Earldom of Caithness, in 1791. No less than four individuals, David, Henry, John, and George Sinclairs, respectively, the immediate offspring of John Lord Berridale, eldest son of George fourth Earl of Caithness, and of the Murkle and Greenland progenitors, all nearer *de facto* than the claimant in the succession to the Caithness honours, were exclusively extinguished the 14th of April 1791, by documents in 1587, 1606, 1618, and 1619, through the mere agency of the descriptions either of "brother *natural*," or of "son *natural*," the identical words in question—that were there applied to them, in reference to the material link of fraternity and filiation, that proved their recenter relationship and descent.[1] Hence this specific and unexceptionable precedent is regularly to be held as fixing and deciding in practice the legal import of *naturalis*,—occurring as it does precisely in the Borthwick case.

Res judicata as to the fatal objection of *naturalis*.

With allusion again to the subject of extinctions, the Borthwick claimant in 1762 principally founded upon a general service in 1734, as heir-male of William first Lord Borthwick,[2] which was admitted; and the following is the manner in which he disposed of his extinctions, including that of the Borthwicks of Glengilt, whom I can alike prove by legal deeds to have been numerous, of long continuance,[3] and directly sprung from a Lord Borthwick. "In matters of succession, it is established by the Law of Scotland, that any degree being proved, it is presumed to be the nearest degree, unless a nearer be instructed; it resolves in this negative that there is no other

Extinctions in the Borthwick claim in 1762. Service chiefly founded on.

[1] See Caithness Minutes of Evidence under the above date, pp. 139, 167-8-9, 170.

[2] In the Records of Chancery. [3] These facts were not stated.

nearer degree, which, as other negatives, proves itself.[1] In the present case, therefore, the claimant cannot be put to prove the extinctions of every person who appears from the ancient deeds and writings to have been connected with the family of which he is descended. The extinction of all the branches of the family, except that of Borthwick of Cruikston (whom he makes of remoter descent,) is proved by the general *reputation* of the country." And he likewise gratuitously asserts, that the Borthwicks of Glengilt have been "long since extinct."[2] I do not dispute, that as there was no competitor, this, with taciturnity and absence of previous counterclaim, upon which he also founds, might suffice, according to our law; but the House of Lords claim the merit of adopting a *new* system, so that the above allegations being at once received by them without scruple, there is here a contradictor to it; while it is a jest again to admit, with certain English counsel, that in our Peerage claims they have always exacted the strictest evidence, especially in extinctions. On this occasion too, in further refutation of the same conceit, hearsay, and reputation, and printed books, such as Rymer's Fœdera, and Fordun, &c. were adduced to authenticate ancient material facts.[3] And the same thing, independent of the corroborations in that of Cassilis, will be shewn in the sequel, in respect to other claims.

Proof of the former, and other evidence lax, and contradicting *supposed* strictness of House of Lords in such matters.

Henry Borthwick, the successful claimant, died without issue in 1772. But long thereafter, in 1808,[4] the Borthwick honours were claimed by Archibald Borthwick, Esq. descended in the male line from Alexander Borthwick in Reidhall, younger brother of William Borthwick of Soltray, immediate ancestor of the preceding, and younger son of William Borthwick "*in Johnstone*," which last was son of William Borthwick "*in Johnstone*," the son of Alexander Borthwick "*in Johnstone*,"

Claim to the Borthwick honours, in 1808.

[1] The authorities referred to here were Stair, B. III. Tit. 5, § 35; Erskine, B. III. Tit. 8, § 66; Macdowal, vol. II. B. III. Tit. 4, p. 331.

[2] Papers and argument in the claim. The printed case is subscribed by Alexander Wedderburn, *afterwards Lord Rosslyn*, who was then making his *debut* in Peerage matters.

[3] Procedure in the claim.

[4] This fact, and the subsequent procedure referred to, are taken from the Lords' Journals, and Minutes of Evidence, &c.

and of *Nenthorn*, the legitimated *filius naturalis*.[1] He stood in the shoes of the previous claimant, being his heir-male (*collaterally*), and thus equally descended from the *same* Alexander, the common ancestor. There being no doubt of this *connecting* ancestry, Archibald Borthwick was entitled, having much the same arguments in his favour, to found upon and avail himself of Lord Mansfield's decision.[2] And it was upon this occasion, on John Borthwick, Esq. of Crookston, a lawful descendant of the House of Borthwick, coming forward, and objecting,—as he was authorized to do, in 1809, that that part of the authentic evidence of the illegitimacy, turning upon "*naturalis*," was first produced. The perplexing and difficult case, therefore, according to English notions, now arose, whether Archibald Borthwick was entitled *de plano* to rest upon the previous decision in 1762, in favour of Henry Lord Borthwick—in effect likewise extending to him—owing to their common descent from Alexander, the natural son of William Lord Borthwick—so as to bar the objection of illegitimacy, contrary at least, it may he held, to substantial justice, and thus, in fact, re-importing a supposititious heir into the house of Borthwick. The Lords' Committees, before whom the claim and objection came, reported on April 27, 1809, that the facts in the claim of Archibald Borthwick "may be enquired into, *before* the House shall determine whether John Borthwick of Crookston shall, according to his petition, be heard by counsel," as objector; and the House, of the same date, ordered the former to search into precedents, for the better fixing the procedure. The Committee having accordingly resumed, and investigated, and John Borthwick of Crookston having also claimed on March 23, 1812,[3] they next reported on the ensuing 14th of April, that a motion had been propounded to them, that they "ought not to re-

New claimant stood in the shoes of previous one.

Evidence of the Bastardy now *first* adduced by Mr. Borthwick of Crookston, the objector.

Procedure as to the exception of *res judicata* in 1762.

[1] The descent in question can be legally authenticated.

[2] This family, I need not add, are respectable, and I regret being thus obliged to allude to their remote illegitimacy,—only owing to the peculiar nature of this treatise, and stern legal necessity.

[3] As heir-male of John, second son of William first Lord Borthwick, on the failure of nearer male descendants, except those, *de facto*, of his *illegitimate* grandson Alexander, the "*filius naturalis*."

ceive any such evidence against the claimant (Archibald Borthwick), as calls in question the right of Henry, late tenth Lord Borthwick, to the title, honour, and dignity of Lord Borthwick, which was reported from the Committee of Privileges, and resolved and adjudged by this House on the 8th of April 1762;" *but* that the Committee had "resolved that it is expedient to receive the instructions of the House upon a matter of *such* importance." Here they were embarrassed and difficulted, owing to Lord Mansfield's decision. If the above motion had been allowed, Archibald Borthwick would have prevailed, the lawful descent of his branch from that of Lord Henry, and the male representation so far, as already obvious, being indisputable. On June 28, 1813, however, the purport of it was negatived, and this resolution agreed to by the House: "That the Committee of Privileges be instructed to permit the Claimants of the title of Borthwick, whose petitions have been referred to this House by his Majesty, to give evidence in support of their respective claims, though the same should controvert the pedigree produced by Henry Lord Borthwick, in favour of whose right, on the *supposed* truth of such pedigree, the House decided in 1762; as there is *no* lineal descendant of the said Henry now *in being*, who can claim the benefit of such judgment, and as Archibald Borthwick, the only claimant who alleges a descent from *Alexander* Borthwick of Nenthorn, (or, *in Johnstone*, the *natural son*,) as the common ancestor of himself and the said Henry Lord Borthwick, *has disqualified* himself from claiming the benefit of such judgment, by proposing to *falsify* the pedigree under which Henry Lord Borthwick claimed and obtained it, without prejudice to any question that may arise concerning the effect of a previous judgment of the House in a case of Peerage, if there existed claimants who had interest in the judgment, or who had *not so* disqualified themselves."

Curious specialty, allowing that exception to be traversed.

How grounded.

For proper apprehension of the specialty here, it is to be stated, that Henry Lord Borthwick, in his pedigree downwards, had omitted an essential link,—so much, again, for the *care* and *vigilance* bestowed upon Peerage matters by Lord Mansfield and his coadjutors, who could be so imposed upon, without perceiving the error,—and which had been properly

corrected by Archibald Borthwick, who accurately supplied the deficiency, that directly affected himself.[1] Upon this ground he may be allowed to have disowned, in a particular, and justly so, *that* descent (*Lord Henry's*) on which the Lords decided in 1762. But how, in this laudable and honest effort, he could be unqualifiedly stated as *falsifying*, while he thus amended, may be rather enigmatical; and still more, how, upon this ground, he, and more especially his innocent descendants, should be summarily barred, and placed in a worse situation than otherwise, may be irreconcilable with the common rules of reason and equity. The induction seems adverse likewise to the English principle of Peerage rights (as were here in question) being inherent in the blood of the family, without subjection to a casual, personal exception, such as this was. The doctrine and expedient resorted to seems curious and anomalous; but whatever objection attaches thereto, though, at the same time, forwarding, through a tortuous and somewhat inexplicable path, the ends of substantial justice, that had, perhaps, been better attained by the relevant plea of *res noviter veniens ad notitiam*, may be palliated by the peculiarity of the emergency, and glaring want of due investigation and discernment on the part of the legal dignitaries in 1762. Their successors were here trammelled by the extreme effect occasionally given by English law to the *previous* admission of a Peerage right,—or summary recognition of it by a writ of summons and a sitting,[2] from which ours considerably differed, having been more cautious and unconceding, in the first instance; and while, as has been instructed, it was in the habit of only allowing a qualified or *interim* right of possession, where there was appearance of doubt, did not preclude a Peerage, even regularly constituted and perfected in form, and clothed with unexceptionable possession, from being afterwards questioned and annulled, upon a special

English notions here.

[1] The omission of the link erroneously made his ancestor Alexander Borthwick in Reidhall, son of the first William Borthwick in Johnstone, (son of Alexander Borthwick in Johnstone, in 1511), instead of the *second*, (see p. 584,) as truly obtained; but *who was wholly* left out.

[2] As illustrated in the casesof the Baronies of Strange, Clifford, and Willoughby of Parham.

legal ground.[1] We here, moreover, see the necessity of the innate jurisdiction of the Session as Ordinaries in Peerage claims, who, by previous examination into the proper and more accessible sources, and better and easier preparation and determination of the relative *facts*, might have been the means of preventing such untoward and embarrassing consequences, saving future parties much anxiety and delay, besides heavy and severe expenditure.

English precedent of Willoughby of Parham.

The case of Borthwick differs from the noted one of Willoughby of Parham, in England, though evidently in view, and influencing the above instructions of the House of Lords,—inasmuch as in the latter there *were* heirs-male of the body of the individual in whom the Peerage, in virtue of a writ of summons upon a claim, had been erroneously admitted by the same tribunal, in 1680; and whose rights, or pretensions, therefore, though not the heirs, in terms of the ruling patent in 1547, to heirs-male of the body, they would not afterwards disappoint or recal, even at the suit of the true and *preferable* heir accordingly, in 1733. That person only at length succeeded, upon the male extinction of this *strictly* usurping line—*more remote* heirs-male—in 1767, who thus, all along, by means of a summons and recognition, erroneously grounded, came to supplant him and his ancestors, and merely upon this special ground, that "the contrary possession ought to be no bar to his claim, *as* there was *no* person in being interested under such possession,"—that is, no heirs-male of the body of the first interloper, in the face of the patent; "but *without* prejudice to the question, *if there was*."[2] Thus, the utmost tenderness, and regard to their in-

[1] See pp. 103-4-5, &c. and previously, pp. 7, 8, 9, 16. In the instance of the Earldom of Strathern, (see p. 16,) reduced and rescinded by a common action at law before the Session, without interposition of Parliament, there had been the fullest and most solemn constitution and enjoyment of the dignity by the holder in every conceivable way. (See, among other proofs of this, Acts of Parl. last Edit. vol. V. p. 6 &c.)

[2] See Cruise on Dig. pp. 169-70. Supposing that the *first* Willoughby of Parham usurper, and taker "contrary to right and the truth of the case," as stated in the ultimate determination of the Lords in 1767, had had a younger *brother*—necessarily an heir, in terms of the patent—of whom male issue then existed, and *holding* that the usurped posses-

terests, merely from the unjustifiable *rei interventus*, was still shewn the intrusionists, even when believed extinct; while the righteous heir, in fact, was thereby fatally injured, and certainly in direct violation of the regulating grant, came to be postponed, and only to take after them. We hence see the reason for the stress above laid upon the corresponding incident in the Borthwick case, of there having been no heirs-male of the body of Henry Lord Borthwick, the intrusionist—from the *bastardy*, in 1772. And the Lords, we may conclude, might have come to another and more favourable determination, as in the Willoughby of Parham instance, if there had;—although, I repeat, by the genius and spirit of our practice, supported by authorities adduced, which, I conceive, should rule exclusively,—the most solemn grants of Peerages, with Royal and Parliamentary recognitions, were not held indefeasible, or to be incapable, upon strict and weighty cause shewn, to be afterwards recalled and rescinded. And, if so, how much more the original resolution of the Lords, in the hasty procedure upon the Borthwick claim—a purely Scottish matter—in 1762.

English or British practice seemingly inconsistent in this respect.

Neither, it must be confessed, does English practice appear always to have been consistent, or swayed by the same adventitious *enuring* rule, as was countenanced by the case of Willoughby of Parham. Although James Duke of Queensberry, in Scotland, after his creation into the British dignity of Duke of Dover, by patent dated May 26, 1708, with

sion had enured into a *legal* right, the latter, by our genuine and original law, might even have likewise taken, in exclusion of the elder and *just* heirs, because an heritable subject, such as the Peerage here, with us, constantly descends—and *never ascends*, as would have obtained had it gone *vice versa*. In this emergency, "the heir of my heir was my heir," agreeably to the old brocard, and we only here contemplated, as a *terminus*,—from which the succession was to be regulated, —the *last* holder. Such was our maxim, curiously illustrated by the conceived preferable right of the House of Lennox to the Crown, immediately after James VI. (before he married), in exclusion of that of Hamilton,—though strangely overlooked, and denied by some authorities in modern times. But of course I don't admit that, by our law, an indefeasible right had vested in the usurping Willoughby line. The previous doctrine also ruled in distinguished cases on the Continent. The House of Lennox were heirs of James VI. but *not* of his *mother*.

Case of Dukedom of Dover, in 1720.

limitation to him and the heirs-male of the body of Charles his son, had *had* a writ of summons accordingly, and had sat, and voted without challenge, in that sole capacity, in the House of Lords, during no less than two ensuing Parliaments, they nevertheless *eventually* determined, the 14th of January, 1720,—owing to the conceived incompatibility with the Articles of Union, of a Scottish Peer holding a British Peerage,—upon a claim to the Dukedom, and the above identical rights and privileges, actually clothed by possession, by Charles Duke of Queensberry the son, that he was not, in *consequence*, entitled to a writ of summons, or to sit and vote in their House as a member of their body, from which he therefore was excluded.[1] Here the principle in the Willoughby case was obviously violated, inasmuch as solemn admissions, and possession of the essential attributes and privileges of a Peerage, without which it was as nothing, in the same way as there, were utterly contemned and disregarded. What had preceded might have been thought to have operated, by analogous argument, as a specialty in favour of the claim of Duke Charles, without compromising the general question regarding the Scottish Peerage. If confessed rule could be sacrificed to the authority of the acts of the Sovereign, and the Lords, in the Willoughby instance, so also might it be in that of Dover. The judgment affecting the latter was, besides, adverse to the *dictum* of Lord Erskine in the Banbury case, however contrary *it* may be to our notions,—"that when *once* the blood of a man is *ennobled* by *sitting* in *that House, (the House of Peers) as* a *Peer*, nothing but delinquency (that did not obtain) can deprive *his posterity* of the *same* honour."[2] Consequently these express acts, that so remarkably concurred in respect to James first Duke of Dover, should have enured to an heritable right to the *precise* force and effect in *every* extent, *including* sitting, &c. in favour of Duke Charles his son, and his male posterity, the blood of the father having been hence indubitably ennobled. On the contrary, however, what weighed with Lord Erskine, and

Judgment affecting Lord Erskine's doctrine.

[1] Lords' Journals.

[2] Report of the Barony of Lyle by Sir Harris Nicolas, p. 108, *note*.

especially in the Willoughby case, turned out in his, to be nothing;[1] and we may be thus justified in not holding as conclusive the rule authorized by the former, going irretrievably to shield usurpers against law, and frustrating and annulling the right of true heirs, owing to erroneous admissions and recognitions by the Peers. The restrictive term "*posterity*," used by Lord Erskine, must yet take the case of Borthwick, in 1808, out of the benefit of the English law he inculcates, for the claimant was not of the body of Henry Borthwick, ennobled by the decision in 1762. It remains to be stated, that the *actual* Dover question, turning upon the Articles of Union, was *again* canvassed, *but otherwise* determined, by the House of Lords, in the noted, though *far weaker* case,[2] of the British Dukedom of Brandon,—(created in 1711, in favour of James Duke of Hamilton, a Scottish Peer,)—upon the 6th of June 1782,[3] whereby the claimant, his heir, was found entitled, in consequence, notwithstanding the same objection, as urged in that of Dover, to sit and vote in the House of Lords, and enjoy and exercise all the privileges of English Peers. This conflicting decision further shews that resolutions of the Lords are fluctuating and traversible, and by no means irrevocable and conclusive even in a matter, as here happened, where there was not *res noviter veniens ad notitiam*. The Brandon precedent, therefore, may bear *a fortiori* upon the Borthwick exception, that *did* involve such, backed moreover by the concurrent Scottish law and practice. Nay, with the greater reason still, as this very Brandon case *had* been also unfavourably dealt with by the Lords, precisely like Dover, by their antecedent resolution in 1711.[4] Certainly the rejection of a Scottish Peerage claim by the House of Lords is not decisive, and can be again brought before them, and discussed upon a petition and reference, as was actually done in the very

Dover decision at variance with that of Willoughby, and Lord Erskine's doctrine.

Specialty in Borthwick case.

Case of Brandon, in 1782.

Fluctuating, and unstable nature of the Lords' judgments.

Contrary Brandon decision *previously*, in 1711.

[1] The honours of Dover, in terms of the patent, became extinct in the person of Duke Charles, who merely had the nominal title, without any benefit in the slightest manner therefrom during his lifetime.

[2] There having been there *no* summons, sitting, or voting upon the patent.

[3] Lords' Journals. [4] *Ibid.*

recent case of the Barony of Rutherford, to be afterwards adverted to.

Further proof of the illegitimacy in the Borthwick case adduced, in 1814.

The next material step in the Borthwick claim, was the *corroboratory* adduction by John Borthwick of Crookston, on May 26, 1814, of the new evidence of the "legitimation" of "Alexander Borthwick, in Johnston," in 1511, which was received and founded upon. Archibald Borthwick, the first claimant, having died, Patrick, his son and heir, in 1816, petitioned to be placed in his situation; but although there was subsequent discussion as to the mode of procedure,—whether or not the claim of the latter, prior in order, should be first disposed of, before at all scrutinizing the other, nothing decisive ensued, and the claims are *still in pendenti*, or rather fallen asleep. It was not unnatural that Patrick Borthwick should wish, as he did actually, by such scrutiny, to have a hit against his opponent, in return for the *compliment* paid to his father, which however was never realized.

Both claims to the honour *in pendenti*.

Question of prescription illustrated.

John, the last undoubted Lord Borthwick, appears from the discussion to have died in 1672;[1] so the ninety years that preceded the claim in 1762 were held to be no bar. This is perhaps a better instance of the non-operation of prescription in honours than Somervile, and is in accordance with our law, where no right is lost, without its *actual* devolution to, and possession by another. Henry Lord Borthwick had indeed assumed the dignity, and voted, under protest, at Elections, after his general service to the first Lord in 1734; a form of proving a descent thus invariably resorted to, although, on a far weightier occasion, so remarkably discountenanced and rejected in the recent Rutherford claim.

Lord Mansfield's mistaken *ratio* still applied.

The same points formerly discussed recur, in respect to the devolution of the Borthwick Peerage. Although the above Lord John was heir-general, as well as heir-male of the family, Lord Mansfield, as usual, in 1762, at once cuts the Gordian knot, by deciding, upon his arbitrary principle, in favour of the conceived heir-male, notwithstanding the exist-

[1] On January 28, 1676, John Dundas, younger of Hervieston, was served "*heir*" (through his mother) of John Lord Borthwick "*avunculi*," (thus extinguishing her,) in Borthwick castle, Barony of Heriotmure, &c. and residue of the Borthwick estate. *(Ing. Spec.)*

ence, then, of numerous and preferable heirs in the female line.

The castle of Borthwick, the principal messuage of the old "Barony of Borthwick," with the remainder of that large fief, which comprised Heriot-mure and various lands, was descendible, before 1672, to heirs-female,[1] however originally to heirs-male. The honour, therefore, the constitution being wanting, may approach in its leading features to that of Lovat; while both, owing to the marked feudal connection and distinction, differ, as has been seen, in this respect from the Barony of Kennedy.

Parole evidence in the Borthwick case taken in Scotland, under authority of the Lords.

In the Borthwick claim in 1808, Archibald Borthwick judged the examination of Margaret Lady Borthwick, widow of the claimant in 1762, incumbent, in order to obtain her hearsay as to the extinction of a younger brother of the latter and nearer heirs-male; and that, in his belief, Archibald's family were his next heirs-male. But, as it happened that this lady was old, bed-rid, and infirm, and incapable of travelling, without serious risk and danger, as was sworn to by a Scottish medical person at the Bar of the Lords, he petitioned that she should be examined at her abode, by two of the Justiciary Lords on the Perth circuit, which the former agreed to, on June 20, 1810, after consulting precedents, and finding they authorized the step, "though at first their Lordships entertained great doubts upon the subject." The lady was then accordingly examined, and her answers to the questions, that had previously been submitted to the House, were subsequently reported and received.[2] The difficulty here obviously originated in the recognised principle, of always securing, and in the best and most unexceptionable manner, direct probation in a Peerage claim. The House of Peers, in

[1] This is proved by the retour, quoted January 28, 1676, of John Dundass, younger of Harvieston, in the castle of Borthwick, &c. shewing that the residue of the fief had at least stood in Lord John, who was born in 1616, (Prestonpans' Parish Register,) and his heirs-general. The family, however, were quite reduced, and in a bankrupt condition, which may account for the heirs-female not moving. Neither did, then, any heir-male.

[2] Lords' Journal, 16th May, 1809; 15th and 20th June, 1810; 20th January and 9th April, 1812.

the cases of Colvil and Borthwick, may be said equally to have awarded the dignity to a stranger, in the first, to one not entitled to that claimed, under the grant exclusively adduced: in the latter, to one still less, owing to his exceptionable and illegitimate status.

Earldom of Sutherland—its leading characteristics and descent.

The existence of the Earldom of Sutherland, certainly among our original Earldoms, though not the most ancient, or to be classed with Marr,—now, perhaps, unparalleled in the Empire,—or even certain others, may be traced, as already observed, to a period *between* 1222 and 1245.[1] Although the constitution, like that of the former, is unknown, the "*Comitatus*" of Sutherland in 1347,—then aggrandized and distinguished by the high and inhering privileges of a regality, into which it was erected,—was equally descendible to heirs-general.[2] The futile and gratuitous attempt to separate and disconnect the *integral* regality from the *comital* fief at the time, by Sir Robert Gordon, one of the claimants, during the noted Sutherland discussion after 1767,—so as to make them devolve *differently*, and partly assist his imaginary *salick* theory,—being in itself so absurd and preposterous, is undeserving of comment. It was certainly, if I may so express myself, "splitting straws with a witness," nay, going even farther.[3] The dignity, besides, in the 15th century, in virtue of a Royal charter, still exclusively of the "*Comitatus*" in 1455,[4]—continued to be in favour of heirs-general, and under an investiture, still to the latter, the succession opened, in 1514, to Elizabeth Sutherland, the only sister and heiress of John Earl of Sutherland, who died in the same year, son and heir of a previous John Earl of Sutherland. She accordingly took, to the exclusion of male heirs, descended of the body of the old Earls of Sutherland, including the Sutherlands of

[1] See pp. 167-8-9.

[2] See Lord Hailes's Sutherland case at the beginning, p. 10.

[3] Who ever would, now at least, maintain that valid erections of lands, before the Union, into a higher denomination, with a title and dignity, of which we have many instances in the 17th century, to heirs-general, would not carry *all, collectively*, to them?—and yet this is a parallel case to that considered.

[4] *Ibid.* p. 12.

Forse and Duffus,—in virtue of grants of the *Comitatus* simply, though *embracing* the *honours*, as well as lands, and transmitted both to her heirs by Adam Seton, or Gordon of Aboyne, younger son of George Earl of Huntly, (of the distinguished House of Seton,) [1] who further, in marked exemplification of the continuance of the territorial system, *became Earl* of Sutherland through his marriage, "*ratione curialitatis Scotie.*" [2] Of this union the direct descendant was William Earl of Sutherland, who died in 1766, leaving issue an only child, Lady Elizabeth Sutherland,—the late Duchess Countess of Sutherland,—undoubted successor to his estates, and the claimant likewise of his dignities.[3]

The investitures of the "*Comitatus*" of Sutherland were still repeatedly, in the 16th century, to heirs-general; [4] and although they were altered by conveyances, after 1600, in favour of heirs-male,—heirs-female again took, including Lady Elizabeth, (in 1766,) by Exchequer charters of the same, bearing mention also of the honours, in 1681, and down to the moment of the Union. [5] But these identical conveyances may be regarded too late for the purpose, because patents were then fairly introduced, by which dignities were conveyed

[1] Through his male ancestor, Sir Alexander Seton, younger son of Sir William Seton, of Seton and Winton, who, early in the 15th century, married Elizabeth Gordon, heiress of the family of Gordon. This is another remarkable alliance of the same noble and distinguished house, to which, therefore, the late Duchess Countess of Sutherland belonged in the male line. I may mention by the way, that I believe I have new and authentic evidence which may settle the important *antiquarian* question that has been long agitated in Aberdeenshire and the north, as to the *status* of certain Gordons there, sprung, by male descent, from the family of Gordon, near the termination of the *direct* male line, in the person of the above Elizabeth, the heiress. The chief cadets seem the fine border family of Gordon of Lochinvar, or the Viscounts Kenmure in the south. The Setons, even after the Gordon alliance, retained their own surname, though they in course of time sunk it in Gordon, but still quartered, as at present, the Seton arms. All the Gordon *honours*, including the Ducal, were alone acquired by the *Seton* Gordons.

The oldest cadets were quartered as at present.

[2] Lord Hailes's Sutherland case, pp. 13, 14, 15, *et seq.*

[3] *Ibid.* p. 19.

[4] In virtue of Royal charters in 1527, 1546, &c. *ibid.* pp. 15, 16.

[5] *Ibid.* pp. 17, 18, 19.

exclusively of lands,—while in Peerage charters, as illustrated by the cotemporary instances of the Earldom of Winton, and others,—indeed previously, towards the end of the 16th century,—it became prevalent *specifically* to mention honours and dignities in the relative transmissions.[1] Exact strictness too was enforced, in the conveyancing practice in regard to Peerages, as is demonstrated by a letter of James VI., in 1615, previously referred to, as to the peculiar form in passing "signatouris of alienatioun, resignatioun,—taillie," and "dispositioune" of "*honouris, titillis* and *dignities*, wharin the righte succession is altered,—against the tendencie of the first original infeftments" of *honours* and *titles*, confirmed by his Majesty or his predecessors.[2] Here honours again are expressly *nominatim* designated.

Properly descendible to heirs-general.

Taking the above circumstances into consideration, joined to the leaning of our law in favour of heirs-general, as evinced by the instance of the Earldom of Athole, and the constant early authorities,—while the "*Comitatus*" of Sutherland originally, as far as can be seen, and at the period that fell to

[1] On June 20, 1606, Robert Earl of Winton resigned "the *Erledome* of Wintoun—*with* the estate, *dignitie*, and *honour* of the saide Erldome, with all prerogatives, priviledgies, and liberties of the samyn," in favour of George Seton, his younger brother, and his heirs-male. And thereafter, a royal regrant, dated Whitehall, the 12th of July 1607, past in favour of the latter, and his heirs-male, of the "*Comitatus*" of Winton, "*cum nomine*, statu, *titulo, honore*, et *dignitate*," while it has this further clause, that they, respectively, should, in Parliaments, have "*dignitates, honores*, et *loca*—sicut aliquis *alius Comes*, infra dictum nostrum regnum Scotie," and "*Comites* de Winton posthac nuncupentur et instituentur," &c. (From the Originals, *penes* the Earl of Eglinton, the lineal heir-male of the Earls of Winton, Lords Seton, &c. and their partial registrations on Record.) The like form is observed in the subsequent entails and transmissions of the Winton honours and estates, during the century in question, the honours being specified, together with, and independently of the *comitatus*, as obtains moreover in various cotemporary instances of the kind. It is to be remarked too, that during the same period there came to be sundry erections of *lands merely*, into a "*Comitatum*," and even "*Marquisatum*" and "*Ducatum*," without conveying honours, or having any authority to do so. There was hence at length a new crisis, different from strict feudal times.

[2] See p. 257.

govern, stood likewise to them,—hence making the case different from that of Lovat,—and, moreover, the actual devolution of the honours to the heir-female in 1514, in exclusion of the heir-male, the right of Lady Elizabeth Sutherland, her direct descendant, and the heir female and general in 1766, may be admitted. And accordingly it was allowed by a resolution of the House of Lords, the 21st of March 1771, upon a petition and reference by the Crown,[1] in opposition to counterclaims, in the same way,[2] by Sir Robert Gordon of Gordonstone, Baronet, the direct heir-*male* of Adam Gordon of Aboyne, Earl of Sutherland, and Countess Elizabeth in 1514, and of George Sutherland of Forse, as the male descendant and representative of the *first* and *original* Earls of Sutherland, before their representation had merged in the line of Gordon or Seton. But while this obtained, the grounds, as partly enforced by Lord Mansfield in the resolution, cannot either be overlooked, or coincided in. He could not contemn or gloss over the strong fact of the *ancient* female descent,—howsoever opposed to it, which he therefore converted into a specialty,[3] taking the case out of the constrained, and despotic bondage of his doating and fictitious presumption in behalf of heirs-male; but, in so doing, he still stretched and carried the same to the utmost; for, aware of their hostile counteracting force, he here visionarily inculcated, "that *none* of the Charters produced affect the Title, Honour, and Dignity of Earl of Sutherland, but operate as conveyances of the *estate only*."[4] This preposterous and futile doctrine, thus in direct contradiction of the actual fact, and

Triple claims to the Earldom of Sutherland, in 1767, and resolution and actual judgment, in 1771.

Faulty ground, in part, of the resolution.

[1] Lords' Journals. [2] *Ibid.*

[3] It cannot escape attention—even upon this abstract specialty of Lord Mansfield—how much more relevantly, and *a fortiori*, the *original* Earldom of Marr, considerably older than Sutherland, now vests in the present Earl of Marr, the *lineal* heir, and in his heirs-general, owing to the *ancient*, invariable, and *repeated* descents of the dignity to heirs-female. (See p. 168.) The Earl of Mar may be justly considered the *premier* Earl of Scotland, as he is the *premier* Viscount, notwithstanding the decreet of ranking in 1606, which is no legal bar in his way, and could be legally set aside as regards him.

[4] Lords' Journals. The resolution is well known to have emanated from him.

rendering, in the main point, the Royal charters of the princely erection of the "*Comitatus*" of Sutherland into a regality, in the fourteenth century, and of the identical "*Comitatus*" in the fifteenth, and beginning of the sixteenth,—all to heirs-general—a mere nullity and dead letter, was yet in keeping with the astounding, and even still more incredible allegation in his speech, upon the same occasion,—which has been so often adverted to, that with us, "after 1214,—territorial Peerages must have been gone." [1]

Fully exposed by the Sutherland succession, Lord Hailes, &c.

Such glaring bigotry, and manifest adhesion to gross error, is hardly conceivable, especially when so directly refuted by what actually occurred, and indeed passed before his eyes, in the very Sutherland succession in 1514, that is, so late even as the *sixteenth* century. Lord Hailes has further proved to demonstration, that on its then opening to Elizabeth, the heir-female, she still continued to be described as a *commoner*, and in law continued so,—in the same way as John the Earl, her brother, previously, *until* she was retoured and *feudally vested* in the "*Comitatus*," or fief, including the lands, in 1514 and 1515, after which only, *in virtue* of the *territorial* possession, she thereby became *Countess* of Sutherland.[2] The above material circumstance, likewise, I find again illustrated by the

[1] "*After* 1214," (he there says,) "I think it is clear, that territorial peerages must have gone—*no man can* say, *when* they *did* exist. *Possibly* before 1214, but not after!" An authentic transcript of the speech of his Lordship, containing the above,—as well as of Lord Camden's, to be shortly referred to,—is preserved in the Sutherland Charter-chest, from which I long ago took a literal copy, that agrees with one from the same source, lately published by Mr. Maidment, advocate. He thus again has done essential service to the public by bringing forward to open scrutiny what formerly, from being only in MS. and in a private repository, was known to but a limited few. These publications of the learned gentleman cannot fail to advance and ripen our Peerage law, by exposing errors and misconceptions, and fairly submitting important points to the test of candid and general criticism, so much wanted in respect to what has been styled, though now by no means in a flattering sense, "Lord Mansfield's Law." The speeches in question I shall also subsequently quote, under the title of Mr. Maidment's publication, where the preceding quotations will be found at pp. 17—19.

[2] See Lord Hailes's Sutherland case, pp. 13, 14 and 15, at the beginning, where the facts are instructed by explicit legal evidence.

following entry in the Responde Register,[1] where the officer of the crown is debited with the relief duty and ordinary feudal payments due by a vassal on relieving the fief out of the hands of the crown, the superior. Under date the 14th of October 1514, there is a corresponding charge "de *relevio* totius et integri *Comitatus Sutherlandie* cum tennentibus, tennandriis, et liberetenentium servitiis, cum advocatione, et donatione capellanarum sancti Johannis de Helmsdaill, et beati Jacobi in Ecclesia Cathedrali Cathaniensi fundatarum, cum advocatione, et donatione ecclesiarum, et Hospitalium *in dicto Comitatu* cum pertinentiis," which, it is added, was owing to the King, "per saisinam datam," (simply) "*Elizabethe Sutherland* de eodem."[2] This evidently may even be held conclusive upon the point, and fully to refute the modern fallacy of Lord Mansfield: for if honours had then ceased to be territorial, as he insists—that is, obviously connected with land—the lady in question, on the other hand, agreeably to modern practice, would have been Countess of Sutherland from the moment of her brother's demise; but so far from this, without reference to that fact, she was *not* so, until she had obtained the *fief* or *Comitatus*,—which, nevertheless, his Lordship here recklessly and ignorantly excludes from effect—when, as a necessary consequence, the honour thereby centered in her. Being originally in the *Comitatus*, it still went with it, and by the mere settlement of the fief upon heirs-general, she became Countess of Sutherland. What clearer evidence can there be, that dignities were then territorial—

[1] In her Majesty's General Register House.

[2] It is also proved by the Record at the identical period, that the same thing obtained with respect to the Earls of Bothwell, Lennox, Caithness, Montrose, and the Lord Seton, &c. who, on thus entering into their lordly inheritances, are simply styled Patrick Hepburn, John Stewart, John Sinclair, William Graham, and George Seton; but, of course, immediately thereafter, are described by their Peerages. All their fathers, the preceding Peers, had strikingly fallen at the sanguinary conflict of Flodden; and it was previously ordained by a special Act, that minor heirs in such circumstances should at once be feudally admitted into their patrimonies, as if they had attained majority, subject to no burden or penalty, by reason of wardship and minority.

that is, under *proper* conveyances—and went with, and were an heir-loom of the lands?

Independently, too, this identical fact, notoriously to all Scottish antiquaries, is demonstrated *ex abundanti*, not only by Lord Hailes, in his Sutherland case,[1] but in every variety of way, by our records at large in the 13th century, posterior to 1214, and long subsequently.

Former mistaken *ratio* of Lord Mansfield again sported in the Sutherland case.

To redargue Lord Mansfield again, in the Sutherland instance, as respects another striking particular,—to which he adverts in order to prop a favourite fallacy,—would be to repeat, tediously enough, much of what I have offered under the Cassilis case,—the mistaken *ratio* or principle upon which the latter was decided—to show the progress of error—being *now confidently* founded upon, both by him and Lord Camden, who spoke upon the occasion. By means of the untenable theory there exposed, grounded upon misconceived notions of our original law, that where the constitution of the fief and dignity is not extant, and there is no express *specialty*, the *legal* presumption *is*, that it alone descends to heirs-*male* of the body,—backed by the other illusion of honours ceasing to be territorial from 1214,—he again seeks, most lamely, to get quit of the irresistible argument, of *all* the known conveyances, of *all* our ancient Earldoms, under the simple description of a "*Comitatus*," being actually limited to, and having constantly descended, like the crown, to heirs-general. This

[1] I may here particularly refer to his clear and minute exposition, under the head of "Connection between lands and titles of honour," Chap. IV. from p. 43 to p. 70, which I humbly conceive will infer conviction even to ordinary capacity. The instance of the Earldom of Wigton, in 1342, 1366, and 1371, (at pp. 51-2,) is especially striking, the respective grants of the "*Comitatus*" to the original disponee, and —upon a sale—to a stranger, affecting the dignity, and both making, and unmaking an Earl; in which last event the individual dwindled into a commoner. This fully instructs, as Lord Hailes inculcates, (at p. 50,) that in ancient times "the title of honour" was understood to be "inseparably connected with territory." He likewise illustrates the principle in the Sutherland case subsequently, and much later down, including portions of the 16th century: yet Lord Mansfield takes it upon him to say, that no "satisfactory evidence has been shown upon this point." See Mr. Maidment's Pub. p. 10.

he utterly regards as nothing, first, because the *original* constitution (*longobardicè*), though not preserved, MAY *have been* to heirs-*male*; and secondly, as before, forsooth, that the *Comitatus* merely related to, and carried the estates, and not the dignities!![1] Nothing can be conceived a more outrageous begging of the question.—The conveyance, or recenter constitution, moreover, of the "Comitatus" of Strathern, by Robert the Second, in favour of heirs-general, under which the heir-*female* succeeded as "*Countess*,"[2] and the still earlier, and remarkable Parliamentary Barony and Regality of the Lordship of Man, by Robert I. in 1324,—with the constant attendant title of Lord of Man—of which Lord Mansfield neither knew, nor dreamt—in favour of such identical heirs,[3] —independently, again, of the ancient Fyfe instance,[4]—disprove another flagrant misconception he falls into, of there being no grant of dignities before the time of James I. but to heirs-*male*.[5] According, incontestably, to his strange and crude notions, if the Earldom of Sutherland had not gone to the heir-female, in exclusion of the heir-male, in 1514,—the circumstances otherwise, being yet *precisely* as they are,—it would infallibly have been *fabricated* in *his* hands into a male honour, and been awarded by him to the male-heir, instead of to Lady Elizabeth. But withal, in the same instance,—and with his usual luck and fatality, although, like persons espousing a bad and untenable cause, he is guilty of a striking contradiction, and of a glaring *felo de se*. He insists that *when*

Felo de se perpetrated by Lord Mansfield.

[1] "Though ten of the thirteen original peerages, (we must now add *all*, including the thirteen, see pp. 561-2,), stated in Lady Elizabeth's case, *have* gone to *females*, *yet I* am *not* convinced, *but that* the *original* limitations *might have been to heirs male*;—*no man* can say when (territorial honours) *did exist*. (!) Possibly before 1214, but *not* after. (!) *Can it then* be maintained that a grant of the *Comitatus* carried the honours so late as the time mentioned?"!! (Mr. Maidment's Pub. pp. 13, 19.) This is indeed *cogent* reasoning, especially as, independent of the universal adverse testimony, his Lordship has not a single *scintilla* of a fact or argument in support of such manifest and ignorant assumption.

[2] See Lord Hailes's Suth. case, Chap. V. Sec. 13, pp. 55-6.

[3] See pp. 102-3. [4] See p. 568.

[5] "It comes out that all the peerages created before 1424, when James I. returned from England, whose limitations now appear, are to heirs male." (Mr. Maidment's Pub. pp. 12, 13.)

honours were territorial—that is, by his assertion, only before 1214—the husband of a feudal Peeress, in her own right, took the dignity by the *courtesy*.[1] This was a peculiar and inherent feature of the system, consequently afterwards exploded; —but then to refute the absurd claim of Sir Robert Gordon, upon the pretence that Adam Gordon, the husband of Countess Elizabeth, *after* 1514, had the title by a new creation,—from whence he politely made it go—under Lord Mansfield's auspices too—to heirs-male, and necessarily to himself, he straightway *wheels* about, and retorts in reply, that it was *not* in that way he became Earl Sutherland, but actually, will it be credited, by this *usage* of the *courtesy*![2] Why, if so, did it then not strike his Lordship that the territorial principle and practice, of which this was an admitted element, and that connected honours with the fief, so far from having vanished, as he absolutely asserted, in 1214, *might* not have continued a great deal later, and although, in manifest opposition to his former doctrine, even in the 15th century,—nay, in fact, in 1514? Nor is this all, for he elsewhere inculcates that "in *personal* honours *no* courtesy took place,"[3] that is in honours, precisely the same as he would represent Sutherland, stript of their territoriality, which is again to his own palpable refutation, for, as just shewn, he contended that *it* applied to it! In such manner Lord Mansfield, like Lord Lord Rosslyn, as formerly exemplified, blows hot and cold,[4] at one moment

[1] "It is clear that, *when* they were territorial, the husband had a right by courtesy to his wife's title, as well as to her estate." (Mr. Maidment's Pub. p. 10.)

[2] *Ibid.* p. 14; and he adds in corroboration, that "the *idea* of a *connection* between the *territory* and the *title* of *honour* did *not* wear out all at once, but by degrees. It is *very well* known, if a *territorial* peerage descended to a female, the husband must have been tenant by courtesy, both of the estate and peerage. It was indisputably so in England, and there is no ground to think it was otherwise *in Scotland*." (*Ibid.* p. 15.) Here, to our great surprise, he changes to the advocate of territoriality in Scotland, comparatively at a recent period; —and pray, how are we again to reconcile this with his other allegations, that "*no* man *can* say when *they* (*territorial* honours) *did* exist," or shew "any satisfactory evidence—upon this point?" (See p. 598, *note* 1, and Mr. Maidment's Pub. p. 10.)

[3] *Ibid.* p. 10.

[4] See p. 259, *note*.

upholding the comparatively modern continuance of the territorial principle, which at another he nearly wholly excludes, just according as it suits him. A signal instance of this further occurs in respect to the former, in his desperate attempt to prop his argument by means of the Earldoms of Fife and Ross, in the fourteenth century. He *before* would *not* allow grants of a "*Comitatus*," from 1214 downwards, to carry a dignity; but *now* he appeals to much later charters of the "Comitatus" (merely) of Fife and Ross, in 1362, and 1369, in favour of heirs-*male* of the body,—though failing these, likewise to heirs-*female* in the Ross case,[1]—to instruct that of old *all* peerage constitutions were to heirs-*male*.[2] Nay, not content therewith, he even goes the length of styling these charters "*Creations*,"[3]—although that of Ross is only a regrant upon a resignation, like many upon which Lord Hailes has founded in the Sutherland claim, in favour of heirs generally, but which he most *consistently* rejected. This is indeed sad *ambi-dexterity* in Lord Mansfield, always keeping in view his noted resolution in the Sutherland claim, that such conveyances of a "Comitatus," in the 14th and 15th centuries, do *not* "affect the title, honour, and dignity," &c.—*This* doctrine therefore, proceeding from his own mouth, excludes the Fife and Ross precedents from his argument.

Other glaring contradiction.

Amid such contradictions—gratuitous and unauthorized inferences of his Lordship—and his superficial and mistaken researches, it is no wonder that he lamentably erred, and has perverted and mystified our Peerage law.[4]

[1] See Mr. Maidment's Pub. p. 13. The same remark applies to another Earldom he there mentions.

[2] See *Regist. Dav.* II. p. 31, *No.* 62,—*ibid.* p. 74, No. 258. These are abstract charters of a "*Comitatus*," and unquestionably what Lord Mansfield refers to. That of Fife is styled our's, having been in the crown, though long before constituted.

[3] Mr. Maidment's Pub. *ut. sup.*

[4] We may be now enabled to appreciate what is termed "Lord Mansfield's Law," that *once* obtained a strange adventitious celebrity, and, according to Sir Adam Fergusson, an able Peerage lawyer in his day, was lauded, and "rung in (his) ears by those who knew nothing of the subject." I need not add, that he expressly deprecated it. The above forms part of his remarks, already referred to under the article of Cassilis, (see p. 578).

Lord Camden's argument in the Sutherland case.

The argument of Lord Camden, the only other legal dignitary who spoke, seems indeed incongruous and inexplicable. He *does* very justly scout the notion of lands and honours, both in England and Scotland, *not* being descendible of old to females. Nay, he is at pains to show, most relevantly, that the principle was solemnly recognized and fixed in Scotland, at the competition for the crown, between Bruce and Baliol;[1] but then,—though he inculcates, that in ancient times "the grant of the barony itself *carried* the *dignity*," and "they needed only to look to the *lands*, and the dignity followed,"[2] he strangely, and perversely will not admit our cotemporary or even *oldest* Earldoms, further still through conveyances of a "*Comitatus*," their proper style and description, to the same comprehensive construction or indulgence.[3] By some inconceivable and arbitrary whim, he draws an enchanted and condemning circle around them, holding them so far as proscribed, and as legally precluded from it. In these circumstances, while he concedes that the Earldom of Sutherland, owing to its devolution, in 1514, to the heir-female, must go to Lady Elizabeth, the successful claimant, he yet, like Lord Mansfield, regards *every* old grant of a "*Comitatus*" as merely carrying the feu or lands, and the dignity, without such peculiar specialty, *abstractly* to rest in the direct heir-male,—that is, though the *lands* might descend *otherwise*. He unqualifiedly says, "it will likewise be understood, as an established point, that NO *charter* of the *Earldom* or Lordship, without mentioning the dignity, shall be understood to carry the title of honour."[4] He preposterously thinks, that every *old* charter of a Comitatus, however solemn and weighty, carrying for instance the important and super-eminent privilege of a regality, a *dominium in dominio*, as in the Sutherland instance in 1347, has no greater force or effect.[5] He confessedly subjects the matter here to a modern, most inadequate, and inapplicable criterion. As will be afterwards shown, under the head of the Earldom of Caithness, there was a Royal charter of the "*Comitatus*" of Caithness in 1476, to

[1] See Mr. Maidment's Pub. pp. 25, 26.
[2] *Ibid.* p. 23.
[3] *Ibid.* pp. 21, 22.
[4] *Ibid.* p. 22-3.
[5] *Ibid.* p. 21.

William Sinclair, the *youngest* son of William Earl of Orkney and Caithness, proceeding upon the resignation of the latter, who had two *elder* sons, William and Oliver. Now, according assuredly to Lords Mansfield and Camden, as a "*Comitatus*" grant, of whatever date,—even a great deal earlier, does not "affect the title, honour, or dignity of Earl," but *operates* as a *conveyance* "of the *estate only*," the dignity of Earl of Caithness, previously hereditary in the father, should have devolved notwithstanding, upon William the eldest son, and his heirs, the mere lands "only" going to William, *junior*. But practice, which is much better than most theories,—certainly than those of the above modern authorities,—here instructs the direct contrary, and rivets my argument; for it so turns out, that under the conveyance in question, as has been tested in the most unanswerable and conclusive manner, the dignity *did* descend to William, *junior*. Nay, under it, as a cardinal title, though altered in the limitation by a subsequent Royal charter,—but again, it will be observed, solely of the "*Comitatus*,"—moreover to his direct heirs; and is actually held by their representative at the present moment. And this, while William, the eldest son, and his heirs, have been obliged to be contented with the dignity of Lord Sinclair; and Oliver,[1] the second, and his heirs, with no dignity at all.

Manifest refutation of the preceding authorities, by the case of Caithness in 1476.

But this is merely one of innumerable illustrations, to the same effect. At the same time, it is evidently here difficult to deal with Lord Mansfield in his *Proteus* capacity,—as was shewn also in another instance;[2]—for this enemy to, and debaser of "*Comitatus*" at one moment,—on his different bent, has admitted, as we have seen, that it not only implied an honour, but the *creation* of a Peerage. Thus, when you press him hard, and think you have him,—"*fiet*, aper, modo avis, modo saxum," &c.—"*effugiet* tamen, hæc sceleratus vincula *Proteus*."—Neither is it less observable, that Lord Camden falls into the same contradiction with Lord Mansfield, before noticed, first asserting, that in 1455,—thus even earlier than

[1] Oliver will be proved, under the article of Caithness, to have been the second son, and William, junior, the *youngest*.

[2] See p. 375.

Similar contradiction of Lord Camden with a previous one of Lord Mansfield.

the Caithness charter in 1476,—when a charter of the "*Comitatus*" of Sutherland passed to heirs-general, the territorial principle, and honour had ceased,—indeed long before, and yet that Adam Gordon, after 1514, enjoyed the title of Sutherland, by the territorial rule of the courtesy.[1] When I further add, that deriving, at the same time, his information of our ancient Earldoms from Lord Hailes's valuable and universally esteemed Sutherland case, he yet chooses to designate it by the epithet of "*rubbish*,"[2] I think I may venture to leave his effusions and speculations to the just discrimination of others, without much apprehension of my doctrine being thereby endangered, or serious fear of the consequences. Indeed, in perusing the speeches of the preceding unfortunately legal umpires, as they have proved, we are, I conceive, insensibly reminded *etiam in re tam exigua*, —according to Chancellor Oxenstiern,—"quam parva sapientia," or penetration, "mundus regitur." Lord Hardwicke, at least, was less confident and assuming, and honestly admitted that the matter in question was "*obscure*" and *difficult*;[3] but Lord Camden, on the contrary, openly asserted, that it was simple and extremely "*clear*;"[4] thus prepared, rashly, it may be admitted, and proud in his own conceit, to overleap every obstacle.

Claim of Sir Robert Gordon to the Earldom of Sutherland at the same time.

The claim of Sir Robert Gordon to the Earldom of Sutherland, at the same juncture, has been noticed. It was certainly untenable, assuming, without any proper proof, and what was absolutely negatived, that Adam Gordon, husband of Countess Elizabeth, in 1514, had been created Earl of Sutherland,—in virtue of which supposed constitution, their heirs *alone*, it was pretended, held the dignity, that was descendible, of course to heirs-male of the body,—according to *Lord Mansfield's* law, —from ignorance of the limitation, and hence to Sir Robert,

[1] *Ibid.* pp. 23, 28.

[2] *Ibid.* p. 21. I must be allowed, with every apology, here to repeat in reference to him and the production, *Græcum est non potest legi*; nor is the illegibility in this instance, by the *foreign* individual, as I may style his Lordship, at all unnatural.

[3] See Mr. Maidment's publication of Cassilis case, pp. 56, 57.

[4] His Sutherland publication, p. 21.

the nearest in such relation. All in support of the theory is an unsupported allegation of Ferrerius, a foreigner, who wrote a history of the Gordons at the middle of the 16th century,[1] that the previous Adam Gordon, on his marriage, "Comes Sutherlandiæ—creatur." But the authority of this person, by no means always accurate, and under the special circumstances, cannot be admitted. The creation also, if true, was liable to this legal objection, owing to the date, that it must have been the unwarranted act of a regent, who, it was argued without refutation, could not confer a dignity.[2] Supposing, however, there had been such grant, liable to no objection, by which the subsequent Sutherland line exclusively took, the Earls of Crawford and Errol, as well as certain other Earls, would have then had the precedence of them,—though not, as things actually stood, the authentic era of the constitution of the Earldom of Sutherland being, as has been shewn, at least antecedent to 1245, while that of the former was respectively in 1398, and during the reign only of James II. Yet, under the previous hypothesis, the House of Peers, the 16th of March 1769, ordered Lady Elizabeth Sutherland, the successful Sutherland claimant, to give notice "to the Earl of Crawford and the Earl of Errol—that they may appear before the said *Committee (of Privileges)* for their interest" so far, "in case they shall be so advised."[3] On the 12th of March, 1770, two counsel were appointed to be heard for these Earls.[4] But they don't seem to have been disposed to act with vigour, or

Supposed interest of the Earls of Crawford and Errol in the matter.

[1] Two MS. copies of this performance exist,—one in the Advocates' Library, and the other among the Harleian Collection, in the British Museum. A different version of the matter, too, is given by another historian, Alexander Rossæus, who wrote in 1627, in his account of the family of Sutherland, where he says that Adam Gordon of Aboyne "*Elizabethæ* Sutherlandiæ *heredе* uxore ducta, *hujus Provinciæ (Sutherland)* comes evasit," and adds, that Elizabeth "*juxta* regni *consuetudinem*, hæres Sutherlandiæ Comitatus proximo, anno, 1514 declarata fuit,"—that is obviously, as has been seen, on her being feudally entered by the crown. One MS. copy of this work of Rossæus was in the possession of the Kinnoul family.

[2] He could however with us, by consent of Parliament, as instructed by the case of the creation of the Barony of Stewart of Uchiltrie, March 15, 1542. (See Acts of Parl. last Edit. vol. II. p. 413.)

[3] Lords' Journals. [4] *Ibid.*

to revive that contest for precedency which was so keenly agitated by their predecessors before the Union.

Barony of Gordon of Dornoch.

It having been rumoured, though by no means instructed, that the title of Baron Gordon of Dornoch had been recognised in the family of Sutherland, in 1617, Sir Robert Gordon also claimed it by petition and reference, in 1769.[1] No resolution, however, was here come to, and the pretence appears to have been visionary and groundless.

Claim of Sutherland of Forse.

The claim of George Sutherland of Forse, the remaining competitor, was founded upon the doctrine of the old Longobardic feudal law, by which fiefs, including Earldoms, went exclusively to heirs-male; but, as formerly instructed, there is no trace of the rule, however received elsewhere, having operated in Scotland. Indeed, every thing tends to the contrary. The circumstance, therefore, of the former being the lineal heir-male of the original Earls of Sutherland, however ancient and distinguished the descent, could prove to him of no avail. Of course, he bolstered his plea by the question being that of an honour, and not necessarily prescribed by the protracted *adverse* possession of the heir-female since 1514. By the settlement of the Sutherland estates, failing Lady Elizabeth, they went to the heirs to the honours; and, in consequence, Lady Elizabeth Wemyss, her aunt, the next heir-at-law, was allowed by the Lords, the 16th of March 1769, (upon her petition,) to maintain a corresponding argument with the former against the counter-claimants.[2] In general, the House of Lords, as will be further shewn in the sequel, allow any one, upon a feasible ground, or in support even of no very material interest, to object in a Peerage claim.

Cases of the Earldom of Caithness in 1768, 1771-2, 1787, and 1793.

The "*Comitatus*" of Caithness, as already partly obvious, was constituted in the person of William Sinclair, *youngest* son of William Earl of Orkney and Caithness,—the first Earl of Caithness of his line,—in exclusion of his two elder brothers,[3] and their issue, by a Royal charter, upon

[1] Lords' Journals. The petition was presented to the Lords the 15th of March, in that year.

[2] Lords' Journals.

[3] These. were William *senior*, mainly disinherited,—the eldest,—whose son and heir, Sir Henry Sinclair, as "cheiff of yat blude," had

record, dated December 7, 1476, proceeding upon the father's resignation, with limitation to William, younger, "et heredibus ipsius *quibuscunque*." In virtue of this grant alone of

a Parliamentary confirmation of the title of "Lord Sinclare," January 14, 1488, "efter the forme of ye charteris and evidentis maid tharupoun," (see Acts of Parl. last edit. vol. II. p. 213,) and Sir Oliver Sinclair of Roslyn;—but whether the latter, or the William in the text, was the elder, has been controverted, and keenly disputed by their descendants. The following material legal deed, however, may fairly settle the question. Contract, under form of Instrument, 9th of February 1481, between *William* Sinclair, "*son and heir* of umquhile William Earl of Caithness, and Lord of Saint Clair,"—Henry Saint Clair, his son and apparent heir; and Sir Oliver Sinclair, whereby the last renounces in favour of the former the lands of Dysert and Ravynscraig, with all rights and securities thereof, "not scaithless to *himself* in *other* lands, *nor to his* YOUNGER *brother William*," but in return he is to have Rosslyn, including the Castle, Pencaitland, &c. "And ye said Sir Oliver shall in tyme to come doe worship and honour to ye saide William, as effeirs and accords him to doe to his eldest brother, and give it happins any plea or debaitt to be betwixt ye said William, and his *younger* brother for ye *Earledom* of Caithnes, the saide Sir Olipher shall stand evinlie betwix yame." This final settlement and transaction is from the Pencaitland Charter-chest, among the writs of Sir John Gibson of Pencaitland. In 1509, there is mention in a civil process, of "Henry lorde Sinclare, ye are and successor of umquhile Williame erle of Orknay, for ye tyme erle of caithness, and lorde Sinclar," and of "umquhile William Sinclaire, son and are apperande to ye saide umquhile Williame erle of Orkney," which last is stated to have married Christian Lesley, daughter of "umquhile George Earl of Rothes," (by his divorced Countess, see pp. 453-4.) *Acts and Decrees of Supreme Civil Court.* In 1511 also, Henry Lord Sinclair protests that whatever was done "anent ye *erldome* of *Caithnes*, &c.—suld not turne him nor his airis to prejudice. And for remeid yeragain, tyme and place efferande." *Ibid.* Owing to the failure of the male line of William senior, (the present Lord Sinclair being of a different stock of Sinclairs,) as well as of Sir Oliver Sinclair, Alexander now Earl of Caithness, the male descendant of William *junior*, is heir-male of the original William Earl of Orkney and Caithness, and chief of the family. The Parliamentary confirmation of the title of Lord Sinclair, noticed in 1488, being to Lord Henry, upon the consideration of his being heir by his father, and William Earl of Orkney and Caithness, his grandfather, "*Lord Sinclair*," and after the form of the relative grants, is not the old dignity in *them* conveyed, and should not the ranking of the Barony, confirmed and extended to *new* St. Clairs by patent in 1677, (see p. 55,) be therefore considerably before 1488, the date now assigned to it?

Descent of Earldom of Caithness.

the "*Comitatus*," the disponee, hence but a singular successor, was Earl of Caithness, and inherited the honour, as well as the landed fief, in striking refutation, as has been remarked, among a host of concurrent authorities, of Lord Mansfield's memorable, and ever to be stigmatized hallucination in the Sutherland claim, that honours, with us, became wholly personal after 1214; and that such charters of a "*Comitatus*," even as far back as the 13th and 14th centuries, &c. had *no* relation to *dignities*, but operated as conveyances of "the *estate only*."

But by a later charter of the "*Comitatus*" of Caithness, the 2d of October 1545, upon a resignation, it was made descendible to heirs-*male;* while corresponding Royal regrants of the same followed, on the 3d of April 1592, and thereafter.[1] The alteration of the investiture may be regarded as having diverted the honours into the male channel.

George, sixth Earl of Caithness, lineal male descendant of the noble disponee in 1476, after an ineffectual attempt in 1672, as formerly stated,[2] to convey the honours and estates to Sir John Campbell of Glenorchy, afterwards Earl of Breadalbane, died in 1676, without issue, when he was succeeded in the former by George Sinclair, his heir-male, only son of Francis, second son of George the fifth Earl. This George, hence the seventh Earl, whose right was specially admitted by the Crown in 1681,[3] died unmarried, in 1698, leaving an only sister, Jane, the wife of Sir James Sinclair of May; but the honours then devolved, to her exclusion, on John Sinclair of Murkle, the eighth Earl, as next collateral heir-male, the male descendant of Sir James Sinclair of Murkle, (his grandfather,) second son of John Master of Caithness, which last had predeceased George, fourth Earl of Caithness, his father, who died in 1582.

Upon the death of Alexander, ninth Earl of Caithness, in 1765, the son and heir of the said Earl John, the dignities, again, instead of centering in Lady Dorothea Sinclair, his only child, the wife of James Earl of Fife, were exclusively claimed by two asserted male-heirs,—first, by James Sinclair,

[1] They are all to be found in the Great Seal Register.

[2] See pp. 29—72.

[3] See pp. 29, 30.

who styled himself Earl of Caithness, and protested, on his vote not being received at an election in 1766,[1] alleging himself, through his father, David Sinclair in Thurso, to be grandson and heir-male of David Sinclair of Broynach, *undoubted* second lawful brother of John Sinclair of Murkle, who succeeded as eighth Earl in 1698; and, secondly, by a more remote relative, William Sinclair of Ratter, founding as male descendant, (as he truly was,) of Sir John Sinclair of Greenlands and Ratter, younger brother of Sir James Sinclair of Murkle, who has been mentioned, the grandfather both of the said John, the eighth Earl, and of his brother, the said David Sinclair of Broynach,—who was thus near in the scale of propinquity. William Sinclair also answered another protest by his opponent, James Sinclair, as before, at a Peerage election in 1768, maintaining his preferable claim; and "that by the *laws* and *practice* of this country, it is an established rule, that where a collateral heir-male claims a Peerage, he must first establish his right by a regular *service*, as heir to the person who last enjoyed the dignity,"—which, he added, James had not done, (although he had taken out brieves for the purpose,) but, with "the highest presumption," had assumed the dignity, which, by order of the Court of Session, in the litigation to be immediately noticed, he was "obliged to lay aside."[2]

Competition for the honour, in 1768, between two parties.

Agreeably to the constant and appropriate rule in question, to fix their respective pedigree and propinquity, both parties forthwith took out brieves in their individual capacity, to be served heir-male of Alexander the ninth and last Earl, and a mutual competition thus arose between James and William Sinclairs. William admitted the nearer descent of the other *de facto*, as he set forth, but objected bastardy against him, because Janet Ewen, the mother of David, James's father, was not the *wife* of David Sinclair of Broynach, the father, again, of David, from whence it resulted that James the claimant taking through this channel, was necessarily illegitimate, and barred from the succession. This was in fact the only possible objection, although, if admitted conclusive—the same

Both first proceed by service.

[1] See Robertson's Peerage Proceedings, p. 319.

[2] Robertson's Peerage Proceedings, p. 342.

descent being otherwise unquestionable, and conclusive. The Court of the Macers, before whom, according to the practice of the time, the matter came, (in 1767) allowed a conjunct proof; and after examination of various witnesses upon the points at issue, and adduction of written proof, principally by William Sinclair, in behalf of his descent, the Jury, on November 28, 1768, returned a verdict in his favour as heir-male of Earl Alexander.

William Sinclair preferred by the service, in 1768.

By the Information for James Sinclair in a subsequent process, he laboured on the occasion under every disadvantage, being himself poor and destitute, without any interest in Caithness,[1] the scene of operations, or having sufficient legal assistance, while his opponent, besides a gentleman of fortune, possessed both in a high degree. He also complained that a re-examination of certain witnesses had been denied him, upon the opposition of the latter, who justly dreaded it, from which material results might have been expected, and that his very obscurity, and the charge of illegitimacy in his instance, had operated unfavourably to him. Nay, that the Jury, so far from being unanimous, were difficulted and divided in opinion,—some even thinking that they were not competent to the question, which was *strictly* consistorial.

Sustained by the Session in 1770, upon an action of reduction by James Sinclair.

Accordingly, before the service was retoured to Chancery, James Sinclair brought it under review of the Court of Session by an action of reduction, where he was only enabled to obtain an examination of some immaterial new witnesses, and who, upon July 21, 1770, absolved his opponent from the conclusions of the action, and ordered the service to be retoured to Chancery.

William Sinclair of Ratter, however, still did not think himself secure, but actually now applied to James Sinclair, as he positively maintained, for a *ratification* of the decision "by a proper deed under his hand," promising, in the event of his

[1] According to the testimony of Sir William Dunbar, April 14, 1791, upon the subsequent claim of Sir James Sinclair of May to the Earldom of Caithness, (see Minutes of Evidence,) he was then "of a lower degree," and not in "Gentleman's company," while his wife was the daughter of one of his tenants. Younger sons, however, of good families in the north were sometimes taxmen and rentallers.

compliance, to procure him an ensigncy or life-rent tack out of his estate,—but which the latter indignantly rejected.

The successful competitor having thus instructed his status, as heir-male of the family of Caithness, according to the approved form, next claimed the honours in the House of Peers, by a reference to them, the 5th of February, 1771, (upon a petition to the Crown,) where he pointedly founded upon his retour.[1] That Tribunal, thereafter, ordered him, the 16th of March 1772, to give notice to James Sinclair,[2] which, in his petition on the ensuing 3d of April, he stated he was unable to do, because he had found, on inquiry, that James,—the previous 5th of February, had sailed as a cadet for the East Indies, "as will be proved by the affidavit of a Gentleman."[3] The House, on his application, therefore, at the same time ordered him merely to give notice to the agents of the former;[4] after which, trusting to what had preceded, they, without farther procrastination, the 7th of May 1772, at once resolved in favour of the claimant,[5] who succeeded to the honours accordingly, under the due sanction and approbation of the Crown.

Claim of William Sinclair before the House of Lords, in 1771.

Resolution in his favour, in 1772.

The just and precautionary step in the first instance, is strangely contrasted by the precipitancy in the last, under the circumstances, and after the repugnance, and opposition of part of the Jury in 1768, that must have been known, or ought to have been, to the Lords; while James Sinclair was now out of the reach of hearing, and thus capable subsequently, of objecting the plea of a judgment in absence, and *non valentia agendi*, that would have voided such procedure in our Courts. But, in fact, Lord Mansfield and his coadjutors were too eager speedily thereby to inculcate their favourite doctrine, of the descent of Peerages not constituted by *modern* patent, to heirs-male of the body,—and with the *usual luck* and fatality,—that likewise happened, (as in the case of Borthwick,) signally to characterize their efforts. By what strict evidence too, it may be asked, did the House

Remarks.

[1] Lords' Journals.

[2] *Ibid.*

[3] Here, at variance with the procedure in the Wigton case, as will be afterwards seen, the Lords received affidavits.

[4] Lords' Journals.

[5] *Ibid.*

Procedure loose comparatively, and premature under the circumstances.

extinguish David Sinclair of Broynach, an undoubted nearer heir-male, even *admitted* by William Sinclair? By none except by the parole testimony adduced below—not the most convincing, it may be held,—indeed disputed by some of the Jury in 1768,—a fact that might have startled them,—and whose credit and veracity may be ascertained in the sequel. Had the cause been influenced by rules enforced on other occasions, the Lords would not have remained satisfied with it, but compelled a personal examination of the witnesses at their bar. Indeed, as has been seen, they were with difficulty induced, in the Borthwick claim, to allow Margaret Lady Borthwick, an aged and bedrid witness, and unable to move without risk of her life, to be solemnly examined upon commission by the Lords of Justiciary on the circuit.[1] This, with the summary procedure in other respects, the precipitancy, and want of evidence of the extinction of Francis Sinclair, a preferable heir-male—paternal uncle of David Sinclair of Broynach—who is admitted to have gone to *Sweden*, and gratuitously represented to have had no male issue,[2]—as to which afterwards—further proves that the House of Lords have not been precise and uniform in their procedure, or, as some English lawyers have ventured to assert, always demanded the strictest legal evidence in Scottish peerage claims.[3] Indeed, both the claimant and the House appear to have relied principally upon the contested service in 1768, in regard to the pedigree. The procedure may be held by some to have been lax enough, and the consequence is both striking and interesting.—David of Broynach had also a son, Francis.

The utter incapability of acting, (there not being then in London such zealous and munificent patrons of every claimant to a Peerage, as in our days,) from absolute poverty,[4] and want of requisite assistance, had alone prevented James

[1] See p. 593.

[2] See printed Case for William Sinclair of Ratter. [3] See p. 584.

[4] David, his grandfather, he represented as merely designed of Broynach, probably from living or having a tack there. His descendants were destitute, and, as we have seen, in a lowly situation, while the party in question had the humble description during the competition, of James Sinclair "in Reis," or "in Thurso."

Sinclair from proceeding, and necessitated him to accept a situation abroad. But he merely went there to better his circumstances, in order that he might push his claim at a future period,—which he never for a moment overlooked. And fortune crowned his laudable, and arduous efforts, in this respect, with success; for, at the long interval of fourteen years afterwards, on June 24, 1786, he—now a captain in the Honourable East India Company's Service—was enabled to return to his native country, with the proper means for the purpose. His first and prompt step was to present a petition of appeal in that year to the House of Lords, as the Appellate Jurisdiction, against the judgment of the Session, in 1770, but it came too late, and was withdrawn. His whole case, (as partly evident,) turned upon this, whether David Sinclair, his father,—through whom he claimed,—originally at least a natural son,—had, or had not been legitimated by a marriage between David Sinclair of Broynach, with Janet Ewen, his concubine, of which they were both capable, being *solutus* and *soluta;* and fortune here again assisted him in a signal and opportune manner. He learned "by accident" that a near relative of William Sinclair, his former competitor, had mentioned to two persons, when talking of the Caithness claim, that he knew where there was *written* evidence sufficient to prove the marriage of *Broynach*, (the above David Sinclair,) with Janet Ewen, nay, "was even so particular as to condescend upon the *place* where they lay," and to admit that if "he had been called upon at the time the aforesaid proofs [1] were led, he must have made the discovery." Captain James came also to be informed, that "Mr Andrew Robertson, late Minister of Kiltearn in Ross-shire, who had been schoolmaster and Session Clerk to the Presbytery of Caithness, recently after *Broynach's marriage* with *Janet Ewen*, upon deathbed, about the period of the former proofs, and hearing of the point at issue, had declared to a neighbouring clergyman, that Broynach and Janet Ewen *were married* persons, and had their children baptized, as such, by Mr William Innes, the Minister at Thurso." This shows

Return of James Sinclair to Scotland, and remarkable and conclusive discoveries by him.

[1] Those during the competition in 1768 and 1770.

how partial, and insufficient the probation must have been in 1770,—probably, as was maintained, owing to the influence and exertions of William Sinclair and his friends.

After such favourable and direct clues, the party lost no time in despatching his agent to Caithness, to make the requisite investigations; and the result was indeed triumphant and decisive. The latter, on examining the Presbytery records of Caithness from 1700, "in the very place *mentioned*," actually found a process, by the Presbytery, against the Reverend Arthur Anderson, an Established clergyman, *inter alia*, for celebrating an irregular *marriage* between David Sinclair of Broynach and Janet Ewen, wherein, after proof being led, and the charge legally instructed, sentence of deprivation by the reverend Court was pronounced against him. The fact in question thus came out in the most unbiassed and unexceptionable manner; and this was quite *res noviter veniens* ad *notitiam*, and entitled to the due weight in law involved in the plea; for who, in the ordinary case, without such fortunate or miraculous reference, would have thought of exploring Presbytery *ordeals* in matters of descent or pedigree?[1] I need not add, that by our law in later times, and at the period, such a marriage, though irregular, had legally every civil effect, and legitimated the issue. Nay, by our very loose and unauthorized modern practice, as I have attempted to show, a great deal less would have sufficed, even a simple acknowledgment by a man, (as in the instance of Macadam,[2]) of a female as his wife, without the intervention of a clergyman, merely before ordinary witnesses; and Gretna Green marriages, (by a blacksmith,) which even bind English parties, are not to be contrasted with the former. But the above was not all: a concurrent and material procedure was discovered in the Record of the Kirk-session of Olrick, in which parish David Sinclair and Janet resided, for the purpose of obtaining penance from them, for *antenuptial delinquencies*, previous to their procuring one of their children baptized. This was a necessary clerical measure, on account of the immorality of their

[1] Independently, too, as already obvious, there was the fact of the judgment in 1772 being in absence, and the non *valentia agendi*.

[2] See pp. 482-3, *et seq.*

original state of concubinage, that demanded appropriate expiation,—notwithstanding the purifying, or removal of civil objections by the subsequent marriage, which it necessarily, at the same time, proved. In addition to this, there was the pointed parole testimony alluded to, and more of a corroboratory kind, irrefragably substantiating that Captain James, after all, was not only the lawful heir-male of David Sinclair of Broynach, his grandfather, but, moreover, of the Earls of Caithness, and justly entitled to their honours and dignities. Here, then, was a strange and most anomalous situation of things,—occasioned by the inadvertence and precipitancy of Lord Mansfield and the law Lords,—involving all the horrors and embarrassments that operated in the untoward case of Willoughby of Parham, in England; and, to a lesser degree, in that of Borthwick.[1] But Captain James was not to be deterred in the just vindication of his rights, and those of the house of Caithness. He forthwith, in 1787, raised an action of reduction before the Court of Session, (to which he regularly betook himself, according to our notions, in the first instance,) of their judgment in 1770, and the retour it had sustained,—his former competitor being now dead,—against "John Sinclair of Ratter," his son and heir, "*assuming* and *taking* upon himself the title and dignity of John Earl of Caithness,"—whom he thus described. On the 20th of July thereafter, in the same year, the Lord Ordinary *repelled, in hoc statu*, the summary objection of the defender to the competency of the action; and issue being joined, the question was brought directly before the whole Court, through printed cases, wherein the pursuer founded, as stated in terms of his action, upon the *new* evidence. Against this the defender had nothing actually to offer, nor did he even meet it; he exclusively stood upon the *res judicata* in 1770,—in favour of which, (that was relevantly traversible by the *res noviter veniens ad notitiam*,) even the *vicennial* prescription had not run, and upon the resolution of the Lords in 1772. He contented himself with exclaiming against the indecency and "gross impropriety" of the degrading designation given

Curious, and perplexing state of matters.

New action of reduction by James in 1787 of the Judgment in 1770, and previous service in 1768.

[1] See pp. 535-6, *et seq.*

John Sinclair, Earl of Caithness, son and heir of the previous William, declines going into the merits.

him by the pursuer, derogatory "from that respect which is due to the constitution and to the law of the land." He entrenched himself in these adventitious outworks,—thus constructed for him by Lord Mansfield,[1]—maintaining that the "matter was no longer entire;" that the pursuer, by not opposing him in 1771 and 1772, had *acquiesced* and *barred* himself; and that, "in consequence" of the Peerage decision, "the title and dignity of Caithness must for ever remain" with him. He hence availed himself of the plea of the intrusive line of the Lords Willoughby of Parham, in England; but without quoting that case, or entering into express argument or authorities in his behalf. There can be little doubt what would have been the result. Under the authority of *our* law, as inevitably expounded by the Supreme Civil Court, the pursuer would have been adjudged lawful male-heir and representative of the Earls of Caithness; but he *might* not have been held heir to the Peerage, though properly turning upon the same hinge, in the House of Lords, who had, *in fact*, unjustly deprived him of the very kernel of his status. The character and rights of the parties might have contradictorily shifted and varied in the two tribunals,—the one being lawful representative, and taking the Court of Session; but the other not, and a usurper,—and *vice versa* in the House of Peers. But strangely, as happened again, the unfortunate Captain, who, upon the whole, seems to have been born under an unlucky star, died without issue at the critical moment, on the 11th of January 1788, during the pendency of the process, which restored things exactly to their previous state, both he and his father having left no surviving younger brothers or male-heirs through them,[2]—but fortu-

But successful issue of the action, and possibly strange results, barred by the sudden death of James Sinclair in 1788.

[1] Who directed and ruled the Scottish Peerage proceedings after the middle of last century, and in 1771 and 1772, and was then regarded a *vast* authority.

[2] Some of these just and righteous claimants to honours seem to have been less lucky than certain *supposititious* aspirants who have recently obtruded themselves upon public attention. Sergeant David Lindsay, son of John Lindsay, a common soldier, who, it was truly stated, "had fallen back in the world," but undoubted lineal heir-male of the Lindsays of Kirkforther, (as from authentic documents I have

nately, indeed, for the line of Ratter, (if their possession could have been challenged,) or rather, as turned out, for the subsequent heirs;—for, *moreover*, by another extraordinary fatality, John Earl of Caithness, their *last* male representative, who has been mentioned, equally doomed, as would appear, died *suddenly*, the *very next* year, in the *precise* predicament, under circumstances too affecting and notorious to be particularized. Had Captain James Sinclair, therefore, but survived until 1789, the tables *again* would have been turned in his favour, and he would have been Earl of Caithness without impediment,—his situation being then identical with that of the just and eventual heir to the Willoughby of Parham honours.[1] Nay, even *duplici jure*;—for he would also have legally taken *qua* male-heir of the stock of Ratter, and the last of them. Fortune, in this manner, played a strange and provoking game with both parties, signally favouring and baffling each in their turns,—in reality and in prospect.

Sudden death also of Earl John, the defender, in 1789.

With every submission, far better had it been, if, according to our practice,—as instanced in the cases of the Earldoms of Buchan and Kincardine,[2] (independent of the Session being Ordinaries,) and supported by the corresponding rule in the

seen), had right, in virtue of this eminent descent, to the honours and dignities descendible to the heirs-male of the noble and ancient house of the Earls of Lindsay, Lords Lindsays of the Byres, &c. He, in consequence, was extremely desirous to educate himself for that sphere in society to which he was justly entitled by birth; but, instead of commencing with the common elementary instruction exclusively suited to his calibre, he was recommended (by some witling apparently) to logarithms and the abstruse sciences, in his utter inability to apprehend which, while he laudably though desperately persevered—amidst this struggle of ardent zeal with intellect—a brain fever supervened, that quickly despatched him in 1809. He had only been served heir-male of the family of Lindsay of Kirkforther, indisputably cadets of the Lords Lindsays mentioned, the 23d of August 1808, notwithstanding an attempted opposition, that turned out to be groundless. What is singular, John Lindsay, the soldier, his father, was actually younger brother of Captain George Lindsay of Kirkforther (son of John Lindsay, of Kirkforther), and in 1760 had been served tutor of law to his daughters. So ended the line of Kirkforther.

[1] See p. 588.

[2] See pp. 32-3.

Commons, — the House of Peers, in 1772, had, in the emergency, only granted *interim* possession to the claimant, aware, as they were, of a competitor, who was *abroad*, and whose rights fell to be fully canvassed. The expedient strikes me as more salutary, and really beneficial, than the device or principle of summonses to Parliament in England, however erroneous, indelibly ennobling the blood and descendants,[1]—rather crazy, and POETICAL, as may be thought, —that, besides, did not always hold.[2] It is a fiction, no doubt, to extricate a difficulty; but, according to our law, not admissible in such a case, when palpably enuring to injustice, and defeating the rights of others.

It has been truly said, that it *must* be an *ill* wind that blows no good; and, finally, after the preceding melancholy occurrences, and *premature* decease, also, of John, the *in fact* intrusive Earl, in 1789,[3] the Caithness honours devolved to a *remoter* heir-male, Sir James Sinclair of May, whom they thus benefited and promoted, in virtue of his descent from George Sinclair of May, younger son of George, *fourth* Earl of Caithness. He claimed them by reference, (upon petition,) the 19th of February, 1790;[4] and, after instructing his pedigree, and founding upon, and proving, by parole evidence, the extinction of the Broynach branch, owing to the demise of the unfortunate Captain James Sinclair,—and, moreover, of *Francis* his *uncle*, without issue,[5]—they accordingly were allowed him, through a resolution to that effect, the 4th of March 1793.[6] Alexander, his son and heir, is the existing Earl of Caithness. In unison with received form, which sufficed the Caithness claimant in 1770 with respect to his pedigree, Sir James had been served, the 24th of May 1790, heir-male of William, second Earl of Cathness, (though the first of his stock), the original disponee in 1476.[7] He probably adopted this procedure owing to the *peculiar* state of matters,

Claim to the Earldom by Sir James Sinclair of May, the next heir-male, allowed in 1793.

[1] According to Lord Erskine, see pp. 590. 587, *note*. [2] See pp. 589-90.

[3] He was a gallant officer, with promising prospects, who had hardly attained the meridian of life, which lamentably closed, the 8th of April in that year, to the regret of *one* especially.

[4] Lords' Journals.

[5] Minutes of Evidence, 14th April, 1791.

[6] Lords' Journals. [7] Records of Chancery.

which perhaps rendered a service to the *intrusive* Earl, or the the other (*de facto*) righteous one, ineligible, (though otherwise the preferable course), from the pendency of the action between them, and sudden and premature decease of the two *Sosias*, claiming alike the same dignity and status.

Remarks as to the descent of the Earldom.

There does not seem much more requiring comment, the right of the heir-male, so repeatedly obtaining,—in terms of the Lovat decision in 1730, and Lord Hailes's feudal principle, being good, however the claimant and the House of Lords, in 1772, and 1793, went upon Lord Mansfield's abstract rule in behalf of heirs-male of the body. And although the original constitution of the Earldom in 1476,—which I maintain must then be held to carry the dignity, whatever his Lordship may inculcate to the contrary,—was to heirs-general —a circumstance no doubt deserving consideration, when backed by our leaning in their favour—still the former was altered, as has been proved by a Royal charter, as far back as 1545, to heirs-male, not to advert to others uniformly downwards.[1] The last conveyance in 1672, by Earl George, of the honours and estates, in the reign of Charles II., to John first Earl of Breadalbane, I need not observe, was null, being unauthorized by the Crown.

Extinctions not strictly made out in either of the claims.

It is further remarkable, that nearer heirs-male had existed, who were neither directly extinguished, or according to the *supposed* strict method of the House of Lords—in 1793. Among these particularly, was Francis Sinclair, formerly alluded to, paternal uncle of John eighth Earl of Caithness, and of David Sinclair of Broynach, who went to Sweden, and was stated, in the Ratter case in 1771, to have died without issue;[2]—but he now turns out to have had a son *James*, as is specially admitted in this last claim.[3] Nay, it is possible to conceive that there may be yet male descendants of Francis abroad, for there was again nothing directly to discuss him.[4] Neither was there any thing to impugn a general

[1] See p. 610. [2] See p. 614.

[3] In the genealogical table to the printed case for Sir James Sinclair of May.

[4] The only new evidence here, so far as I can find, was legal proof of his being at Thurso, the 11th of March 1635, he of that date subscrib-

service, which was still received. Indeed far from it, as the extinction of the previous Francis could only be effected by that alluded to of yesterday, upon which the claimant directly founded.

Notable discovery of Lord Mansfield.

But Lord Mansfield, it seems, has made another notable antiquarian discovery, to enlighten and edify the hitherto obtuse and uninitiated antiquaries and lawyers of Scotland. There is a peculiar unknown charm, it turns out, in the adjunct, "bearing the name and arms of a family," of sovereign force and efficacy, which by some invisible magical intervention alters the colour of things, and converts limitations "to heirs-male," or "heirs" simply, into the unbounded ones of heirs-male, or heirs-*whatsoever*. I will not allow,[1] Lord Rosslyn inculcated, following in the wake of his noble master and oracle, that "heirs-male" include heirs-male *collateral*. The words are little comprehensive, and merely denote heirs-male of the body;[2] but apply the charm in question,—then presto, the transformation immediately ensues, they attain excessive force, and become enlarged and inflated, in the way stated.

Case of the Barony of Kirkcudbright in 1772.

Upon *this* ground the Barony of Kirkcudbright, granted by patent, June 25, 1633, to Sir Robert Maclellan, "suisque hæredibus masculis *cognomen et arma dicti Domini Roberti gerentibus*,"[3] was adjudged by the House of Lords, the 3d of May 1772, to John Maclellan, a very remote collateral heir-male, his branch having sprung from the patentee's family, as far back as the fifteenth century![4] The *ratio decidendi* being thought *rather* peculiar, is notorious, and transmitted on all hands. I have a letter from the late James Chalmer, who has been alluded to, the first Peerage solicitor in his day, besides a professional cotemporary, who had the best

ing an instrument there. (Minutes of Evidence). The authorities for the facts and proceedings in the Caithness claims, from those of James and William Sinclairs, in 1766 and downwards, inclusive, independently of what has been specified, are the printed informations and cases, before their respective tribunals, Minutes of Evidence, and *res gestæ*, &c. and relative proof upon record, and elsewhere, &c.

[1] Or, to use the peremptory language of these legal dignitaries, it was so *penned* and fixed by Lord Mansfield and myself.

[2] That such was his opinion, will be immediately shown.

[3] Great Seal Register. [4] Lords' Journals.

means of knowledge, wherein he mentions, that in the "case of Kirkcudbright, Lord Mansfield took a *distinction* in respect to the *addition, cognomen et arma gerentibus*, which he held to be *something more* than the simple *hæredibus masculis*." Mr. Chalmer also intimates in another, in the same year (1812), that he had stated the question as to the legal import of a limitation, "heredibus masculis,"—*whether* it comprehended *collaterals* —"to a counsel of considerable eminence, and received an elaborate opinion, that (he) had every reason to believe was dictated by the late Lord Rosslyn, who *knew more* of such matters than *any man*,"*(?)*—where he "discusses the particular circumstances" of the individual peerages, which are so granted with us, and shows "their inapplicability" to authorize the affirmative,—but especially "goes *deeply* (he adds,) into *Kirkcudbright*." It is to be regretted that the venerable solicitor did not do so himself on this occasion, and favour us with the results.

Importance attached by Lord Mansfield to adjunct, "bearing name and arms," in a limitation.

The conclusion that the opinion was Lord Rosslyn's, is corroborated by an unfavourable one, which I know he gave in reference to the claim of the collateral heir-male to the Earldom of Dunbar, conferred in terms of a patent dated July 3, 1605, upon Sir George Hume of Berwick, the first Earl, "et *hæredes suos masculos in perpetuum*."[1] He thought *(valeat quantum)* that it alone descended to heirs-male of the body.

But really, in sober earnest, we must fairly admit, notwithstanding what has been premised, that the cardinal addition, as was thought, of "bearing name and arms," is here immaterial, nay, amounts to nothing. The largeness and extent of a concession of honours exclusively depends upon the will of the Crown, whose concern that is; but a man, even where he could only obtain a restricted limitation of them, might still naturally desire—nor would he be here opposed or thwarted —that his heirs, however comparatively few, should bear the former. The condition, accordingly, has thus freely been inserted at his option, in order to combine the family representation as much as practicable—but without enuring effectually otherwise. It will not be affirmed to be so important, more

Inept and insignificant.

[1] Great Seal Register.

Illustrations of my position.

weighty, or significant than the appendage of "succeeding to the patrimony and estate;" and yet the latter, latinized "*ipsi (the patentee)* in *patrimonio*, et *statu*, &c. succedentibus," is attached to the *narrowest* limitation—"suisque hæredibus masculis *de corpore suo*" in the patent of the Earldom of Findlater, the 20th of February 1638,[1]—showing that it even may not elongate the succession, but merely serve as above. To come to the precise point,—the present adjunct, of "bearing the name and arms," likewise identically figures after such restricted limitation—namely "hæredibus suis masculis *de corpore suo*,"—in the patents of the Baronies of Barrêt of Newburgh, and Fairfax of Cameron, the 17th, and 18th of October 1627.[2] The addition was hence indifferent, and neutral in its import, so far as regarded descent, and as much applied to *lineal* heirs-male only, as to heirs-male collateral, in which last way it figures in the limitation of the patent of the Earldom of Selkirk, the 24th of August 1646.[3] But being there thus inserted—after "hæredes masculos *quoscunque*," —it again is exemplified to be confessedly inoperative in the material view,—heirs-male collateral taking quite *independently*, and as much so, as without it.

Case especially of Viscounty of Melgum.

But the next illustrations even more pointedly, and in the most express manner, instruct my position, and expose the utter ineptness of a circumstance upon which such stress has been laid,—even when obtaining in a limitation precisely the same with Kirkcudbright. It is proved by the patent of the Viscounty of Melgum, dated October 20, 1627, that that dignity was granted to John Gordon, son of George Marquis of Huntly, "suisque heredibus masculis *cognomen et insignia de Gordon gerentibus*."[4] Had the limitation, therefore, been shown to Lord Mansfield, he would have decided, upon the strength of his favourite adjunct, here expressly inserted, that the Viscounty was descendible, failing heirs-male of the body, to heirs-male whatsoever, and hence at least to the *brothers* of the patentee. Than this, however, nothing could be more erroneous. John, thus first Viscount Melgum, as is well

[1] Great Seal Register. [2] *Ibid.* [3] *Ibid.*
[4] Original, Aboyne, or rather Huntly Charter-chest.

known, died without issue, having been lamentably burnt in the Tower of Frendraught, (a remarkable and rather inexplicable catastrophe at the time); when Charles I., on the narrative of this calamity, by *another* patent, dated April 20, 1632, was induced to confer and *constitute* the "*prior*" dignity upon George Lord Gordon, his *elder brother*, during the lifetime of the above George Marquis of Huntly, their common parent,—and subsequently to that event,—after Lord George's necessary accession to the hereditary, and higher honour of Marquis of Huntly, upon other male heirs. And why, it may be here asked, and upon what account? For no other reason than this,—owing to the *failure of heirs*,—*because* "dictus quondum Vicecomes de Melgum (the *first* patentee) obiit *absque heredibus masculis de corpore suo*,"—"*in* QUOS," the second patent next distinctly states,—moreover quoting the *ipsissima verba* of the former limitation, in that of 1627,—"*dictus* titulus Vicecomitis per nostras literas patentes *conferendus fuit*."[1]

It is hence—over and above—pointedly instructed by the best and highest authority, by the Crown, the fountain of honour,—whose sense and pleasure are imperative on such occasions,—in complete refutation of Lord Mansfield's jejune and empty distinction,—that so far as regarded the length, or brevity of descent, his favourite adjunct weighed nothing,—was actually nothing,—since the identical Kirkcudbright limitation is —*the very year before*,[2] interchanged with, and explicitly proved to have been legally synonymous,—not merely with "heirs-male,"—just as if there had been no "bearing name and arms,"—but even with the narrowest and most restricted limitation to heirs-male *of the body*;—a meaning too, which, whatever may be urged to the contrary, in the 17th century, after the full introduction of patents and personal honours, was frequently imparted in patents to "heirs-male,"—and which remarkable circumstance, in the case of such subjects as honours, at that period, should create an impression against their comprehensive import. There was consequently no

Cotemporary, and conclusive.

[1] From the original, *(ibid.)* which is also recorded in the Great Seal Register. The limitation in 1627 is also elsewhere literally repeated in the grant.

[2] As stated, the Kirkcudbright patent was in 1633.

proper ground in the Kirkcudbright instance, for extending their effect,—which otherwise, neither he nor Lord Rosslyn would have done,—according to their confessed notions,—simply owing to the repetition of the express adjunct in question,—so strangely magnified and exaggerated by them, but in reality here trivial, and nugatory. The point is brought to the plainest conclusion; for if the construction of these lawyers had been true, the second patent in the case of Gordon would have been wholly excluded by the first, which had still ruled, and been operative, and had, *per se*, given the dignity to the identical George, the new patentee,—who, however, takes alone by means of the second, in 1632. And so far, again, from the *same construction* holding, it is additionally refuted by the inductive ground and avowed motive in the preamble of the second, namely,—"*ut* PRIOR *titulus Vicecomitis*, (that in 1627) REVIVAT,"—(which *thereby* it could not have done,—being actually *existing*,)—in James Gordon, son of the previous Lord George,—to whom, after his father, though under the style of Viscount of Aboyne, it is now given, by means of a renewal, or reconstitution of the spent limitation in 1627, "hæredibusque suis masculis nomen et insignia de Gordon gerentibus." Nor is even this all; for upon the demise also of this James, who at length succeeded, in conformity to the grant, without issue, the same Viscounty of Aboyne may be concluded, in further illustration, to have become extinct; for, besides, never having been assumed, or enjoyed by the main stock of Huntly, the collateral heirs-male, and still the certain heirs, under Lord Mansfield's interpretation,—as proved by the various and anxious enumerations of their titles in their styles,—the dignity of the Earl of *Aboyne* was conferred by patent, dated 10th of September, 1660, upon Lord Charles Gordon, a later cadet, and the heirs-male of his body.[1] Such new creation by the identical title, though under a higher degree in the Peerage, according to our old notions, appears incompatible with the existence of the former.

It is needless to add, that Lords Mansfield and Rosslyn were quite ignorant of the preceding case of the Viscounty

[1] Great Seal Register.

of Melgum and Aboyne;[1] nor can it be supposed, nor does it appear from what has been transmitted, (which also but too often happens in the case of the English authorities, in respect to our Peerage claims,—they being estranged, and away from the natural sources of information,) that Lord Mansfield had at all properly examined into the subject. He was chiefly, if not wholly swayed by his own heresies and predilections, and in fact at once solved the matter by mere intuition, or rather fancy, much in the same way that he arbitrarily cuts the gordian knot, in others of far greater abstruseness and difficulty. We here again see the expediency of the *precise* facts and authorities in a Scottish Peerage claim, being first settled and adjusted through the salutary and appropriate ordeal of the Session,—acting in their just and inherent capacity as Ordinaries.

Expediency of primary cognizance of the Session.

The Kirkcudbright honours had for a considerable time been dormant or unassumed. William Maclellan, glover in Edinburgh,[2] the father of John, the claimant in 1772, was, on the 9th of April 1734, served heir-male in general of James Lord Kirkcudbright, a previous assumer of the dignity, whereupon, agreeably to the usual practice and legal understanding, he also took, and maintained his right to it, voting at Peerage Elections in 1737,[3] as well as thereafter, though under protest. There was a counter-claim, at the same time, by James Maclellan, son of Sir Samuel Maclellan, Provost of Edinburgh, both as asserted nearest heir-male of the family, and founding upon a pretended resignation of the honours by a previous Lord Kirkcudbright,—but what that was, does not satisfactorily transpire, and the right seems to have been visionary.[4] He states, in 1741, that he had petitioned his Majesty for the honours, who had referred his claim to the Lord Advocate and Solicitor-General, "that the said Peerage may be determined upon in the course of Law."[5] According to the pro-

Previous competition for Kirkcudbright honours, between William and James Maclellan.

Reference of petition of last to Scottish crown counsel alone.

[1] It was first adduced by the Author in a Treatise published in 1833.

[2] See Robertson's Peerage Proceedings, p. 154, and the subsequent references.

[3] *Ibid.* pp. 182-3-4-7. His right to the title and vote had also been protested against by James Maclellan afterwards mentioned in the text, as early as 1734, when he was served. (See p. 154, *ibid.*)

[4] *Ibid.* pp. 95, 154, 231-2-9. [5] *Ibid.* p. 231.

test against him by William Maclellan, his opponent in 1742, the reference was on April 28, 1736; and these legal officers had certified to his Majesty that he had *not* instructed, by writings produced, what he maintained, that he was "the nearest heir-male" of Sir Robert Maclellan, first Lord Kirkcudbright.[1] James Maclellan did not take further steps in relation to his claim; and the House of Peers having, the 14th of December 1761, discharged William Maclellan from assuming the title, or voting until he made out his right, John, his son and heir, eventually claimed with success, as shewn in 1772.[2] The above reference of a Scottish claim to the Crown Officers of Scotland exclusively, is somewhat different from the subsequent usually practised form, though apparently more competent, and, it may be maintained, the next best course in the first instance, excepting the innate and preferable cognizance of the Session as Ordinaries.

Constitution of the Earldom of Wigtoun, in 1606.

A Commission, and "Letter of Patent," dated at Whitehall, March 19, 1606, passed the Great Seal, wherein James I. of Great Britain, on a narrative of the services of John Lord Fleming, and especial considerations, grants power and authority to John Earl of Montrose, the King's Commissioner for the time, and, in his default, to Alexander Earl of Dunfermling, the Chancellor, to constitute and create the aforesaid nobleman Earl of Wigton; which dignity the King declares "cum præfato Joanne Domino Fleming, hæredibus suis masculis legitime, et linealiter descendentibus, manere, et durare volumus, omni tempore futuro."[3] A signature, the due warrant for the grant, in English, had previously past the Sign Manual.[4] And the Act of creation followed thereafter, at Perth, on July 1, 1606, where, in presence of "a number of the nobility of the said kingdom of all ranks," the patentee delivered the warrant under the Sign Manual, with the patent, to the Earl of Montrose, the Commissioner; who, in implement thereof, "constitute, and *create*, with *all* solemnities *used* in such cases, the said John Lord Fleming

Act of creation, with the usual forms, followed accordingly.

[1] *Ibid.* pp 237-8.

[2] Lords' Journals.

[3] Original, with the seal still entire, Cumbernauld Charter-chest. It was also recorded, though not until 1777.

[4] Cumbernauld Charter-chest.

Earl of Wig… …irs-male simply, and Presumed failure of heirs-male, in terms of patent 1606.
pre-eminence … …ations that go to …
cordingly,—the… …y of the pa-…
his heirs-male of… …the con-…
after." The sole… …his …
stances, consisted in … …
appearing in his roll … …
ceive the new honou… …
"*belting*," a usual acce… …
and dignity by the hera… …
creation is instructed by a… …gis-…
books of the Lord Lyon, c… …g Peerage creations in Lyon's Register.
him and "Ilay, herald keipe… …under …
the Sign Manual is *verbatim* …, essential to
shew that the creation had the … …n of the Sovereign.
On this account it is always first… …ied for in Peerage claims, and especially relied upon, as interpolations occasionally intervened,—independently of undue conveyances of Peerages,—of the easier fabrication, owing to the remoteness of the seat of Government. Agreeably likewise to a natural and laudable form, there was a record of the creation in the Lyon's registers, that have been so miserably kept, and purloined,—a remarkable consequence of the mismanagement so discernible in later times, in all relative to that department. That the practice was usual, is further evident from the patent of the dignity of Lord Binning, conferred, the 19th of November 1613, upon that able statesman, Sir Thomas Hamilton of Byres, first Earl of Haddington, with limitation, "ei, et heredibus suis masculis cognomen et insignia Hammiltoniorum gerentibus,"—where there is a mandate, "Leoni Regi Armorum fratribusque suis fecialibus, ut presentis creationis diploma suis *scriniis*[3] inserant, et insumant,

[1] See pp. 571-2, and the same thing will be corroborated in the sequel. For the above ceremony of the heraldic proclamation and others, see form of creation of the Marquises of Hamilton and Huntly, in 1599, given by Sir George Mackenzie. Works, vol. II. p. 535.

[2] Cumbernauld Charter-chest.

[3] What are *now* the "*Scrinia*" (forsooth) of the Lyon Office,—*quantum mutata*, it may be indeed said, in their poverty, or evanescence, if such even can be held to exist? See also p. 7.

(et) Thomam Dominum de Bynning, et heredes suos masculos in *catalogum*,[1] et ordinem Majorum Baronum, et Dominorum Parliamenti dicti regni Scoticani, referant, et inscribant."[2] Had the Lyon Registers,—now in ancient matters a mere blank,—deformed, as they besides are, by every incongruity and misrepresentation, at a modern period,—been kept even with secondary care and precision, they might, notwithstanding unavoidable casualties, have thrown no small additional light upon the constitution and descent of our Peerages.

The Parliament to which the Earl of Montrose was High Commissioner, commencing at Perth, on July 1, 1606, the date of the Act of the Wigton creation there, afforded a natural occasion for the solemnity. And, accordingly, "Johne Erle of Wigtoun, Lord Fleming," figures upon a Committee of Parliament in the same year.[3]

I have been careful in detailing the especial forms of the constitution of the dignity in question, as the present instance, with various others to the same effect,[4] must expose a glaring and unaccountable hallucination of Lord Rosslyn, in reference to the mere *accessory* ingredient of "*belting*," in the act of creation or inauguration,—already,[5] and further to be after-

[1] How important, too, such official and authorized Catalogue would have been, if duly kept after the Union, when the roll of our Peers has, in certain respects, been so objectionable, and little corrected and emended!

[2] Great Seal Record, *Append.* or Paper Register.

[3] Acts of Parl. last Edit. vol. IV. p. 300.

[4] The constitution of the Earldom of Roxburghe is identical with that of Wigton. There is a letter of patent the 18th of September, 1616, directed to the Chancellor, to constitute and inaugurate Robert Lord Roxburghe in the honours of "Earl of Roxburghe, Lord Ker of Cessfurde and Caverton,"—"quovis *tempore* et *loco*—*cum ceremoniis* et *solemnitatibus* in talibus casibus *usitatis* et *consuetis*," which is moreover special, limited "sibi, suisque hæredibus masculis." (Original Roxburghe Charter-chest, unrecorded.) And it is stated, in an original cotemporary letter in the Balfour Collection, in the Advocates' Library, that "the Lord of Roxburghe was *created* erle of Roxburghe upon the 19 of this instant, (*September* 1616,) the *solemniteis* being assisted be the Marques of Hamilton, the erlis of Mar, Wynton, Perthe, Eglinton, and Tullibardin, the Lords Scone, Bugcleugh," &c. The inauguration or creation thus took place the next day.

[5] See p. 573.

wards alluded to,—little indeed to be expected from those the least versant in such details; and which may even excite surprise in England. It has been productive of most irrelevant and unfair conclusions, injurious to the proper descent and rights of Peerages.

Descent of the Earldom of Wigton.

The Earldom of Wigton, in terms of the patent in 1606, devolved upon William the fifth Earl, the great-grandson and heir-male of the patentee. He obtained, upon his resignation, a signature under the King's hand, dated August 18, 1669, authorizing a charter or regrant to pass the Great Seal, of the dignities of Earl of Wigton, Lord Fleming[1] and Cumbernauld,—together with the estates,—in favour of himself and the heirs-male of his body, containing remainders also to Charles Fleming, his brother-german,—Sir William Fleming, his Majesty's gentleman usher, son of John, second Earl of Wigton,—Lieutenant Colonel John Fleming, son of Malcolm Fleming, son of the first Earl of Wigton,—and to Lady Jean Fleming, (afterwards wife of George Earl of Panmure,) only daughter of John fourth Earl of Wigton,[2] to the heirs-male of their bodies, *seriatim*, each, and all of them; with an ultimate substitution to the eldest heir-female without division of the body of the disponee.[3] It is remarkable, however, that this regrant always remained in the same inchoate state, and was never perfected in any manner. Nay, what may be still more singular, it was not only neglected by the family, but

Signature of an extended regrant of the honours in 1669 on a resignation.

Never perfected.

[1] This was another old Barony of which the constitution is unknown, but, according to the Auchinleck Chronicle, created in 1452,—the act of creation being there stated in that year, when Robert, the first Lord, was, in usual form, made a "Lord of Parliament and Banrent." From what will be afterwards remarked, it may be affected by the above resignation.

[2] This lady, by the Earl her husband, had an only child, George Lord Maule, who is extinguished by his father's retour to him, upon record, after the death of the mother, on May 9, 1685.

[3] Cumbernauld Charter-chest. The present John Lord Elphinstone is now the heir under the grant, in terms of that substitution, in virtue of his descent from Lady Clementina Fleming, his great grandmother, to be afterwards noticed. The signature of the regrant was adduced by the crown against the Wigton claimant, who will be mentioned, in 1781. It passed the King's signet, and an extract was given forth of the precept under the signet.

even became subsequently unknown to them, until its accidental discovery after the middle of last century. Earl William died previous to October 19, 1681, as is proved by the retour of his successor, of that date, upon record, leaving two sons, John and Charles, the sixth and seventh Earls of Wigton, who took *seriatim* in male order. The first had an only child, Lady Clementina Fleming, the heir-general, married to Charles Lord Elphinstone; and eventually, in 1747, upon the death of Earl Charles, her uncle, without issue, sole representative of the family, her Ladyship having succeeded to the estates, in virtue of a strict entail, made by Earl John, her father, dated June 24, 1741,[1]—to whom, strangely indeed, the signature in 1669 was unknown—in favour of the heirs-male of the body of himself and Charles his brother, in the first instance, which last was thus preferred, owing to his being heir to the Wigton honours. These are the *only heirs-male* specified; and there is a remarkable clause, carefully binding the heirs-female, and next substitutes, to take exclusively the title of *Lord Fleming*—should they have a right,—and surname and arms of Fleming of Cumbernauld, in the event of the *failure* of the *former*,—"*whereby* (the Earl adds) the title and dignity of *Earl of Wigton* (the chief consideration, and that was to be borne also in their case *exclusively*) *may* become *extinct*." In this manner things stood at the time of Lady Clementina's accession. By the resignation in 1669, which was gratuitous and not onerous, as in the instance of Oliphant, William the fifth Earl may be legally held to have denuded himself of the honours; and although the crown regranted them to him, and the heirs mentioned, by the signature, the latter was never acted upon or completed. That the signature, in these circumstances, must be accounted effete, follows, I conceive, from what I formerly instructed.[2] A material objection might therefore have been raised to the subsequent existence of the Earldom, had the occurrence in question been known, which it happened not to be until long after the extinction of the direct male line, and epoch of the female succession. But even holding that the same resignation did not

[1] Recorded in the Register of Entails.

[2] See pp. 64-5-6-7.

defeat the original patent in 1606, to heirs-male simply, and that it is still in force, there are considerations that go to countenance the failure of heirs-male of the body of the patentee; because, in the first place, Earl William, in the conveyance of 1669, seems to have been anxious to secure his heirs-male—according to the general bent of the family—in the succession, whom he may be held to exhaust *nominatim*; while all of these there recited—and indeed others previously existing,—have been extinguished by evidence I have seen. The above inference may be natural, agreeably to the more modern usage,—although such *nominatim* specifications,—instead of a general substitution to heirs-male,—have been employed of old when a partial selection was intended. Still, nevertheless, why the Earl did not complete the conveyance, when he was fully enabled to do so, seems at the same time an enigma to be solved. And secondly, the conclusion of such male failure, in the conviction of Earl John, the head of his house, so extremely solicitous, as has been shewn, for the preservation of his honours, and of the Earldom in the first place,—who succeeded as early as 1681, and was likely to be well versed in the state of the representation of his family,—may be more directly authorized by the contingency he takes for granted in his entail in 1741, of the extinction of the dignity, on the death of himself and his brother without male issue. The obvious induction here may be, that they comprised the remaining male heirs.

Presumed failure of heirs-male, in terms of patent 1606.

In these unfavourable circumstances, as would seem, we come to the pretensions of Dr. Charles Ross Fleming, physician in Dublin, who assumed the title of Wigton shortly after the death of Charles the last Earl, as lineal heir-male of the patentee in 1606, and who, on being ordered by the House of Lords, in 1761, to instruct his right, and claiming upon petition and reference to them in 1762, acknowledged, the 25th of March in that year, that he was "*not* prepared with *any* evidence," but desired "further time."[1] Such admission boded but ill for his claim. The Lords in consequence resolved that he should be considered unentitled to the Peerage,

Claims to the Wigton honours in 1762, and in 1777-81-82, by Dr. Fleming and his son.

[1] ds' Journals.

which he was discharged from assuming, or to vote at Elections, until his claim should be substantiated.[1] After his death, however, and a long interval, Hamilton Fleming, Esq. his son, in 1777, claimed in like manner. And from the evidence, that was *now* singularly only *first* adduced, the subject may be despatched in a few words. John first Earl of Wigton, no doubt, had a younger son Alexander, father of James Fleming, which last was alive in 1654;[2] but the claimant failed to instruct his male descent from them,[3] as he maintained, (nor could it be,) through James Fleming, rector of Castlane or Kilkenny,[4] and Magdalene Way, his wife, his grandfather and grandmother, and an earlier James Fleming, rector of Ray or Romachy in Donegal, &c. He could only properly condescend, waving his immediate ancestry, upon vague or inconclusive writings, and parole testimony in the shape of hearsay.[5] The latter seems of easy attainment in Ireland; but the glaring futility, and absolute falsity of which, has been so pointedly exposed in the late case of the Crawford succession, that so strangely misled several.[6] Such charms has romance at all times.

There is a bond upon record for 200 merks, by William Fleming, merchant in Glasgow, dated the last of July 1654, to "James Fleming, son lawful to umquhile Alexander Fleming, brother-german to John Earl Wigton."[7] None of this stock, however, are called to the Wigton succession, either in 1669,—by Earl William, grand-nephew of Alexander, and cousin and cotemporary of James,—or in 1741, from whence,

[1] *Ibid.* under same date. [2] This will be immediately proved.

[3] He represented Alexander, as the fourth and youngest son of the Earl, James and Malcom being the two immediately elder.

[4] He is stated to have been one of the Chaplains of the Duke of Ormond.

[5] This account is from the printed evidence, papers, informations, and procedure in the case, &c.

[6] This is the more remarkable, there having been *no* written proof at all in support of the aspirant, though the alleged descent was not remote, while the fanciful parole testimony was not only traversed in the same way, but most articulately, and irrefragably by written.

[7] Registered, October 5, 1775, as a probative writ in the Books of Session.

and owing to what was formerly stated, their extinction may be presumed. But the matter, in the circumstances, however the want of due evidence, *may* be remedied by Irish ingenuity and resources, was *jus tertii* to the claimants, either in 1762 or 1782; on the 6th of February, of which last year, the Lords resolved, that Hamilton Fleming had "no right to the titles, honours, and dignities" in question.[1] In this case the House also determined that they could "not admit *affidavits* as evidence."[2] Nor would they enforce production of the original patent of Wigton in 1606, by Lady Clementina Fleming and Charles Lord Elphinstone, her husband, (who had declined compliance when applied to for the purpose,) upon his *affidavit*, "that he has been informed, and verily believes" that they had it, (which was the fact,) and his representation that he could not proceed without such original document.[3] That the Lords were *here* justified in the step, I will not dispute; but an important question arises, whether, in a more favourable alternative, where two parties competently join issue in a Peerage claim, one is not entitled to force and expiscate, on fair shewing, conclusive evidence in the possession of the other,—or even elsewhere,—when he has made out a presumptive, or even probable or unrefuted *ex facie* case, different from that considered, in which there was an insurmountable impediment, and where the actual adduction of the patent craved for could not avail. It is singular, that notwithstanding the great *lacunæ* in our public records, our remissness and negligence in the registration of patents and Peerage grants,[4] which often descend, with the lands, to strangers or remote heirs, who, as I have experienced, are generally opposed to their exhibition,—and whereby their contents, from their clandestineness and the want of registration, are unknown, and sealed to those interested,—no point of the kind has yet directly occurred. This, too, although the value and importance of private repositories is necessarily so peculiarly enhanced; and in the case of any grant, including a pa-

Claim of Hamilton Fleming, the son, disallowed.

Can exhibition of important deeds be enforced against a party in a Peerage matter?

[1] Lords' Journals. [2] *Ibid.* on 10th of April, 1781. See p. 613.
[3] Lords' Journals, May 6, 1777.
[4] In reference to the unmethodical and careless procedure in this respect, even in the event of registration, see pp. 255-6.

tent, according to legal doctrine, the right of property in it vests in the heir under the limitation.[1] The same remark applies to material evidence of pedigree and descent.

Our law would seem more inclined to an exhibition or delivery, in such circumstances, than the English, which, I am informed, from their peculiar practice and conveyancing, is especially scrupulous in interfering, even indirectly, with private rights and charter-chests; but then, again, a Peerage is *jus publicum*, in which the nation, as well as the parties, are interested, and who hence may naturally require that justice, and the fair truth in the matter, should be fully extricated; while our own doctrine, and not that of the English, ought relevantly to rule. Added to this, our neighbours being more methodical and careful than our very negligent selves, in the registration and transmission, in a public form, of Peerage grants,—their records, at the same time, having been far better kept, and suffered far less from dilapidation and the injury of time,—the motives and considerations that apply to them, may not to us.

Connected with the present weighty topic, in some degree, which it anticipates, and may in the main discuss, though does not properly decide, the following modern case, that, if is to be regretted, was not formally and sufficiently laid or framed for better elucidation or determination, (however, not altogether unfavourable) falls particularly to be noticed.

Action of exhibition, and delivery of patents and grants of honours, &c. by Colonel Campbell, against Lady Mary Lindsay Crawford, before the Session, and the Appellate Jurisdiction, in 1823-6.

John Earl of Crawford and Lindsay obtained, upon his resignation, a charter or regrant, under the Great Seal, dated at Edinburgh, the 28th of April 1648, of the honours and estates of Crawford and Lindsay, &c. to himself and the heirs-male of his body; whom failing, to the eldest heir-female of his body, &c.[2] And Colonel William Claud Campbell, under the latter character, (the heirs-male having failed,) being, in 1820, served and retoured heir of provision in general, pursued an action of exhibition and delivery in the Court of Session, of all original grants of the Crawford honours, including those before 1648, and afterwards, or deeds

[1] See authority of Stair, afterwards referred to.

[2] Great Seal Register. Infeftment followed in due course, and the title under the conveyance to the estates took full effect.

connected with them, which were specially condescended upon, against Lady Mary Lindsay Crawford, the presumed possessor; at least who, though a more remote heir-female, had succeeded to the Crawford estates and family papers, in virtue of a modern settlement, of the property alone, long after the Union, which so far abrogated the former. She had confessedly no claim to the honours; while the pursuer's object was to corroborate his right thereto, and to avail himself of every incidental interest, pre-eminence, or faculty affecting the same, that might thus transpire, and centered in him, in virtue of the charter in 1648. To such of the deeds and instruments as concerned exclusively the dignities, he maintained a right of property, according to the doctrine laid down by Stair;[1] but to the remainder that might affect the estates also,—which he again did not claim, a right of inspection, and of availing himself of them *quoad* the former, on receipt and obligation for re-delivery. The Court of Session, on July 9, 1823, after opposition by Lady Mary, the defender, who appeared, sustained the action, and remitted to the Clerks of Session "to examine Lady Mary Crawford's charter-chest, or other repositories, containing the family papers, for the deeds called for by the pursuer in his information, and to select the same, if found, and with full power to take the deposition of havers; and granted commission and diligence for that purpose accordingly." But the noble defender having appealed, the House of Lords, as the appellate jurisdiction, the 26th of May 1826, reversed the judgment, and assoilzied or absolved her Ladyship from the conclusions of the process.[2] The grounds of the reversal, as given by Lord Gifford, in his speech or decision upon the occasion, were these:—that Colonel Campbell had failed to prove his right of property in the deeds, he neither claiming the estates, or having *at all* instructed his right to the dignity,—which were regarded indispensable for the purpose. His want of

Sustained by the Session, but their judgment reversed by the Appellate Jurisdiction.

[1] "Exhibition and delivery (that learned Judge inculcates) is competent to any party, in whose favours a writ is conceived, without necessity to prove that it was delivered." (*Inst.* B. I. *Tit.* VII. § 14.)

[2] See Wilson and Shaw's Reports of Appeal Cases, containing the present, vol. II. pp. 443-7.

right to the latter was, besides, confessed, by his merely pursuing as a commoner. "His action is not," his Lordship affirmed, "for the exhibition of deeds to make out his claim, but to deliver the deeds to him, he founding upon a right of property in the deeds.[1] He says he has been served heir. Be it so: still he has *not* established his right to the dignity; and *unless* your Lordships *have* recognised his claim, he *cannot* say that he *is* entitled to the dignity." But this judgment, at the same time, Lord Gifford added, "will *not* prevent a proceeding on his part, on any future occasion, supposing him to have a ground for it. He *may* raise, if he is so advised, an action of exhibition, *ad probandum*,—that accessory action to which I have referred,[2]—or if, at a future time, he shall be found entitled to the dignity, the present form of action may be relevant."[3] It is very remarkable, that if the Crawford succession had opened to Colonel Campbell, the heir-female before the Union, and if he had produced in Parliament the charter in 1648, and evidence of a Parliamentary ratification *in* 1661,—which, though not now existing, can yet be instructed to have past,—then his case would have been *fully* identical with that of the Earldom of Buchan in 1698. The claim there, was exclusively supported by a parallel charter of the honours and estates of Buchan in 1625, dated at Edinburgh,[4] backed simply by a Parliamentary ratification in 1633.[5] And the Parliament, therefore, as they did in that instance,—as well as in conformity to the later one of Kincardine, in 1706,—would accordingly, in the event stated, have given the Crawford party in question *interim* sitting and possession, *reserving* power to all interested to question his right in the Court of Session, who were alone competent to the matter.[6] Such being the case, and the evidence the Colonel adduced being equiponderant, and by relevant Scottish pre-

Case of Colonel Campbell the same with that of the Buchan claimant, in 1698.

[1] This only, however, as is clear, partly or alternately obtained.

[2] In obvious opposition to the substantive one, grounded upon a right of property.

[3] Wilson and Shaw, *ut sup.* p. 451.

[4] Great Seal Register.

[5] Acts of Parl. last Edit. vol. v. p. 65, *et seq.*

[6] See pp. 32-3, and what precedes.

cedent allowed to constitute a presumptive, or at least *ex facie* right in a Peerage, with incidental and attendant interests,—could the Session, at the same time, in the due exercise of their authority, have, in strict form, refused to enforce delivery, or exhibition of any grants or patents of the Crawford dignities, on a substantive action at his instance, grounded upon his title as a Peer, and pursuing in that capacity, or even by an accessory one to authenticate (*ad probandum*) or corroborate it, *ob majorem cautelam*, and prudentially and relevantly, *ob majorem rei securitatem*? I conceive they strictly could not. There was, it is observable, *no* counterclaim.

Court of Session competent to it.

The error committed by Colonel Campbell in his action,—after his service, too,—upon Scottish principle, strangely as it may strike modern apprehension, may have been in not proceeding *qua* Peer, in this way. By not assuming the dignity, upon grounds that were certainly admitted and recognised by the Scottish Parliament in 1698, but insisting as a commoner, he gave rise to a *personal* objection; and may hence have invalidated, (agreeably, as seems, to the exception in the Borthwick case,[1]) or indicated a distrust of his right to it. The new evidence adduced in this treatise[2] was not then known, or at least referred to,—instructing the Court of Session to be the exclusive Ordinaries in Peerage questions. A service besides, by which Colonel Campbell had been duly warranted, as has been abundantly proved by cases after, as well as before the Union, was of far greater account in law, in respect to dignities, than Lord Gifford, an English lawyer, seemed aware of. It was the ordinary method, even recognised by the House of Peers,[3] of instructing the right to a Peerage, in

His action, perhaps, not properly shaped.

Misapprehension of Lord Gifford.

[1] See p. 586-7.

[2] Under Chap. I.

[3] This has been shewn by the claim of William Sinclair of Ratter, to the Caithness Peerage, in 1772, (see p. 614,) where his recent unsatisfactory, and in fact erroneous service, in 1768, was relied upon by the Lords, and by which alone extinctions could have been substantiated. The same remark applies also to the service in 1790, of Sir James Sinclair of May, the next successful Caithness claimant, founded upon before the Lords, in 1793. (See p. 620. See also the striking concurring instances of Somervile, Holyroodhouse, Cassilis, Borthwick, and Caithness again, pp. 350, 385, 578, 583, 611, 621-2.) At the Peerage Election in 1737, William Maclellan, in whom was the Peerage of Kirkcudbright,

terms of a conveyance of honours, or even of a mere constructive grant or descent.

Both ingredients in a Peerage claim appear to have been virtually and presumptively held to constitute such right; and by our forms and practice, Colonel Campbell, it seems, having, in reality, sufficient interest, and entitled to *interim* possession in virtue of the Buchan precedent,—nay, *a fortiori*, by means additionally of a service that did *not* there hold,—may have been authorized to insist in the way stated. And further still, if opposed by a competitor, the Court of Session might then have probed and investigated his right to the Peerage. The action of exhibition, granting the premises, follows even upon the reasoning of Lord Gifford, who laid such stress upon the matter of claim, which he absolutely rejected in the case. English Peerage notions, so much at variance with ours, may be further held to have prejudicially operated against the Crawford pursuer in 1826. What the latter were in such respect, —in confirmation of what I have attempted to inculcate,—is thus, I conceive, well and truly explained in an original statement—yet extant, by a lawyer, in reference to another Peerage case, at the middle of last century. "The Peers of Scotland were *not* (it is justly stated) summoned to Parliament by particular writs addressed to each Lord, but by one general Summons. When a Peerage fell to a collateral heir,[1] he had no occasion to apply by Petition to the King, as in England, for his writ of Summons; neither had he any occasion to apply in order to prove his propinquity, because *that was* ascertained in the *regular legal* method by the *verdict* of a *Jury*, upon evidence returned to the writ of Mortancestry (in other words,

Difference in instructing Peerage rights, and in relative procedure between the two countries.

as subsequently found by the Lords, produced a service, in 1734, as heir-male of James last Lord Kirkcudbright, "in order to show that he has a right (*qua* such) to vote at the said Election." (Robertson's Peerage Proceedings, p. 183.) Our original, and appropriate law, was here obviously adopted. Nay, the sole ground, as has been proved, (see p. 185,) upon which Charles II., the 11th of July 1670, allowed the Barony of Salton to Alexander Fraser of Philorth, the heir-female, was merely his service in *that* year, as "heir of lyne," of George Lord Salton.

[1] Of course the same thing obtained in respect to a lineal,—the mention here, of the *collateral* heir, was owing to the case under consideration affecting such.

by a *retour.)* That return is *not* traversable, but must be taken as a true bill, *till* by a process of reduction it is falsified. Upon this service then he took his seat in Parliament, and held a *right* to the *possession* of his Peerage. If this right was objected to, it might either be by a competition for the Peerage, or by a Lord objecting to his title; and in *both* cases the matter was considered as any *other* question of civil right, and *determined* by the *Court of Session.* If not objected to, he continued *his possession*, and enjoyed the right of a Peer."

Inductions in favour of the Session's competency in the matter of exhibition.

There is hence abundant ground here in favour of the competency of the Session in honours, and their consequent authority and jurisdiction in Colonel Campbell's action. Independently of this, according to English rule, Lord Gifford, with every submission, (to whom these facts must have been unknown,) may be charged with great inadvertency, or inaccuracy, when he unqualifiedly said, that the former could not be viewed as "entitled to the dignity,—*unless your Lordships* have recognized his claim."[1] Now it is indisputable, that the House of Peers have, in reality, no proper jurisdiction in the matter,—no more than any other tribunal,—nay even than the Court of Session, abstracting from their actual right, as has been shewn,—who may as relevantly, under the only sanction or authority, in England,—that of the Crown,—discuss and resolve, in a Peerage claim. It is remarkable that it was even argued without direct contradiction, in the Crawford process, before the Appellate Court, that the Session were alone competent to the "question of property" in the grants of honours,—though Lord Redesdale affirmed, agreeably to his known and exclusive doctrine, that when the Lords were constituted by the King judges in Peerages, "all orders," including the "power of taking the proof, emanated from the House."[2]

This quadrates certainly with English notions, but by ours properly, the power in the first instance should centre in the Session, as Ordinaries. But be this as it may, Lord Gifford admitted, that in *other* circumstances, in a substantive claim

[1] See Wilson and Shaw, *ut supra*, p. 451. [2] *Ibid.* pp. 44C-7.

to a Peerage, which the present was not, an action of exhibition, *ad probandum*, *might* be raised,[1]—of course before the Session,—so that from this, in the important emergency contemplated at the outset, involving a Peerage right directly and relevantly contested by two parties, we may be led to conclude, that exhibition of material documents may be here insisted upon, by one party having shown sufficient cause or interest against the other, and duly enforced by the former, under authority of the House of Peers—whether in the character of their appellate, or *quoad* Peerages, delegated jurisdiction. This not inconsistently, too, in the latter case, as our law Lords in Scotland have thus incidentally acted, in Peerage claims before the Peers, and taken proof in regard to them, as has been instructed by that of Borthwick.[2]

The Flemings of Cumbernauld, Earls of Wigton, &c. who have indirectly led to this discussion, were an *old*, and distinguished House, of whom, nevertheless, no male cadets appear now to exist, although they, singularly enough, often abound in many families of a much briefer pedigree. The Flemings, ancient Barons of Slane in Ireland, it is remarkable, from an idea of clanship, or mutual descent, uninstructed, and probably only grounded upon the coincidence of surname, included the former in an entail of their estates in 1624.[3]

[1] See p. 638. [2] See p. 593.

[3] See Lynche's Feudal Dignities in Ireland, p. 206. The ultimate settlement there is "in fee to the Lord Fleming, now Earl of Wigton, in *Scotland*, and to his heirs for ever." There were diverse previous remainders to heirs-male. The Cumbernauld charter-chest contains a curious communication in 1725 from William Fleming, afterwards "commonly called Lord Slane," (there having been an attainder,) to John Earl of Wigton; from whence it transpires that he was "cousin german to the late Lord Slane, now Lord (Viscount) Longford," (outlawed at the Revolution,) and "cousin german to the late Earl of Antrim;" and he in it expresses "deep concern that your Lordship's friends in Ireland are not better known to you,—Christopher Fleming, late Lord Baron of Slane, (his 'Great Grandfather,' having) limited his estate and titles to the Earl of Wigton and his heirs;" and the present Earl, it is intimated, being now "*next*" in remainder to *him*—the said William. There is also the old legend of three sons of an Earl of Flanders being ancestors of the Earls of Wigton, the Le Flemings in the north of England, and of Lord Slane. William Lord Slane,

The House of Peers, the 9th of March 1761, appointed a Committee to make a "list of the Peers of Scotland at the time of the Union, whose Peerages are still continuing," with "power to summon all proper persons before them, and to report from time to time."[1] On the 15th of March 1762, they further ordered a reprint of the Report of the Lords of Session in 1740, upon the same subject, including the limitations of certain dignities, which, with some good remarks, contains inadvertencies and misconceptions.[2] And the 20th of March 1767, they formed themselves into a Committee, "to consider of the most proper means effectually to ascertain the descents of the Peers of this kingdom, so that the Crown, or this House, may not incur the risk of being imposed upon by any ill-founded claim of Peerage."[3]

Efforts of the Lords in 1761 to have a correct list or roll of the Scottish Peers.

There was, it must be admitted, great necessity for these steps,—the Roll of the Scottish Peers adopted since the Union being inaccurate, and carelessly adjusted. But, perhaps, the duty fell more eligibly to the Peers of Scotland, who might have been intrusted by the crown and legislature with summary powers for the purpose,—though under reservation to parties who might think themselves aggrieved by the procedure,—as on the noted occasion of the decree of ranking of the Scottish nobility in 1606,[4] to have recourse, for redress, to the Courts of law; for it so happens, as things at

Roll since the Union inaccurate, and not properly adjusted.

representative of the Irish Flemings, had a son, Christopher Lord Slane, who died without issue in 1771, having three sisters, his coheirs. (See Lynch, *ut sup.* p. 210.) The arms of the Scottish and Irish Flemings are different. Much in the previous way, the Flemings of Barochan, another old family with us, but probably distinct by male blood connection, bearing different arms, are called as ultimate male heirs in a Wigton settlement in 1595. (Great Seal Register.) The Scottish stocks may be descended from leaders of Flemish colonists, who figure in our charters in the 12th century. The present John Lord Elphinstone, besides other representations, is heir-general of the Earls of Wigton, and through them, of the ancient and still *more* distinguished House of the Keiths, Earls Marshal, (if we take every kind of relevant "illustration," according to the present French test, into account,) in whom the hereditary office of Marshal had been for such a protracted period, and to which there are likewise now no male heirs.

[1] Lords' Journals.
[2] *Ibid.*
[3] *Ibid.*
[4] See pp. 10, 11.

present stand, that our Peers at Elections are the only public body who have no right to purge their Roll. Neither, as formerly obtained with us, on the extinction of a dignity, or its merging in another, has there been any order for expunging it from thence.[1] Owing therefore to all titles, with the sole exception of those forfeited, being retained in the existing, or what is styled the Union Roll, whether assumed or extinct, although it has been altered and augmented by the insertion of others under the authority of the Lords, successfully claimed since the Union,—the unrevised and exceptionable state and condition of that roll, and want of a peremptory form and due establishment of Peerage rights, upon the demise of a Peer and accession of his heir,[2]—while far-

Prejudicial consequences from this, and want of form in Scottish Peers instructing their right on succession.

[1] The Parliament, the 23d of April 1685, "ordered that *Tullibarden* (the *Earldom* of) be *expunged* out of the Rolls of Parliament, in regaird the estate and *title* thereof *is* in the person of the Marquess of Athole." (Acts of Parl. last edit. vol. VIII. p. 457.)

[2] With us too, it is remarkable, that after the inauguration, or accessory solemnities of a Peerage constitution, there was no parliamentary form by which its descent was *articulately* guarded or defined,—other than such order noticed on a merger, or an extinction. There was the intervention of no writ of summons, as in England, individually, to the heir of a Peerage, on the demise of a predecessor—affording a salutary check to undue assumption and usurpation. Scottish Peers before the *Union*, in the ordinary routine, on such event, neither petitioned the King or Parliament, (which, differently from England, comprized in one chamber both Peers and Commoners,) and which last, as little, except in remarkable cases, and urgently and summarily called upon, as in that of Buchan in 1698, (see p. 32,) interfered in the matter of his right or pedigree. Nor did *they* even then go into the merits, (see again *ibid.* and p. 33, &c.) only giving an *interim* order. As formerly shewn and stated, (see pp. 640-1.) *these* were "ascertained *(inter alia)* in the regular legal method by the verdict of a Jury, upon evidence returned to the writ of mortancestry," which was "not traversible, but must be taken as true, till by a process of reduction it is falsified. Upon his service (of far greater account than Lord Gifford seems to have apprehended,) he took his seat in Parliament, and had a right to the possession of his Peerage. If his right was objected to, it might either be by a competition for the Peerage, or by a Lord objecting to his title, (as in the same instance of Buchan, *ut sup.* and see Acts of Parl. last edit. vol. X. p. 144,) and in both these cases the matter was considered as any other question of civil right, and determined by the *Court of Session*, (see p. 33). If not objected to, he continued his pos-

ther still, the preceding measures of the House of Lords have proved *ir*remedial,—it has been practicable for any one, though a mere stranger, to answer and vote, under some *vacant* dignity, at Peerage Elections. Hence the late preposterous intrusion and annoyance of the *pseudo* Earl of Stirling, and certain individuals as little entitled, with untoward, and perplexing consequences, at least, that have been felt,—a door being thus opened, to use the purport of the resolution in 1767, for imposing upon the Crown and the Peers, by ill-founded claims. Lord Roseberry, no doubt, in our days, has made laudable efforts to remedy the evil, aggravated, as I conceive, by the Session having been disused as Ordinaries

No proper remedy enforced, or proper Peerage Roll made.

session, and enjoyed the rights of a Peer." (See same case of Buchan *ut sup.*) Upon the moving for a writ for Perthshire, in the House of Commons, the 21st of February 1840, owing, *then*, to the succession of William Lord Stormont, by the death of his father William Earl of Mansfield,—Viscount of Stormont, to the latter Scottish dignity, Sir William Follet, (who was only recently aware that the Court of Session ever discussed Peerages), influenced by English notions, irrelevantly maintained, upon the strength of the inapplicable precedent formerly of the present Lord Scarborough, that until a nobleman, in such situation, had received a writ of summons, it was not usual to move for a new writ in the Commons in respect to a place he had represented. Mr. Maule answered, that Lord Stormont would take his place in the House of Lords, *qua* such, without summons; the Lord Advocate, that by the law of Scotland *no* service of his legitimacy or filiation, (which was notorious to the House,) or form whatever, was incumbent; while Sir William Rae justly argued upon the importance and expediency of a service on the occasion. His opinion, though there certainly be foundation for the proposition of the Advocate in modern times, seems the sounder, and is precisely consonant with our genuine original notions; for it has been established, that in the 16th century, at least, *until* a Scottish nobleman was served, and feudally took, after his deceased predecessor, he was accounted but a commoner. (See pp. 598-9.) The principle here did not obtain with us, "*quod mortuus sasit vivum.*" This form, grounded upon feudal principle, like every thing else, as is obvious, again refutes the *first* Lord Mansfield. We have seen too, that upon the death of Alexander Earl of Caithness in 1765, the two claimants had recourse to a service to instruct their pedigree, and peerage right; while the Court of Session, in the interim, before the matter was duly fixed, compelled one to relinquish the title which he had taken. (See p. 611.) The previous writ for Perthshire was carried, of the date mentioned.

and the natural *Forum* in such matters; but, by some strange fatality or other, not with the effect and success that might have been expected. Neither, as I have already hinted, did the former attempts of the House of Lords attain the intended end; for no new Roll was ever made and adjusted. They, however, in the furtherance of their object, on March 16, and November 16, 1761, ordered the assumers of the titles of Stirling,[1] Borthwick, Kirkcudbright, Rutherford, and Wigton, to "attend this House," and "shew by what authority, and upon what grounds," they respectively took them.[2]

Previous efforts however, of Lords in some degree beneficial, in the case of certain Peerage aspirants.

None, however, of the same,—including also William Graham, the assumer of the Menteith title, who had come to be cited in like manner[3]—having done so, the Lords, on

[1] Lords' Journals.

[2] The petition of William Alexander, the claimant of the Earldom of Stirling, had been referred by the Crown to the Lords, the 2d of May 1760, and again, on being *re*presented, December 14, 1761, *ibid.*

[3] On the 27th of January 1762, *ibid.* As far back as October 12, 1744, —at a peerage election—this individual, styling himself a student of medicine, on calling the Roll, answered to the title of Earl of Menteith, founding upon his confirmation as executor to "the *last Earl*"—*William* Earl of Menteith and Airth, who died at the close of the previous century. (See Robertson's Peerage Proceedings, p. 243.) Half crazed, though harmless, and only inheriting (except the right of blood) but a portion of the lunacy of his family, he yet fully believed himself an Earl, and was to be seen, during a life of continued mendicity, *escaping* from towns, on the eve of Elections, with his "bags and wallets," *lest* his presence as a Peer might have the effect to concuss them. His wretched circumstances, occasioned, as is believed, by the unnatural conduct of a male relative to his equally unfortunate mother,—originally heiress to the estate of Gartmore,—the Menteith and Airth executry, and to relative landed interests, together with undue advantage taken of her in her minority, not to add his state of mind, ever precluded him from actually mooting his claim. He was the direct heir through her, of Lady Elizabeth Graham, sister and co-heiress of Earl William mentioned, by her husband Sir William Graham, Baronet, of Gartmore,—of whom he farther, in like manner, was the sole representative. And in Lady Elizabeth's descendants, and in those of Lady Mary Allardice, the remaining sister and co-heiress, centered the immediate representationship in general of that nobleman. Had Lady Elizabeth been eldest, the poor mendicant would have been a preferable claimant to the Earldoms of Menteith and Airth, than Mr. Barclay Allardice of Urie, and Allardice, (or his female ancestors,) the

Nature of Menteith claim in 1744, and afterwards.

December 14, 1761, the 2d, 10th, 15th, and 25th of March 1762, discharged each and all of them from taking the dignities, or voting at Elections, until they had made out their claims, and had them allowed in legal course.[1]

The procedure, in a certain degree, was productive of good effects. It forced the Borthwick, Kirkcudbright, and Wigton claimants eventually, as we have seen, to prosecute their conceived rights to a determination,—the Rutherford asserted heir male, to claim, by petition and reference,[2] though neither he, or the Stirling aspirant,[3] chose to insist farther. And,

direct descendant of Lady Mary, and present competitor for these dignities in the House of Lords. But the evidence, now recoverable, told the other way; though the Earl had chosen to appoint Sir John Graham of Gartmore, his only nephew, by Lady Elizabeth, (who died with issue,) his executor by testament. By those ignorant of law, such preference of Sir John, who came to be cognosced for lunacy, and in whose shoes the mendicant, his grand-nephew, stood,—though in reality inconclusive, was thought to be decisive in his favour, as to the seniority in question; and in virtue of it, he voted at several Elections after 1744. (See Robertson's Peerage Proceedings, pp. 255, 273, 275, 277, 290.) It is now altogether immaterial, owing to the thorough extinction, as proved in the Airth claim, of Lady Elizabeth's line. But what of the defect of right of her descendant so far, he was of high—indeed of the purest royal descent, being sprung, as well as Mr. Barclay Allardice, of the heir of Robert the Second's unexceptionable and *unblemished* marriage with Euphemia Ross, (see pp. 515, 518-9, 136,) and had a clear and transcendant claim, *contrasted* with that of *sundry* Peerage aspirants in our days. The end of the beggar-*Earl*, as stated in an original letter, was indeed "deplorable," he dying through penury and exhaustion, in 1783, on the road-side near Bonill, when plying his *vocation* among the neighbouring farmers. His nephew, and heir, by a sister, one Bogle, a miniature painter of some celebrity, died without issue.

[1] Lords' Journals.

[2] His petition was presented to the House the 14th of December 1761, *(ibid)*. The conceits, and clamorous wrangling and jarring of the male and female Rutherford claimants may be said to litter our Peerage proceedings, (see Robertson's relative work, *passim;)* and while the case of the first still remained in the objectionable *statu quo* in the proof of descent, that of the latter was utterly futile and preposterous. Rutherford claim in 1761 and afterwards, untenable.

[3] The William Alexander above referred to. He afterwards figured as the noted American General, and friend of La Fayette and Washington. His death in 1783 was "very much regretted" by the last. (See Letter of Washington among the La Fayette MSS. lately pub- Stirling claim in 1761.

with respect to the others, including the Rutherford heir-female, they, by taking no step at all, virtually avowed the futility of their pretensions.

Principle upon which the Lords interposed, as above.

By the Articles of Union, as the Scottish Peers are entitled to the privileges of the British, with the exception of a hereditary sitting in the House of Lords, (unless they be also British Peers, as has been latterly found,) and derogation, in a certain degree, from their strict chronological precedence, according to their respective creations,—while besides, they are all individually capable, by election, of becoming members of the House of Lords,—that House, and the order generally, thus comprising more or less the Scottish nobility, have an interest in preserving, and keeping the *whole* free and inviolate, owing to the common co-existent rights and privileges, from the intrusion and encroachment of strangers; which may be assigned as the only argument for their having acted incidentally, and questionably, as it may seem, as just stated. For I need not observe, that by the law and practice of England, the Lords have, otherwise, no cognizance directly, or in the ordinary case, of discussing, and determining Peerage claims, or settling or adjusting the Peerage; and by that of Scotland, as I have contended, which however is more favour-

lished, vol. II. p. 70.) I have seen a statement of his case by Mr. Dagg, his solicitor, who affirms that the General's family "has been settled in America" down to 1756, when he came to Britain, and that, in their "opinion, —— the Peerage of Stirling had devolved to him as the male descendant of John Alexander, uncle of the first Earl of Stirling." His service, whereby he assumed the dignity, as heir-male of Henry last Earl of Stirling, was in 1759; and the Earldom, by the only, and regulating patent, dated 14th of June 1633, (in the Great Seal Register,) went to the "heirs-male bearing the surname and arms of Alexander." But his pedigree appears not to have been properly borne out, which probably prevented him from proceeding, independently of the subsequent revolution in America, in which he prominently figured. His original descent was at least obscure; "John Alexander in Middleton" his alleged ancestor, and made by genealogists younger son of Andrew Alexander of Menstrie, grandfather of William first Earl of Stirling, (see Douglas's Peerage, first Edit. pp. 641-3.), I have found as a tenant upon the lands of Menstrie, being so alluded to,—as well as Janet Sinclair, his widow, (a new character,) after his death,—among other tenants there, in a process in 1575. (Acts and Decrees of Council and Session.)

able to them, they exclusively come strictly to do so, as an Appellate jurisdiction from the Court of Session, here acting, as usual, in the first instance, as Ordinaries. It is owing to the previous reasons that they still more relevantly decide on the occasion of disputed Elections of any of the sixteen Peers, upon a protest and petition by parties, in order to fix the due component members of their chamber. [1] The form here, as well known, is for the House to refer the petition to a Committee of Privileges, who proceed, and report as in a regular Peerage claim, while the House take it upon themselves ultimately to decide. In this way Peerage claims have been more expeditiously and economically dispatched for parties. But even, as formerly observed, when the House of Lords discuss Peerage claims by a specific reference from the Crown, they are held merely to advise, and not to decide,—a right that still remains with the authority from whom they so far derive their existence, that accordingly constitutes them a legal or efficient body. The Crown is not bound by what they resolve, and can order a re-consideration of the Peerage discussion, either by themselves, or by others. And, in fact, it so happened, that all the individuals mentioned, against whom the House of Peers had issued their anathemas in 1761 and 1762, and who had any feasible pretensions, did not, *de plano*, proceed to show, or instruct their rights, as thereby ordered by the Lords, but had recourse, for the purpose, to the special authority of a reference from the crown, upon petition.

Also at contested Scottish Peerage Elections, and the form, in which they then interpose.

On the 29th of January 1762, there was a reference by the crown to the Lords, upon a petition, of the claim of George James Duke of Hamilton, as heir-male, to the Earldom of Angus. His Grace further set forth, that the dignity had

Claim to the Earldom of Angus in 1762.

[1] There is nothing, however, upon this, and the previous matter, in the Articles of Union, &c. When Lord Lauderdale objected to the right of George Earl of Errol to his dignity in 1796, after the preceding Election, it was for the purpose of being returned himself, he having the next greatest number of votes. This, he contended, in the event of success, especially from having protested at the time, followed *ipso facto*. But, on the other hand, I am informed by cotemporary good authority, still alive, that Lord Rosslyn thought there should even then, have been a *new* Election.

been claimed by Dunbar Earl of Selkirk, (owing to a conceived settlement and grant of the estates and honours before the Union,) and by Archibald Stewart, Esquire,[1]—subsequently Douglas, and created Lord Douglas in 1790, whose petition likewise for the dignity was thereafter disposed of in the same way on the 22d of March, in the above year.[2]

To the Earldoms of Lennox, Ross, and Newburgh, in 1769, 1777, and 1784.

There were references besides by the Crown to the Lords, the 15th of March 1769, and the 9th of February 1777, of the petitions of Alexander Lennox, in the sixth regiment of militia for the county of Surrey, and Munro Ross of Pitcalny, respectively, for the original dignities of Earl of Lennox, and Ross;[3] and latterly, on the 14th of June 1784, of the petition of James Bartholomew Radcliffe, as heir-female, for the Earldom of Newburgh, &c.[4] But, as happened besides in respect to certain others that have been mentioned, none of the parties insisted farther.

Claim to the Barony of Borthwick in 1774.

John Borthwick, Esquire of Crookston had previously claimed the dignity of Lord Borthwick in 1773, immediately on the death of Henry Lord Borthwick, who has been pointedly mentioned. His petition to the crown was referred to the Lords the 24th of February, 1774.[5] But after proceedings were had upon the claim, the 14th—16th of May, and 16th of June thereafter, and in 1776, he was, on November 25th in the last year, discharged from assuming the title "until his claim shall have been allowed in due course of law,"[6]—subsequent to which he did not push it. The ulterior proceedings in the case of this Peerage have been already given.[7]

Above Lennox claim opposed by Lennox of Woodhead.

The claim of Alexander Lennox in 1769, to the ancient original Earldom of Lennox, that has been referred to,—upon an alleged service in 1765—in virtue of a pretended male descent from Alexander Lennox, younger brother of Duncan Earl of Lennox, executed in 1425,—had been opposed by William Lennox of Woodhead, another competitor, as preferable heir-male, at a Peerage election in 1768—when the Clerks very properly would receive neither of their votes *in hoc statu*, the Peerage not having been upon the Rolls of

[1] Lords' Journals. [2] *Ibid.* [3] *Ibid.* [4] *Ibid.*
[5] *Ibid.* [6] *Ibid.* [7] See p. 584, *et seq.*

Parliament for centuries.[1] Alexander's pretension was futile and preposterous, as the dignity went to heirs-general,—of whom innumerable then existed *before* him, (and still do) even admitting his pedigree, and had repeatedly gone to the heir-female, in exclusion of the heir-male. It hence, even by the circumstance and specialty that influenced Lord Mansfield in the Sutherland claim in 1771,—independently of the regulating substitution in the charter of the "Comitatus" of Lennox, dated 8th of November 1392, "*hæredibus quibuscunque*,"[2] of the above Earl Duncan,—would have been decided to have descended in the same way. But, moreover, the pedigree of the claimant was utterly unsupported, and incapable of proof; although he intimated in his petition, in 1769, that he had, in 1765, been "served nearest heir male" of Earl Duncan, (which happens to be unfounded,[3]) and had, "the 26th of April 1768, made legal claim accordingly, before the Peers of the Realm of Scotland at Holyroodhouse." It is also falsely, and unblushingly set forth there, that the regulating charter, cited by Robert III.—erroneously again represented as by Robert II.—was simply to Earl *Duncan's* "heirs *male* whatsoever;"[4] whereas it was first to heirs-male of *his* body *only*,—of whom he had none—by lawful descent, whom failing, to Murdac Duke of Albany, and Isabella *his* daughter, the heirs between them, who failed at her death, with an ultimate substitution to the Earl's heirs "*whatsoever*."[5]

[1] See Robertson's Peerage Proceedings, pp. 335-6. The family of Woodhead never petitioned the crown for the dignity.

[2] Great Seal Register.

[3] This will be evident in the sequel. [4] Lords' Journals.

[5] In the "Case of Margaret Lennox of Woodhead, (the heir-general of that family, who have now failed in the male line,) in relation to the title, honours, and dignity of the ancient Earls of Lennox," printed and circulated in 1813, there is the following note at p. 8, which throws further light upon the same Alexander Lennox and his proceedings. "In 1768 and 1769 a claim was made, and a petition presented to the King, for the title of Lennox, by an Alexander Lennox, who alleged he was lineally descended from Alexander, the brother of *Duncan, (the Earl noticed)*. In 1771 he attempted to get himself served heir-male of Earl Duncan; the evidence he produced consisted of *recent* notarial *copies* by an English notary, of *contracts of marriage from* 1389, and of *certificates* of *birth* from 1345 downwards; but the

By the way, as constantly obtains, among a multiplicity of other instances, the charter of the Lennox "Comitatus," in 1392, again signally refutes Lord Mansfield's finding in the Sutherland case in 1771, that a charter of a *Comitatus* then, *only* carried lands; for, in virtue of the *same*, the honours of Lennox, as well as the estates, devolved, after her father's death, to Isabella; and this identical grant was still admitted, and founded upon by the *female* competitors for the dignity, as its regulating conveyance, even in the 15th century.*

* Proved by deeds in the Montrose, and Haldane charter chests.

The claim of William Lennox of Woodhead, who opposed in 1768, has been alluded to. Although *de facto* a male descendant of the preceding Duncan Earl of Lennox, and certainly capable of instructing the fact, he yet was fully barred by the spurious *status* of Donald Lennox, his direct male ancestor, the natural, and thereafter legitimated son of the Earl. Donald is specially styled the Earl's "*natural* son," with Malcolm, and Thomas Lennoxes, his other offspring, equally spurious, in an original confirmation by him, dated 12th of August 1423, I recently found in the Brisbane charter-chest.[1]

Lennox of Woodhead claim.

claimant's ancestor (Mr. Lennox of Woodhead) having objected, the proceedings were carried before the Court of Session, and Alexander's measures prevented." By all who are aware of the peculiar state, and destruction of our old writings and records, comprising those here mentioned, I conceive the latter will be at once pronounced to be *fabricated*, and supposititious, (and of *equal* credit with the late *Stirling* contrivances,) as struck me long ago on the first examination.

[1] None of the alliances of Earl Duncan having hitherto been discovered, though long sought after for obvious material purposes, in respect to his lawful and preferable representation, the following notice I have lately found, at least of one of his wives,—as is to be concluded, possibly the only one,—may be here given. It is derived from an Exchequer Roll in 1434, where there is first an *item* of payment "domine *Isabelle* albanie ducisse juniori" of "xxi li. vi s. viii d.," and then another of "vii li. vi s. viii d. domine *Elene* Comitisse de levinax," both being "per assignationem *regis*" (James I.) who had achieved the ruin and downfall of the Houses of Albany and Lennox. The mother of Earl *Duncan* "*octogenarius*" in 1425, when executed, (see *Fordun*, vol. II. p. 483,) was *Margaret* de Levenax, Countess of Lennox in her own right, (from whom he inherited the Earldom,) as is proved by the Chartulary of Lennox, and other authorities; so we may fairly presume that the same Countess Elen was his widowed spouse. The probability, under the circumstances, likewise is, that she may have

The claim to the Earldom of Ross, also previously noticed, by Munro Ross of Pitcalny, in 1777,—heir-male of the family of Ross of Balnagown, sprung from Hugh Ross, younger son of Hugh Earl of Ross, (slain at Halidon in 1333,) of the original Ross stock,—stood, in regard to pedigree, in a very different situation. But then, again, as ever, in refutation of Lord Mansfield, this other original "*Comitatus*," like all the rest, was clearly descendible to heirs-*female*, and had repeatedly gone to them, in exclusion of the heirs-male. Nay, it further was forfeited to the Crown in 1475, and 1476, in the person of the last John Earl of Ross, Lord of the Isles;[1] so that, upon two grounds, the claimant in 1777,—both by reason of forfeiture, and not being the preferable heir,—came to be excluded,—however remarkable, and distinguished his descent.[2]

Preceding Ross claim.

been the mother of the above Isabel Duchess of Albany, eldest daughter of Earl Duncan, and the widow of the unfortunate Murdac Duke of Albany, Regent of Scotland, not rendered the less probable from their thus figuring together, and experiencing the charity of the crown. If so, Countess Elen cannot be presumed the mother of Donald Lennox, ancestor of Woodhead, the only way, in the emergency,—backed by her survivance,—by which he could have been truly lawful. In a charter, dated 25th of August 1423, (Great Seal Register,) Duchess Isabel is expressly styled "HÆREDEM *Comitatus* de *Levenax*," when confirming a Lennox grant by her *existing* father,—the "*Comitatus*" *then*, as has been shewn, by the regulating charter in 1392, being settled upon his heirs-*female only*, in *failure* of heirs-*male* of the body, which corroborates my induction; for if Donald, the son of the Earl *de facto*, had been of the same mother, he would have been not merely full brother of the Duchess, but excluded her here, by *clear* legitimacy, in the *apparency* in question, which, in refutation of any such notion, on the contrary, was thus duly vested in her. Neither is it less remarkable, that the application of the epithet "*hæredem*" to the Duchess, was indubitably *posterior* to that given to Donald,* and supposed to instruct his legitimacy. But this *per se* irresistible piece of evidence necessarily of his illegitimacy, is only a portion of what can be legally urged to the same effect, including the actual devolution of the Earldom to the Duchess, and the descendants of her two *sisters*, *qua* the "*nearest lawful*" Lennox *co-parceners*, and *thus served* to Earl Duncan, her father, &c. &c. (as I shewed in another treatise),—which so clearly refutes the Woodhead claim. "*Levenax*" and "Lennox" are identical.

This authority is *new*, and not known, or met in the Woodhead case in 1813.

* See p. 519. and note 2, *ibid.*

[1] See Lord Hailes' Sutherland case, Chap. V. Sect. 7, pp. 26-7-8, *et seq.* besides other known authorities.

[2] It could, I believe, be instructed by documents, which probably still exist.

Indeed, the families of Ross of Pitcalny, and Sutherland of Forse, respectively heirs-male of the original Earls of Ross and Sutherland, may be deemed of the highest and most unexceptionable lineage in the north.

Case of the Barony of Spynie in 1784-5.

Upon the 6th of May 1590, a charter past the Great Seal, specially erecting various lands and regalities that formerly constituted the patrimony of the Bishopric of Moray, into the free Barony of Spyne,[1] *moreover*, at the same time conferring, and granting "*Titulum, Honorem, ordinem, et statum* liberi Baronis" to Alexander Lindsay, the King's Vice-Chamberlain,[2] "*hæredibus suis, et assignatis*,—qui nunc, et imperpetuum *barones de spyne* nuncupabuntur."[3] This was in direct implement of a solemn promise of James VI. when in Denmark, in 1589, or considerably previous to May 1590, as expressed in an original letter still extant,[4] wherein he engages to give the said Alexander the said "*temporalitie* of *Murraye* in a temporall lordschipp, *with all honouris* thareto apparteining." Nay, it appears from another, equally authentic,[5] addressed to his favourite Jean Lyon, Countess Dowager of Angus, whom the former, an especial "minion," afterwards married by the procurement and earnest management of the King, that he had designed to raise him even to a higher grade in the Peerage, inasmuch as he there says, "I ame resolute to advance this *mann of myne (the latter)*, whomfor I have nou sa lang delt vith you, to *the ranke* that *ye* vas last *joyned with*,"—namely, that of an Earl, her deceased husband having been Archibald Earl of Angus. Thus, if any doubt were entertained as to the rela-

Its constitution in 1590.

[1] Naturally enough from Spynie Castle, the chief residence of the Bishops of Moray. The lands were limited like the honour.

[2] He was a younger brother of David Earl of Crawford.

[3] Great Seal Register, and Acts of Parl. last Edit. vol. III. pp. 650-1, *et seq.* where the grant is verbatim given in a ratification of the same in 1592, to be shortly adverted to.

[4] Without a date, among the Balfour Collections, in the Advocates' Library. To shew their intimacy, the King thus curiously dates his epistle: "From the Castell of Croneburg, quhare ve are drinking and dryving our in the aulde maner."

[5] *Ibid.* Also without a date, but obviously before the Spynie charter. It is of course also proved by the same letter, that the parties in question were then unmarried. Both letters are *autograph*.

tive or precise import of the charter 1590, it would be fully explained and removed by these antecedent Royal demonstrations of intention, and warrants. That grant was subsequent to the noted act 1587, c. 120,[1] by which the ordinary or lesser barons were excluded from a hereditary seat in Parliament, their right to sit and vote there, in time coming, being merely elective, as it has ever since continued; while the words "*title, honour*, and *rank* of a free Baron," as above,—independent of the Baronial fief,—now necessarily especially select—were technically applied *ex tunc*, in reference to, and descriptive of, a great Baron or Peer, or hereditary Lord of Parliament, as proved in various instances.[2] Such being the case, the notion of Lord Mansfield in the Spynie claim, that *ex terminis*, and from its import, a hereditary Baronial Peerage was not carried by the charter 1590, but merely an ordinary fief, the converse of which is not only already evident, but will be further in the sequel,—is untenable. Nor will it excite less surprise, when it is added, that the learned counsel for the Spynie claimant were so rash and ill advised during the discussion, as actually to "*give it up*," as a grant of peerage, or *at all* influencing the dignity, and to admit, in like manner, that it merely carried lands.[3] This shews, with various preceding illustrations, not only how badly the business was conducted,

Rash and unfortunate error of the claimant's counsel here.

[1] Acts of Parl. last Edit. vol. III. p. 509.

[2] Thus the charter of constitution of the Peerage of Cardross, June 10, 1610, which has existed ever since, confers the "honour, title and dignity of a free Lord and Baron," (Great Seal Register); and the words "title, honour, rank, and state of a free Baron," as in the Spynie grant, are used, in the same way, in the charter of constitution of the Barony of Abercorn, dated April 5, 1603, *(ibid.)* upon which, by the authority of Sir David Lindsay, the Lord Lyon at the time, under his autograph attestation in the Advocates' Library, *creation* or *investiture* followed the 25th of April 1604.

[3] Proved by a Memorial for the Counsel of the Claimant, after the Spynie decision in 1785, in his repositories; for which, and other information, to be referred to in the sequel, *as* in the Spynie charter-chest, I am indebted to the kindness of John M. Lindsay, Esq. W. S., brother of William Fullarton Lindsay Carnegie, Esq. of Spynie and Boysack, in whom the claim of the former to the Spynie Barony now vests, in the same character of heir-general.

but how hastily and inadequately Scottish Peerage claims have been discussed.[1]

Subsequent Spynie Act of creation or investiture in 1590.

The Spynie Act of creation or investiture, an attendant form, as in the case of the Peerage of Wigton, and others,—including the usual solemnities, of which "*belting*," or the *cinctura gladii*, was a constant ingredient, obtained on the ensuing November after the charter, which was its warrant. Sir James Balfour, Lord Lyon to Charles I., explicitly informs us, that the "same zeire, (1590) 4 *Novembris*, Alexander Lindesy, brother german to David Earll of Crauford, ves *knighted*, and immediatelie thereafter made Lord of oure Soveraigne Lords Parliament, and *nam'd* Lord *Spynie*,"[2] thus in *exact* conformity to the charter. And David Moysie, a legal cotemporary, corroboratively states in his noted Memoirs, that "upon the *feird (fourth)* of November (1590) Mr Alexander Lyndsay, brother to the erle of Crafurde, wes maid lord of Spynie, and with him, Sir George Home, (afterwards Earl of Dunbar,) and Sir James Sandelandis *knichtit*."[3]

The latter intimation, (together with the nomination, &c.) clearly fixes that this was the attendant investiture or inauguration, including "belting;" the creation of *Knights*,—as will be fully instructed hereafter,—constituting another indispensable portion of the solemnity. Although a circumstance that has elsewhere misled English authorities, and Scottish legal sciolists, inducing erroneous conclusions, in conformity with modern prejudicies and prepossessions,—the bane, and antidote to all antiquarian accuracy,—it is yet of no moment, or any way impeaching or invalidating the ascribed effect of the charter in 1590, that the party in the subsequent act of creation, as seen, is immediately before its obtaining but

Exception here obviated.

[1] Lord Mansfield, as will afterwards be seen, like a special pleader, instead of a sifting, justly discriminating Judge, turned the previous unwary step, and abandonment of the charter, with interest against the counsel.

[2] Autograph excerpts by Sir James from the productions of the nobility to instruct their precedence, under legal authority, previous to the decree of ranking in 1606. (Ad. Lib.) The Record from whence they were taken no longer exists.

[3] Edit. 1830, printed by the Bannatyne Club, p. 85.

simply described "Mr. Alexander Lindsay," *qua* commoner. Such was the form, with us, that applied in the *interval*, after an indisputably valid written grant of Peerage, and before the act of creation. Thus the Wigton patentee, as has been instructed, was *then* simply styled in the same way "Lord Fleming,"—his previous style, and had only the designation of Earl of Wigton, notwithstanding the pre-existing patent, after his act of creation.[1] And again, in the act of creation of William Marquis of Douglas, (specifically including "belting") in 1633, following in like manner a valid patent, (as will be fully seen in the sequel,) he is at the outset, and before its completion, merely described by his former inferior title of Earl of Angus, and does not receive his new and more elevated style until the concluding form of the "*nomination*." Various other such illustrations could be added. It was in virtue directly of the *latter*, the crowning part of the ceremony, that the title vested; and accordingly Alexander, first Lord Spynie, after the forms and nomination, as has been seen in his creation, certainly *relative* to the previous charter 1590,—became Lord Spynie, and so subsequently invariably figured. All this is easily explainable; the inauguration or investiture was analogous to infeoffment in lands, which perfects in form the real right; and it has been fixed, that, at a territorial period, *heirs* to an honour, upon the death of their predecessors, did not assume it, until *after* their service and investiture in the fief. Until then, as remarked, they were ostensibly regarded but as commoners.[2] It is further corroborative too, that Johnstone, the cotemporary Scottish historian, at the same time that he mentions the *creation* as above of the "*Baro Spinæus*,"—with the attendant creation of knights, in effect intimates that he had obtained the patrimony of the Bishoprick of Moray, under the description of Spynie,[3] thus

Instance of Wigton in 1606.

Of the Marquis of Douglas, in 1633.

Application to Spynie case.

Explanation.

[1] See pp. 628-9.

[2] See pp. 598-9, including *note*, and p. 645, *note*.

[3] "Quo *prædio*," he immediately adds, after noticing the SPYNIE creation in this manner, the former term, from the context, necessarily referring to the fief *with* the dignity, "potitus fuerat *ante Pontifex Moraviensis*, (the *Bishop of Moray*,) et *nullus* ante *eum* (Lindsay,) laicus *feudi Ecclesiastici*, (namely of *Moray*), *dignitatem* habuit." (*Rer. Brit. Hist. Edit.* 1656, Lib. v. p. 150.)

undeniably by the charter 1590, and showing that it and the Peerage were relative, and formed in reality one grant. There clearly having been investiture, or inauguration, in the Peerage, which was always warranted by, and conjoined with a written grant,—while *no* other previously than *the* exact *corresponding* one in 1590 can be either figured, or discovered,—the *same* necessarily must have been that, substantively, constituting the dignity and limitation.

Authorities of Balfour, Moysie, and Johnstone relevant and admissible after the solemn admission of a lesser, in the Glencairn case in 1797.

The above authorities,—Sir James Balfour, the Lord Lyon, Moysie, and Johnstone,—which were not adduced in the Spynie claim,—no more than the preceding argument,—the House of Lords, and English lawyers, cannot consistently contemn or reject,—peculiarly strict although the latter pretend,—however gratuitously, and erroneously, as has been repeatedly proved,—the British practice to be in Scottish Peerage claims;[1]—when in that of Glencairn in 1797, (as will be seen in the sequel,) Chancellor Rosslyn admitted without scruple,—nay, triumphantly founded upon the *single* incidental intimation by a subordinate English herald,[2]—a stranger to Scottish law and usages,—and so far back as 1503, (when he happened to be in Scotland,) of the *creation* of the Earldom of Glencairn in that year, as decisive evidence of the fact. It was merely transmitted too in a modern printed book,[3]—from which secondary notice he drew the *supposed* vital conclusion, upon which he alone, and the Lords with him, grounded their resolution,—and in fact the decision.

Alexander Lindsay, in this manner first Lord Spynie,—there being no record of an intermediate meeting,—accordingly took his seat in Parliament upon the 6th of August 1591, and is there ranked, as lowest of our hereditary Lords of Parliament, under the specific title of "Spynie."[4] He moreover,

[1] I have an opinion by a modern English counsel, not the least celebrated or in repute, in which he peremptorily lays it down, that there must be "evidence of the *strictest* kind in Scots Peerage claims," an inadvertent conclusion, as may be sufficiently tested, and appreciated by much indeed that has preceded.

[2] John Younge, Somerset Herald.

[3] Leland's Collectanea, edit. 1770, in vol. IV. p. 300.

[4] Acts of Parl. *ut sup.* vol. III. p. 525.

in that year, in 1592, and constantly afterwards, figured in the same capacity in the Rolls of Parliament, and in Privy Council,[1] as well as upon every occasion. The fief conveyed in 1590, however, having been church property, to remove the solitary though material objection that necessarily attached, grounded upon the Act 29th of July 1587,—whereby all church lands had been annexed to the Crown,[2] and effectually to dissolve, and dissever such connection, in this instance, there subsequently past a full and express Act of Parliament, in 1592, for the special purpose. It proceeds upon the onerous and weighty consideration of the great public services of Alexander Lord Spynie, including his actual payment of 8000 crowns of the Sun to government; and while it fully *confirms* the charter in 1590, there not generally, but *verbatim* engrossed, disannexes the lands and subjects it transmitted from the Crown, "notwithstanding" any act to the contrary. And further "findis" and "declairis" that his majesty might lawfully "*haif*" bestowed, and may *ex tunc* grant them to "the said Alexander Lord of Spyne, his *airis* and assignais, and to sic *uyeris* wyt him, as he sall nominat and designne." But this is not all, for the Act "of *new*—grantis and disponis" the same to him, "and dame Jane lyoun, countes of Angus, his *spouse*, (the monarch's *favourite*) the langest levar of yame, in conjunct fie, and to the *airis* lauchfullie gottin, or to be gottin betwix thame, quhilkis failzeing, to the narrest and lauchfull airis maill of ye saide Alexander lorde of Spyne quhatsumevir, and thair assignais." They, together with a right of regality, are to be erected into the "temporall lordschip" of "Spyne,"—while the King, by the authority of Parliament in the same way, again "gevis and grantis" to the nobleman in question, "and to his *foirsaidis*, the *honour*, *estait*, *dignitie*, and *pre-eminence* of ane *frie lorde* of *parliament*, to be intitulat Lordis of Spyne, in all tyme cuming,"—in reference to all which, a new charter and infeftment is *ordained* to pass "hereupon."[3]

Sitting and possession in case of Spynie, accordingly, ever afterwards.

Confirmation of previous right, and disannexation of the fief from the crown by Act 1592.

Definite implement there, of limitation in 1590, with still ampler clauses.

[1] *Ibid.* pp. 530, 562, 593-4, 650-56, &c.

[2] See p. 238. The objection from the annexation is set forth in the Act next adduced.

[3] Acts of Parl. last Edit. vol. III. pp. 650, *et seq.*

Second Spynie Royal charter in 1593 in unison with the above.

In regular practical implement of the Act therefore—so precise and explicit—the noble disponee, who is invariably styled "Lord of Spyne," obtained forthwith, in proper form, a regrant or second royal charter, dated April 17, 1593,—duly followed, like the first, by infeoffment, of the aforesaid temporal Barony, *with* the honours and dignity of Spynie, literally as in the Act.[1] It not only narrates the full import of the Act, but contains the identical limitation there, which cannot be said to be novel, or extraordinary,—inasmuch as heirs-female still took, as before, in the first instance; while the use of the term "*assignatis*"—*then* more effectual and operative than latterly,—in the antecedent charter in 1590, were *capable*, and admitted of such future modification. It is remarkable too, that the terms "heredibus et assignatis (as before) supra recitatis" are even incidentally used in the charter 1593, as expressive of, or in reference to, its limitation. The same conveyance, over and above, for the first time vests a right in the disponee, and his heirs, to the patronages and relative interests of the chapter and inferior clergy of Moray, to be afterwards noticed.

Further Spynie Parliamentary ratification, in 1593.

The favour of his majesty still continuing, in the Act 1593, recalling and voiding grants of church patronages formerly in the crown, there is notwithstanding, a reservation to the same party of those in the "Lordschip and Baronie of Spynie," in terms of his infeftment.[2]

Ranking of Lord Spynie, according to the stated constitution, in 1606.

Alexander Lord Spynie, withal, by the decree of ranking of the nobility in 1606, was placed immediately after the Lord Thirlestane,[3] who had been created a Lord of Parliament the day of the Queen's coronation, in May 1590,[4]—thus prior only by a few months to the Spynie creation in November in that year, and necessarily in striking conformity thereto. Neither the circumstance, nor the latter coincidence

[1] Great Seal Register. [2] Acts of Parl. *ut sup.* vol. IV. pp. 19, 20.

[3] Certified extract of the same, under the subscription of the Clerk of Privy Council at the time, in her Majesty's General Register House.

[4] See p. 572, *note.* Two knights were then also created, according to custom. Sir James Balfour, Lord Lyon, in his Collections referred to, in the Advocates' Library, instructs the Thirlestane creation to have been at the same time, there having been besides, as always obtained, a written grant. See also another authority for the Thirlestane creation, in May 1590, at p. 157, *note.*

and corroboration seem to have been known, or were founded upon in the Spynie claim. It will be observed, that the old precedence of 1590, *still* continued in Lord Alexander, according to our practice; for the parliamentary ratification in 1592 *confirms* the charter 1590, whereof the act of creation was an adjunct—while it removes the obstacle grounded upon the act of annexation in 1587, and ordains, together with the relative *modified* limitation, the re-investiture in 1593,—which, as can be legally instructed, technically sufficed for the purpose. Even in the case of regrants of honours, upon resignations in favour of entirely *different* heirs, whose right of succession was thereby exclusively constituted, it was still the form generally to *confirm* the *original* grant, though innovated upon and abrogated in the main, "*in its contents*," with the view to the *old* precedence. It is not wonderful that this apparent *Iricism*, if I may so speak, may not have been understood by English lawyers, and have led, like other peculiar *Scotticisms*, to error and misconception, although rather unpardonably indeed in the case of Lord Mansfield, a Scottishman. Notwithstanding the proper and requisite Spynie conveyance in 1593, *inter alia*, as fixing the exact limitations, virtually however comprised in the former, that in 1590, still so far *stood*, and remained evidence of the original constitution, and necessarily precedence.

Precedence regulated by the charter 1590, that was not superseded, but still so far in force.

So things were in essentials during the lifetime of the nobleman in question, all in fact we have to deal with,—exceedingly plain and obvious,—the Spynie honour having been conferred by the joint charters and act mentioned, without the intervention of any *other* written grant, or faintest surmise or indication of such,—by which *alone* a dignity could be *substantively* constituted, though formally perfected, in terms thereof, by the investiture or creation. His right, therefore, to the title may be held to have been constituted, not only duly and legally,—but in a manner not always precedented on such occasions. No objection ever could arise from the prior act 1592, against ratifications of erections of church property into temporal lordships, subsequent to the act of

[1] See, among others, the Napier and Lothian regrants, February 17, 1677, and October 23, 1678, Great Seal Register.

Act 1592, c. 13, regarding *inter alia* investiture and belting in temporal Baronies, and inconceivable objection therefrom by Lord Mansfield against Spynie constitution, as stated.

annexation 1587; for the former has at the same time a special reservation, and exception of all such, in virtue of charter and infeftments to "persounes as hes *already*, *sen* the said last Act of annexation, ressavit ye honouris, ordouris and estaitis of Lordis of parliament be the solempne forme of *belting*, and *utheris ceremonis* observit in sic caisses, and hes *sensyne* enterit, and *sittin* in *parliament* as *temporall lordis*, voitit in parliament, and articles, ressavit and admitted to that effect,"[1]—under which category, having reference, *inter alia*, to the act of creation, including belting &c. the Spynie dignity and lordship are obviously comprised. Lord Mansfield, in the Spynie decision in 1785, is stated to have founded upon this act, as barring the *previous* constitution;[2] but in what way it seems wholly impracticable to figure; his argument must have been the result of some confused and obtuse perception, through the mist of caprice,—or error unpardonable again in a Scottishman, and often discoverable in his instance. As before shown,[3] there especially had been illegal and surreptitious charters of the foregoing erections into temporal lordships; and what the Act does, as a measure of necessary precaution, and for the public weil,—in this *peculiar* exigential emergency, is to deny present or future benefit to any that had not thus been openly, ultimately, and rigidly perfected in form,—with reference, in particular, *quoad* the dignity, to the vesting ceremony, which ought always to obtain,—but had not in the case of the undue grants, owing to the clandestine and unauthorized nature of the procedure. However therefore the Act in question may bear upon the Barony of Culross,—to be noticed again in the sequel,—or slenderer conveyances of the kind, it can have none prejudicially to the Spynie dignity, so *fully* and articulately constituted in the above respects. Nor indeed is this all, for its valid constitution will be further corroborated.

In such identical situation, in fine, Alexander first Lord Spynie was notoriously slain by Sir David Lindsay of Edzell,

[1] Acts of Parl. *ut sup.* vol. III. p. 544.

[2] See Mr. Maidment's recent Publication in reference to the Spynie case, (to be afterwards more particularly referred to), p. 10.

[3] See pp. 237-8-9, also subsequently, under pp. 242-3.

on the 12th of June 1607, as is proved by the "Testament" (confirmed the 7th of August thereafter by the Commissaries of Edinburgh,) of "ane noble and potent Lord Alexander Lord Spynie—gevin up be dame Jane lyoun Countes of Angus, his *relict* spouse,"[1] who thus survived him. By this lady, his only wife, he left issue—Alexander the second Lord, then a minor, who was not served heir to his father until the 3d of March 1621.[2] It is extremely obvious that he, a new character, might have had different views from his father in regard to the succession; but these, or whatever he did, could not compromise or shake the *remote* and distinct constitution of the *honour*, until fully and unexceptionably implemented, or *it* was innovated upon, or altered in the peculiar strict and scrupulous way, justly fixed and established by practice. And it so happened—whether by design, or accident, that he obtained upon his resignation, and that of certain strangers, burgesses of Edinburgh, a charter dated 26th of July 1621, to himself, "et heredibus suis *masculis* et assignatis quibuscunque," of the lands of Ballysak,[3] and others in Forfarshire, distinct from Spynie, with the patronage and attendant rights of the Chapter and inferior clergy of Moray, previously granted by the Spynie *charter* in 1593, which, however, are *falsely* stated, in terms of the limitation *there*, to be simply conveyed to Alexander first Lord Spynie, Countess Jean his wife, and "heredibus ipsorum *masculis* et assignatis;" whereas the limitation, as has been proved, was first to their heirs-general. Nevertheless the same conveyance, on the further narrative of the resignation by the first Lord Spynie, exclusively of the territorial patrimony of the Bishops of Moray, distinct from the *latter* clerical rights and interests, &c.[4] in obe-

Death of first Lord Spynie in 1607, and accession of his son, a minor.

Ballysak charter to latter in 1621.

Glaring misrepresentation there of charter 1593.

[1] Testamentary Register of the Commissary Court of Edinburgh.

[2] Register of Retours.

[3] Now written Boysack.

[4] It is to be observed, that though the Act 1606. c. 2, (see Acts of Parl. last edit. vol. IV. p. 281,) restored Episcopacy, and voided the grant, in effect, of the Bishopric of Moray, that had been conferred by charters upon Lord Spynie, yet his right, owing to a certain statutory provision likewise, still stood in law to the patronages and relative rights alluded to, of the Chapter and inferior clergy of Moray, carried, moreover, as we have seen, by the Spynie charter 1593. (See p. 660.)

dience to the desire of the King, then bent upon the restoration of Episcopacy,[1]—while it is,[2] at the same time, admitted, that notwithstanding, the dignity, still uncompromised, vested in the present Lord, and his "successors,"[3]—now erects the new lands of Ballysak in Forfarshire, with the remainder of the subjects here mentioned, into a barony, under the designation of Spynie; and wills and declares that the *dignity* of Spynie shall be held by the noble disponee "suique *antedicti*," his "*successors*," (that term immediately preceding,) or heirs-male ostensibly, but in reality by his heirs-*general*, for there qualifyingly follows, "*secundum tenorem infeofamenti* dicto *quondam* suo *patri* desuper confecti, ac *secundum* dicti quondam sui patris creationem in temporale dominium tempore prescripto."[4] Reference is thus clearly made at the

Original honour however still existing, and in *fact* descendible as before.

[1] The original letter of the King in relation to this resignation of Lord Spynie, and his willingness to accede to the Royal request, is among the Balfour Collection, Advocates' Library, and dated December 1605.

[2] Whether the royal authority, however, was properly adhibited, in point of form, to the present grant, will be afterwards seen.

[3] "Quod *sicuti* (notwithstanding the previous resignation of the Bishop's patrimony) *titulus*, honor, et dignitas dicti dominii de Spynie ad dictum nostrum prædilectum consanguineum Alexandrum *nunc* dominum Spynie *pertinent*, ac cum ipso et successoribus suis *remanent*." This,—or more cogently perhaps, from what was intimated in the last note,—the undoubted continuance of the Spynie Peerage in the first Lord, after his resignation mentioned,—and in his son, at least before this charter 1621,—indicates the separation of an honour, as now becoming more peculiarly personal, from its old territorial character, instead of the arbitrary apocryphal epoch assigned by Lord Mansfield, so far back as 1214. The Spynie Barony would hence invariably descend, as in fact it thereafter did, according to the naked limitations of the Peerage grants, abstracting from the lands, the estrangement of the latter in such a case,—certainly by the practice of the House of Lords, not forming an objection. That tribunal, as has been proved in the Colvill instance in 1723, awarded the dignity, (though mistaken, and under an erroneous designation), in terms of the limitations, in the same way, in a corresponding charter of a secularized church patrimony in 1609—when every acre of the lands had vanished. The constitution of the Spynie Barony, as premised, is evidently further corroborated by the charter 1621.

[4] Original Spynie charter-chest, also recorded in the Great Seal Register.

close to the completing conveyance of the dignity in virtue of the charter 1593, taken however with the first, in 1590, and the relative accessory creation,—chiefly so far as regards the precedence, that still operated in this view, in virtue of the ratification by Parliament in 1592, and agreeably to our practice, upon both of which infeoffment *exclusively* followed,—though in consequence of extreme negligence, sometimes precedented, and the inaccuracy with which the grant is confessedly drawn,—and presumed ignorance, or inadvertence, on the part of the framer,—the general limitation in the same charter 1593, as already obvious, is falsely made to have been, in effect, to heirs-male only, which *may* have elicited the new one in 1621, and led verbally to a mutual identity,—while the dates of the primary constitution and creation, elsewhere, when alluded to, are left blank. There is also another careless blank, and omission of the dates of an important known Act regarding patronages referred to.—The preceding facts may be now held to exhaust every thing important to the merits of the case; and in these circumstances certain material considerations may naturally present themselves.

Confessed errors in careless and inaccurate charter 1621.

I. In whatever situation the lands may have been,—and it is remarkable that "*no* infeftment was taken, nor possession had, upon the charter 1621,"[1] which I shall call the Ballysak one,—the substitution limiting the honours—evidently that acting through the medium of the grant of the patronages in question, and barony and honours of Spynie, in terms of the charter 1593, indisputably referred to, would still, even on a far *worse* occasion, however misrepresented, retain its true unvarnished import and meaning, and carry them to heirs-general. There is here, so far as regards the substitution, but a subsequent clerical error only, which, as was decided in the case of the Barony of Napier, the 25th of February 1793, in an analogous point, cannot void or nullify the right of the previous, or actual legal heirs. The regrant and ruling conveyance of the Napier honours, the 17th of February 1677, now proceeds upon a reference to an *entail* of the estates there given, as on the 7th of February 1667—but

Clerical errors noticed in 1621 cannot shake or affect charter 1593, or previous constitution.

Napier decision in 1793 in point.

[1] This was affirmed, so far as I can find, without contradiction, in the argument and printed information in the Spynie claim.

none in *that* year was ever executed. The regrant was therefore argued to be null and invalid; it happened, however, there had been *an* entail—that evidently in view,—though mistakenly, dated the 7th of February 1667—instead of 1677, which was held nevertheless to rule—the admitted faulty reference being merely construed, justly enough, as a clerical error.[1]

Also a subsidiary finding in Glencairn case in 1797.

The palpable misconceptions and confessed errors in the Ballysak charter in 1621, can never, by faulty *incidental* description, as obtains much in the same way, make the regulating charter 1593 belie itself, and operate to a different legal purpose—prejudicially to the honours. This the more so, when it was decided, *inter alia*, in the Glencairn case in 1797, that a direct and express ratification by Charles I., the 21st of July 1637,[2] *per incuriam*, of a grant of the Earldom of Glencairn by James III. in 1488,—in reality ineffectual, having shortly thereafter been rescinded, but declaring it to be "*validum, perfectum, et sufficiens jus*" for the full and peaceable enjoyment of the honour,—"*secundum*" its own terms, did not, in consequence, transform or alter its *pristine* character or condition, nor give it, under such unquestionable royal authority, a different effect than it had before. The objection here, from the rescission alone—though, with us, as will be afterwards proved, competent in a proper way to the crown to cure and remove without the aid of Parliament—was fatal. If, then, by parity of reasoning, the erroneous assumption by the King —which has, even in certain cases in English practice, enured into force, or homologation of the validity of a faulty writ or admission of honours, thus availed nothing, *a fortiori* must the erroneous assumption of the limitation in the charter in question, by a mere clerk or agent, be as inept. It cannot disturb or unsettle its intrinsic import.

At the most, charter 1621 could not affect original Spynie *honour*, from its *non* resignation.

II. As the charter 1621, almost wholly involving new subjects, did not proceed upon a resignation of the dignity,—which moreover was *never* resigned, but only of the lands and patronages, &c. by the noble disponee, and certain strangers, to make up a due title, the dignity can, in no degree, be thereby compromised, but must still continue intact

[1] The Napier case will be further stated hereafter.

[2] Great Seal Register, under the sign manual.

and descendible, as before, and in 1593, to "heirs." Nay, actually a second grant or patent—unexceptionable in point of form—even supposing the above charter to have been so—in favour of a party and *new* heirs—of an honour, of the identical name, and degree in the Peerage, (which seems the strongest case of confliction, if I may so speak, of the kind,) with a *pre*-existing one,—duly constituted, like that of Spynie, in virtue of the charters in 1590 and 1593,—and as follows *differently* limited, but still not proceeding upon a resignation —not only, as evinced, is not held to prejudice the latter, but besides to be, in itself, inept, and ineffectual, as a Peerage conveyance. The conjoined Earldoms of Annandale and Hartfell were bestowed by a patent, dated February 13, 1661, upon James, formerly only Earl of Hartfell,[1] and his "heirs-male," (simply) with subsequent remainders.[2] And he thereafter obtained a royal charter, under the sign manual, dated April 3, 1662,[3] erecting his estates into the "Earldom of Annandale and Hartfell," "*cum titulo stilo et dignitate Comitis secundum* (the identical word used in the Ballysak charter in 1621,) *datas Diplomatum dicto* consanguineo et consiliario nostro *Jacobo* comiti de Annandaill et Hartfell, et quondam ejus patri desuper concessorum,"—thus literally including the former dignity, or dignities of Earl of Annandale and Hartfell, in terms of the patent in 1661, and another with the same limitation, as there in the first instance, of the Earldom of Hartfell, dated March 18, 1643, to Earl James his father,[4]—but in favour of different heirs, of "heirs male *of the body*" only,[5] instead of "heirs male" simply, as before, or heirs-male-general, as is now held by the House of Peers,—though with the subsequent remainders, as in 1661. It happened, however, that this charter 1662 did as little as the Ballysak one proceed upon a resignation of the honours, and accordingly, during the pending discussions on the Annandale claim, it was not founded upon by Mr. Hope Johnstone, the claimant, whom it would have decisively preferred, as a peerage conveyance. He, like his opponent Sir Frederick Johnstone,

Elucidation from pending Annandale claim, evincing besides that *no* honour could be carried by charter 1621.

[1] In virtue of an earlier patent, to be immediately mentioned.
[2] Great Seal Register. [3] *Ibid.*
[4] *Ibid.* [5] *Ibid.*

whom the charter again excluded, joined issue upon the earlier patent in 1661, which the Lords, likewise so far, only considered. There was, moreover, a parliamentary ratification of the charter 1662, in the same year,[1] but equally disregarded agreeably to the law formerly noticed, and as admitted in the Cassilis instance. The law in question appears to have been first recognised there in 1762. In discussing the merits of the similar Cassilis charter (though also otherwise objectionable) in 1642, Lord Hardwicke said, "It is agreed that, by the charter 1642, *no* honours passed, *because it* was a personal *honour (Cassilis)*, and *was not* resigned." And in this Lord Mansfield assented, observing, "I take it, that *nothing* can pass by *such* right. It is clear the King could grant *nothing* but what was resigned. *Here* the *honours* were *not* resigned, and *therefore* could *not* pass."[2]—But the case of the Marquisate of Queensberry, decided the 9th of July 1812,[3] may be much stronger, where that dignity, the Viscounty of Drumlanrig, and a subordinate Barony, were found to remain with the original heirs, even in the face of an actual resignation and regrant of the other, and principal family dignities, in favour of *new* heirs,—with a general reference to, and salvo in behalf of the latter, of any honours and dignities, &c. ever conferred upon the grantee and his family,[4]—merely because the former were not specified *nominatim*. And this, although there could be no doubt of the intention then of the resigner

Concurrent authority of Lords Mansfield and Hardwicke in Cassilis case.

Case of the Marquisate of Queensberry, &c. in 1812.

[1] Acts of Parl. last Edit. vol. VII. p. 641. Had the honour been previously *resigned* in 1662, then the case evidently would have been the same as that of the Earldom of Roxburghe, in virtue of the royal charter of the estates and dignity of Roxburghe, dated July 31, 1646, (Great Seal Register,) with the consequent nomination, which *did* proceed upon a resignation of the *dignity*, and hence, *cæteris paribus*, was resolved by the House of Lords in 1812 duly to transmit it.

[2] See Mr. Maidment's Cassilis Pub. pp. 59, 53.

[3] Lords' Journals.

[4] Patent dated June 17, 1706, Great Seal Register, with the resignation in question, and the relative instrument, *ap.* Minutes of Evidence in the claim of Charles Marquis of Queensberry. &c. The provision or reservation alluded to is thus expressed in the deed of resignation, that there, moreover, shall be no *prejudice* "to *us (the resigner)* nor *our foresaid aires of tailzie*—of *any* of our *former* titles, *honours*, &c. formerly granted to *us* and our *predecessors*."

to make (under due authority) a total settlement of his honours and estates, *simul et semel*.[1] Neither was there, as has been supposed, at the time, any reservation of the Marquisate of Queensberry to the old heirs. And accordingly, it so happens that their representative, the heir-male, inherits that dignity, and the relative ones mentioned, without a particle of the resigner's land; while his entire territorial patrimony, and more exalted titles of Duke of Queensberry, Earl of Drumlanrig, &c. now, in virtue of the resignation and regrant in 1706, centre in the Buccleugh family, the heirs-female. The law here, justly enough, is strict and scrupulous; and hence, the original Spynie honour, owing to the want of the shadow even of a resignation in its case, as I before observed, is intact, and in any event unaffected by the charter 1621, even in whatever way we may regard the *new* substitution there to heirs-male, or the ostensible, though false, conveyance it indubitably perpetrates of the honour,—from misrepresentation of the true limitation—or rather of its visionary counterpart, to the same heirs. Independently too, there is intrinsic proof, in the *same* faulty Ballysack charter in 1621, not only that the Spynie honour was not resigned, but that no *innovation so far* was thereby intended; for it admits, as already seen, that notwithstanding the resignation by Alexander Lord Spynie, of the lands of the patrimony of the Bishops of Moray, and what had obtained,—the said dignity of Spynie still *belonged* to the noble disponee his heir, and "*remained*" with him—evidently according to the original constitution—and his "successors."[2] In fact, the chief scope or legal purpose of the charter 1621 had reference to other objects, and the title to, and consolidation of the patronages, with the estates.

Application.

But further, charter 1621 ineffectual in point of *form* to transmit *any* dignity.

III. But hitherto we have been taking it for granted, that the charter in 1621, *quoad* the honours, was duly warranted, and perfected in point of form. This, however, is not so in practice, or can be held to be by a ruling judgment of the House of Peers. In every grant conveying honours, according to the *rationes* and decision in the parallel case of Cassilis in 1762, *these* must be *specially* and *literally* described in the

[1] Proved by authorities, *ibid.* and others upon Record.

[2] See p. 664, *note* 3.

Fixed especially by a sustained plea in the Cassilis case in 1762.

docquet by the public functionary, subjoined to the proper warrant or signature, legally to evidence, together with the authority under the sign manual, the due intelligence, and apprehension of his Majesty,—for whose special information the docquet here is devised, and whose unequivocal *scientia* and act, *as* to *them*, thus deliberately adhibited, is imperatively demanded for their transmission.[1] Whatever may have actually obtained, the law, as a necessary guard against surreption, which, as has been proved, has been practised upon such occasions,[2] presumes the royal *non*-consent if the form be omitted. Instead of which notice, the docquet to the signature of the charter in question merely mentions the patronages and territorial fief, without any such exemplification, or more.[3] This striking defect therefore, seemingly omitted also to be founded upon by the Spynie claimant in 1784-5, is in practice fatal to the effect of the conveyance, as touching or compromising the honours,—independent of the previous conclusive arguments, as conceived,—and at once expels it from the discussion.

Parliamentary ratification of charter 1621, here unavailing under the circumstances.

I need as little allude to the summary parliamentary ratification of the charter 1621, in the same year,—which remark-

[1] It was objected in the Cassilis case, and sustained, that a royal charter in 1671 under the sign manual, carrying *in grœmio* the Earldom of Cassilis, "with the *dignity, precedency, and priority*" of place, was null as to the *latter*, because "the docket subjoined to the original signature, which was intended as a check to prevent grants by subreption, contains a special description of the whole lands—*but* does *not* once mention the title of honour or dignity." (See also p. 559.) This is the fact, as I found by the actual signature in the State Paper Office.

[2] See p. 63, and pp. 207-8.

[3] The following is an entire copy of the docquet, which was adduced, with the conveyances in the Spynie claim: "An Grant to be passed by your Majesty to the Lord of Spynie, of the lands of Ballysack, Braidfuttis Garden, and other lands lying within the Sheriffdom of Forfar, with the patronage of divers Kirks, unitit and annexit in an Lordship and Barony, to be callit hereafter the Lordship of Spynie. (Subscribed) George Hay." An ordinary *Dominium* et *Baronia* are here simply carried, which, without the words title, and honour, &c. only then import a landed fief. It is to be observed, that in the Cassilis docquet the "*Earldome* and *Lordschip* of Cassilis" are specified, besides *even* an obligation to the heirs to take the "armes and *dignity*,"—hence so far stronger; but this even did not avail, or enable the grant to pass the honour. Sir George Hay, who subscribes above, was Clerk Register.

ably again does not mention the honours,[1] it being besides long after the union of the crowns, and the removal of the King and leading administration to the remote locality of London, in consequence of the law also laid down in the Cassilis[2] case, rendering the same equally unavailing in the emergency.[3] The descent of the Spynie honours therefore, on all hands, exclusively stands upon the charters 1590, and 1593, backed by the express and effectual act in 1592.

Descent of Spynie honour alone regulated by charters 1590-3, backed by Act 1592, to direct "heirs" in the first instance.

Alexander second Lord Spynie, was succeeded by George his son and heir, the third Lord, who died in 1670, or 1671, without issue,[4] when the direct heirs-male failed. The takers hitherto combined the status both of heirs-male and heirs-general; but by the death of Lord George it split, and the female representation opened to Margaret, his eldest sister, who married William Fullarton of Fullarton. At this period, the means and fortunes of the Spynie family were utterly gone and delapidated; that of Fullarton also were greatly reduced in their circumstances, the members being besides concerned in the rebellions in 1689, and 1715,[5] which, as in similar cases, had barred a claim, and assumption of the dignity, that became subsequently dormant.[6] It still, however, remained on the Union Roll; and, after a considerable interval, was claimed, by petition, and reference to the Lords, the 28th of May 1784, by William Fullarton of Glenquich, the direct descendant, and heir of the above Margaret, in terms of the regulating charters of the honour in 1590, and 1593, to heirs-general,[7]—when it was at once found, after some discussion, on the 18th of April 1785, that he had no right to it.[8] And why, it may be asked, and upon what ground? *Merely*—although the resolution was penned by Lord Mansfield, who alone spoke on the occasion, it may indeed surprise and

Claim to the Spynie honour by the direct heir-general in 1784.

At once rejected by Lord Mansfield and Peers in 1785.

[1] Acts of Parliament, last Edit. vol. IV. p. 654.

[2] Pointedly rejecting a Parliamentary ratification in 1672, of the Cassilis charter alluded to, in 1671. [3] See pp. 558-9.

[4] So proved by evidence in the Spynie claim.

[5] From information, Spynie Charter-chest.

[6] The Lords of Session, in their printed Peerage Report in 1740, could not take it upon themselves to say that it was extinct.

[7] Lords' Journals. [8] *Ibid.*

Grounds of their resolution.

astound most persons—*because* while, it seems, forsooth, there was *no* proof, or indication of "the *original creation* of the title,—it *sufficiently* appears, *from* the *act* of ratification 1592, the *charter* 1593, and the charter 1621, that the descent was limited to the *heirs-male* of Alexander *(first)* Lord Spynie, *consequently*—the claimant has *no* right to the said Peerage."!! The *rationes decidendi*, palpably, may be even still more easy to expose and refute, than most of Lord Mansfield's arguments, futile and inconclusive as they are,—*de plano*, by the absolute *veto* (to use a modern term) of the intrinsic words and import of the said act 1592, and charter 1593, themselves, directly referred to as their warrant,—which are unappealable, and not only substantively instruct,—together with the charter 1590, here however, wholly disregarded,—the actual constitution of the original honour, but its descent, as has been instructed, *e converso*, to heirs-general. "It *sufficiently* appears" from *them*, indeed, that the honour "was limited" but "to the heirs-male!" It is a plain mockery to say so; the conveyances in question, broad and congruent as they are, *intrinsically*, involve no such confined and restricted descent, as his Lordship gratuitously assumes,—not *legally* even the *irrelevant* one in 1621,[1] his only other groundwork,—but diametrically otherwise.[2]

Astounding, futile, and inexplicable.

These memorable *rationes*, which were admitted and confirmed upon the fiat of this legal dignitary by the crown, of a truth, seem the most extraordinary and revolting ever risked

[1] This charter, it is remarkable, with the exception of its palpable incorrectness,—which made the matter worse in its case,—had all the essential features of the Cassilis charter in 1671, yet while the latter was at once discarded by the Lord Mansfield, the former was *consistently* admitted and founded upon by the *same* authority.

[2] The limitations,—abstractly occurring, as they do, in the Act 1592, and charter 1593, and falling to be literally or naturally rendered, as will afterwards be shewn,—namely "to the *heirs* lawfully gotten, and to be gotten, between them, (Lord Alexander and Countess Jean,) quilks failing, to the nearest and lawful heirs male of the said Alexander Lord of Spynie whatsomever, and their *assignees*,"—must include, as every legal Tyro knows, heirs general or female, under the term "heirs," while they *may* involve them likewise in virtue of "assignees." And this the more so, seeing the limitations apply to lands equally as to honours.

in law, and render this singular case, (even still more than some of the preceding,) most strange and inexplicable. His Lordship, independently of his unfoundedly, and as irrelevantly repudiating the conveyances in 1590, 1592, and 1593, as grants of the honour—must obviously be held thus, to have denied and rejected the genuine meaning of a limitation to "heirs" simply, as including heirs-female. And here, not to mention innumerable illustrations and authorities, notoriously to the contrary,[1] this foreclosing, *abnegatory* doctrine is at once shattered and annihilated by the recent Polwarth decision before the same tribunal. The Barony of Polwarth was bestowed, (precisely like the Viscounty of Stair in the same year,) by a patent, dated the 26th of December 1690,—under an uncommon limitation, it may be said, elsewhere unparalleled in Peerage grants,—upon the patentee, "et hæredes masculos de corpore suo legitime procreatos seu procreandos, et *hæredes* dictorum suorum *hæredum*,"[2]—namely, to heirs-male of the body, and to their heirs. The Polwarth estate, under the description of a "Barony,"[3] by royal charters, dated the 25th of June 1669, and last of January 1704,[4] both ratified in Parliament,[5] thereby constantly stood in the person of the patentee, a man of influence, and High Chancellor of Scotland, and to his "heirs *male* whatsoever," in the first instance, which was moreover the limitation he exclusively adopted in his final patent of honours, dated 23d of April 1697, of the Earldom of Marchmont, Viscount Blazonberry, and of "*Baron Polwarth* of *Polwarth*,"[6] &c. a singular recurrence to much the same style, as in 1690,—not proceeding upon a resignation. And though last in degree, though not probably last in estimation, the old family baronetcy of Nova Scotia, conferred upon Sir Patrick his father, December 19, 1637,[7] was also exclusively in him and his heirs-male.

Lord Mansfield must be held to have construed "heirs" here *not* as "heirs-general."

Important case, *inter alia*, of Barony of *Polwarth*, adjudged in 1835, in palpable refutation of his Lordship.

All the family honours there, (except that in 1690) and estates descendible to heirs male whatsoever of the patentee.

[1] See, *inter alia*, Lord Hailes's Sutherland case, *passim*.

[2] Great Seal Register. The patent of the Viscounty of Stair in exact terms, dated April 21, 1690, is also recorded there.

[3] An *ordinary* one. [4] Great Seal Register.

[5] Also in 1669, and 1704. Acts of Parl. last Edit. vol. VII. p. 631, and vol. XI. p. 200. [6] Great Seal Register.

[7] Proved by authorities upon record. The date of creation assigned to this Baronetcy in 1625, is not correct.

The male succession therefore, to the utmost extent,—he preferring all—even the most distant heirs-male, of whom there were an immensity—to his own female issue, and heirs-general, must have been his especial predilection, certainly in respect to his entire estates, and every other honour,—at least saving the Barony of Polwarth in 1690.

Every Scottish lawyer knows, that although the genuine and presumed meaning of "heirs" occurring in the relative patent, is identical with heirs-general, yet it is still a flexible term, and may be controlled and altered in this, its natural acceptation, by certain *marked* and *peculiar* accidents and considerations. And as far as intention went, and in support of its coming here, within such category, may we not hold, that the noble disponee, who preferred the male succession at large, in every other instance, to the complete exclusion of females, must also have been as little inclined to favour or include them in the substitution of the *first* Barony of Polwarth? It must be admitted at least, that such collateral evidence in behalf of the *male* construction, as controlling "heirs," is immeasurable stronger than that in the Spynie instance, directly resorted to by Lord Mansfield; for here it is sustained, and palpably evinced, not only by the uniform, and concurrent import of the settlements of the *Polwarth* fief and his estates, but by the limitation of his higher, and all his other honours,—in fact, substantively constituting his proper family representation,—and moreover, in the manner shewn,—(not alluding to the oldest and hereditary title of Baronetcy, to the precise same effect,)—under authority of Parliamentary ratifications, and Royal grants to the *identical* party himself,—whose will is in question, and which must have been consulted and followed in a great degree, at least, if not wholly, during *his lifetime*. Now, on the other hand, what have we to contrast with this in the same qualifying view, to induce the prejudicial restricting conclusion in favour of heirs-male, from the Spynie conveyances, according as Lord Mansfield has similarly attempted in that case?

Facts urged on ground of intention, as controlling "heirs" in the Polwarth patent in 1690.

Nothing but the impotent, inefficient Ballysak charter in 1621, *questionably* to heirs-male,—that does not carry the Spynie honour,—but mixed incongruous lands and interests,

nearly all distinct from the Spynie inheritance,—and that intended no innovation of the former,—rather it must be held an Irish mode of illustration on the part of his Lordship, seeing it was *not*, as above, during the lifetime of the parallel party, whose intention we are equally discussing, but long after, at the distance of more than a quarter of a century, —in respect to a grant wholly unauthorized by him, of which he knew nothing, and that could not be an index or criterion of his intention, he being then, and long previously, in his tomb;—while the entire and princely *dominium* and fief of Spynie, in *his person*, which alone fell to be consulted in this collateral mode of illustration,—instead of, like the Polwarth, being restricted to heirs-male, was constantly descendible by repeated grants to heirs-general, in unison with the Spynie honour. Such test or probation therefore, instead of cogently impugning or refuting in every respect, so far as it goes, the natural meaning of "heirs," as in the Polwarth instance, *e converso*, pointedly and relevantly defends and corroborates it in that of Spynie. Added to this, not broaching the nice point, whether, in virtue of the Polwarth limitation, a daughter, the sole offspring of an elder brother, a male descendant of the patentee, would fall to exclude his younger, which was mooted by Lord Redesdale,[1] it is indisputable that it might have so happened in respect to it,—giving the term "heirs" a female import, that a daughter and heir-female might, in consequence, have become Baroness of Polwarth in her own right, though entirely destitute, without a particle of the lands —which would then separate in the gross, and irretrievably devolve to the heirs-male. This surely, (confining ourselves to the *first* Polwarth honour, and holding it, as might have happened, to have been the only one,) would be a jarring and anomalous state of things, which, it can indeed be little presumed, the noble disponee, at the *time* of its creation,—which is the relevant epoch, a man of power and influence, and whose will, as has been observed, must have been consulted in the fram-

But the above does not hold in Spynie instance —but *e contra*.

Further objections in Polwarth case.

[1] It here fortunately however happened, that the Polworth claimant was the heir-general both of the first and last heir-male of the body, there having been no *previous* opening, as contemplated in the text, to an heir-female.

ing of the patent,—could ever have countenanced. The effective political representation, and weight of his family, evidently from his anxious entails, and naturally, a cherished object with him, a strenuous statesman and politician—especially in a far more feudal age than afterwards, would have been materially destroyed or shaken; while, in the case of the poor impoverished *Baroness*, with but the bauble of an empty *impotent* title, in the likely emergency, it is probable that, like others in the same situation, as in the instance of Somerville, she would have foreborne to assume it, being wholly without the means of its support. Owing to these forcible and substantial considerations, it was held and argued by some,—who besides viewed "*heredibus*," in the limitation in 1690, but as a legal pleonism, or in fact equivalent to *hereditarie*—solely to elongate the male descent heritably *downwards*,—for it is to be observed, that the previous words there, "heirs male of the body," in our patents, are occasionally employed *only* to include *immediate* male issue, or *sons*,—that the whole Polwarth substitution in question merely resolved into one to heirs-male of the body, which would have fully reconciled matters. It was further remarkable too, that the Stair estates, as settled by the first Viscount Stair, author of the Institutes, and, according to many, our highest legal oracle, went precisely, like the Polwarth, to heirs-male, which, in the same way, might have controlled "heredibus" in his patent of the Stair Viscounty in 1690, having, as was stated, a substitution identical with the former. But the House of Lords would not allow themselves to be influenced by any such reasoning and considerations in behalf of intention, and of the male succession only, or any way countenance such collateral mode of illustration,—at least, so lamely and irrelevantly attempted, in 1785, by Lord Mansfield. They entirely shut their eyes to them; and in this remarkable and rather narrow case, according to some lawyers, they gave the strictest and most rigid effect to the term *heredibus* in the Polwarth substitution, agreeably to its naked and presumptive meaning; and in virtue thereof, the heirs-male of the body having failed,—on the 25th of June 1835, adjudged the said Barony of Polwarth to the direct heir-

Yet House of Lords decided in favour of the heir-*female* in the Polwarth claim.

female,[1]—that is, to the individual who held the same status, and stood in the precise situation with the Spynie claimant in 1785. It must therefore in law, in conformity to the decision, require the agency and bias of strong facts and concomitants indeed, to shake the intrinsic meaning of "heirs,"[2] —certainly not such as warranted the Spynie resolution, penned by Lord Mansfield, whose *rationes* there are necessarily exposed and refuted. And again, contrasting the Spynie case with Polwarth, I need hardly now add,—*a fortiori*, how irresistibly the latter, including the decision, tells in its favour; for not only, under the ruling Spynie grants to the first Lord Spynie, was the word "heirs" opposed, as in the *Polwarth* one—under a *distinct* remainder too, *there* wanting—to heirs-male, moreover with the adjunct *assignatis*,—hence denoting a more varied and wider range of descent,—but heirs-female, as we must now hold, in virtue of the same, were called therein, in the first, and not merely in the second instance,—which indicates a more marked preference. Neither was this by a single conveyance of the kind, as in Polwarth, at variance with all the rest, whether of the estates or honours, but repeatedly and *uniformly* in reference to the large and princely patrimony of the Bishoprick of Moray, from whence the dignity was derived, during again the material and relevant time;—while, to descend to all details, no awkward and irreconcilable dilemma could ever have been occasioned by a separation, under the regulating settlements of the Spynie honours and estates, such as the striking one noticed in the Polwarth instance. On the contrary, both thereby would have been consistently united, and accordingly descended *simul et semel*. In this manner, the Spynie case, in

Conclusion.

On contrasting analogous Spynie case with Polwarth, advantage in favour of the *former*, and previous objections to the latter, excluded in its instance.

[1] Lords' Journals. There still exist *many* heirs-male *whatsoever*.

[2] This rigid doctrine as to such technical terms, as is notorious, was in a great measure enforced in the Scottish cases of Hay of Linplum, 28th July 1788, and of Walker (especially), June 17, 1766,—both upon appeal. "Heirs whatsoever" too, a description likewise flexible in our days, received a strict, *naked*, technical interpretation, in opposition to intention transpiring in *one*, and the *same* deed, in the case of Farquhar against Farquhar, in 1838. (See Dunlop, Bell, and Murray's Reports, vol. I. p. 121.) And the same thing can be additionally evinced.

terms of the claim in 1784, is rendered harmonious and intrinsically coherent, authorizing, agreeably to the modern dictates, and principles of law, the construction contended for.

Upon the footing of the Polwarth decision, Spynie claim irresistible.

Upon the whole, with every submission, so long as the Polwarth decision stands, we cannot but regard the right of the Spynie heir-female to be irresistible,—under favour of that remarkable precedent which, as I premised, utterly shatters, and nullifies the strange and inexplicable finding of Lord Mansfield in 1785, to the prejudice of the latter. And even, if there were doubt in the matter, still I conceive, however it be affected to be contemned and disregarded in modern times, that the general presumption and leaning of the Scottish law in favour of heirs-female—as I have attempted to illustrate—

Absurd objection of Lord Mansfield to Spynie claim.

ought to operate and preponderate. One of the closing arguments, forsooth, of Lord Mansfield, in his speech against the female succession in the Spynie case, was—straining mistaken hypothetical inference of intention to the dregs, *most accordantly* with his principles, as will be afterwards shewn—that such would be "highly improbable,"—for then "a niece (would) *disinherit (exclude*, he ought to have said) her uncle."[1] "*Highly improbable*,"—why, on the contrary, this happens every day in numerous instances, in the case of every peerage descendible to heirs-general. But again, holding, as was forcibly maintained in respect to the Polwarth substitution,—and a point *adhuc sub judice*, that the daughter of an elder brother would exclude his younger brother, this actual vicissitude of things would have obtained, under far more adverse and irreconcilable circumstances. Yet the consideration, so far from being attended to, or operating, according to Lord Mansfield's hallucination, to cast the claim, came to be deemed immaterial in a parallel state of matters, and to be completely disregarded. The Polwarth decision thus additionally refutes Lord

Remarks on peculiar import of the Spynie regulating limitation.

Mansfield. I need hardly advert to the import of the Spynie substitution, as affecting the more precise and intrinsic descent, which is conceived to Alexander Lord Spynie, *Jean* Countess of Angus, his wife, the *longest liver*, and to the lawful *heirs* of the body between *them*, whom failing, to his heirs-male

[1] See Mr. Maidment's Pub. *ut sup.* p. 11.

whatsoever; for any supposed unfavourable inference, would obviously now be irrelevant in practice, in consequence of the finding, and technical construction of "*heirs*," in terms of the former. It was however not unnatural in Lord Alexander, however clannish he might be fancied, in this manner, to prefer his beloved and highly connected wife, whose death he might not always anticipate, and who actually survived him, and his issue by her, to his heirs-male whatsoever, including the issue of others. And what is even still more important, James VI. himself, who, as we have seen, took a deep interest in the Spynie grant to his "minion,"[1] the same nobleman, might be expected to enforce the previous descent out of regard and affection to Countess Jean, there, at any rate, greatly favoured,[2] and whom also, as is transmitted to us, he peculiarly affected and courted.[3] Nay, it would appear evident, from the letters of James I. alluded to, that the Spynie grant and honour had especial reference to the Countess, inasmuch as it was a further argument and inducement to promote and secure her marriage with Lord Alexander, of which his Majesty was the zealous projector and main instrument.[4] This would naturally entitle her, and the issue of it, to the preference in question, in the eye of a monarch who was by no means disinclined to the female descent,[5] and who was vehemently swayed by such predilections—to which, as in the noted cases of Somerset and Buckingham, &c. he repeatedly sacrificed every consideration, even the advan-

Not unnatural under the circumstances.

[1] See Moysies' Mem. first edit. p. 143. And Sir James Melville says, "My Lord of Spyny was in sa gret favour with his maiestie, and sometymes his bedfallow, that he was worthy to be envyed." (Mem. last Edit. p. 402.) See also the Letters from the King to him and the Countess his wife, in the Balfour Collection referred to, p. 654.

[2] From the Spynie liferent to her.

[3] This is proved by a letter of the King to her, as above, (see p. 654), and by another from his Majesty to the Countess, in the Balfour Collection, in regard to which and its contents to that effect, Lord Hailes remarks, in a paper in the Spynie Charter-chest, that the King prosecuted "his scheme—of engaging the Countess Dowager of Angus to marry Alexander Lindsay, for which purpose he became an earnest suitor with the Countess."

[4] *Ut sup.* p. 654. [5] See p. 174.

Precedented elsewhere.

tage and public weal of the nation. Independently too, substitutions the same with Spynie as it stands, and as it proved, obtained elsewhere with us on various occasions.[1]

Remaining, preposterous and even still more untenable *ratio* of Lord Mansfield, &c. against the Spynie claim, on the ground of a supposititious effect attached to "Belting."

But if the previous reasons noticed in the resolutions for rejecting the Spynie claim in 1785, based as they are, be, with every submission, avowedly irrelevant and untenable,—what, although even contrasted with them, is to be thought of this remaining argument by which Lord Mansfield orally, in his extreme necessity, sought to back and to sustain them; and Lord Rosslyn, still more,—on the bare hypothesis of the constitution of the Spynie dignity having been by "belting" *only*,—"*without* writing or mention of descent,"—for which ceremony even he appeals to no proof,—and from which *isolated* act, moreover, they sapiently inculcated and *contrived*,—after this *known* and *approved* mode of *general* constitution,—a fictitious substitution in the present instance, abstractly limiting the honour to heirs-male *of the body*,[2] and

[1] Thus, by the regulating patent, dated February 27, 1707, the honours of Gray are limited to John Gray of Crichie, (afterwards, in consequence, Lord Gray), and to the heirs general and *female* of his body by Mrs. Marjory Gray his wife, only child of the existing Patrick Lord Gray, (upon whose resignation the grant proceeded),—and during her life the heir of line in apparency, with a subsequent remainder in effect, as in Spynie, to *heirs-male whatsoever*. (Great Seal Register.) Neither are any *other* heirs-*general* of Patrick Lord Gray, who was still alive, the deceased Marjory's father, or of the said John Gray of Crichie, himself the next heir independently, failing both their issue, and Charles Gray, the nobleman's only brother, who renounced his right, and had none, contemplated, or called. In this case and that of Spynie, in the event of a second marriage of the parties, which never happened, a full sister of a brother of the first, would have taken, after his succession and failure, in exclusion of a half brother; but such too would be according to our common law. And the honours and estates of Rothes are settled in a similar way, by a Royal charter, dated July 8, 1687, upon the heirs-general of the body, through different remainders, of the disponee, with an ultimate one likewise to "heirs male whatsoever." *(Ibid.)* I might also further allude to the regulating conveyances of the honours and estates of Errol, and Napier, in 1674, and 1677, where heirs-female are in effect called before heirs-male whatsoever.

[2] See Mr. Maidment's recent Publication in respect to the Spynie case, (p. 10), derived from authentic sources, including cotemporary

therefore, to the exclusion not only of the Spynie claimant in 1785, but of every other heir!! Here there is adoption of a former illusion that has been already alluded to, and which can never be sufficiently stigmatized—the rankest error and misconception imaginable. "Belting," or the ordinary "*cinctura gladii*," as is notorious with us, and in conformity to

excerpts from Lord Mansfield's speech on the occasion. He has thereby conferred an additional benefit, independently of the preceding in the Sutherland and Cassilis cases, upon Peerage law; and the public are thus again apprized of the sentiments of Lords Mansfield and Rosslyn in that department, with which they are brought into contact, and thereby supplied with the due means of criticism, and appreciation. Further, in a Memorial for counsel in the Spynie Charter-chest, in 1785, after the Spynie decision, formerly alluded to, it is set forth that Lord Mansfield, who *alone* spoke on the occasion, "stated that the creation *must* have been *by Belting* without writing, and without mention of descent;" and Messrs. Spottiswoode and Robertson, solicitors, (the former the son of Mr. Spottiswoode, the agent in the Spynie claim, and who thus came to have his papers,) corroborate the above, in a letter in 1818 in the same repository, especially mentioning "it had been admitted at the Bar, that the charter 1590 related only to lands," and that Lord Mansfield "considered—that the honour *must* have been created by the form of belting, *without* any *limitation* of heirs." The following passage in the strange speech, and virtual decision of Lord Rosslyn in the Glencairn case in 1797, (to be afterwards more fully noticed), from the authentic copy in the charter-chest of the claimant, next proves his Lordship's concurrent perpetration of the error. "In that title (of Spynie, alluding to the relative claim in 1785) several charters and instruments were referred to as creating the title, but all attempts to prove the limitations by *collateral* evidence, *(direct*, he should have said), were *fruitless*. (Why so?) The *creation* of *the title was by the form of belting*, after which *(only)* the person so created sat in Parliament, and *his son* sat also. And this House *decided* that the *presumption of Law* carried the title *to heirs male. (!)* I recollect not only the speech of Lord Mansfield upon this occasion, but also a consultation, I then having a seat in this House, had with his Lordship previous to the decision. *If* there be any thing *certain* in the Law of Peerage, it *is* this presumption in favour of the heir male."!! His Lordship's misrepresentation noticed, in respect to the evidence, is indeed glaring; and he latterly, most inflatedly and absurdly, *begs* a material question, gratuitously taking a falsity as granted. Legal underlings, of course, and *natural* lauders of *Chancellor* Rosslyn, chimed in with the same preposterous doctrine; and I have a communication, —by the late Mr. Chalmer, the solicitor,—though vain in self-conceit, yet his abject follower, (see p. 384, *n.*), wherein he *discloses*, as an im-

"*Belting*," or "*cinctura gladii*," a mere accessory act, like infeoffment in land.

Cruise even, and to English practice,[1] was but one of the simple, symbolical solemnities that composed the accessory act of "investiture," or "inauguration," as it was also styled, of a new Peer in his dignity, precisely analogous to seisin or infeoffment in the case of land.[2] It was a mere mute in-

portant and valuable secret,—but for the favoured few,—that *he* had written an "*Essay*" instructing that a Scottish Peerage in the 16th century was "*constituted—not* by *Patent, charter, writing*," but by "*inauguration*,"—especially including "*belting*,"—which "was essential, and, *of itself, completely* vested the dignity;"—that "the King" thus "conferred the dignity—*without* writing;"—and that Lord Rosslyn, his idol, *curiously* "*shewed*" that there "*was*" such "creation by the *simple* form of *belting*." The *shewing*, of a truth, must have been indeed curious, inasmuch as it was truly novel, and utterly unrecognised in genuine law, and practice.

[1] Cruise espouses the opinion, "that in *all* those cases (of belting) there was *also* a charter." (On Dig. p. 67.) This was more especially in feudal times; and in the form of creation of English noblemen, the diploma or patent was granted, independent of the investiture. (See Selden and relative English authorities, *passim.*)

[2] Further, in illustration of this analogy and great mutual approximation, Selden states, that in England "neither" was (*cinctura gladii* or belting) "used *only* at the investitures of a *creation*, (as at this day), but at *those also* which were only as *liveries*, or *confirmations* of Earldoms made to *heirs*.—Thence it is that Hoveden hath the phrase of accingere gladio Comitatus *patris sui*,"—in reference to a confirmation by Richard I. of the Earldom of Leicester to Robert de Bretuil, as heir of his father in the same. (Titles of Honour, p. 560.) Here the heir entered, by warrant of the Sovereign, as in the case of a common fief. Investiture or inauguration likewise obtained on all occasions, after the manner of feudal practice,—even in the church, and spiritual department. Thus, on a Pagan being converted to Christianity, he was said to have been made, or "*shriev'd*" Christ's *knight*,—that is, invested in the estate of Christianity, by becoming a member of the church militant, of course upon due written ecclesiastical warrant, and authority. In 1531 Edward Buchanan being "*elected*," by the parishioners, parish clerk of Killearn, Stirlingshire, he was forthwith invested in this spiritual office, ("*clericatus*,")—upon a charter of confirmation, the 18th of September in that year, by the Archbishop of Glasgow, containing a mandate or precept, for the purpose, directed to the Dean of the Christianity of Lennox, Curate of Killearn, &c.—"per *amphore aque benedicte*, et *aspersorii traditionem*, ut moris est." One of the duties of the situation, then discharged by persons of family and condition, consisted in keeping these vessels of religion, which thus were serviceable, symbolically, to the induction; and this, as added, was

gredient, which, although generally shewing, like the latter, the formal execution and completion of the written grant, yet, of itself, so far as regarded the other supposititious restriction as to the *descent*, was utterly inept and ineffectual;—indeed as much, in this view,—in denoting, forsooth, a limitation of the honour *but* to heirs-male of the body,—as the delivery of the *earth* and *stone abstractly*, in the ordinary case of landed investiture. These mere physical, obtuse particles or substances might have been made by the preceding legal dignitaries, with as much reason, miraculously to speak, like the fish in the Arabian tales, and to proclaim the descent of the subject in their instance, and thus to enure in the same way. We might, with equal relevancy *at least*, draw such cardinal result from the other ceremonies that obtained, besides "belting," in the investiture of a nobleman in his dignity,—for example, from the blast of the Herald's trumpets, in the nomination, proclaiming his style, &c.[1] Nay, with greater still, from the simple metal of which the clarions themselves were composed, seeing that, according to the "noble Science of Arms and *honours*," or of "Heraldry," "metals" are of sovereign virtue and efficacy, and, however mute elsewhere, are here extremely eloquent and significant, and, under certain rules, indicate and express every thing sublunary. It is extraordinary, that in such an age so glaring a hallucination as that in question should have ever been sported, and entertained. And here Lord Mansfield again is glaringly in default, —recurring to his hacknied expedient of ambidexterity; for,

Does not, as asserted, affect, or illustrate, in any way, the descent of a dignity.

Lord Mansfield here again sig-

further to entitle the ministrant to the respective oblations—"*farinæ clericali*," &c. (Hamilton of Bardowie Charter-chest.) In the curious instrument of Election, dated the previous antepenult of August 1531, *(ibid.)* the names of the Electors, including the Vicar, *women* as well as men, (which is singular, the former having then no voice in law), "*generosi—husbandi*, et *tenentes*" are specially recited—"qui *omnes* parochiani—*elegerunt—pleno jure*—dando eorum voces," &c.—in the parish church, the place of convocation. The above was the only spiritual patronage, parishioners possessed with us in Papal times, although, much the same right and procedure, the present Presbyterian Scottish Church would now, for the first time, extend to them in respect to church preferment, and advowsons at large.

[1] See pp. 571-2.

nally *ambidexter*.

in *admirable* keeping with this notable hallucination of emblematical and virtual, nay, actual descent, as fixed by "belting" alone, he asserted, in his speech in the Cassilis case in 1762, "that there was *no* creation of any Earl, or Lord of Parliament, *without* some *charter or writing!*"[1] We thus, as repeatedly happens, have only to quote Lord Mansfield in order to refute Lord Mansfield, in a matter which I shall however next proceed to fix and illustrate by direct and specific evidence,—though well aware that, in so doing, I am, in fact, unnecessarily proving a truism.

Direct refutation of his new *renegade* doctrine.

Instance (in refutation) of Earldom of Bothwell, in 1488.

In the abstract entry of the constitution of the *Earldom* ("*Comitatus,*") of Bothwell, in the Books of Parliament, under date the 17th of October 1488, there is the *creation* or *decoration* of Patrick Hepburn Lord Hailes in the dignity, "*per precingcionem gladii*, ut *moris* est,"[2] that is, by *belting;* but

[1] See Mr. Maidment's relative Pub. p. 46.

[2] As I remarked, under the head of our Consistorial Law, (pp. 478-82,) so differently from afterwards, we *were* lovers of forms and solemnities on all occasions. The charter of the Earldom of Marr, conferring his first title, with a specific limitation, upon James Stewart, the noted Regent, (subsequently exchanged for that of Murray), is dated February 7, 1561. (Privy Seal Register.) Of the *same* date, as we are informed by the minute and curious Pollok Chronicle, he "was maid" by his bountiful mistress (by the accessory act of creation) "Erle of of Mar," (*ibid.* p. 70); and the next day, on occasion of his marriage with Agnes Keith, daughter of the Earl Marshal, there was a conveyance of the parties by "the haill nobilitie" from Saint Giles's Church, where the ceremony obtained, to Holyroodhouse. Then followed the banquet, graced by the presence of the benignant, and unfortunate Mary—"casting of fyre ballis, fyre speris," (a fit emblem, like the firebrand of Troy, of the Earl's future incendiary contrivances), horse-racing, &c. with the attendant form in the solemnities of constitutions of honours, of creations of knights. (*Ibid.*) There eventually arose too, a litigation, in 1565, keenly prosecuted, between the Heralds and Macers, who both, by "ye *auld, auncient use* and custome wes present —at ye marriage—of (the said) James *Lord Stewart*, Erle of Mar, and Agnes Keyt," and of course at the creation of the knights, for sharing of the fees, viz. "auchtscore pundis money, and ane blak welvote gowne lynitt wyt satyne, quharof (the engrossing Lyon King of Arms, a miniature of the sovereign, and truly taking the lion's portion in this *Leonine* transaction) ressavit *sex score* lib., *wyt* ye *said gowne;*" while "ye uyer XL. lib. yerof (were) ressavit be ye heraldis," to the utter exclusion of the poor macers, though they figured "beirand yair

Constitution and imposing act of creation, &c. in favour of the Regent Murray, of the Earldom of Mar in 1561.

this plainly did not suffice, for, together with an erection of lands into a "*Comitatum*," it is declared that he, "et *sui heredes pro perpetuo*, futuris temporibus, Comites de Bothvile vocentur."[1] Here Lords Mansfield and Rosslyn are at once refuted, for, in direct opposition to their doctrine in the Spynie claim, instead of no concomitants obtaining *semel* et *simul*, with "*belting*," but that it intrinsically and exclusively operated *per se*, to the effect pretended, there *were*, over and above, both formal constitution of the dignity otherwise, and explicit "*mention* of (the) descent;" and further still, instead of the honour being only, by the accessory of belting, as here intervened, restricted to heirs-male of the body,—which they had inculcated, it was broadly extended to heirs-*general*. The words "ut *moris* est" are material in proving, what however every Scottish legal antiquary must know, that—whether actually specified or not—the accessory of belting held, *inter alia*, in the ceremony of every creation.

Of the Marquisate of Douglas in 1633.

The Act of creation or investiture of William Earl of Angus, in the Marquisate of Douglas, the 17th of June 1633, was by Charles I. sitting "in his chaire of State," in the palace of Holyroodhouse.[2] It consisted in that nobleman being brought in by the Earls of Linlithgow and Wigton, and

masis," and claimed "yair equal pairtis." (Act and Decree Register of the Supreme Civil Court.) The names of the knights created,—all persons of family, or authority,—*twelve* in number, and far more than usual on the ceremony of the creation of an Earl, either through the Queen's favour, or relationship of the party, are specially given in the process.

[1] Acts of Parl. last Edit. vol. II. p. 206. The form here was fuller than ordinary. In some parts of the Records of Parliament there are very summary entries, that such a person was created a Peer of Parliament; this evidently merely relates to the accessory of investiture, or inauguration, and does not constitute alone the substantive grant of the honour, as has been inadvertently supposed by some.

[2] Lord Hailes falls into a slight misapprehension in his remarks upon the Spynie case, (see Mr. Maidment's relative Pub. pp. 11, 12), in supposing "belting" only to have been performed in Parliament. This was not always the fact; it was often performed at Holyroodhouse, as in the present instance, and in others to be stated in the sequel—on the occasion of coronations too, as well as elsewhere, besides Parliaments.

"invested" by his Majesty "with the honourable ensignes of ane Marqueis by *putting* his *robbes* about him, *girding him with* his *sword* (the actual *cinctura* or *belting*), and *setting* the *croune* upon his *head*." Here again, belting was but an accessory; and if the previous legal dignitaries had only read so far from the legal cotemporary instrument, instructing the occurrence and ceremonies, from which I quote,—which is still extant in the Douglas charter-chest—or in some printed historical narrative, but a summary notice of the creation and belting exclusively,—as will be afterwards in reality verified in respect to Lord Rosslyn, in the matter of the Glencairn Peerage in 1797—they would at once have asserted, that the dignity, immediately taken thereafter by the noble investee, was only descendible to heirs-male of his body. But here, as repeatedly on other occasions, they would have grossly erred; for it turns out that there *was also* a patent, dated the *preceding* 14th of June, not restricting the honour, as they had done in their judicial, niggardly, and unjust interpretation of the descent, but elongating it to the former, "suisque hæredibus masculis et successoribus in *perpetuum*,"[1]—which the House of Lords would now infallibly interpret into "heirs-male whatsoever." But, moreover, it naturally happens, that the act of the Douglas creation instructs that his Majesty, on the occasion, *first* produced the *very* patent as the warrant of the investiture, which was afterwards delivered to the new Marquis —upon his knees,—just precisely as a superior or disponer would have done in a landed grant, when he infefts a disponee in such subject, "*propriis manibus*," by earth and stone. The same principle and form prevailed in honours and lands. Together with the previous ceremonies in the Douglas creation, and nomination, and declaration of the new style of the party, there followed also, on this occasion, as in the Spynie instance, the creation of knights, to the number of six.[2] In like manner, in the investiture of George Earl of Huntly in the Marquisate of Huntly in 1599, there were the above ceremonies observed, "*per gladii cincturam, ac* unam *cappam* honoris et dignitatis, et *circulum aureum super caput*," as stated in a

Of the Marquisates of Huntly and Hamilton in 1599.

[1] Douglas Charter-chest. [2] Act of creation, *ibid.*

document in the Gordon charter-chest,—while, by the fuller account of it, as well as of the investiture of John Marquis of Hamilton at the same time by Sir George Mackenzie,[1] there was the nomination of the style by the Heralds, and the creation respectively of four knights. And this wholly independent of the previous patents.

The illegality, nay, manifest injustice, however,—already perhaps sufficiently obvious,—that would follow from the mischievous and pernicious rule of Lords Mansfield and Rosslyn, founded upon the veriest assumption, may be even still more exemplified in the next instances.

Still more striking instance of the Earldom of Ross, and Barony of Ardmanach, in 1565.

Both Sir Nicolas Throckmorton, Queen Elizabeth's ambassador to Scotland at the time, and Sir James Balfour, Lord Lyon to Charles I. have transmitted to us—the first in an official State Paper,[2] and the latter in his MSS. Collections in the Advocates' Library, that Henry Lord Darnley, previous to his marriage with Queen Mary, was, in like manner, with Alexander first Lord Spynie, at Stirling, the 15th of May 1565, "made knight—*named* Lord of Ardmanach, and Lord of our Soveraign Ladys Parliament," and "*beltit* Earl of Ross," with creation of fourteen knights, which, as well as the nomination as stated, always obtained. If nothing more had transpired,—as might have well happened, from the loss of record, and distance of time, Lords Mansfield and Rosslyn now would have clearly had no hesitation, in the possible event of a claim—seeing the heirs-male of the body of the investee, whom they would alone regard, have long failed—to adjudge the dignity to be extinct,—thus to the manifest prejudice and exclusion, as is notorious, of *innumerable female* descendants.[3] What can be a clearer case they would have predicated, the honour *was* created or constituted by "*belting*,"—infallibly therefore "*without* writing, or mention of descent,"—"after which the person so created sat in Parliament, and his son sat also." The honour inevitably was only descendible to the above heirs; the matter is incontestible; for "if there be any thing certain in the law of Peerage, it is this presumption in

[1] Works, vol. II. p. 535.

[2] Published from the original in the Cotton Library, by Keith, in his Church History, (pp. 280-1.) [3] Including her present Majesty, &c.

favour of the heir-male."[1] Such is the "established rule now fixed and settled," &c. &c.[2] This is indeed *conclusive*, and high sounding language;—but here again these authorities would have signally erred, so that it is *vox et præterea nihil*,—however the same might have enured to their unjust and baneful purposes; for it happens, as before, that the charter of constitution of the said Earldom of Ross is extant, dated at *Stirling, the 15th of May* 1565, the *very place* and *day* of the *creation*, for which, like the Douglas patent in 1633, it must have served as the warrant, including the Barony of *Ardmanach*, and an erection of the whole into a "*Comitatum* et *dominium*," &c. and does *not* so restrict them, but, on the contrary, enforces the large substitution, "*hæredibus* de corpore suo legitime procreandis,"[3] confessedly to the corresponding heirs-female, and hence comprehending the vast range of heirs who have been alluded to. This, after the Polwarth decision, must undoubtedly follow, "hæredibus" occurring more nakedly than in that instance,[4]—if there is to be any consistency at all in Peerage practice, and the whole system is not to become an absolute jest and dead letter. The fallacy of the *ascribed* import of "*belting*" is thus reiteratedly exposed. There can be no doubt to every Scottish legal antiquary, in the absence of the contrary, that the honours were constituted by the above grant of the *Comitatus* of Ross and *Baronia* de Ardmanach. It is certainly futile and pre-

[1] See pp. 680-1, including *note*.

[2] See notes of Lord Mansfield's speech, *ap.* Mr. Maidment's Pub., Spynie case, p. 10.

[3] Great Seal Register.

[4] If it were necessary further to elaborate this point, I might appeal to the charter in the above Record, dated 25th of May 1565, of the *paternal* estates of Henry Lord Darnley, in Dumbartonshire, to him and the "heirs-*male*" of his body, whom failing, to "heirs-*male*" whatsoever, where these limitations are thus markedly opposed to that of Ross in his favour. There was an evident reason why Ross and Ardmanach, part of the patrimony of the crown, and hence like it previously descendible to heirs-general, should still, on the other hand, descend broadly in a corresponding way; and it so turned out, that the heirs of Darnley in Ross, &c. actually proved to be the Queen's,—while, in the Ross charter in 1565, there is, after the limitation to "*heirs*," a clause of return to the crown.

posterous to fancy, that the lands only, and not the former, could have been conveyed. Indeed, these twain authorities, Lords Mansfield and Rosslyn,—these Gogs and Magogs in Peerage law—have, in reality, admitted as much during their indiscreet and dangerous toying with the term *comitatus*—although, like certain individuals on such occasions, they have proved fickle and treacherous, and belied, and revoked their language in a different emergency.[1] But if any stress were to be laid upon their vacillating *self*-refuted doctrine, on this head, it would be at once obviated by this additional illustration, in the case of the previous august personage. The solemn act of creation, further, in the same way, of Henry Lord Darnley, *now* styled "Erle of Ross, lord Armanoch," as "*duk* of *Albany*," obtained "with greit magnificence" at Holyroodhouse, the 22d of July 1565;[2] and in more conclusive still, and plainer refutation of the "*fratres* gemelli, *lucida sidera*" in question, it is in proof that there *had* passed a royal charter, on the 20th of July immediately before, "Henrico Comiti Rossie, Domino de Ardmanach," of "totum et integrum Ducatum Albanie,—*cum* omnibus *honoribus*, *dignitatibus*, &c. ad *nobilissimum* Ducatus *statum* pertinentibus," with a limitation, not restrictedly, to heirs-male of the body, but again, as in the Ross charter, "*heredibus suis* de corpore suo legitime procreandis,"[3] and as indisputably, to heirs-*female*. I need not here repeat the same obvious remarks in regard to this instance, where the literal insertion of the words "*honours* and *dignities*," agreeably to the practice that was beginning to be more usual,—though not superseding the former,—removes any possible cavil as to its application and relevancy; and the

And even more so, of the Dukedom of Albany in 1565.

[1] See pp. 603, 259, &c. By the way, Selden says, that "under the words of *Comitatus* Leycestriæ"—after the middle of the 13th century, "the *dignity* of Earl is here comprehended." (Titles of Honour, p. 542.) So Lord Mansfield, independently of Lord Rosslyn, being thus also unsupported, and abandoned by high English legal authority, is left quite a wreck, in his opinion at one time, as to the import of "*Comitatus*," and cessation of the territorial principle in 1214; for the feudal practice anciently, so far, was much the same in both kingdoms.

[2] Curious cotemporary Pollok Chronicle, lately printed, p. 79, and Sir James Balfour the Lord Lyon's *autog.* intimat. Ad. Lib.

[3] Great Seal Register.

Final conclusion as to "*belting.*"

obtained indifferently in every grant of honours, as an ingredient of the investiture,—as much when to heirs-female, or to heirs-male whatsoever, as to heirs-male simply of the body; —to which last, however, the fictitious rule of the former—in reality a mere bugbear—would, unnaturally and arbitrarily, limit it after the fashion of the bed of Procrustes. It was, indeed, *per se*, no fixed, or technical test or criterion at all, as they would have it, of the inheritance and descent of a dignity.

Occasional solitary specialty peculiar to "belting," as opposed to infeoffment.

One singular specialty, however, applied to the act of investiture or creation, that, unlike investiture in land, it sometimes—probably for the purpose of securing additional pomp and solemnity, or for the convenience of the Sovereign, the sole fountain of honour—preceded and anticipated, at a coronation, royal marriage, or great public occasion, the written grant or patent, (which however always past, and must be so presumed to have done, one time or other,) as in the instance, which was shewn, of the dignity of Lord of the Isles in 1476.[1] The Earldom of Caithness, in the Crichtons, may also have

Curious instance of Dukedom of Rothsay in 1594.

Parliament,) the 5th of July 1633. (See Annals of Sir James Balfour, the cotemporary Lord Lyon, vol. IV. pp. 368-9.) And the previous patents, dated the 25th of May, and 24th of June, in the same year, are recorded in the Great Seal Register. Prince Henry, eldest son of James VI., at his magnificent christening in 1594, in the *Chapel Royal* of *Stirling*, was invested in the dignity of Duke of Rothsay, &c., with all solemnities, a ducal crown being placed on the tender head of the infant,—who moreover was *then knighted*, and *named* accordingly; but even supposing there had been no recent *written* confirmation of the dignity, the act would still have been warranted by its original constitution, certainly after *that* form, in 1398, whereby, as has been shewn, (see pp. 263-4,) it was expressly limited "*all tym* (to) ye kingis eldeste sone, and his air,"—*seriatim*, and in this precise way, "Principibus primogenitis Regum Scotie." The form of the inauguration in question is attested by an autograph account in 1627, of the previous Lord Lyon, in the Advocates' Library,—and by a still fuller one, well known, published in the second volume of Nisbet's Heraldry, giving the names of the *sixteen* knights created, conformably to the constant form. (See new Edit. vol. II. under *Exter. Orn.* p. 151, *et seq.*) It is further observable, that by the *original* constitution of the dignity of Rothsay, the Stewart's lands, and various others, were also passed, which could only be by charter *applicable* to the whole. (See Winton, Macpherson's Edit. Vol. II. p. 381.)

[1] See pp. 571-2-3.

been in this situation. According to the old and curious Auchinleck Chronicle, in the Parliament in 1452, "Sir George of Crechtoune was *beltit* erll of Caithness," when, it is added, he "annext all his landis to ye erldome of Caithnesse."[1] And he got a royal charter, with consent of Parliament, dated 8th of July 1452, under the description of George Crichton "Earl of Caithness," incorporating and uniting, upon his express resignation in Parliament, all his lands to the "*comitatui* —et regalitati" of Caithness. Nor is the limitation, as Lords Mansfield and Rosslyn would have again maintained, from the "*belting*," to heirs-male of the body,—but immeasurably broad, namely, to the disponee, "et *assignatis* suis."[2] The investiture of the Earldom of Winton, would appear, from the patent, dated 16th November 1600,[3] to have been at that very time, or rather immediately before; for the King therein says, that "dictum *Robertum*," *(Dominum Seton, the patentee,)* "per *cincturam gladii*, ac unius cappæ honoris, et dignitatis, et circuli aurei, circa caput positionem, *insignivimus investivimus*." In the case of the Earldom of Arran however, that has been alluded to, the investiture was, as ordinarily, subsequent; for the patent, dated the 28th of October 1581, has a promise "*verbo* regio," that *this* "*constitution*" "cum omnibus *solemnitatibus requisitis*, erit sine mora, perfecta, et completa."[4] The *previous* circumstance, has additionally given rise to the palpable fallacy, on the part of Lords Mansfield and Rosslyn, and certain ignorant solicitors, and legal subordinates, that the *supervening* charter of *substantive* constitution, when bearing to be but simply of a "Comitatus,"—at the ancient and due time for the *opposite* effect, had no reference to the honours, but in the hacknied, preposterous notion operated but as a conveyance of the lands. It also explains another thing, that has equally misled, and been held by *tyro* antiquaries, in certain instances, absolutely to rivet the conclusion,—from the dignity necessarily in such a case being given to the disponee, in the preamble of the

Instances of Earldoms of Caithness and Winton, in 1452, and 1600.

That of Arran, in conformity to usual practice.

Errors and fallacies into which Lords Mansfield and Rosslyn, and subordinate practitioners, have here fallen.

[1] Original, in the Auchinleck Charter-chest.
[2] Great Seal Register, and Acts of Parl. last Edit. vol. II. p. 75.
[3] Great Seal Register.
[4] *Ibid.*

charter.[1] This was clearly owing, as indeed in part formerly illustrated, to its assumption immediately after the act of creation,—whensoever timed,—the *name* and *style* of the honour in favour of the party, and his heirs, being *then* solemnly *given*, and proclaimed by the heralds by sound of trumpet, to be in them,—in virtue of the attendant form of nomination, which is of itself here conclusive,—as in the instance of Spynie and others.

Further obviated, in a certain instance.

First trace of the error as to "belting."

The cherished conceit as to the visionary, *conclusive* effect of *belting*, in determining Peerage descents, was a rank and baneful exhalation that arose out of the dregs of the Cassilis claim, where it was ventilated,—then flatly rejected,—and most *consistently*, as has been seen, even at that time, by Lord Mansfield. It further drew forth this pointed refutation by Lord Marchmont, who spoke rather ably on the occasion. He stated, "that the counsel, in arguing in this case, had been guilty of great mistakes, particularly in saying that a Peer could be created in Parliament by cincture,—the *cincture* was *merely* a *symbol*,—it was a general rule, there could be no Peer *without writ*,—symbols were very ancient, and prevailed in all ages; they are mentioned in the Bible, in the case of swearing."[2]

Even exposed by Lord Marchmont in Cassilis case, in 1762.

His Lordship then alluded to the account by Sir George Mackenzie, "concerning Peerage, and the solemnity of investiture, and said that it appeared that the *patent* was *always* carried (over and above), which shows the patent then existed. That it appeared, after the solemnity of investiture wore out,

Instance of Earldom of Glencairn, in 1488.

[1] In the same way, it is to be presumed, in the valid charter of erection, at the time, of the *dignity* of the Earldom of Glencairn, together with lands, dated 28th of May 1488, the grantee, although previously Lord Kilmaurs, and a Lord of Parliament, is called, at the outset or preamble, "*Alexander Earl of Glencairn*, and Lord Kilmaurs." (Original, produced in the Glencairn claim in 1797.) And after such precise form, the disponee, in the same place, is styled "James Lord of Hamilton," in the charter of erection by the King and Parliament, dated the 3d of July 1445, of certain lands into the lordship of Hamilton, with a hereditary lordship of Parliament. (Acts of Parl. last Edit. vol. II. p. 59.)

[2] This, in regard to a mutual obligation, has been illustrated also with us, under the head of Consistorial Law, (see p. 482, *n.* 1.)

the modern patents contained a particular clause dispensing with the ceremony of investiture.—He said there could be no investiture *without* writ. That *the Lords of Erection* were *all* made by charter,"[1] that is, be it observed, undoubtedly such Lords as the first Lord Spynie in 1590, and 1593,—fully refuting Lord Mansfield's absurd finding, excluding its operation in his case, and attributing all to belting,—and who, as has been proved, obtained his honour by actual charters of erection in these years.

Feeble and irrelevant attempt of Lord Mansfield to prop up his *renegade* heresy as to "belting."

But withal, apparently conscious of the weakness and fragility of his visionary pretence upon this head, Lord Mansfield—as in the case of a sinking man and argument—is fain further to prop and sustain himself by the mere agency of a straw, nay, with even less than one. It seems that there passed in 1606, in the year before his demise, a grant of the comparatively insignificant property of Burnside, to Alexander first Lord Spynie, and to his "heirs male, and assignees whatsoever,"—nay, three grants of other *portions* of lands,—*long* after that date, in 1623, 1624, and 1631, in favour of Alexander *second* Lord Spynie, *his son*, and to the heirs-male of his body; and, by means of *these*, he seeks to shake and control the regulating descent of the Spynie honours, fully constituted as far back as 1590 and 1593, in virtue of the Spynie charters mentioned, and to restrict it, *through* co-operation with his wild induction from "belting," to the latter heirs.[2] In respect to the Burnside grant, the noble disponee might have naturally intended thereby a provision to his heirs-male of the body by a second marriage, who, as is evident, would have been excluded from the large Spynie inheritance by a full sister of a *son* of the first, *who* died in *possession*, and by her descendants; or he might even, though less probably, have meditated an alteration in his general succession, precluded by his sudden murder in 1607, but which, being truly an inchoate step, and never completed, could not prejudice the original heirs. Heirs-female too, might still have been called, in virtue of the term "assignees" in the Burnside limitation. Neither can the circumstance in question, at the *most*, or in *any* view, be

[1] See Mr. Maidment's Pub. in regard to the Cassilis case, pp. 41-2.
[2] See Mr. Maidment's Spynie Pub. p. 11.

deemed material,—it being by no means unusual for a person thus to have his principal and inferior successions or properties differently destined in the 16th century. Indeed a parallel, though much more striking instance, has been already given,[1] in the case of Henry Lord Darnley, where, while the Dukedom of Albany, and the Earldom and extensive fief and feudal dependencies of Ross and Ardmanach were, evidently in virtue of the charters in 1565,[2]—in a corresponding manner with Spynie—to go to "*heirs*,"—heirs-general of the body, his Lennox or Dumbartonshire estates, *e converso*, by another, immediately after, in the same year, stood limited, still more exclusively than Burnside, to heirs-*male* of the body, whom failing, to heirs-*male* whatsoever.[3] In this last way, even an heir-male collateral would exclude a daughter;[4] and I conceive he must be a bold person indeed who will maintain that heirs-general did not take under the *first* charters. With respect again to the remaining grants noticed, founded upon by Lord Mansfield, from 1623 to 1631,[5] nothing can be imagined more absurd and preposterous, than their adduction,—they being merely taken by the *second* Lord, without reference to Spynie, or the acts or conveyances of the first, and at so remote and unconnected an epoch, when, inasmuch certainly as regards the honour, or the original Spynie succession, they must be allowed, on all hands, to be wholly foreign and irrelevant.[6]

Here again signally ambidexter.

But come, Lord Mansfield, we might thus apostrophize this legal dignitary:—You are here again signally ambidexter—you here, it turns out, actually *do* avail yourself of conveyances of lands—nay, even but of secondary ones, at any rate of collateral landed grants, expressly exploded by your associate, Lord Rosslyn, in principle, in his view of the Spynie case,[7]—to control, actually to determine the descent of an honour! In-

[1] See pp. 688-9. [2] *Ibid.* [3] See p. 688, *n.* 4. [4] See p. 678.

[5] They carried the acquisitions of Carrieston, dominical lands of Leyis, and Barony of Finhaven, Forfarshire.

[6] This last argument or *ratio*, prudently reserved for mere passing oral enunciation, was, with others, it will be remarked, not ventured to be included in the Spynie resolutions in 1785. (See. p. 672.)

[7] See p. 681, *nota.*

dependently of your utter rejection, absurdly enough, of the territorial rule, so *very* far back as 1214,—how can you possibly reconcile this with your strikingly conflicting and peremptory finding in the Sutherland case, "penned" with your own hand in 1771, applicable even to the 14th and 15th centuries, when, differently from the 17th, personal grants of honours were unknown, and there subsisted a far stronger, nay, the strongest mutual connection and dependence between them, and lands, that charters of a "*comitatus*," nay, further, along with a regality, did "*operate—but* as conveyances of the estate *only*,"[1] without having the least relation to, or any way controlling, or affecting the descent of the dignity? And this although they necessarily involved the most exalted dominion and pre-eminence, and the very stamina and essence at least of family authority and representation! Such was your Lordship's decision, in the face of a strong, and, as is conceived, irresistible argument to the contrary. Can it, for a moment, be pretended,—that *such* charters of a comitatus, with a regality to boot, did not *then* fall, *a fortiori*, at least to affect—if not to determine—as the best Scottish legal antiquaries decisively maintain, the devolution of the relative honour, if the conveyances of the fief or territory are to be at all listened to;—and yet you, in this manner, by a flagrant dereliction of principle and opinion, now, on the other hand, attach imperative importance—as ruling the descent of a *modern* honour, to *far* inferior, irrelevant grants of isolated fragments of lands, not connected with the paramount and baronial fief of Spynie, and much less with a comitatus,—while the Spynie dignity, besides, is shewn, even by the Balysak charter in 1621, to have been admitted to be then personal and not territorial! These grants, of a truth, must weigh as a mere drop in the bucket, compared with the *ancient* and insuperable charters of a comitatus referred to, which you, however, *in precisely* the *present* view, did *most consistently*, when it suited your purpose, scout and disregard—upon what grounds, I shall not stop to re-expose, in the Sutherland instance in 1771. But pray; if, as you *now* think, the estates of the

His effort quite in the face of, and at variance with, his law in 1771.

[1] See p. 697, including what precedes and follows.

Spynie family are to be thus taken in *computo* and into calculation, ought not the actual descent of the *entire* and princely fief of Spynie, after which the honour was named,—containing, with a regality, so many lands and patronages, in *terms* of the relative grants of the peerage—*rather* more *relevantly* come into play, and turn the scale in favour of the heirs-general? They far indeed counterbalance any effect derived from the petty irrelevant charter of Burnside in 1606, at the distant period of the premature demise of the first Lord, which precluded him from completing any alteration, if he contemplated such, in the main succession. Then, besides, adopting Lord Mansfield's exploded criterion in 1771, but now pressed into service, are we to shut our eyes to the confirmation by Patrick Wood of Bonyton, dated July 3, 1601, of the grant, the 4th of November 1597, by Robert Guthrie, of the valuable property of Kinblathmount in Forfarshire, in favour of the first Lord, taken thereby, precisely as in the case of the Spynie charters, to himself and the "*heirs*,"—thus the heirs-general—between his Lordship, and Jean Countess of Angus, his wife,—with the same ultimate remainder,—which is repeatedly and uniformly given, both in the original grant and confirmation ?[1] And, by the way, this moreover is *another* admirable illustration and confirmation of his Lordship's notable and *veracious dictum*, in his speech in the Spynie case, that "*all*" the grants to the first Lord Spynie were to heirs-male![2] The above shows the utter straits and misrepresentations to which the former was driven in supporting the glaring fantasy and anomaly in respect to belting. And after this I need not recur to the important Polwarth decision in 1835, likewise conclusive on this head, and in direct refutation of Lord Mansfield, where the grant of the Barony of Polwarth in 1690—abstracting from *every other* consideration, as has *been* seen, under the natural *female* interpretation assigned to the term "*heirs*," (as in the Spynie grants), effectually resisted the *counter*, jarring limitation at the time, and invariably, not merely of a pendicle of land, but of the whole baronial fief of Polwarth, and family estate, in favour of heirs-male, to the ut-

Refuted, upon his own notion, by the Spynie case.

Glaring inaccuracy of Lord Mansfield.

His doctrine refuted again, *a fortiori*, by the Polwarth precedent.

[1] Spynie Charter-chest.

[2] See Mr. Maidment's Spynie Pub. pp. 10, 11.

ter exclusion of females. The heirs-female, in this manner, in virtue solely of the term "heirs,"—under the most untoward and conflicting circumstances, in the view in question —on Lord Mansfield's *renegade* rule—had, notwithstanding, their right at once admitted; and if so, *a fortiori*, through the merits of this precedent, as has been made evident, that of the Spynie heirs-female should have been still more sustained.

His special pleading and incongruities.

Like a special pleader, more than a Chief Justice, ultimate Judge, (as proved,) or one who discharges *exactum discrimen*, as he was imperatively bound, his Lordship took advantage of the strange admission in 1785 by the counsel for the Spynie claimant, that the charter 1590 was wholly impotent as to the dignity;[1] from whence, as the necessary result was, that it must have been otherwise constituted, it was *therefore* exclusively, by his *now* favourite, though *formerly* exploded method of "belting;" and *therefore* descendible alone to heirs-male of the body—thus at once solving the matter.[2] And this, although he, at the same time, coquettishly allowed a curious, nondescript, unintelligible, and, in fact, *self*-contradicted influence *quoad* the honour, to the Spynie act and charter in 1592, and 1593,[3] on the other hand, however, *de plano*, the immediate organs of its constitution, and validating, and definitely implementing the true original, but utterly discarded grant, (including the act of creation,) in 1590—as I fearlessly maintain, and which I conceive no modern lawyer will now be disposed to dispute. With respect to the subsequent Ballysak charter in 1621, he affirms, "no *variation* (was) intended either to lands or *honours*," and there was "*no* pretence (thereby) for a new creation."[4] Certainly for once, rather inclining to his Lord-

Spynie act and charter, in 1592 and 1593.

[1] See pp. 655-6. In accordance with this, the former said in his speech, "The claimant founded on charter 1590 by petition and case, *now admitted* (by his counsel) that this charter has *nothing* to do with Peerage. *No other instrument of original constitution* appears," &c. (Mr. Maidment's Spynie Pub. p. 10.)

[2] "Honour created by belting, *without writing* or mention of descent." *(Ibid.)* He likewise so expressed himself in his Speech, as is moreover proved by other concurrent authorities.

[3] See resolutions in 1785, p. 672. It is very clear, in any view, if at all listened to, that they, *e converso*, refute, through their limitations, the alleged constructive effect of the belting.

[4] Mr. Maidment, *ut sup.* p. 11.

ship, I *might* admit that there *possibly* was no *intention* (though there then, as is evident, must have been, so far, a clerical error, as is besides *aliunde* discoverable in this faulty conveyance) to vary the descent of the honour, and which at any rate such error cannot legally do—however differently as to the lands;—but here again too, he has in this emergency his fictitious, never-failing, and hacknied explication by "belting," *in promptu*, to the exclusion of every relevant consideration, by which, like the sword of Alexander in the case of the Gordian knot,—or rather more appositely, like the homely, and equally hacknied,—but truly far more effective and serviceable rapier and blade of Hudibras,[1]—he, accordingly,—and Lord Rosslyn after him,—both here, and elsewhere, relieves himself from all difficulty, and cuts every thing short.

Lord Mansfield flies in his emergencies to his hacknied explication by "belting."

The absurd, rash, and arbitrary restriction, by Lords Mansfield and Rosslyn, of the Spynie honour to heirs-male only of the body, also most unjustifiably and illegally, barred the obvious rights of *numerous other* parties, in a different character, who were not in the field, and to whose interests the former, even according to their professed principle of general expediency and utility in determining peerage claims, were imperatively bound to have attended. Of these principally were the noble family of Balcarras, the direct heirs-male of the original Earls of Crawford, who certainly took, far *more* irresistibly indeed than the *adjudged* "Colvil" collateral claimant in 1723,[2] however even the first might have been construed, under the broad closing limitation in the definite Spynie grants to "heirs-male whatsoever,"—Alexander Lord Spynie, the grantee, being a younger son of one of the Earls alluded to. After Balcarras, and Lindsays of Evelick, &c. there moreover came

The absurd arbitrary restriction by Lords Mansfield and Rosslyn of the Spynie honour only to heirs-male of the body, unjustifiable, also barred the undoubted right and claims of numerous *other* distinguished families not in the field, and whose interests should have been consulted.

[1] "It was a serviceable dudgeon,
Either for fighting, or for *drudging*,
When it had stabb'd, or broke a head,
It could scrap trenchers, or chip bread,
Toast cheese or bacon, though it were,
To bait a mouse-trap, 'twould not care,
—— Set leeks and onions, and *so forth*," &c. &c.

[2] See p. 354, *et seq.*

the ancient Lord Lindsays of the Byres, Earls of Lindsay, forming the *later* house of Crawford, with their cadets, also *male* heirs of the old Crawford stock, and others superfluous here to specify, but whose existence, notorious to most persons at least, ought ever legally to have precluded the unauthorized conclusion in question, to the effect of extinguishing the Spynie honour.—But, by the way, the Colvil decision in 1723 has nearly escaped me, which the preceding legal dignitaries either knew, or ought to have known. It comes here indeed most righteously into play, and is directly in the face of, and impugns, that of Spynie,—for there, a single charter of the ecclesiastical lands or patrimony of the Abbacy of Culross in 1609, erecting them into a temporal Barony, like the Spynie conveyance in 1590, or 1593, with the title of "Lord Culross," was *de plano* adjudged, *per se*, to be effectual, and, however strangely, as has been shewn—and sufficiently laiden, as it was already—by some miraculous agency, to have the power of transmitting a *distinct* extraneous dignity which it did not own, or bear *in gremio*. And this, moreover, under unfavourable and concussing circumstances before familiar,[1] and to be further, in the sequel, in respect to its *exclusive* and *ostensible* honour of "*Culross;*"—although no relative act of creation and belting obtained in the case of the *latter*—no sitting, accordingly, in Parliament—no *express* and *special* Parliamentary ratification of the *Peerage*—no admission or matriculation of *its* constitution by the Lord Lyon—no proof, in fine, of such *individual* grant—which the law is ordinarily disposed to question, and regard with jealousy,[2] ever, so far, having been properly recognised and acted upon; —all which important requisites and ingredients, however,—including besides the royal promise and warrant, as to the grant of the *actual* dignity at the outset in 1589, with the second Parliamentary reservation in regard to the fief in 1593,[3]—*e converso*, *did* favourably hold in the affirmative in the Spynie instance,—while a long non-assumption, previous to 1723, the date of the decision, could be equally objected to the other. With submission, it seems impossible ever to admit the *Colvil*

Remarkable case of Colvil in 1723, still more shakes and refutes the Spynie decision.

[1] See *ibid.*

[2] See pp. 238, *et seq.* and pp. 245-6-7-8-9.

[3] See p. 660.

Impossible to admit the former, without also admitting Spynie claim, at least, so far as regards the matter of constitution.

decision (as it has been styled,) without admitting *a fortiori*, — as regards the matter of constitution at least, in virtue of the charters 1590, 1593, &c. with the ratification, &c. the preponderating excellence of the Spynie claim, the just effect and import of which grants, nevertheless, Lords Mansfield and Rosslyn have utterly disregarded, and at once sacrificed to *their* conceit of "*belting*,"—the most visionary and preposterous imaginable. I further conceive, we may certainly conclude, that if the Colvil—or *Culross* claim, as it should have been, —of the true merits of which they were probably ignorant, had come originally before them, they would have resolved, in the first place, that as the mere and *all deciding* act of creation, or "belting"—as they would have viewed it, in 1604,[1] of the indisputable Barony of "*Colvil* of Culross," (wrongly and irrelevantly claimed and awarded in 1723, instead of that of "*Culross*," which was *alone* contained in the *grant* founded on), is but simply transmitted to us,[2] it was thereby exclusively descendible to heirs-male of the body, and consequently extinct, the claimant being only an heir-male *collateral;* and secondly,—inevitably after the fashion in Spynie,—that the said grant or charter of the Barony of "Culross," (alone) so founded upon, in 1609,—being correspondent in terms, as obvious, with those of Spynie in 1590, and 1593, in the hacknied and prostituted language of Lord Mansfield, as it may be held, did *not* affect the title, but *operated* as a conveyance "of the estate only." In this manner, the claimant being placed between two fires, would have had as little right to the latter evidently, as to the former. I need hardly here repeat, that according to English technical accuracy, independent of the other considerations, and proof,—as was instructed,[3] the Barony of "Colvile of Culross" is clearly different from that of "Culross." This is moreover fully fixed and illustrated by our practice, in the case of the two baronies of "Polwarth," and "Polwarth of Polwarth," that may be held still nearer to approximate in the description, and constituted, in like manner, by

Lords Mansfield and Rosslyn, upon their principles, would have rejected the Colvil claim, in 1723.

[1] Of course, there has been then a previous *relative* written grant, now lost.

[2] See pp. 356, *et seq.*

[3] See p. 367, and *note* 2.

two separate grants in 1690, and 1697,[1] but which indisputably are distinct, and now descend in terms of their limitations,—as admitted on all hands—the one to heirs-female of the body, and the other to heirs-male whatsoever.

Further, and striking contrast between the cases of Colvil and Spynie much to the advantage of the latter.

But I have not even yet done with the Colvil or Culross case,—the contrast between which, and that of Spynie,—still much indeed to the advantage of the latter,—will be even further palpable on a little more probing. On the 9th of October 1616, as out of distrust, and justly so, of the Culross charter in 1609, there past, upon the resignation of James "Lord *Colvil* of Culross," (thus the constant style, and not that of "Culross" *simply*), a charter of the barony and estate of Culross, in favour of James, son of Robert "Master of *Colvil*," (not "of Culross,") his grandson, and his heirs-male,[2] only under the caschet, as it proves, and hence not available in any view, *quoad* the dignity. But at length, in 1617, and not till then, there *was* a brief summary parliamentary ratification, not however to be compared, in weight, or authority, with the express Spynie Act in 1592, of the previous Culross charter in 1609, taking no notice of the *interloping* grant in 1616, and again so different from what had obtained in the Spynie instance, without at all mentioning the honour. And this ratification, besides, lets out this important fact, that the patrimony of Culross had been *previously annexed* to the *crown*,—so in law was *not before* capable of being granted to any one;—to remedy which fatal objection therefore, and, for the first time, legally to disannex—the ratification, in 1617, for such identical purpose, was naturally resorted to.[3] It thus happens,—neither the fact of the annexation, in virtue of the Act 1587, being noticed in the Colvil claim, and decision in 1723, and the salving Act, as little founded upon, or referred to

Supposed regulating Culross grant in 1609, as viewed in 1723, null and inept, and hence glaring error of House of Peers.

[1] See pp. 673-4.

[2] Great Seal Register.

[3] Acts of Parl. last Edit. vol. IV. p. 569. The Act, "be the tennour heiroff, annulles, dissolvis, and infringis the said general annexatioun, (by Act 1587,) of the Kirklandis of this Realme to the *croune*, in swa far as it may be extendit to the temporalitie of the said Abbacie of Culros." The party here, as constantly, is styled "James Lord *Colvill*," or "*Colvill* of Culros." An unavailing attempt, as is extremely obvious, had been made, *de facto*, with the same view, in the charter 1609.

in either,—but only the, *per se*, impotent charter in 1609, as their exclusive warrant, that the House of Peers not only then granted an honour, in terms of a charter that did not contain it,[1] but of one which, so viewed, and situated, was clearly, from the flaw attaching to it, by reason of the annexation, a legal nonentity, and dead letter.[2] But again, as in the special effective Spynie ratification in 1592,—so closely following, and directly curing the corresponding defect in the Spynie charter in 1590,—the Culross ratification, further, "*ordanis* ane *new* infeftment to be maid and gevin off the *samen*, (the *Barony* of Culross,) to ye said James Lord Colvill of Culross, his airis maill and successoures heretablie, to be *extendit* in maist ample form, with all clauses *necessar*;"[3]—yet it actually does happen, that this order and enactment, so salutary and incumbent to vest a clear unexceptionable title—necessarily through a new charter under the sign manual, and infeoffment,—while such identical one, to that precise purport and effect, as we have seen,[4] *was* instantly resorted to and fully implemented in the Spynie instance, (in 1593,)—never received the slightest obedience or operation—so far as I can find, in that of Culross.[5] Here then was *another* deficiency,—the new salving Culross conveyance, grounded upon absolute necessity, being in a manner still inchoate, and never adequately and technically perfected, while, I repeat, the direct reverse triumphantly obtained in the *other*;—so that I may conclude, the Spynie case both here, and obviously elsewhere, in the view taken, is in a far more favourable predicament, and infinitely transcends the case of "Culross"—I beg pardon, I should say, in conformity to the Lords' decision in 1723,[6]—though I know not why—that of "*Colvil* of Cul-

Other deficiency in Culross grant, as contrasted with Spynie case, which is both here, and elsewhere, preferable, and stronger.

[1] See p. 354, *et seq.*

[2] Wallace, who ought to have known better, in the same way held the charter *alone* completely to suffice, and to justify the anomalous Colvil decision, which, in his Treatise upon Peerages, published in 1785, (see pp. 371-2,) he represents as wholly warranted by it, without noticing any other grant or adminicle.

[3] Acts, *ut sup.* [4] See pp. 659-60.

[5] I have stated all I can discover regarding the curious Culross case. If I am guilty, inadvertently, of any error or misconception, I need not add, I shall always be most happy to admit and amend it.

[6] See also report of the case, p. 354, *ut sup.*

ross." [1] Nevertheless, however, in these circumstances, the *solitary* inefficient charter,—as standing *alone* merely,—in 1609, was found, in the irrelevant and bizarre manner stated, *fully* to operate as a Peerage constitution,—although such identical effect was utterly denied by Lords Mansfield and Rosslyn, in 1785, to the far preponderating, and unexceptionable title, in virtue of the Spynie *charters* in 1590 and 1593, *with* the *relative* accessory of creation, *backed* by the express Parliamentary ratification in 1592, actually then *adduced*,—not to allude to the repeated feudal investitures in 1590 and 1593! [2] With submission, I conceive, a piece of actual injustice is ex-

[1] It may be also observed, that the title of Spynie continued on the Union Roll, while that of Colvill had been removed from thence, and was only added to it in 1723.

[2] The early Culross charter in 1589 (see p. 355) is clearly quite out of the question. Among the other objections also to its validity,—while no act of creation, sitting in Parliament, possession, or even *assumption* of the dignity followed, as in the instance of Spynie, after, and in virtue of the charter 6th of May 1590—evidently, as applied likewise in the case of certain grants of the kind, from peculiar intrinsic nullity, (see p. 356, *et seq.*)—there was the *conflicting* interest and title "*hereditarie*," in the patrimony conveyed—again independent of its previous annexation to the crown by Act 1587—in the person of John Colvil, "Commendator of Culross," upon whose indispensable resignation, the charter 1609 at length proceeded and passed. It is moreover proved by the Record of the Great Seal, that Alexander Colvil, "Commendator" likewise, the father of the preceding John, the Commendator,—alive in 1589, and years after, had, in 1566, obtained the whole benefice of the Abbacy of Culross for life. This was of itself another bar, and together, with the title in the son, before its voluntary surrender as stated, further excluded, *inter pares*, or subjects, at common law, the legal efficacy of the conveyance in 1589 to the disponee, a distinct Colvil. In these circumstances the Culross charter 1589 never can be put into competition with that of Spynie in 1590—where, besides, no such confliction of titles, but one only existed, the *defect* in the latter instance from the annexation, being fully removed by the Parliamentary ratification in 1592, coupled with the charter 1593;—but the *same* in the *previous* Culross charter *never* was. It was legally, on this, and the other accounts, inept and invalid from its birth, and ever afterwards; while I need not add, that the act of creation of the Barony of "*Colvil* of Culross," in 1604, (see p. 360 and what precedes there,) could thus, independently of relating to another dignity, and grant of Peerage—as by the striking description—have no influence upon, or connection with the charter 1589.

emplified in the Spynie instance, solely to be attributed, like other objectionable precedents and decisions noticed, to the rashness, bigotry, and legal ignorance of the preceding judicial authorities,—who ought to have been fully aware of the Colvil merits, ought thoroughly to have explored the general subject,—and taken the various circumstances *seriatim* into consideration,—in order, in their imperative bounden duty and capacity, to a matured, consistent, and uniform system—instead of the perplexing chaos, and incertitude into which they have plunged our Peerage law, here, as well as elsewhere,—and the anomalous, irreconcilable, and revolting situation of the two dignities in question. And I especially again contend—whatever may obtain in other respects, in regard to interpretating the Spynie limitation, whether justly, by the success of the Polwarth decision, conclusive as it is in practice,[1] or not—that the *rationes decidendi* in 1785, grounded upon *belting*, and the asserted *non*-operation of the Spynie conveyances in 1590, 1592, and 1593, *qua* grants of *Peerage*, never can in reality stand in law ;—but must ever be considered a professional stigma and reproach to Lords Mansfield and Rosslyn. Neither can we shut our eyes to the certain, manifest injustice, as has been stated, done again, necessarily at the same time, to numerous undoubted Spynie heirs, pre-

Conclusions.

[1] It was obviously, at least, *quite as* relevant in the Polwarth case, to look, for explanation of the term "heirs," to the Marchmont and "Polwarth of Polwarth" patents in 1697, granted to the *actual* original disponee in 1690, and his heirs-male *exclusively*—grounded upon the consideration of intention, which, however, was not done,—as in the Spynie case, with the same view, to the inept Ballysak charter in 1621, not in favour of such material party, but at a remote and unconnected period indeed, only of his *successor*.—*A propos* to the charter 1621, *ostensibly*, but ineptly carrying an honour, (see pp. 670-1), a noted Act of the Scottish Parliament in 1695 for a company to trade to Africa, (Acts, last Edit. vol. IX. p. 377,) with a royal charter in terms of it, was held legally ineffectual, because "*without* a warrant from the *crown*." (See Dalrymple's Mem. of Great Brit. p. 96, and Vernon's Letters, recently published, vol. II. p. 303.) This confirms what I have said as to such Acts and grants—of a *higher* kind—having unduly passed, without *real* adhibition of the requisite royal authority, during the union of the crowns.

ferable to those in the yet *favoured* Colvil instance,—who were noways in the field.[1]

[1] The Spynie case is the last of the kind that Lord Mansfield (fortunately) is understood to have been instrumental in deciding. He died in 1793, and thus left a field for which he was ill qualified, and into which he should properly have never trespassed. The very unfavourable impression we derive of him from Andrew Stuart's celebrated Letters in the Douglas cause, as to his inconsistency, unsoundness, vacillation or obliquity, if I may use the term, in matters of evidence, and marked want of fairness, just analysis, and discrimination in balancing their merits, strikes me, I regret, as tested in his Peerage procedure, to have been true. His friend Butler even intimates, what would seem to have been just, that it was "argued, that his knowledge of the law was by *no means profound*, and that his great professional eminence was owing *more* to his oratory than to his knowledge. This (he adds) was an early charge against him. Mr Pope alludes to it," &c. (See *Hor. Jurid. Subseciv.* pp. 222-3.) To the *tender mercies*, as has been seen, therefore, of a shallow lawyer and sciolist, was the arbitrament of our knotty Peerage law committed. His Lordship's motley and tattered Peerage mantle, but a flimsy covering and subterfuge indeed for glaring errors, descended to Lord Rosslyn, who hugged himself in it, to the disappointment of many who expected better things, with an amelioration of that law and doctrine, which, as superficially and fictitiously modelled by his predecessor, he is *repeatedly* stated, by unexceptionable authority, at one time to have condemned. Such returns did we experience from these *fratres gemelli*, these *Scoti Anglicati*, the last formerly with us but a bad epithet (whatever it may be now), and so used in our Chronicles; but unfortunately verified, in such sense, with every *et tu Brute* consideration in their instance. And yet, as Sir Adam Fergusson, a great lawyer in his time, said, Lord Mansfield's law is "every day" extolled, and "rung in our ears," though, he pertinently adds, "by those who know nothing of it;" while Chalmer, the solicitor,—it must, however, be confessed, but a poor authority and discriminator,—while idolizing Lord Rosslyn, affirms that he "knew *more* of such matters than *any* man." (See p. 384, *note* 3.) As if this, forsooth, truly obtained, and either of the above were at all *au fait* therein, or for a moment could be compared with the late Lord Redesdale, in point of indefatigable, strict, and recondite investigation into the proper sources, with due and enlarged illustration,—who here, as well as other English lawyers in the peerage department in the sister kingdom,—whatever peculiar and questionable opinions they may chance to entertain in some respects—and who do not?—have so eminently and laudably distinguished themselves. The late Mr. Adam, an English peerage lawyer, well describes the noted Peerage Reports of the Lords Committees, in which Lord Redesdale at least largely shared, as exhibiting "the most elaborate research,

Law of Forfeiture, or attainder in Honours, after the Union, since 1st of July 1709.

The English law of high treason being extended to Scotland,—in room of the old,—by Act of Queen Anne 1708, c. 21, § 1, 2, &c.—to take effect from the ensuing 1st of July 1709, it falls especially to claim attention in reference to our Peerages. And I accordingly shall next proceed to touch upon, and discuss, so far as I may be enabled, this interesting and most important subject, in its essential and leading features. Scottish dignities coming thus to be regulated in such respect, by a new, and in a great measure, foreign Code,[1] the matter is obviously one that may, in the main, be best appreciated and settled by English lawyers,—although, at the same time, it would follow, that the nature and genius of the Scottish understanding and practice, in certain points regarding conveyancing, and the peculiar effect of our "substitutions," is not to be overlooked, but, on the contrary, consulted in the application. Hence a kind of modified law, though still upon English prin-

That of England in the main, though somewhat qualified.

Opinion *penes* the author.

and the most deep examination, of the principles of law applicable to that subject." This is indeed far better than the superficiality, courtly, and at the same time transparent sophistry, nay palpable errors and misrepresentations, suicidal contradictions, &c. as have been evinced, of Lords Mansfield and Rosslyn, including their mutable, *convenient* argument of "expediency" withal, (of which more hereafter), equivalent to arbitrary legal change and innovation—and by which they attempt to back out of straits and difficulties,—for the most part of their own creating. But, in lieu thereof, full, rigid, and inexorable scrutiny, in matters of fact and precedent, is what we *ante omnia* desiderate, especially owing to the darkness that environs us by the comparative destitution of our records, and the flattering fables, and illusions—with not a little of the *national* tendency, ascribed by Dr. Johnson,—so copiously palmed in our details—even of law, as well as of history, public and private,—upon *whatever* side it may be directed. In the same way, with bitter and repulsive fruits, and ingredients, painful and irksome, lucubrations of the kind often produce wholesome and excellent results—in this instance by the expiscation of truth; and from the zeal and labours of a M'Crie,—in the matter of history—even a staunch Episcopalian or Papist may glean information and arguments serviceable to his own views in civil and religious polity,—and *vice versa*. Lord Hailes, though somewhat formal, quaint, and costive in his expositions, may be deemed the first who, with the qualifications of a scholar, duly applied the rigid and *clamant* test in question, and therefore can never be sufficiently upheld and commended.

[1] See pp. 125-6-7-8, 230-1, and what will be stated in the sequel.

ciples, would seem to be established.[1] For the first of these reasons, I, of course, must offer my remarks with corresponding deference, and occasionally with some distrust. But, at any rate, the validity of the grant, and conveyance of the honours, its construction *ex terminis*, and import of the limitations—so far as defines the line of descent, and who are, or are not to take,—must still be regulated by our especial doctrine and practice. The English treason law, *in honours*, be-

Forfeiture.

[1] This is undoubtedly a nice, and rather difficult point. The late Mr. Adam, (see p. 707, *note,)* the English barrister, as well known, much employed in peerage practice, Scottish as well as English, has the following remarks, in a relative opinion referred to—"Altho' it depends on the Law of England whether any ascertained interest under a Scotch grant be forfeited, yet to ascertain what that interest is, *recourse must* be had to the *Law of Scotland;*" while he adds, what tends to occasion the perplexity, that "there is always extreme difficulty in ascertainiug with precision, whether the limitations in a Scotch patent or deed are to be considered as equivalent to an English remainder, the whole scheme and genius of the Law of Entails in the two countries being entirely dissimilar." The Scottish estate of Park was entailed by Sir James Gordon in 1713, upon himself for life, whom failing, to William his eldest son, and the heirs-male of his body, *whom failing*, to the heirs-male of Sir James's body. William, afterwards Sir William Gordon, who succeeded accordingly, was forfeited, for his concern in the rebellion, in 1746; and Mr. Cruise, another English lawyer, the writer upon Dignities, in an opinion I also have by him, holds that by "the English Law the limitation to the heirs male of the body of Sir James would have united with the estate for life, and have descended to his eldest son William, *(the traitor,)* and been forfeited by his attainder," so as to bar *John* Gordon, William's younger brother, unattainted, who claimed, in virtue of it, in the noted case in 1754. "But," he adds, the limitation in question "was construed *very differently;* it was *admitted*, on the part of the crown, that (it) was not by the *Law of Scotland* an estate tail executed on Sir William, but was a substitution, in the nature of a *remainder*, created in favour of the *younger* sons of Sir James, and *not* affected by the attainder of Sir William. The construction was adopted by the House of Lords, for Sir William having died at Douay in 1751, leaving two sons born in France after his attainder, his next brother, John Gordon, claimed the estate, upon the ground that his brother was dead without issue inheritable," owing to their *alienage*, and he succeeded accordingly by judgment, in 1754, of the same appellate jurisdiction. Here, although an English principle obtained, yet it saved entirely, through the *medium* and *operation* of the Scottish doctrine as to substitutions,

Scottish case of Gordon of Park, in 1750 and 1754.

Forfeiture.

Introduction of English law here by the Statute of Queen Anne in 1708, instead of our former rigorous system, and a boon to us, as exemplified in the specialty of Remainders over.

ing less inexorable and obdurate, nay not altogether absolute, and uncompromising like ours formerly,[1] but open to certain favourable specialties and exceptions, may be regarded, in its amalgamation with our system, as a boon conferred upon us—inasmuch as it has constructively identified our "substitutions" or limitations, *nominatim*, or *otherwise*,[2] in patents and strict entails, prefixed by the words "*whom failing*," with English "remainders over," in virtue of which a certain antidote has been afforded in especial emergencies, to other heirs than the traitor, and those who took *with* him, against the severe

which was curiously followed *vice versa* in the face of the English, by which apparently the claim would have gone. The above is a most material precedent fixing the law, and proving that the last Park limitation mentioned is constructively as strong as if it had been after the fashion of the irresistible remainder in the Somerset patent in 1546, to be afterwards noticed, *nominatim* to *John Gordon*, younger or second son of Sir William, and the heirs-male of his body. Mr. Cruise adds, what is admitted likewise by Mr. Adam, and all authorities, "I have no doubt but that the principles adopted in the *second* case of Park (*that* in question) are equally applicable to dignities;" and, besides, corroboratory peerage instances will be given. Mr. Cruise, however, and Mr. Adam, (*ut sup.*) draw a distinction between the last Park remainder, and one rather different,—namely, if it had been to *Sir James* the settler, *and* the heirs-male of his body, where, by the English law, as Sir William the traitor, who likewise answers the description (*literally*), "would have *taken* a vested interest as *heir-male*—expectant on the determination of *his* (*previous*) estate Tail," the right of John, by his necessary conjunction of "estate" with the traitor, would have been forfeited. But still it might have been saved, as before, by the Scottish law, though this is not *res judicata*. Of course, as I remarked, at the outset, considerable abstruseness attends the matter, especially owing to conflicting opinion. The doctrine of Lord Redesdale, to be given in the sequel, especially as illustrated in the instance of Bolingbroke, of the heir by remainder taking as by an original independent grant, may be viewed favourable also to the latter conclusion. Lord Hardwicke too, admits, that an interest, under the *last* Park limitation, vested (fatally) in the traitor by the English law, but that it held otherwise, according to the law of Scotland, which saved. (See Kames's Elucid. p. 382.)

[1] Owing to the high prerogative of the crown in Scotland, however, the king, by a remission, *could alone* salve and remove an attainder, (see p. 128, and authorities to be afterwards adduced,) though Parliament also was occasionally and often resorted to for the purpose.

[2] As illustrated by the above case of Gordon of Park, *inter alia*.

Forfeiture.

consequences of conviction for treason, which, without such aid and interposition, would have been final and irremediable. The ruin and calamity, instead of being total, is thus partially and equitably salved. But it must, however, at the same time be confessed, that our substitutions of the kind stated, though couched in identical terms, are, by the Scottish law, different in their technical nature and attributes from the remainders in question. They merely constitute a *spem successionis*, a right, *not real* in contingency, to take as *heir* under the *actual* character with the prior holders ;[1] and not, as in the English case, an independent vested right at the moment, through a *separate* "estate," even amounting, as will be afterwards seen, according to Lord Redesdale, in dignities, to an original *distinct* grant and creation, though only subsequently coming into *play ;* upon the basis of which principle a forfeiture incurred by other previous takers does not here apply.

Our substitutions, though *now* constructively equalized with the latter, not strictly, or inherently so.

[1] The subject is thus explained by an eminent Scottish judge, Mr. Cranstoun, lately retired from the Bench, in an opinion he gave upon an important point of forfeiture, now before me. "By the law of Scotland, substitute heirs of *tailzie (entail)* have rights of two kinds. In the first place, by virtue of the destination they have a right to succeed to the estate, on the failure of the prior members of the tailzie. This right is evidently *not vested*, but purely contingent, and it does *not* affect the estate *in any way whatever*, until the contingency has occurred. In the second place, every substitute has a *personal* right, a *jus crediti*, which vests in him from the moment of his birth, and to which, therefore, it is unnecessary for him to complete any title by service or otherwise. By virtue of that *jus crediti*, he may reduce any act done by the heir in possession, in contravention of the fetters ; and, if the contravener is alive, may also insist in a declarator of irritancy or forfeiture against him. *But* although this right is vested, it is *not real ;* it does not affect the estate, and cannot be made to affect it, unless an irritancy is committed. It exists only in consequence of the *personal* obligation imposed on the heir in possession ;" the interest "is of an anomalous nature." Baron Hume also corroboratively says, "every substitute in the tailzie, when he succeeds, is no other than an heir who takes by inheritance of, and *through* those who are called before him, and, by the proper forms of title, as in a succession, the *very same estate or fee*, which has been *vested* in those *prior*, and more favoured *persons*. As also, it is not conceived with us, that before succeeding, the heir of tailzie has in him *any actual* or *real* estate of his own, *distinct* from that of the present owner ; but only a prospect of succeeding," &c. (Punishment of Crimes, Edit. 1797, vol. II. p. 471.)

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By our law, forfeiture and its penalties attached, irremediably in every instance.

Neither did we in honours, as in England, in respect to forfeiture, make any distinction between *entailed* succession and that at common law. Both were equally affected by it. The Scottish Act 1690, c. 104, no doubt (like the English statute *de donis*) saved the right of heirs other than the traitor, to strictly entailed *estates* for a period, which advantage they thereafter lost by the Act of Queen Anne, in 1708; but it does not, I conceive, extend to, or embrace the former, a matter that will be afterwards adverted to.

Precedents and illustrations of the existing law.

I shall next give instances of Scottish dignities since the Union, and introduction of the English treason law, protected, through its intervention, against the penalties of forfeiture, in virtue of constructive remainders over.

Case of the Barony of Sinclair in 1723, thereafter, and in 1782.

The present dignity of Lord Sinclair was granted by patent, dated the first of June 1677, to Henry Sinclair, and to the heirs-male of his body; "*whom failing*," or with *remainder over*, to John Sinclair, brother-german of the said Henry Sinclair, and to the heirs-male of his body; remainder to Robert Sinclair, brother-german of the deceased John Sinclair of Herdmanstone,[1] (father of Henry the patentee,) and the heirs-male of his body; remainder to George Sinclair, another brother-german of the last John, and the heirs-male of his body; *remainder* to *Matthew* Sinclair, also another brother of the said John, and the heirs-male of his body; with an ultimate one to the nearest and lawful heirs-male of the said Henry, the patentee.[2] The latter, thus Lord Sinclair, died in 1723; but John, his eldest son, and heir, in terms of the patent, having been previously attainted by Act of Parliament in 1715, was thereby unable to succeed; and hence, during his life,[3] which continued to 1750, and the lifetimes thereafter, of his brothers, James, and Henry Sinclairs, who died in 1762, and 1766,

[1] He (*John*, of Herdmanston) was not descended of the Lords Sinclair. For remarks upon the curious state of this Peerage, carrying the precedence of the *original* Lords Sinclair, of a different stock in the male line, see pp. 54-6.

[2] Great Seal Register.

[3] There was a partial Act of restoration by Parliament, that availed nothing as to the honours, in 1736, of the said "John Sinclair, eldest son of Henry late Lord Sinclair deceased, to sue or maintain any Action," and take property, "notwithstanding his attainder." Brit. Acts.

and took, under the same limitation, or estate-tail, the honours were forfeited. But in 1780, after the entire male extinction of this branch or estate-tail,[1] they were claimed by Charles *St. Clair* (Sinclair),[2] a remote, though now the next heir male,—great grandson of the aforesaid Matthew Sinclair, a *distinct remainder*-man in the patent,—by a reference to the Lords upon his petition to the crown, and found, by their resolution, the 25th of April in 1782, (duly admitted by the crown) to be legally vested in him, and to be wholly unaffected by the attainder, from his thus inheriting under a special and distinct remainder.[3] There having been no formal or *nominatim* forfeiture of the dignity was of no moment, as will be instructed in the sequel. It was duly held in law to be as much attainted—tacitly and virtually—from the succession opening to the traitor after his father's death, as if its *literal* forfeiture had obtained. The honour was lost and gone by the fatal and blasting contact with him, and would have been so for ever, had it not been for the subsequent form of the destination. I may here add, what may be sufficiently intelligible after this, that an inferior Peerage in the person of a nobleman exclusively attainted under the title of a higher, his ordinary designation, is, at the same time, equally forfeited. Forfeiture.

The honours of Earl of Kintore, Lord Keith of Inverurie, and Keith-hall, are in a parallel situation, and have been long held, in like manner, without any challenge, or exception, by the concurrent and decided opinions of lawyers. They were conferred originally by patent, the 26th of June 1677, upon Sir John Keith, younger brother of George, hereditary Earl Marshal of Scotland; with limitation to him, and the heirs-male of his body,[4] but extended thereafter to a large series of Case of the Earldom of Kintore, &c. in 1761, and 1778.

[1] There were also three other brothers, William, David, and Matthew, who were equally extinguished in the subsequent claim noticed.

[2] Such was the later orthography, in the same way that Seymour is now *St. Maur* in England; and hence, with equal reason, the surnames of *Muschet* and *Mowat* with us—though, it must be confessed, vilely corrupted—ought to resume their original, and Norman forms of "Montfitchet," or "de Monte-fixo," and "Monte-alt," or "de Monte alto."

[3] Lords' Journal. Other particulars are from the papers, &c. in the case.

[4] Great Seal Register.

Forfeiture.

heirs, by means of the royal and regulating regrant, dated 17th of December, 1694, (that carried likewise the estates,) proceeding upon his resignation, and backed by the sign manual.[1] And, under identical circumstances with Sinclair, all came to be indisputably forfeited, from the succession opening in 1761, in terms of a remainder in the regrant, to George Earl Marshal —the grandson and heir of the preceding George Earl Marshal,[2]—the heir-male and chief of the House,—who had been attainted in 1715 by Act of Parliament, and who, although subsequently restored, to take as heir by remainder to *lands*,[3] was never rehabilitated so as to enable him to hold honours. But again, after his death without issue in 1778, and co-extinction of the heirs under his remainder, the dignities in question, in virtue of another, in the regrant that *then* came into play, were saved to the next heir. It is in these terms, "*quibus deficientibus* filiabus, seu hæredibus femellis ex corpore *Gulielmi* Domini de Inerurie, (eldest son of John first Earl of Kintore, afterwards second Earl,) legitime procreatis, seu procreandis, et heredibus masculis, et femellis de corporibus dictarum filiarum descendentium successive." And they accordingly devolved to, and were taken by Anthony Lord Falconer of Halkerton, the lineal female heir, owing to his descent from Lady Catherine, eldest daughter of the said William Lord Inverurie. Claiming too under quite a different character, and status, from George Earl Marshal, the traitor,[4] he was, to use an English legal phrase, clearly "out of the mischief."

[1] *Ibid.*

[2] Namely "Georgio Marescalli Comiti," (the latter elder brother of John Earl of Kintore, the patentee, in 1676,) "et heredibus masculis de corpore," &c.

[3] By a later Act in 1760, enabling the Earl "to sue or maintain any action or *suit* notwithstanding his attainder," and likewise "to take, or inherit any Real, or Personal Estate that may, or shall hereafter descend or come to him, or which he was entitled to in *Reversion* or *Remainder*." British Acts.

His Lordship came hence afterwards to possess the Kintore estates in 1761. His brother, the celebrated Marshal Keith, in the Prussian service, predeceased him without issue. He was the last of this talented, and remarkable house, taking in the corresponding remainder.

[4] See p. 709, *note*.

Upon the same ground, the honours were held by William, his son, the next Earl, and now vest in Anthony, his son and representative, the present Earl of Kintore, &c. Forfeiture.

I may further illustrate the law here, through the *medium* of English cases and precedents, now of course mainly applicable to us, only premising, as before, that the express forfeiture of the honour, which obtains in their instance, makes no essential difference between them and the Scottish ones that have been given. English precedents, of course, *now* applicable to us.

The Earldom of Northumberland, in the reign of Elizabeth, stood limited to Thomas Percy, Earl of Northumberland, and the heirs-male of his body, *whom failing*, to Henry Percy, his brother, and the heirs-male of his body. Earl Thomas (in possession) was attainted and executed for high treason, but that did not affect the previous right that had thus vested, at the moment, in contingency by the remainder, in Henry his younger brother, who, after the death of the traitor, inherited the honours.[1] This, as Cruise observes, immediately happened, Earl Thomas not having left male issue; while it follows that, if they had existed, the forfeiture would have attached to them also,[2]—being of the body, and in the same limitation, with the traitor. The case of the Viscounty of Bolingbroke, to be afterwards particularly noticed, is, as now held, to the same purport. Case of the Earldom of Northumberland, in the reign of Elizabeth.

But further, that of the Dukedom of Somerset may be even still more striking, and in point, as is obvious from the following statement of it by Lord Redesdale, "when Edward Seymour, Earl of Hertford, by letters patent, dated the 16th of February 1546, was created Duke of Somerset, and by the terms of the patent, that dignity was granted to him, and the heirs-male of his body, by Ann, his second wife; and *failing* such heirs-male, the dignity of Duke of Somerset was, by the same patent, granted to *Sir Edward Seymour*, son of the Earl of Hertford, by Catherine, his *first* wife, and the heirs-male of the body of Sir Edward Seymour, the son, the *attainder* of the Duke of Somerset, *his father*, and *forfeiture* of *his dignities* by Act of Parliament, of the 5th and 6th of Edward Remarkable case of the Dukedom of Somerset, in 1750.

[1] See Cruise on Dig. p. 122, &c. [2] *Ibid.*

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the Sixth, *did* NOT *affect* the dignity of Duke of Somerset granted to *Sir Edward Seymour*, and the *heirs-male* of *his body*. By the terms of the grant, that dignity had vested, immediately after the patent had passed the great seal, *in Sir Edward Seymour*, with limitation to the heirs-male of his body, though the actual enjoyment of it by Sir Edward, and the heirs-male of his body, was made to depend on the failure of heirs-male of the body of his father, by his second wife." His Lordship adds, that such conveyance would have obtained even if the noted statute *de donis* had not been made, and thus continues, " Edward Seymour, (for there were *two* Edwards his offspring), son of the first Duke" "by his *second* wife, (tho' the *preferable* heir,)[1] was, in the first of Elizabeth, created

[1] The first wife of the Duke, known as the Protector Somerset, was Katherine Fillol, daughter and co-heir of Sir William Fillol; the second Anne, daughter of Sir Edward Stanhope, (see Dugdale's Bar. vol. II. p. 357); and upon this subject, Horace Walpole, Earl of Oxford, has these striking and curious remarks, in letters, in 1750, to Sir Horace Mann, " You have heard me speak of the great injustice that the Protector Somerset did to the children of his *first* wife, in favour of those by his second; so much that he not only had the dukedom settled on the younger brood, but, to deprive the eldest of the title of Lord Beauchamp, which he wore by inheritance, he caused himself to be anew created Viscount Beauchamp: well in Vincent's Baronage, a book of great authority, speaking of the Protector's wives, are these remarkable words, ' *Katherina*, filia, et una cohæredum Gulielmi Fillol de Fillols hall in Essex, *uxor prima, repudiata, quia* pater *post* nuptias *eam cognovit*.' The speaker has since referred me to our Journals, where are some notes of a trial in the reign of James the First, between Edward the second son of Katherine the *dutiful*, and the Earl of Hertford, son of Ann Stanhope, which in some measure confirms our MS., for it says, the Earl of Hertford objected that *John*, the *eldest* son of *all*, (wholly omitted in the Somerset patent,) was begotten while the Duke was in France. This title, which now comes back at last to Sir Edward Seymour, (the successful claimant,) is disputed: my Lord Chancellor has refused him the writ, but referred his case to the Attorney-General, the present great opinion of England, (Sir Dudely Ryder,) who, they say, is clear for Sir Edward Seymour." (Letters to Sir Horace Mann, edited by Lord Dover, vol. II. pp. 346, 359–60.) The writer subsequently adds, (p. 372) that Sir Edward "has not yet got the Dukedom himself, as there is started up a Dr. Seymour, but he will be able to make nothing of it."

Of course I cannot vouch for the accuracy of what is thus stated, up-

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Baron Beauchamp and Earl of Hertford; and William, son of Edward, and grandson of the first Duke, was afterwards created Marquis of Hertford, and was in 1660 restored to the Dukedom of Somerset by act of Parliament. *But* the restoration, &c. did *not* operate to preserve the dignity of Duke of Somerset, granted to *Sir Edward Seymour*, &c. because it *wanted no* such act for its preservation. If the dignity had not been restored to the Marquis of Hertford, Sir Edward, or the heirs-male of his body, *must have enjoyed* the dignity of Duke of Somerset, on failure of heirs-male of the first Duke, by Ann his second wife. The dignity of Duke of Somerset, vested in the *first* Duke, was *utterly gone* by the forfeiture, &c.; it was *not* by that act vested in the *crown*,[1] but until it was again called into being by the Act of 1660 it had *no* existence," it was "*utterly extinct* and *gone* by his forfeiture, —the legislature alone having power to restore the dignity, &c. *When* the *heirs-male of the body* of the first Duke by his second wife, *failed*, the grant by the original patent of the dignity of Duke of Somerset to Sir Edward Seymour, and the heirs-male of his body *took effect;* Sir Edward Seymour having taken the dignity under that grant, *as a purchaser*, and the first Duke having taken *nothing* under the grant to Sir Edward Seymour, which was a *distinct*, and *substantive* grant. Accordingly, on the death of Algernon Duke of Somerset, in

on the authority of Vincent's MS. Baronage (in the possession of the College of Arms,) but it transpires that the unfortunate *John* Seymour, the son of the stigmatized Catherine Fillol, thus utterly disinherited, was alive at the date of the Somerset patent in 1546, and made his will as far down as the 7th of December 1552, where he constitutes, under deduction of legacies to his servants, Sir Edward Seymour, his brother at least through his mother, his executor, and heir to his lands. It was recorded in the Prerogative Court of Canterbury, the probate being dated April 26, 1553. He is represented as having died without issue, of which the above seems presumptive evidence. The further singularity would *appear* to be in the Protector cohabitating with Catherine, after her illicit offence, whether incest, or simple adultery, to which John may be inferred to have owed his birth, and to have then had by her Sir Edward Seymour.

[1] This may be somewhat a new distinction,—honours, when there is no possessor, being usually thought to revert to, or merge (at least conditionally) in the crown.

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1749, there was a failure of heirs-male of the body of the first Duke, by Ann his *second* wife; and on the 17th January 1750, a writ having issued, upon the report of the Attorney-General, to summon to Parliament, as Duke of Somerset, Sir Edward Seymour, who was then the heir-male of the body of *Sir Edward Seymour*, (the *remainder-man*, under 'the second grant,' in 1546,) Sir Edward produced *that* patent, and took his seat in the House, according to the date of that patent," &c.[1] —from whom the honours have descended in the same way, to his male descendant the present Duke of Somerset.

Remainder over in Somerset case even saved the descendants of the traitor, against the forfeiture of the latter.

Here the issue of the body of the traitor were even saved from attainder, by the mere sovereign effect of the remainder over, the honour in this manner first utterly dying,—from the fatal taint, and visitation in the original limitation, and then again as suddenly re-existing through the medium of the former. But, as Cruise says, "the issue must (abstracting from the *forfeiture*, in such limitation) be capable of inheriting the dignity, otherwise the remainder will take effect. Thus, in the case of Gordon *v.* the King's Advocate, (that of Park, formerly alluded to,[2]) the following question was put (in 1754) to the Judges by the House of Lords:—"Tenant in tail male of lands in England, with remainder over, is attainted of high treason, and the estate tail thereby forfeited to the crown. After this attainder, tenant in tail has issue male *born* in *foreign parts*, out of the ligeance of the crown of Great Britain, and dies leaveing such issue male, *Quære*, Is the estate or interest in the lands, which were forfeited to the crown, as aforesaid, continuing, or determined? The Lord Chief Baron of the Court of Exchequer, having conferred with the other Judges present, delivered their unanimous opinion, that the estate or interest in the lands so forfeited to the crown, as aforesaid, *was determined*." In consequence of this opinion, the person who was next in remainder, *recovered* the estate from the crown.[3]

Issue, however, must be otherwise capable of taking, and not *aliens*, else the next remainder takes effect.

[1] Third Peerage Report of the Lords on the dignity of the Peerage, in 1826, pp. 75-6.

[2] See p. 709, *note*.

[3] *On Dig.* p. 123. Had it not been for the alienage here, the estate would have been still retained by the crown, under the title of a "base

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Cruise further inculcates, (as elsewhere shewn,[1]) as well as other lawyers, that the above case and decision,—which moreover corroborates what was premised,—applies equally to hon- Case of Park exemplifying the law, equally applicable to honours.

fee," during which tenure, that *might* have continued for ever, it could have granted and assigned the same to any one in fee-simple,—always conditionally, however, and dependent upon the existence of heirs-male of the traitor's body,—in terms of the first limitation; for upon their failure, the heir under the remainder could have reclaimed the inheritance *vi juris*, and at once rescued it from the crown, and the assignee. In the previous interval, the holder of such "qualified" base fee "has the same rights and privileges" over it, "*till* the qualification upon which it is limited is at an end, as if he were tenant in fee-simple." (See Cruise on real property, under estates in remainder, referring to Plowden &c., vol. I. pp. 108-78-9-96.) This of course does not obtain in the case of forfeited estates in fee-simple. The above curious state of things, and peculiar kind of abbeyance, though now, from the introduction of the English treason law, applicable to us, *was*, I need hardly add, quite foreign and unknown to our system; and, what is remarkable, has never yet fairly occurred, or come into play; though there have been, since the treason Act of Queen Anne, several forfeitures of lands held under entails, with remainders over, including that of Gordon of Park. I recollect the astonishment, and almost discredit and disbelief, with which this English doctrine was treated by some Scottish lawyers at a consultation involving a question of forfeiture, and the same contingency. As the heir by remainder, on the expiry of the base fee, must also come to possess in Scotland, (constructively) *vi juris*, and *proprio jure*, it may be difficult,—taken with the purport of recent Scottish decisions regarding services, to say in such event,—how he should proceed in completing his title. It might be probably, in part, by an action of declarator before the Session, against the crown or assignee. He can as little, as our law stands, serve heir to the entailer—as to the *traitor*, the *last* heir of entail, (*otherwise* the proper ancestor, or *terminus* to select,)—passing over intermediate substitutes, and heirs already respectively served *seriatim*,—though this would be in conformity to the English principle of the heir in entails taking *per formam doni* only, under the settlement of the entailer. But, to secure the indefeasible rights of Scottish remainder-men, in *lands*, the entail must be strict, and recorded in the Register of Tailzies, (see case of David Kinloch against the King's Advocate, January 10, 1751). The principle is obvious, in order that their contingent interest be inviolable, and independent, and not vacillating, or at the disposal of common law. Irritancies too, incurred by the traitor, in terms of the same decision, and that of Gordon of Park, November 16, 1750, must be declared before his attainder; they cannot be afterwards. This prospective expedient, in one event, to

In lands, to give effect to remainders over, with us, the entail must be strict, and duly recorded, and irritancies declared before the forfeiture.

[1] See p. 710, *note*.

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Conceived principle in exception from alienage.

ours. This indeed is, of itself, obvious, from his giving them in illustration in his work confined to dignities. The principle there involved, in the determination of the succession, I conceive, is, that the issue being *aliens*, and not subjects, are as if they had never existed, in the *utmost* sense, and hence incapable of any prejudice,—such as even the consequences or penalties of forfeiture,—equally as of civil benefits. The crown therefore can have no interest in the matter,—as otherwise, in the case of attainder, by the treason of *subjects*,—being precluded, in this way, from taking any thing from such legal non-entities,[1]—as much beyond the pale or knowledge of law, with due apology to Mr Wallace, as his ideal men with tails.[2] The next heir accordingly forthwith succeeds. Upon corresponding ground, the honours of Earl of Newburgh, Viscount Kinnaird, &c. though simply conferred by patent, the last of December 1660, upon James Viscount Newburgh, "ejusque hæredes quoscunque,"[3] have been assumed by the heir-general, *capable* of taking in this country, in exclusion of the nearest, in such character, in terms of the patent, who happen to be aliens, and resident foreigners.

Present case of the Earldom of Newburgh.

Curious conceivable case in regard to Lord Lewis Gordon, forfeited in 1746.

Put the case, that Lord Lewis Gordon, younger son of Alexander Duke of Gordon, attainted in 1746, had had afterwards male issue born abroad, where he was, in consequence, obliged to reside, who again had left male descendants, existing at *present*,—of course aliens,—the latter necessarily would not only have been excluded from the Dukedom of Gordon, limited by patent in 1684,[4] to heirs-male of the body of George Duke of Gordon, Lord Lewis's grandfather, but from the

Partial guard against forfeiture by Dean of Faculty Fergusson.

guard against the fatal consequences of treason to a family, was suggested, the middle of last century, by James Fergusson of Pitfour, Dean of Faculty, an eminent lawyer, afterwards promoted to the bench —viz. to insert a clause in the entail, enabling the possessor at the time,—when the heir apparent should be attainted,—so far to alter it, as to exclude, by requisite conveyances, both him, and the heirs of his body, from the succession.

[1] By the English law, even an attainted person could *take* an estate conveyed to him, though only for the benefit of the crown. (See opinion of the twelve Judges in the Airly case, Cruise on *Dig.* p. 163.)

[2] See p. 520, *note* 3.

[3] Great Seal Register.

[4] Great Seal Register.

Marquisate of Huntly, created in 1599, and descendible at least to such actual heirs of George Earl of Huntly, their common male ancestor.[1] There being certainly, in the above event, no other heirs-male of the body of Duke George, the Marquisate would have gone, as was in fact resolved by the House of Lords in 1838, to George Earl of Aboyne—the next "*habile*" male descendant of the first Marquis. But supposing the crown—as might not unlikely have happened, especially after the many recent Peerage restorations, nay even that of Francis Duke of Buccleugh in 1742, to the Earldom of Doncaster, forfeited as far back as 1685—to have naturalized and simply restored, subsequent to 1838, the male descendants in question of Lord Lewis, this curious and conflicting situation of things might have obtained, that they would have been Dukes of Gordon, &c. without any demur, so far, on the part of the said George present Marquis of Huntly (late Earl of Aboyne), to whom the matter is wholly *jus tertii*, owing to his not being sprung from the first Duke of Gordon, but more remotely:—while, on the other hand, he ought apparently to retain the *adjudicated* Marquisate,[2] though strictly turning, *quoad* the *rehabilitated*, upon the same hinge, and *otherwise* conjoined with the Dukedom in them. Could, in such vicissitude, the naturalization and restoration have here a retrospective, adverse, and injurious effect to the former? At the same time, as will be afterwards instructed, owing to a known specialty, if the issue of Lord Lewis had been born in Scotland *before* the attainder in 1746, they, or probably their male descendants, would at once have succeeded to all the Gordon and Huntly honours, &c. upon the demise of George, last Duke of Gordon, in 1836—just as if there had been no forfeiture.

Forfeiture.

Lords' Journals.

Favourable result to the supposed issue of Lord Lewis, in another alternative.

The law, above applied in the instance of Gordon of Park, may now, by a kind of analogy, hold *a fortiori*, when attainder in England in one coheirship to a Barony in abbeyance does not bar, as was formerly conceived, the determination of the hon-

Law in the Park case strengthened by later.

[1] Proved by original documents in the Gordon Charter-chest.

[2] From what was formerly shewn, especially in the case of a Scottish honour, the noted precedent of Willoughby of Parham, by the genius of our law, may not here altogether rule.

Forfeiture.

our in favour of the sole existing heir under the other, which was lately found in the case of the Barony of Beaumont, not an entailed honour, but merely constituted by writ of summons. The exception of alienage, as illustrated, partly gainsays Lord Redesdale's proposition of an honour, under a remainder over, being "utterly gone" without qualification, *during* the existence of heirs of the body of the traitor.[1] But, on the other hand, in the case of a dignity granted in tail-male, under one estate or limitation—as to heirs-male of the body, wholly abstracting from remainders, the consequence would have been different from what was instructed, upon the attainder of the actual holder for high treason. The Earldom of Westmoreland was thus limited by letters patent to the original grantee and the heirs-male of his body, under which an Earl thereafter succeeded, who became attainted. And his treason was decided by the Judges, the 2d of James I. to extinguish the honour, and, in contradistinction to the case of a saving remainder, to bar the right of the collateral heir-male, descended of the body of the patentee, who claimed after the decease of the traitor without male issue, and whose blood had received no taint or corruption.[2] By the original English law, grounded upon the Statute, *de donis*, 13. Ed. I. c. 1, which was then, and long afterwards at least, held to apply to, and include honours, the dignity would have been saved, and found legally to have been in the claimant, because in entailed subjects comprehending such—though otherwise, in respect to those in fee-simple,[3] the right of succession of every heir or individual distinct from the traitor, is thereby preserved intact and inviolate, without being affected or compromised by the offence. But then again, this Statute was

Alienage forms an exception to Lord Redesdale's doctrine.

Quid *juris*, as to honours in tail *of the body*, without remainders?

Case of the Earldom of Westmoreland, in the reign of James VI.

Such honours then included in the Statute *de donis*, as modified by the 26th of Henry VIII.

[1] See p. 717. I have not space to enter minutely into a distinction drawn by some English lawyers, in respect to dignities viewed as incorporeal rights, in opposition to lands that are corporeal; and perhaps with the less regret, as it appears to be too subtile, and nice spun; while, at the same time, not properly borne out, or recognised, or established in practice.

[2] See Collins on Baronies, pp. 137-8, *et seq.* Cruise on Dig. p. 118, and Neville's case, 7 Coke, pp. 33, *et seq.* &c.

[3] I need hardly here add, that honours, and every possession in fee-simple, are utterly gone, and forfeited by treason.

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trenched upon or altered to a certain extent, by the 26th of Henry VIII. c. 13, which specially enacts that thenceforth every offender, being convicted of high treason, "shall lose and forfeit such lands, tenements, and hereditaments, which any such offender, or offenders shall have, of any estate of inheritance, in use or possession, by any right, title, or means, at the time of any such treason committed, or at any time after; *saving* to *every person* and *persons*, their heirs and successors, (*other* than the *offenders* in any treason, *their heirs and successors*), all such rights, titles, &c. which they shall have at the day of committing such treasons, or at any time afore."[1]

There was, consequently, a manifest extension of the penal law, and it now came to obtain in virtue of the exception here, that not only the traitor, but also "his heirs and successors," were affected, and compromised by the treason; which last description legally include the heirs in the same estate tail with himself, and necessarily the claimant in the Westmoreland case;—while the *saving* continued in favour of the *separate* guiltless "person, or persons, their heirs and successors," protected, *quoad honores*, under received construction and authority of the act *de donis*, as formerly, the remainder men; they not being held by the English law the heirs of the traitor, but taking, though eventually, in their own right, as strangers or "purchasers" in the strictest sense, under an independent and distinct vested title.[2]

Supposing the honour to be limited to "heirs male" unrestrictedly, though still without remainders?

But supposing the limitation (still without remainders over) had been simply to "heirs male," (not restrictedly of *the body*), which words have of late received in England, by the Devon decision, so broad a construction, equivalent to "heirs male general," or "whatsoever," and, in fact, embrace a far wider range of heirs-male than those called *nominatim* in the Sinclair patent in 1677,[3]—would the same law, it may be inquired, have still obtained—that is, so as *not* to save the heirs-male *collateral*, *other* than those of the body of the patentee,

[1] See Cruise on Dig. p. 142.

[2] The new ground upon which Lord Redesdale saves the right of remainder men in honours already glanced at, will be further adverted to in the sequel.

[3] See p. 712.

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as in the Westmoreland instance? The legal understanding appears to be—though this is not *res judicata*—that it would, and that nothing but the interposition of an explicit remainder would protect the former. In this conclusion I am further supported by the opinion of Mr. Adam, the English authority referred to,—and who has stated, in an answer[1] to this identical question, professionally put to him, that the limitation "still conveyed but an Estate tail male general," while these "collateral heirs could not take as in remainder, and consequently (that) their interest would be affected and destroyed by the attainder of the tenant in tail in possession." The same doctrine would indeed follow undoubtedly, according to the modern impression of Lord Redesdale, as will be afterwards seen, but to which it may be now difficult to subscribe, that honours are not included under the antecedent English statutes, and who puts the *exclusive* exception in favour of remainder men upon another footing. We now naturally come to a specialty under this head, which, although in part already contemplated and obviated, through the *medium* of the Scottish illustrations given, has, as well known, occasioned much discussion, and been greatly mooted in our days. It involves the case, not of a holder, but of the *direct heir-apparent* to a dignity in tail male, who had been forfeited for treason only *during* his *apparency*, but survived when the succession eventually opened to him, in terms of the patent. And the question is, whether this qualifying circumstance, as thought by some, coupled with the heir-apparent dying without issue, equally sunk and destroyed the honour, and barred the right of the guiltless *collateral* heir-male, (who otherwise took,) *as* in the Westmoreland case? This matter, which elicited ingenious views, and arguments of a favourable tendency, though unavailing, and strictly without solid foundation in our original law, from Scottish lawyers, is exemplified and solved by the following cases of Airlie, and (actually) of Wemyss. The Earldom of Airlie, Barony of Ogilvie of Lintrathen, &c. was granted by patent, dated April 2, 1639, to James Lord Ogilvie, "suisque hæredibus masculis, sibi in *patrimo-*

Unfavourable opinion as to such case also by late Mr. Adam.

Same consequence would obtain under Lord Redesdale's doctrine.

Case of an heir-apparent under the same estate tail, forfeited, and then surviving the holder of a dignity.

Case of the Earldom of Airlie in 1812, and thereafter.

[1] *Penes auctorem.*

nio et *statu* succedentibus."[1] It would appear that heirs-male-general were here in view, because, shortly previous to this, by a regulating charter, the 18th of July 1635, in force at the above date, the ancient Barony of Lintrathen, and the family estate, thus evidently referred to, are destined to the patentee in liferent, with limitation to James Master of Ogilvie, his eldest son, (afterwards second Earl of Airlie,) and the heirs-male of the body, between him, and Helen his wife; whom failing, to the other heirs-male of his body; *whom failing*, "legitimis et propinquioribus hæredibus *masculis* et assignatis dicti Jacobi Magistri de Ogilvie *quibuscunque*."[2] As to this fact, which however does not concern the present point,—only compromising the *lineal* heirs-male, in *one* estate-tail with the patentee, more hereafter. Forfeiture.

James Lord Ogilvie, son and heir-apparent of David third Earl of Airlie, who took as heir-male of the body of the former, was attainted by Parliament of high treason in 1715, during the lifetime of his father, whom he survived; and died eventually without issue about 1730. And there was another forfeiture, upon the same ground, in 1746, of David Ogilvie, Lord James's nephew, son and heir-apparent again, at the time, of John Ogilvie, his immediate younger brother, who was never attainted, but came, in 1730, after the death of his said attainted brother Lord James, to be heir in terms of the patent, and

[1] Great Seal Register.

[2] *Ibid.* The adjunct in the Airlie patent, succeeding to the *estate*, &c. with other more inconvenient, and difficult ones in such grants, has been already alluded to, (see pp. 202-3-4, *note*, 205, 221-2, &c.) This objection was, in consequence, urged by the crown in the identical case of Airlie, that the succession to the dignity necessarily depended upon the succession to the estate, and that the reference to the charter 1635 did not merely serve as a rule or criterion of descent, but denoted and enforced an inseparable union between both the honours and lands. To which it was not irrelevantly replied, that the argument proved too much, as the alienation of any portion of the patrimony, however *small*, would, on that construction, defeat the title to the dignity. No direct opinion was expressed upon the point in the House of Lords; but the objection, from what ultimately followed, may be held to have been virtually overruled, and that although the Airlie estate has not in *every* respect descended entire to the heir.

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male representative of the family.[1] David likewise survived his father; so that there were here two attainders, *in pari casu*, in the direct descent from the Airlie patentee, though qualified, in respect to the last traitor, first by a pardon, and thereafter by an Act of Parliament, the 23d of George III. c. 34, that removed certain disabilities, and incapacities, but without affecting the dignities. Upon the failure and extinction of the above David Ogilvie, and David his only son, the same were, at length, claimed in 1812, by Walter Ogilvie, unattainted, the younger brother of the former, by petition, and reference to the Lords, by whom, after much discussion, it was resolved, (the claim being likewise pushed, after the death of Walter, by David Ogilvie his son), in conformity with the opinion of the twelve Judges, who were consulted upon the occasion, that they could not take, but were barred by the attainders,[2] which at the same time fully forfeited the dignities, in respect at least to the *direct* heirs in tail-male. In consequence of this, David, the claimant, present Earl of Airlie, availed himself, as is well known, of a special Act of restoration to the honours, which past in his favour in 1826.[3]

Held to be unfavourable by the English Judges and House of Lords.

Case of the Earldom of Wemyss, essentially the same.

The case of the Earldom of Wemyss,—though never pushed to a claim, or publicly mooted, was however, in terms of the regulating charter or patent, the 23d of August 1672,[4] the same in essentials. Francis, the present Earl, no doubt took through uncorrupted blood, besides under a remainder there, in favour of Margaret Countess of Wemyss, in her own right, and the heirs-male of her body; but then it equally embraced David Lord Elcho, his grand-uncle, a previous and preferable heir-male, under that precise character, who had been *attainted* in 1746, *during* the lifetime of James Earl of Wemyss, his father, the grandson and heir of Countess Margaret; and whom he *survived* without issue,—identically as in the Airlie instances. Both being thus included (whatever independently

[1] He took the title of Earl of Airlie, and his son that of Lord Ogilvie.

[2] See Cruise on Dig. p. 131, *et seq.*

[3] Brit. Acts. The above account is from the printed papers and procedure in the case, Cruise, *ut sup.* &c.

[4] Great Seal Register.

held) in one simple limitation, to heirs-male of the body, the treason of Lord David, agreeably to the Airlie finding, proved as fatal to the claim of the other, who, in consequence, under the mere description of "Francis Baron Wemyss,"[1] his recent British title, conferred in 1821, obtained also, in 1826, a Parliamentary restoration to the Wemyss dignities.[2] In this case it was only necessary to rescind the attainder of David Lord Elcho; but in that of Airlie, which was more complex, it behoved to rescind both those of "James, eldest son of David Earl of Airlie (Lord Ogilvie,) and of David Ogilvie (his nephew), taking upon himself the title of Lord Ogilvie,"[3]—which forms, accordingly, were respectively adopted. And, in this manner, two noble and estimable families were most equitably reinstalled in the honours of their ancestors. Forfeiture.

The prominent arguments, that may perhaps strike one as chiefly weighing in the Airlie case, seem to be these. Supposing, as previously admitted, the Statute *de donis*, which has been alluded to, to remove corruption of blood in dignities in tail-male, such as Airlie,—so far as it has been considered,—then the surviving traitor in question has capacity to "take," but not for himself, but for the crown, in whom the honour would then vest from want of a *proper* heir,—in consequence of his attainder,—that is, of one able to maintain or rather retain possession. Nay, the same result would follow in virtue of the Act of the 26th of Henry VIII. c. 13, which trenches upon, and to a certain degree alters the other, inasmuch as it forfeits to the traitor, and his heirs in the *same* estate tail, not only "any estate of inheritance, in use or *possession*, by *any* right, title, or means, *at the time* of any such treason committed;"—but *also* "*or* at *any time after*,"[4]—under which last terms, the interest or inheritance, by the future opening of the Airlie succession to the Airlie traitor, was held to be comprized. The honours, therefore, became duly and adequately forfeited,—that event having actually occurred in his instance. In this way, in support of such conclu- Arguments which appear to have weighed in the Airlie case.

[1] It will be observed, that he is as little described here as Earl of March, see p. 207.

[2] Brit. Acts. [3] *Ibid.*

[4] See p. 723.

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sion, the twelve Judges inculcated in the Airlie case, that "a conveyance to an attainted person, *ever so long after* his attainder, would—carry an estate to him, which he would be capable of *taking*," but only "for the benefit of the Crown;"[1] —while honours, included by English authorities in real inheritances,—in such alternative,—naturally return to the latter, from whom they originally came.

But over and above, the Judges likewise thought that the Statute *de donis*, saving the rights of all heirs of entail excepting the traitor, does not, *ex terminis*, embrace the peculiar Airlie situation, whatever it may else do,—where the traitor was not heir, or tenant in tail in *possession*, or had done any thing in that character at the time of his attainder; which precise situation, with certain acts incurred, according to them, by the traitor, then or before, it alone contemplates.[2]

This, with every submission,—while the effect of the Statute *de donis*, as relating to dignities, and so far removing corruption of blood, was at the same time first questioned in the Airlie case,—a matter to be afterwards noticed,—is all I deem myself entitled to offer upon the curious and obviously nice points in question, without presuming to go farther into the subtile arguments,[3] and distinctions, there mooted. For these—which, as connected with English law, I may not be well able to appreciate, I must refer to the appropriate sources. What I have adverted to, however, may possibly be sufficient to evince the legal insufficiency of the Airlie and Wemyss claims, in bar of attainder. I need not add, that excluding the application of the Statute *de donis* to honours, they were then solely amenable to common law, and subject to forfeiture in every view.

[1] See Cruise, *ut sup.* p. 163. [2] *Ibid.* p. 158.

[3] Stress was *laid* by the Judges upon the other doctrine, in Neville's case, that a Peer, by attainder, forfeited "*his estate*," in "a dignity—by force of a condition *tacite* annexed to the estate, because he owes duties to the crown in respect of it, which are grossly violated by the offence of high treason," from whence they inferred the forfeiture, independently of the grant being only in tail-male, to be, on a separate ground, by common law, and hence irretrievable.. (Cruise, *ut sup.* p. 162.) *Sed quære?*

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There never was an *express* forfeiture of the Airlie or Wemyss *dignities;* nay, the latter has inadvertently continued, without intermission, in the Union Roll, which confirms what I have remarked as to a virtual, implied one, in the way illustrated, in reference to them, being as fatal and conclusive as the former. But another material question might arise, affecting the *eventual* condition of the Airlie honours,—under the hypothetical continuance of the forfeiture,—now most happily removed. Holding, as would seem just, the regulating charter of the Airlie estate, in 1635, to be taken into account, nay to fix, and constitute, and to be the *regula regulans* of the descent of the dignities, under authority and adoption in effect, of the patent in 1639, which directs to it accordingly, would the heirs-male collateral, on failure of the direct heirs-male of the patentee,—namely, those in the same estate-tail with the traitor,—be saved from his treason, and be then duly entitled to the honours, in virtue of the ultimate remainder over to heirs-male whatsoever in the charter in question?[1] If the remainder had been specifically contained in the patent, they assuredly would; but the *present* matter is not actually *res judicata*, although such references in patents to the settlements and entails of the family estates, in order naturally to make them and the honours go *simul et semel*,—nay, on other occasions with far less precision, are by no means uncommon with us.[2] We seem thus to have made the latter an integral portion of the former, from which the same favourable result may be held still to follow, the *referential* remainders in this guise being indubitably warranted by the crown; while, as has been fixed by the instance of Gordon of Park,[3] (where the remainder over was solely by a subject,) the nature and technical import and force of our practice, in such respects, are by no means to be overlooked in the apposite construction.

Airlie case, again illustrative of the general rule, that an implied forfeiture is equipondérant to an express one of a dignity.

Other point that might be mooted in the above, on the continuance of the forfeiture, owing to the reference in the patent to a ruling conveyance of the estate *with* remainders.

I do not precisely know how the English law abstractly would view the question. I may only here add, that the limit-

[1] See p. 725. "*Assignatis*" in the remainder may be held, *applicando singula singulis*, to relate to the lands.

[2] For a few such instances, among various others, see pp. 199, 200, 202-3-4-5, &c.

[3] See pp. 709-10, *note*.

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ation in the patent of the ducal honours of Roxburghe, dated 25th of April 1707,[1] after that to heirs-male of the body now spent, in favour of the *heirs* appointed by *previous grants* to "succeed" to the title of Earl of Roxburghe, was decided by the House of Lords, in 1812, *exclusively*, in virtue of a noted and special limitation and *remainder* over—in a private nomination, authorized by a royal charter, of the Earldom and estates of Roxburghe, in 1646,[2] to constitute the existing title and right to the entire dignities and estates of Roxburghe. Hence, so far at least, the utmost force has been attached to such mode of conveyance, whatever might hold in respect to forfeiture.

Case of the Dukedom of Roxburghe, in 1812.

What, under the same estate tail, if the attainted heir-apparent predecease the holder of the honour, leaving issue, are the latter excluded from afterwards taking?

But, transposing the occurrence of the material fact considered in the Airlie and Wemyss cases, and imagining the traitors there to have *predeceased*, instead of surviving the respective possessors of the dignities, at the date of the forfeiture,—while moreover, *e converso*, they also left issue,—we next come to a distinct favourable specialty (independent of that through a remainder over) that actually would protect the latter against the treason, though taking under one and the same limitation, or estate-tail, with the attainted parent. The Dukedom of Athole was granted by patent, dated June 30, 1703, to John Marquis of Athole, "et hæredibus *masculis de suo corpore*, quibus deficientibus hæredibus masculis de corpore defuncti Joannis Marchionis de Athole sui patris."[3] It was hence a dignity in tail-male in the first instance, with a remainder over, but which last has not yet, or is likely to come into play. The patentee had issue, besides William Marquis of Tullibardin, his eldest son, attainted in 1715, (when, and in 1733, there passed, during the lifetime of his father, two remarkable Acts, establishing the succession in the other heirs-male, just as if he had never lived,[4]) Lords James, and George. Lord James, in consequence, by his parent's demise, and even during the existence of the Mar-

Case of the Dukedom of Athole in 1764.

[1] Great Seal Register.

[2] *Ibid.* and authorities, and informations in the case.

[3] Great Seal Register, and Acts of Parliament, last Edit. vol. XI. pp. 117-18, where the patent is also recorded. Under the remainder, the Dukedom, &c. would go to the noble family of Dunmore, though not of the body of the patentee, but only of his father,

[4] See p. 202.

quis, his eldest brother,[1] became second Duke of Athole; while Lord George, as well known, was attainted in 1745, for his prominent concern in the rebellion. But, after the death of Duke James, without male issue, in 1764, the honours were claimed, by reference to the Lords, upon petition, by John Murray, son of the identical attainted Lord George, and allowed him, owing to the latter having *predeceased* the previous holder of the honours, and not survived him, as in the Airlie and Wemyss instances.[2] Here, upon the *then* admitted principle of corruption of blood not applying to entailed dignities, the heir could not only take, but, *e converso*, being no traitor, without interception or impediment,—for his own benefit, instead of that of the crown. In these circumstances it was held he could directly make resort to Duke John, his grandfather, the patentee, as in the ordinary case of entailed succession in England, and claim from him, *per formam doni*,—although still *de facto*—or necessarily connecting his "pedigree"[3] through the traitor. For, under the Statute *de donis*, regulating entailed succession, *all* called in an entail take from the original donor, or entailer, *per formam doni*, without being prejudiced by the acts of the intervening predecessors. And while this obtained, the Athole claimant took nothing from his attainted father, who was never tenant in tail in possession, or could forfeit "by any right, title, or means," &c. in regard to the matter, during his life, so as to bring him here within the penal enactments of the Act 26th of Henry VIII.[4] The authority and ground-work for the resolution is the doctrine admitted by Blackstone, Chief Baron Parker, Lord

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Opposite reasons, and remarkable specialty, why the latter are here saved from the attainder.

The authors and inculcators of the doctrine.

[1] Marquis William survived until 1746, (being also engaged in the rebellion, 1745,) when he died without issue. Cruise, in his report of the Athole case, erroneously represents Duke John, the patentee, as being succeeded, on his death in 1725, by Duke James, "his *eldest* son," which the latter then obviously was not. See his work on Dig. p. 128.

[2] Lords' Journals, February 2, and 7, 1764; also papers and authorities in the claim, Cruise on Dig. pp. 128-9, *et seq.* &c.

[3] "His title, or, to speak more accurately, his *pedigree*." Such are the relative words, in the opinion of Sir Fletcher Norton, in 1761, in the present case, founded upon by the claimant, (*ap.* Cruise, *ut sup.* pp. 129-30.) The distinction is curious, and rather *fine*.

[4] See Cruise, *ut sup.* and p. 723.

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Nottingham in Viscount Purbeck's case, and long before by Coke, and the Judges unanimously in that of Neville in the reign of James I. with sundry others,[1] that an honour, as well as lands, came under the above Statute *de donis*,[2] (though partially altered by the 26th of Henry VIII.) which was viewed as thus operating in respect to honours. For without such statutory intervention the Dukedom of Athole would have been utterly sunk and gone, necessarily by common law, to the claimant and his heirs—abstracting from the remainder over, as to which more immediately, It would appear to have been first reserved (directly at least) for the late Lord Redesdale, and the Attorney-General in the Airlie case, to question, and deny the application of the Statute *de donis* to dignities,[3] in this manner traversing and unhinging what may not inadequately be viewed as established law and rights, and inducing untoward and unlooked-for consequences. His Lordship even maintains, in accordance with the doctrine, that the right of heirs, in virtue of remainders, against attainder, is not thereby saved, as was imagined,[4] but exclusively, if I may so speak, by a kind of fiction,—upon the supposition of every individual remainder over being, *per se*, a separate original grant of a dignity, and so to be construed—though

Alone founded upon the Statute *de donis*, for the honour would be otherwise gone.

The doctrine first assailed by Lord Redesdale, and Attorney-General, in the Airlie case.

Lord Redesdale holds remainders to save *intrinsecally*, or *proprio vi*, from forfeiture, without the Statute.

[1] See afterwards.

[2] Blackstone's Com. Edit. 1770, II. p. 113. Eden's Reports, II. p. 373. Lord Nottingham's Speech in Purbeck case, *ap.* Cruise, *ut sup.* p. 124, *n.* Shower's Parliamentary Cases, pp. 5, *et seq.* Coke's Rep. p. 34,[a] (Edit. 1826, vol. IV. pp. 120-1.)—1st Inst. p. 9,[b] &c. &c.

[3] See Third Report of the Lords Committees on the Dignity of a Peer of the Realm, &c. pp. 58, *et seq.* 74, &c. &c. It is generally stated —and, as far as I know, without contradiction—to be framed by Lord Redesdale. Also Cruise, *ut sup.* pp. 132-3.

[4] See Coke's Rep. p. 34,[a] And in Viscount Purbeck's case, the Attorney-General thus addressed the Lords, for the crown, "The Statute, *De donis conditionalibus*, extends to honours; the word *terram* would be thought an improper word to comprehend all things tailable, yet said to extend to *all*, and to *honours* too, 1 Inst. 20; and if an honour can't be entailed, *then no* remainder can be limited; and there be many Lords that sit in this House by remainder, by good title." Shower's Parliamentary Cases, p. 5. The Purbeck case, in 1678, involved the surrender of an honour to the crown, which was then disallowed, though the practice certainly continued in Scotland till the Union.

only to take effect afterwards.[1] And this, however numerous the remainders, and merely comprized but in one instrument, —and otherwise operating, *quoad* the order of succession, like common substitutions, or even a single one, with us. Thus, to appeal (with Lord Redesdale) to the instance of the Viscounty of Bolingbroke, which was granted by patent in 1712, to the celebrated Henry St. John, and the heirs-male of his body, with remainder to Sir Henry St. John, his father, and the heirs-male of his body, there were here accordingly two distinct patents or creations of two distinct dignities,—though identical in name and by date,[2]—whereby the heirs-male, under the last remainder, were eventually enabled to succeed, as resolved, in 1754,[3] notwithstanding the noted attainder of the patentee in 1715, after the period of his death, and the consequent extinction of those in the same estate-tail. It is to be remarked, that the patentee *literally* also again took in the above way, as nearest heir-male of Sir Henry his father, whom he *survived;* but Lord Redesdale (still in unison with his opinion) sensibly inculcates, contrary to some, that he legally here had no interest, which had been spent.[4] And, on the opposite supposition, the case indeed, by the peculiar English law, might have been much the same with Airlie. The traitor would have re-taken, but not for himself, but for the crown, and the honour would have been irretrievably forfeited. Whatever there may be in Lord Redesdale's peculiar

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Case of the Viscounty of Bolingbroke in 1754.

Strange conceit, once entertained there.

[1] In such event, he says, "the dignity, so granted, (by the saving remainder) will not be *the* dignity which existed before the attainder; it will be a new and distinct dignity, of the same quality and name, but not the same dignity." Third Rep. *ut sup.* p. 76. See also, upon this head, pp. 74-5, *ibid.*

[2] See previous note.

[3] The Lords' Journals (vol. XXVIII. p. 204,) bear that, Feb. 12, 1754, Frederick St. John, (grandson of Sir Henry the father, and heir-male of his body through a younger brother of the patentee,) "by virtue" of the remainder, *claimed* the honours, and was "introduced" accordingly, and took his seat. Bolingbroke, the statesman, as is equally notorious, was partially restored, as in the instances of Sinclair and Marshall, (see pp. 712, *n.* 714, *n.*) but not so as to repone him in the dignities. See also Third Report, *ut sup.* pp. 76-7.

[4] For a curious distinction here, drawn by Lord Redesdale, in the case of *land*, by English law, see Third Rep. *ut sup.* p. 77.

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doctrine, it yet goes more effectually to protect the remaindermen, in the Scottish conveyances noticed at the outset,[1] against attainder, as well as those in the instance of the Dukedom of Somerset, (independent of the Statute *de donis*, &c.[2]) which he has elaborately referred to in exposition of it.[3] We in fact only arrive at the same favourable conclusion by a different route; while the precedent of Bolingbroke, as formerly hinted, becomes an additional illustration in point.

Whatever the true law, the consequence the same in remainders over.

To recur to dignities in tail male *simply*, although at the same time it may be confessed that there is foundation abstractly, and *ex terminis* for Lord Redesdale's or the Lords Committees' restricted interpretation of the Statute *de donis*, so as not to comprehend honours, and of course not to exclude corruption of blood in respect to them,[4] still this is *now*

The protection of dignities in tail, simply, by the Statute *de donis*, though not expressly there afforded, yet has constructively enured into law.

[1] See pp. 709-12-13. [2] See p. 715.

[3] It is curious to observe, under favour of the law, perhaps too much originating in the authority in question, that in the Sinclair patent in 1677, (see pp. 712-14,) there would have been no less than six distinct patents or creations; and in that of Kintore in 1694, and others, many more, although it may have indeed little struck the humble concoctors, or framers, or the Scottish advisers of the crown, that they were then specially discharging so large an exercise of the Royal prerogative.

[4] The Statute, strictly speaking, merely concerns *tenements* and lands, and not honours, especially such as are personal. It was, however, upon the supposed connection between lands and an honour, that Sir Edward Coke held that of Westmoreland to be within the former. And this territorial postulate, in some shape or other, caused a demur at first to Chief Baron Parker, in the case of the Earldom of Ferrers created in tail-male "without mention of any locality," after the conviction and execution of Earl Ferrers for felony in 1760. Being thus entirely personal, it was difficult to include it within the Statute, by which forfeiture for the crime could alone be avoided. At length he resolved, that as the Viscounty of Tamworth, a dignity "named from a place—(was) created by the same patent," the Earldom was likewise so protected; for "otherwise this absurdity would plainly follow; that where two honors were conferred and limited in tail by one and the same patent, the one from a place, and the other not,"—the last would be forfeited, and the other not. (Third Report of the Lords Committees, *ut sup.* p. 72.) This may not seem conclusive reasoning; it might be argued, that the Viscounty of Tamworth, the lesser honour, should rather succumb to, and be thus metamorphosed into the nature and condition of the higher, and be hence lost with it, by "*attraction*." But be this as it may, the Earldom in view was accordingly saved; and it has

not *res integra*, the contrary having so long obtained, under the highest and gravest authorities,[1]—enured into law—and been fairly admitted and homologated in practice;—while the Statute has received a large, and by no means judaical interpretation. Coinciding with the former again, how are we to regard the Athole decision in 1764, and certain other Peerages, which are alone saved to their present holders, and rescued from the penalties of forfeiture by the Act? Of this number are the Earldom of Ferrers and Barony of Stourton, dignities exclusively limited in tail-male,—and actually in the same situation,—that have been thus preserved against forfeitures for felonies, perpetrated by their respective possessors, in 1557, and 1760,[2]—owing to which they would otherwise have gone, (as will be further evident in the sequel); for excluding the Statute in question, then the common law comes into play, with its blasting and utter extirpating results. It may be here remarked, that although the reverse obtains in it, in regard to the effects of treason, there is, in the subsequent one of the 26th of Henry VIII. repeatedly alluded to, no notice of felony. The larger protection, therefore, of the heirs in tail-male, in the case of felony, other than the convicted criminal, is wholly grounded upon the Statute *de donis*. It may be thus forcibly argued, that the fa-

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Injurious consequences would else ensue, and admitted Peerages struck at and gone.

founded this important doctrine, that a dignity "in tail" is within the Statute, and hence not forfeited for felony, whether "it be conferred from any place or not." See Eden's Rep. II. p. 373.

[1] Independently of others, and those already cited, Mr. Charles Yorke states, in his opinion in 1761 in the Athole case, that "though the descent of a dignity, in fee-simple, *may be* impeded by corruption of blood in cases of *felony* or *treason*, yet, as there is *no* corruption of blood in the course of succession to an *estate-tail*, created *either* in lands or *dignities*," he therefore concludes that John Murray, the claimant, as already obvious, was entitled to the Athole honours. See Cruise, *ut sup.* p. 129. According to Mr. de Grey's opinion also, in the same matter, he identically took *per formam doni*, indubitably in virtue of the Statute *de donis*, (*ibid.* p. 130.) And further, Sir Fletcher Norton inculcates there, that by the law of England there was "*no* difference" in such respect, between "estates-tail and *dignities* in tail." (*Ibid.* p. 129.)

[2] See preceding note, and p. 734, note, and Cruise, *ut sup.* pp. 123-4.

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vourable law, constructively recognised and admitted, is not now open to challenge, and, if it were, as already observed, baneful and injurious consequences would ensue, for several Peers would be stript of their dignities. To use the strong words of Lord Nottingham, "the Peers are all undone if the objection be true, and that honours cannot be entailed."[1] Neither is it to be supposed, in these circumstances, that the House of Lords would tamely abjure a doctrine, upon which the rights of many of their order may so inevitably depend.

Dignities in fee-simple are unqualifiedly or generally lost by forfeiture.

As indeed already evident, by the English law, all honours held in fee-simple, or at common law, are unqualifiedly by attainder for treason and felony. Accordingly the Barony of Lumley, constituted by writ of summons, and descendible to heirs-general, was found in 1723 not to have been in John Lumley, or in any heir, but irrevocably forfeited to the crown, and extinct, owing to George Lumley, his father, having been attainted for treason, though he even *predeceased* John Lord Lumley, his father, the undoubted holder of the dignity, and grandfather of the said John.[2] This, with the sole, though weighty and decisive exception of the honour not being entailed, is obviously the precise case of Athole in 1764; and, as will be afterwards seen, the decision is in unison with *our* original law. Had the traitor survived his father,—then it would have been even worse,[3] and more so than the unfavourable cases of Airlie and Wemyss, though in a degree analogous. The Lumley attainder, thus again equally forfeited the dignity, though it was not of the tenant in possession, or of the first mentioned directly or expressly.

Favourable specialty, however, in succession in fee-simple.

Cruise however inculcates, as to succession in fee-simple, that though the attainder of an elder son, as above, *during* the lifetime of his father the tenant, induces forfeiture, and the escheat of the property to the crown, yet that a younger one would take as heir to the father, *if* his eldest attainted brother had *predeceased* the latter without issue. The reason assigned by Cruise, is, because—even differently from the

[1] See Cruise, *ut sup.* p. 125, *note.*

[2] Collins on Baronies, p. 373; and Cruise, *ut sup.* p. 126.

[3] See Cruise, *ut sup.* p. 125.

Athole instance—the younger son "can derive his descent from *him* (the *father*) without claiming through, or *even mentioning* his brother." [1] Forfeiture.

Although baronies by writ of summons were unknown to us, we yet certainly had, and still have, various dignities (saving abbeyance,) alike descendible to heirs-general, either expressly—or constructively, as has been resolved by the House of Lords in the instance of the Peerage of Sutherland in 1771, without the intervention of a known constitution or creation—including both the latter, and the still older Earldom of Marr, &c.—to which, necessarily, the same law of treason would apply. In the same manner, honours, like the Earldom of Cassilis, found constructively descendible to heirs-male of the body, would be, *in pari casu*, with one actually so limited. The absolute attainder of an English dignity in fee-simple for *felony*, is illustrated in the case of the ancient Barony of Audley, constituted by writ of summons. It only came to be held by James Touchet, the son of the notorious Mervin Lord Audley, convicted, and attainted of that offence, in 1631, through special restoration, by Act of Parliament, the 29th and 30th of Charles II. without which, according to English authorities, it had gone. There is here a strikingly different result from that in the Ferrers and Stourton instances, owing to these dignities being in tail-male; while it would have equally obtained, had the attainder in question been of an "heir apparent," who survived his ancestor,[2] &c.

Same law applicable to Scottish dignities so descendible, (saving abbeyance), whether literally, or constructively.

Absolute attainder of English dignities in fee-simple for felony—case of Audley in 1631.

Result different from when in tail-male.

But, with us, it may be questioned, whether the same law, in the case of felony, would obtain, because the Act of Queen Anne, in 1708, c. 21, though it extends the English treason law to Scotland,—yet likewise expressly enacts, that certain felonies and capital crimes, such as "*theft* in landed men, *murder* under trust, wilful fire-raising, firing coalheughs,[3] and *assassination*"—which had been alone made *treason* in Scotland by *Statute*,[4] from, and after the ensuing 1st of July 1709, are to cease to be *so*, and "to be *only* adjudged, and decerned to be

Questionable, owing to a specialty, whether felony ordinarily would thus compromise a Scottish honour.

[1] *Ibid.* p. 127.

[2] See Cruise, *ut sup.* pp. 123-5.

[3] Coalpits. This would be now, clearly, a very heinous offence.

[4] See pp. 129-30, 230, 224, 227.

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capital offences, and the committers thereof" to be only "punished, and tried—as, by the *Law* of *Scotland*, is provided in the cases of other capital crimes."

The above, therefore, constituted no longer treason in any view, even by the Act that introduced the English treason law into Scotland, and were reduced to a common level, as originally, with ordinary Scottish felonies, which had never been so visited by our statutory law, and did not infer treason. Owing to this circumstance, backed by the special eye of the Legislature in 1708, from urgent and weighty political considerations, with the object, so far, of mutual assimilation, to what is termed "proper," or high treason, or misdemeanours directly against the State, without reference so much to the inferior crimes in question, which more approximated with us to *petit* treason, but were now even divested of that character, the Scottish common law in this emergency, from the restoration of things to their first state—necessarily without any English controul, would appear to come into play, and to rule in the case of the latter,—and in the parallel delinquencies that have been considered in England, in respect to Scottish honours—thus excluding the operation of English law. The plain corollary from which, at the same time, would be, that the perpetration of such felonies referred to, by a Scottish Peer, would not, as occasionally by it, compromise his dignity. That would still continue entire, in all events. An exception, however, obtains in the British Act in 1708, in regard to the murder of "any of the Lords of Session," or "Justiciary, sitting in *judgment*, in the exercise of their office," which, it is declared, "shall be construed and adjudged (from the said 1st of July, 1709) to be high treason."

Exception, however, by Queen Anne's Act, in murder of a Lord of Session or Justiciary *when* sitting in judgment.

On the murder, otherwise, in 1543, of Mr Robert Galbraith, a Judge of the Court of Session, or one of the Senators of the College of Justice, as they are also styled, there was an act or ordinance by the Regent Chastelherault, with advice of the Chancellor, and Lords of Council—upon the narrative of the "cruel and *tressonable* slauchter," committed by John Carketill, burgess of Edinburgh, and his accomplices, "quhairthrow," it is stated, "yair is" such "*monisching*[1] and *bost-*

By *our* common law, murder of such supreme Judge, or a Chancellor, *at any time*, treason.

Case of Galbraith in 1543.

[1] *Admonishing.* Arnot, referring to MSS. Memoirs of the Family of

ing maid aganis ye remanent of ye said Counsell, advocatis of ye said College," that "yai feir to procure in ye materis concerning oure Soverane Ladyis liegis." And by the act, his Grace declares, that "quhatsumevir maner of persone invadis, *slayis*, or hurtis cruelly *any* of ye Counsell, *advocatis* or *scribis yeroff*, wytout quhome ye said College cannot be halden, (they) salbe callit and accusit, as committaris of *lese majestie*, and punist yerfore." This was an evident extension of the law in their subordinate case; but, "*not* ye *less*," it is added, "ye slauchter of ye said Maister Robert, is to be persewit as *tressoun*, *conforme* to ye *common* law,"[1]—that is, agreeably to the existing, and the old—shewing what it here *was*, and necessarily in the matter that forms the exception in the last passage referred to in the British Act, 1708. Ac-

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Then intended to extend like penalty to the other members of Session,—though not duly effected.

Sinclair of Hermistoun, states that Galbraith's murder, by the parties mentioned, was "on account of some favour shown to Sir William Sinclair of Herdmanstoun." (Crim. Trials, p. 155.)

[1] February 13, 1543, Acts and Decrees of Council, &c. I am not aware of this procedure being elsewhere adduced. The Session, at the juncture, seem rather to have been in bad odour, and to have been exposed to much insult and obloquy. James Hamilton of Stenhouse, Captain of Edinburgh Castle in 1545, told Mr. Thomas Macalzean, an able lawyer, that if "he procurit in ye mater movit be Alexander Sandelandis aganis him,—he suld have his *skin*;" nay, when taken to task in consequence, he even said that he "suld do *siclyke*" to a Judge, "or *ony* of the Lordis yat satt upon ye *sete*," *(Session)*. A confederate, Hamilton of Cauder, herein agreed with this worthy, "and said mair,—yer were *na lyff bot* giff ye advocattis were punist, on *yat* sort." Long before, in 1515, in a judicial procedure, the Right Reverend the Elect of the Isles called the Chancellor, (Beatoun, Archbishop of Saint Andrews,) "ane *waf* Juge," a disreputable, sorry one.—There was at least harmony upon the bench on the 23d of May 1546, when the Session, at a full *Sederunt*, or convocation, "concludit" unanimously "not to remain, wytout yai gett payment for yer laubouris." The above genuine notices transpire, at the corresponding periods, in the Act and Decree Register of our Supreme Civil Court. What by assassination, on one hand, and by poverty, on the other, they were, as we say, "between the devil and the red sea." These lines are known:—

> "Dat Galenus *opes*, dat Justinianus *honores*,
> Sed nos Philosophi *turba misella* sumus."

The last description, in reference to the "philosophers," would thus appear to have applied to *our* sons of Justinian at the time.

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cordingly the criminal Carketill, and his coadjutors, were indicted in Parliament the 28th of March 1544, "pro *proditoria* interfectione" of the Judge in question,[1] but they were too consciously guilty to stand the result, and absconded. The law was as solemnly, and still more expressly recognised on the 3d of August 1546, in an age of bloodshed and anarchy, when there was riot and deviation in every respect; of which date it was "inquirit" by the Chancellor in Privy Council, of certain prelates, nobility, and barons, if it be "*Treason* to *sla (slay)* an Chancelar of the realme, or nocht? Quha all declarit, that conforme to the *commone law*, it *wes* treasoun,—and acceptit the interpretatioun of the law, *quisquis ad Legem Juliam C.* in that *cais*."[2] The question obtained in reference to the murder of Cardinal Beatoun, the late Chancellor, Primate of Scotland, *in* his *Castle* of Saint Andrews, the exclusive seat of his Archiepiscopal jurisdiction; while his murderers, again, as before, were equally prosecuted, and convicted of "*tressoune*" and "*lese majestie*."[3] The murder therefore of a judge or chancellor has been instructed, by the preceding authorities, to have been treason with us at *common law*, obviously founded, as well upon feudal principle, from their being the direct representatives or ministrants of the sovereign, the great paramount or supreme head,[4] in their functional capacity, as upon the Roman law, above specially referred to, which was vehemently impressed with the same principle.[5]

Further illustration of the above law, in 1546, in case of the murder of Chancellor Beatoun.

[1] Acts of Parl. last Edit. vol. II. p. 445. The former Act of the Regent Chastelherault, in 1543, further ordains that the extension of the law, in respect to the advocates and scribes of Session, should be fixed by Statute in the next Parliament; but none such appears to have passed.

[2] Register of Privy Council. The penalty is extended by the Roman law, under the title quoted, to such as should generally conspire, "*de nece* etiam virorum *illustrium* qui *consiliis*, et *consistorio* nostro intersunt, Senatorum etiam, *nam* et *ipsi* pars *corporis nostri* sunt."

[3] Acts of Parl. last Edit. vol. II. pp. 467-8, &c. and 479-80.

[4] All contempt, insult, or outrage were as much banished from the presence of Royalty, or the *halo* around it, as the descent—though, *vice versa*, unjustly enough—of all our original Earldoms to heirs-general, from the minds of Lords Mansfield and Rosslyn, in determining the descent of such dignities.

[5] *Ut sup.*

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The latter likewise, on other occasions, will be shewn in the sequel to have been much regarded by us in matters of treason. Such being the case, the crime of treason, *so* established, and attaching to the slaying of a supreme Judge at any time, and in any situation, may not have been properly rescinded by the British Act in 1708, which merely contemplates murder made treason by statute, and not simply by common law, like the former. Nay, so far from this, the Act admits and re-enacts, by way, as it were, of special reservation, the identical penalty, though partially, when the legal dignitary, in the character of a Lord of Session or Justiciary, happened to sit in judgment. And hence it *might* singularly follow, that a Scottish Peer—owing to the Scottish treason law being unrepealed, and still obtaining here—were to slay such Judge, in any emergency, *tanquam quilibet*—not sitting in judgment—that his honours, in that event, whether in fee-simple, or held under remainders over, would be lost and gone for ever; while, in the *later* restricted view of the offence, they would, under favour of the English law, be saved to remainder heirs, or to those in the predicament of the Athole claimant in 1764,—unless we are to hold that the old Scottish law, owing again to not being peremptorily repealed, is still generally to govern. The spirit and purport, no doubt, of the British act might be thought to operate otherwise, inasmuch as its avowed object is to make the treason laws in both countries as "near as may be," and broadly to enforce the English, which it may do indirectly. But such statutes—independently, as formerly observed, of the higher crimes against the State being more especially in view,—are ordinarily strictly interpretated; and the matter still, may not be so unequivocally, or so unexceptionably fixed as could be desired.

Roman law, a great rule with us in treason, here followed, as well as the feudal.

Our law in question, in the broad way stated, perhaps not rescinded by Queen Anne's Act in 1708.

Curious possible consequence from this.

But the penalties of parricide and matricide, in terms of act 1594, c. 224,[1] are not affected, or infringed upon by the British act in 1708,[2] the crime being in no way there alluded to. Neither was it accounted treason with us. And hence, sup-

The Scottish penalties, however, in the case of parricide, &c *not* altered by Queen Anne's Act.

[1] See p. 222,—c. 30, according to *last* Edit. of Acts.

[2] The latter also makes, properly enough, counterfeiting the Royal Seal treason.

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If the former comprehend honours, then the same descendible, on conviction for parricide, as in the case of alienage.

posing the former to extend to, and embrace the state of honours—as to which before,[1]—there would necessarily, in the event of conviction, be another, and qualified kind of forfeiture by special enactment—namely, of the criminal and his heirs, *in recta linea;* while, under its protection, collateral heirs would immediately take,[2]—as through *alienage*, in the instance of Gordon of Park.[3] Upon the subject of the application of the same act 1594 to honours, it is remarkable that the English statute *de donis*, so often alluded to, though literally like it only regarding landed rights and succession, has yet been held, as was seen, to extend to dignities. But then again, the English statute was of far ancienter date,—in the reign of Edward I.—when there existed a strict connection between lands and honours, owing to which reason, as is specially inculcated by English lawyers,[4] honours have been thereby included. This, however, by the way, with a host of authorities to the same effect,—the corresponding practice and understanding in such respect, much obtaining in both countries, but *a fortiori* in Scotland, palpably refutes Lord Mansfield's ever astounding proposition in the Sutherland case, that Peerages with us had previously ceased to be territorial, and become quite personal,—nay, even so far back as 1214!!

Glaring absurdity of finding of Lord Mansfield in Sutherland case further exposed by the English construction of statute *de donis*.

The following case, of a twofold nature, and involving both the *British* and Scottish law of forfeiture, is curious and remarkable. William Drummond of Cromlix was created, by patent, dated the 16th of August 1686, Viscount Strathallan, and Lord Drummond of Cromlix, with limitation to him and the heirs-male of his body, "quibus deficientibus, (ad) *alios* ejus hæredes masculos."[5] On the death of James, third Viscount of Strathallan, his grandson and heir, without issue, in 1711, the succession to the honours, in terms of the patent, under the closing substitution, opened to William Drummond of Machany, the heir-male, collaterally, he being descended of Sir James Drummond of Machany, younger brother of John second Lord Maderty—an older title in the family[6]—the male ances-

Case of Viscounty of Strathallan, &c. in 1787-90; also involving the matter of Forfeiture in Honours, so far back as 1690, according to our original law.

[1] See pp. 228-9-30.
[2] See p. 222. [3] See p. 718. [4] See p. 734, *n.* 4.
[5] Great Seal Register.
[6] It was limited simply, January 31, 1609, to heirs-male of the body

tor likewise of the patentee in 1686. But Sir John Drummond of Machany, the grandson and heir-male of Sir James, and father of William Drummond of Machany, referred to, had been forfeited, with others, in terms of a Scottish Act of Parliament, the 14th of July 1690, whereby they, "their name, fame, memory, and honour," are declared "to be extinct, their blood to be tainted, and their armes to be *riven* furth,[1] and delett out of the book of armes, sua that their *posteritie* may *never* have place, nor be able, hereafter, to brook, or joyse *any honours*, offices, titles, or dignities, in tyme comeing," as well as lands, heritages, tacks,[2] &c. Sir John, the traitor, was never pardoned, or restored, against the attainder; though he latterly returned to Scotland, where he resided, and died in 1707, under circumstances to be stated. However William Drummond, his son, *might* have been benefited,—according to the English law of treason, as exemplified in the case of Athole, &c. by the decease of his father, *before* the opening of the Strathallan succession to him in 1711, and his own survivance—while he took nothing from his father excepting his "pedigree," in respect to the Strathallan and Maderty honours, or otherwise, that law did not then obtain with us; and the consequences of the attainder in 1690, or indeed of *any*, (as perhaps has been anticipated,) from the discussion that will be subsequently gone into, may be very different. Nevertheless the said William in 1711, and thenceforth, actually assumed the Strathallan dignities, though with the less chance of challenge or dispute, as he forbore to take the oaths to Government, or vote at Peerage Elections. Indeed he had been captured at Sheriffmuir, in 1715, on the side of the Pretender, but without being prosecuted, or experiencing, in

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of James first Lord Maderty, the father of Lord John, (see Petition, Lords' Journals, printed Strathallan case, and Minutes of Evidence, &c.) and also, going to the same collateral heir-male, was included in the claim in question in 1787, by Andrew Drummond, the male Machany representative. The patentee, in 1686, was a younger brother of the family of Maderty by recenter descent, in whose son and heir William, second Viscount Strathallan, the Barony of Maderty, in default of nearer heirs-male, came eventually to merge.

[1] *Torn* forth.

[2] Acts of Parl. last Edit. vol. IX. Append. pp. 61—65.

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consequence, the rigour of Government. Being zealously attached to the same unfortunate cause, and also engaging with James his son in the rebellion of 1745, there passed an Act of Parliament in 1746, declaring that if the said "William *Viscount of Strathallan* (and) James Drummond, Esquire, eldest son, and *heir apparent* of William Viscount of Strathallan," did not surrender themselves, and submit to justice, "on or before" the subsequent 12th of July 1746, they should, "from and after the (previous) 18th day of April,—stand and be adjudged attainted of high treason."

Falsa designatio of the party attainted by a British Act in 1746.

It so happened, however, that the Viscount during these dates was dead, having fallen at the battle of Culloden; while James, his son, necessarily not then in *apparency*, as set forth, but in fact the family heir and representative, abstained from complying with the conditions, and escaping abroad, died there in 1765. The son and heir of the latter was Andrew Drummond, who in 1787 claimed the Strathallan and Maderty honours, by petition, and reference to the Lords, upon this ground—that any forfeiture, in terms of the preceding Act, was null and ineffectual in regard to his father and to himself; because, while it would be proved to have been only brought into Parliament the 8th of May 1746, and did not pass until the 4th of June thereafter, Viscount William, his grandfather, against whom the said Act was, (as premised,) *expressly* directed, did not then exist, but had been killed as far back as the 16th of April previously. There were hence, he insisted, during the material periods—both when the Act was introduced and passed—*no* such persons as William Viscount Strathallan, and, especially, "James Drummond, Esquire," his "son and heir apparent;" for James, by the direct admission of Government, who did not deny his father's right to the dignity, had *then* been divested of his former status, and become a peer of the realm, under the family title of Viscount Strathallan. From whence it resulted—from *his false* designation in this manner,—that, not being properly, or at all described, or called upon to surrender, James was not bound to obey the Act, or legally included in its terms and conditions, which were necessarily, so far, effete, and actually levelled at a non-entity. This, coupled with the predecease of Viscount William, which render-

ed the same also abortive *quoad* him, the claimant contended, excluded the operation of the conceived forfeiture, and duly substantiated his case. Forfeiture.

But on the matter being referred to the twelve Judges, they unanimously gave it as their opinion, that by the legal understanding, and practice, such statutes must be held to relate to, and embrace the *first* day of the Session of Parliament,[1] which, in this instance, began as early as *October* 1745. "In the contemplation of the law, the *whole* Session makes but *one* day;" and as "Parliament may pronounce on men's *future* conduct," they could here effectually act as they did, and hence, through the agency of this legal fiction, duly attach, and implicate the parties;[2] for Viscount William, as well as James his son, was alive in October, and for months afterwards, both being then known, and styled by the identical designations given them in the statute. The Viscount "was dead" when it "really passed," (as to which no proof was allowed). Was he attainted? Perhaps *he was not.* But that must be not on account of any defect in the act, or because he died on the 16th April; but because he died before the 12th July 1746,—and it would be presumed that he would have surrendered, had he lived. The claimant was here seeking to take an advantage, to defeat the plain intendment of the legislature; for it could not be disputed that his father was meant to be attainted by the Act. It could not be regretted, therefore, if there should be a rule which went to support the legal intendment, though grounded on a fiction."[3] The claim, accordingly—the Judges determining that James Drummond had been attainted, was, the 12th of May 1790, rejected by the Lords.[4] James Chalmer, the solicitor, who has been alluded to, and was employed by the claimant in the case, may thus not inapposite- Unavailing, in consequence of a peculiar English fiction, unknown to us.

[1] As will be seen in the sequel, the Scottish practice was different, the effect of our statutes not being thus regulated, but naturally, according to their precise dates.

[2] This specialty was however admitted, that "in the ordinary course of judicial proceedings, the conviction must have related to the time of the treason. But *Parliament* is *not* so bound."

[3] See Cruise on Dig. pp. 120-1-2, where the reasons, and grounds of opinion, are given. The other facts, previously stated, are from the Informations and papers, &c. &c.

[4] Lords' Journals.

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Report of Strathallan case by Chalmer, the agent.

ly comment upon the result,—in his usual characteristic manner. "The judgement of the House of Lords was, that he (the claimant) had not made out his right, and consequently, if he could now make it out, it would be competent to petition the King again, and have a fresh reference to the House. But it is a mistake to suppose, that *his* (the *claimant's*) want of success was owing to a crotchet of Lord Rosslyns. The decision went upon a crotchet of the Law of England, as it then stood, viz. that all the Acts of one Session of parliament were to be held as passed on the first day of it, and, in consequence, when we maintained that William Viscount Strathallan was not attainted, because he was dead before the Act passed, and that his son was wrongously attainted as a Commoner, when he had become a Peer, the answer was, that they were both rightly named and attainted, *holding* the Act to have passed the *first day* of the Session; and our Reply, that even supposing the general rule, it could not apply to the case, because the Act *mentioned events subsequent* to the first of the Session.[1] This question was before the twelve Judges, who delivered an unanimous opinion against us;[2] and they concluded with observing, that, however *harsh* or *absurd* the general rule might seem, they could not regret the applying it to this particular case, where we were seeking to take advantage of the words, against the intendment of the Act." Mr Chalmer adds, "it was this determination which gave rise to the law, that every Act should, in future, bear the date of actually passing, and operate only from that day, unless otherwise expressed."[3]

Alteration of the law, in regard to previous fiction, owing to the Strathallan decision.

Partly similar case of James Drummond, *titular* Duke of Perth, in 1749, though without *falsa* designatio, and relative *Scottish* notions.

In the Act mentioned, in 1746, in respect to William Viscount Strathallan, and his son "James Drummond, taking upon himself the title of Duke of Perth," was also included, under the same condition and penalties, and he too, prematurely dying on the 11th of May, could as little surrender, and submit himself to justice thereafter, "on, or before the 12th of July" (1746,) the precise term assigned. But on the question of his forfeiture coming before the Court of Session, to whom it was fully competent, "as having authority to deter-

[1] This further specialty, of course, will be attended to.

[2] Through the Lord Chief Baron.

[3] From the autograph statement of Mr. Chalmer, still extant.

Forfeiture.

mine claims on forfeited estates,—though the attainder be by act of Parliament,"[1] they decided, the 18th of July 1749, that the attainder of James was, in consequence of his predecease, "void and null," and his estate "not forfeited," because "the condition" (of surrender) was "*suspensive* of the attainder," and "not resolutive,"—and could not have an absolute prejudicial effect ;[2] to which judgment the crown did not demur, but acquiesced.[3] James Drummond, here properly enough described, was, differently from William Viscount Strathallan, alive and not dead when the Act was brought into Parliament, but certainly dead almost immediately after, and considerably before it passed. No strict presumption appears to have been drawn,—as in the instance of Strathallan, "that he would have surrendered, had he lived." In terms therefore of this decision, Viscount William was not attainted, indeed, as is nearly admitted by the twelve Judges ;[4] and all turned upon the condition of James, his son.

Its application to that of Strathallan.

In consequence of the judgment, James Drummond (of Perth,) being found, in 1749, not to have been attainted, his succession *opened* to John—or Lord John Drummond, (as he was commonly styled), his next brother, (the former having died unmarried), who having been in like manner called to surrender by the Act 1746, and surviving the prescribed term, and long after, was necessarily duly attainted. It hence also followed that the estate was irretrievably forfeited in his person, the same contingency having here occurred as in the Airlie and Wemyss cases,—by the succession thus opening to an attainted heir apparent; as was accordingly decided the 1st of December 1750, on the claim of a third party, for collateral

Case of John, or Lord John Drummond, in 1750.

[1] So Lord Elchies, a reporter of the case, says, under the reference subsequently made.

[2] This was a counter plea. "It will not be pretended, that captivity or grievous sickness, during the *time limited*, would have barred the effect of the attainder ; and yet these, as well as death, would have made *his (James's)* surrender impossible." It was also argued in the case, that the assumed "resolutive condition being fixed upon by the *Statute*, cannot be supplied by an *equivalent*."

[3] Drummond of Logie-almond against the King's Advocate, of the date mentioned, in Falconer's Decisions, and those of Lord Elchies, vol. I. Append. II. under Forfeiture, No. 7.

[4] See p. 745.

Forfeiture.

Forfeiture of an estate by the succession opening to a convicted traitor, without any salvo, from the misconceived plea of his being *civiliter mortuus*.

heirs, including himself, in the face of the erroneous and unfounded plea, that John Drummond, being attainted, could *not* hold or take;—from whence it was urged, that although the estate escheated to the superior, yet *it* was not forfeited. It does not appear how this could greatly assist the claimant, for, in such emergency, the crown would still come in as superior.[1] He evidently founded, as was replied, *super jure adversarii*; but, as already instructed, the traitor in question *could* take, though only for the crown's benefit, in virtue of the Act 26th of Henry VIII. formerly referred to, and which was actually objected by the crown counsel in this case, who, it is remarkable, put the same construction thereupon, as the twelve Judges in that of Airlie.[2] The preceding plea of a traitor *thus* attainted not being able to hold, but wholly *civiliter mortuus*, has been elsewhere irrelevantly espoused by some modern Scottish lawyers, who have even inadvertently been disposed to give it an effect like that of alienage, in the case of Gordon of Park.[3]

The Strathallan and Maderty honours,—even if previously existing,—being, agreeably to the resolution in 1790, exclu-

[1] The Lord Advocate also contended, that supposing even the "estate were held of a *subject*, and escheat, the property would fall to be determined by the law of Scotland, as it is only with regard to forfeitures that the English law obtains, and by the Scots law Escheats likewise fall to the King."

[2] Drummond of Logie-almond against the King's Advocate, of the date in question, Falconer's Decisions, and Lord Elchies's Reports, vol. I. under *Forfeiture*, Append. II. Nos. 15, 16. The preceding James Drummond, commonly called Duke of Perth, had legally no right to that title, it having been conferred by James II. after his abdication, upon his grandfather, James Earl of Perth, Chancellor of Scotland. The dignity of Earl, and that of Lord Drummond also, the constitutions or grants of neither of which honours exist, were forfeited by the attainder, in 1715, of James Lord Drummond, (son of the Chancellor, and father of the titular Duke,) who was also in the same way Duke of Perth, and *survived his* father. The Scottish Earldom and Barony, I need not add, would, at the same time, have been forfeited in John Drummond, in 1746, had they not been so, previously in 1715; when the estate however was saved, as thereafter found, in consequence of a precautionary family transaction.

[3] See pp. 718-20.

sively and sufficiently forfeited in the person of James Drummond, in terms of the act 1746,—it hence became unnecessary for the House of Lords to probe, and go into the remaining objection and obstacle alluded to, grounded upon the forfeiture also, as has been seen, by a Scottish Act of Parliament in 1690, of Sir John Drummond of Machany,[1] father of William, styled Viscount Strathallan in the previous year. It was *through* Sir John, the latter, and the claimant his grandson, connected themselves, as collateral heirs-male, and as heirs to the dignities, of the Strathallan, and Maderty grantees, of the direct main stock. The Act of Queen Anne in 1708, introducing the English treason law with us, having no retrospect, and only operating from the first of July 1709, this next matter, of course, falls to be decided, not by its import, which, as has been shewn,—were it not for the attainting *words*, would have saved the succession to the honours, upon the authority of the Athole case in 1764,[2]—but by *our* original treason law.

Forfeiture.

Other bar to the Strathallan claimant in 1787, from the attainder of Sir John Drummond, his ancestor, in 1690.

The Strathallan claimant, in his printed case, and written Informations, which I have seen,—though not the subject of proper or any discussion by the Lords, first pleaded, in bar of the attainder in 1690, a Royal charter thereafter, dated February 28, 1695, of the estate of Machany, to the above William Drummond, son of the attainted Sir John, in favour of him and his heirs-male. It proceeds upon the express narrative of his attainder, and the forfeiture in consequence, of the property to the crown, and contains, among other burdens and provisions, that of a slender aliment to Sir John.[3] It was hence contended, from this partial countenance, or regard and favour shewn towards the traitor, on the part of Government, that they had in fact overlooked, nay even fully pardoned his crime,[4] although no rehabilitation could be discovered of this individual, who thenceforward resided, and died in Scotland in 1707.

First plea of the former against the said attainder in 1690, which falls to be regulated by our *original* treason law, thus next forming a subject of inquiry.

Effect of a slender aliment by a Royal charter, to a convicted traitor.

[1] See p. 743. [2] See pp. 730-1.

[3] Great Seal Register. The grant is hastily and carelessly concocted; even the Christian names of the disponee and his mother are left blank, independent of other such defects.

[4] "The Royal grant to William Drummond, the son of Sir John, in 1695, was, by the law and custom of Scotland, equivalent to a pardon and restitution." (So the claimant insisted in his printed case.)

Forfeiture.

Insufficient *per se* to cure or remove the attainder.

But the circumstance is evidently too weak and inadequate to authorize so broad and violent a conclusion; and, while the forfeiture is reiteratedly founded upon in the grant, as the *existing* basis of the crown's right, there is nothing, directly or indirectly, in a relevant view, to remove it,—from whence we must unavoidably hold that it still in the main continued. The rescinding of so heinous and flagrant a crime as treason, especially by our peculiarly rigid and inexorable code in this respect, cannot be left to mere presumption and implication, even were there room for them, in the present instance. And whether by the King singly,[1]—or by Parliament, with his sanction, *simul et semel*, there must, for the essential purpose, be a plain restitution and rehabilitation of the traitor and his heirs, in full and express terms. To proceed to illustrations, the case of James Lord Balmerinoch, in the reign of James VI. may be in point. Although solemnly convicted of treason the 1st of April 1609, with sentence of decapitation,[2] he was yet allowed, like Sir John Drummond, to exist and die in his native country, without experiencing the due rigour of the law—nay, actually to reside at his house of Balmerinoch, and to derive benefit from the property.[3] This was clearly, however, at the most, but a merciful qualified indulgence, as in the previous case, the sentence being still in force, and suspended over him; and it was only by means of a royal pardon, and rehabilitation subsequent to his death, August 4, 1613, that the disability was removed from the family, and John, his son, enabled to succeed to their honours and estates. It is precisely to the effect required. After reciting the forfeiture, and the services of his ancestors, it specially "restores" and "redintegrates" the said John, "suis honoribus, singulis dignitatibus, nomini, bonæ famæ, et privilegiis," receiving him and his *successors* "ad nostras, misericordiam, favorem et gratiam, contra *dictam sententiam*, &c. ac si eadem," with *all* attendant injury to John, and his *heirs*, "nunquam pronuntiata fuisset,"[4] &c. The rehabilitated, however, had been in no respect guilty, or had in-

Removal of attainder, whether singly by King, or by the latter and Parliament, must be direct, and in full, specific terms.

Illustrations—case of the Barony of Balmerinoch in 1609 and 1613.

[1] As to this hereafter.

[2] See Pitcairn's Crim. Trials, vol. II. p. 580.

[3] *Ibid.* and Scotstarbet's Stagg. State, Edit. 1754, p. 61.

[4] Great Seal Register.

curred the Royal displeasure. Lord John was obviously in the precise situation with William Drummond, the disponee, in 1695, who hence, for the proper rehabilitation or restoration likewise, of himself, as well as of his family, ought to have been similarly pardoned, which never happened. They were therefore still barred by the uncommuted crime of his parent. Lord Redesdale inculcates, in England, that "on all attainders, whereby a dignity has been forfeited, the crown has no power to restore the dignity; and it can only be restored by Act of Parliament," &c.[1] There was therefore a wide, and marked difference here, between the law of the two countries, as is evinced by the Balmerinoch precedent,—where certainly the mere Royal act sufficed, without any interposition of Parliament, and further, by what will transpire in the sequel.

Forfeiture. Peculiarly applicable to case of Strathallan claimant. Difference between the English and Scottish laws, in restorations against forfeiture.

The Argyle case, likewise confirmatory, is remarkable. Charles II. in 1663, granted to Archibald Lord Lorn, and his heirs, the honours of Archibald Earl of Argyle, his grandfather, and of his predecessors, with the exact precedence, which had been forfeited, the 24th of May 1661,[2] for treason, in the person of the celebrated Archibald Earl, and Marquis of Argyle his father. This, if any faith or weight is to be ascribed to an indirect, or inferential restoration against attainder, would obviously afford one, in the main, far beyond what could be pretended in the Machany instance,—but still such large concession and expression of favour on the part of the crown, by which the disponee was *instanter* ranked among the first hereditary counsellors of the nation, did not suffice; for, to give them effect, there is, over and above, in the relative charter, dated the 16th of October 1663,[3] a special rehabilitation of him, and the offspring of the traitor, "ad eorum *integram famam*, ut ad omnes terras, *honores*, *dignitates*, bonaque mobilia," making them capable to hold, and to transmit the same, with the family "coat of arms," "officiis," &c. Some such suitable clause, therefore, again, for the due purpose, should have been, besides, inserted in the Machany charter in 1695. And accordingly, in corroboration of a previous

Case of the Earldom of Argyle in 1663 also corroboratory.

[1] Third Report of the Lords Committees, *ut sup.* p. 76.
[2] Acts of Parl. last Edit. vol. VII. p. 582.
[3] Great Seal Register.

Forfeiture.

allegation, while the Argyle disponee, immediately upon his father's forfeiture in 1661, had been but simply styled "Archibald Campbell,"[1] instead of Lord Lorn, his former appellation, no sooner did the above rehabilitation pass in 1663, than, in virtue of it—without the aid of Parliament, he figures as Earl of Argyle,[2] and holds the old rights and identical pre-eminence of his family,[3] together with the separate subjects and privileges, of which he would have been otherwise incapable. Things remained incontested in this state down to as far as 1669, when, no doubt, on the occasion of a Parliamentary ratification of a conveyance of the estate, there was, at the same time, a confirmation of the rehabilitation;[4] but this was evidently *in majorem rei evidentiam, accumulando jura juribus*, without paramount necessity for it; while this accompaniment, making it indispensable, would further expose the futility of the alleged effect (by the claimant) of the slender Machany grant in 1695. The Marquisate of Argyle had been conferred upon Earl Archibald, the traitor,—whose fame and memory were never restored—in 1641;[5] and consequently the son was not to take any thing from him, although fully from the previous family representatives, so that there was an exception as to this higher dignity, which remained attainted, as indeed it still does. Corruption of blood, in the general case, will be afterwards shewn to have obtained with us. The material fact, as to the exclusive efficacy, in law, of a royal pardon for treason, is inculcated by Sir James Stewart, Lord Advocate to Queen Anne, a revolutionist, and *far* from a kingly zealot;[6] independent of concurring authorities. Alexander Macdonald, younger of Glengarry, was forfeited, and his blood attainted, precisely as Sir John Drummond, under the same act in 1690;[7] but, on the last of April 1692, he obtained a remission or pardon from the King for his treason, still preserved in her Majesty's State Paper Office,—in virtue of which, again, without

Marquisate of Argyle still attainted.

Strong case of Macdonald of Glengarry, in 1690 and 1693.

[1] See Acts of Parl. last Edit. vol. VII. pp. 380-85, and Append. pp. 89, 90, &c.

[2] The title of the said grant in 1663, is "Diploma Archibaldi *Comitis de Ergyle*," shewing it *instanter* acted.

[3] Acts, *ut sup.* pp. 526, 530-6, *et seq.* &c. &c. [4] See *ibid.* p. 582.

[5] *Ibid.* vol. V. p. 515. [6] See afterwards. [7] See p. 743.

Forfeiture.

any Parliamentary interference, he was fully rehabilitated, and the estates and succession perpetuated in the family. There are corresponding ones there, to different Scottish individuals at the time; but no trace of a condonation to Sir John Drummond of Machany, who equally and indispensably required it; which striking defect again shews that such clemency and favour were not intended to him.

No pardon to Sir John, the traitor.

Craig says, "Princeps tamen, si feudum concessit incapaci, sciens, videtur eum—natalibus restituere," though admitting that here "ratio dubitationis—est, quoniam hic per bannum sine *forisfacturam* (the very crime in question) ab omni jure divino et humano, et ab omnibus commodis, &c. quæ inde proveniunt, excludi videtur,"—while he even holds, at the most, that such presumptive restitution[1] only enures to a remission of the criminal prosecution, and "capacitatem *futurorum* commodorum." The Machany grant, in 1695, may possibly have had the former effect, with the restricted means of enjoying the qualified or abstract boon it conferred. But, at the same time, coupling the fact of Craig being more a general than a discriminating Scottish feudist, and that he adds, on the other hand, that "plerique sint magni viri, qui bannitum seu *forisfactum prius restituendum* putant, quam *ullius* beneficii sit capax; saltem crimen ei *expresse* ex indulgentia *Principis* remittendum,"[2] I think, upon the whole, I may be authorized and countenanced in the law I have laid down,—certainly in the material view. Craig besides adds, that he was aware of no decision in point;[3] which may have been naturally owing to the palpable, admitted truth and application of the law in question in practice.

Opinion of Craig.

Conclusion.

Rigid as our doctrine in forfeiture was, based upon the stern and unflinching Roman Code in this particular, it still likewise, after the example of the last, connived at, or countenanced a *certain* aliment or provision to the innocent offspring of a traitor,—but without superinducing other claims or ex-

Certain slight specialties grounded upon the Roman law, —a great rule with us in treason.

[1] It is observable, that analogous authorities, appealed to by Craig in support of it, are from the canon law; but, in forfeiture, as is repeatedly illustrated, we were guided, in these respects, by the contrary purport of the Roman law.

[2] *De Feud. Lib. I. Dieg.* 14, § 9. [3] *Ibid.*

Forfeiture.

emptions. Thus the Session, the 11th of July 1622, enforced payment of a "*meane*" sum, due by William Hamilton, on his bond, to Margaret Stewart, in that situation, she being the guiltless offspring of Hercules Stewart, who had been forfeited by Act of Parliament,[1] upon this charitable specialty, that the sum was "*meane*," and tended to her "*aliment*."[2] And this, though Hamilton, the defender, refused compliance, harshly enough, but not irrelevantly, on Margaret's pursuit, by reason of the civil disability, or nullity, attaching to her in consequence of her father's treason, which barred her from legally insisting. The above was obviously under shelter of the Roman principle, which, although it generally subjected the heirs of a traitor to every disability, yet made a distinction as to daughters, on account of their "sex" and "infirmity,"—allowing them "*mediocrem—alimoniam*" out of their mother's effects. *Quisq. ad Leg. Jul. C.* Under such consideration, in a great measure, the crown, in the Machany charter in 1695, gave a small aliment to the wife and children of the traitor. It bears that her jointure was to be divided into three parts, two of which were to be assigned respectively to the latter; while, by a large stretch of benevolence, the wretched pittance of the remaining third was extended to the husband. The Act 1663, c. 19, likewise, while it peremptorily continues the severest disabilities and inflictions of treason, in the main, against convicted traitors, that "they, and their *children* and *posterity*" shall not "enjoy honors, dignities, offices, lands, possessions, or *inheritance*," has yet this exception,—"*But what* they shall receave by his Majesty's *speciall favour*,"[3]—thus in the latter instance comprising the very situation of Sir John Drummond of Machany, and especially his son, in 1695, who were accordingly so far, not irrelevantly indulged; but from whence it

Case of Stewart in 1622.

Act 1633, c. 19.

[1] In 1592, with the usual "pane of tressoun, and utter and last punishment *appointit be* ye *lawes* of this realme." Acts of Parl. last Edit. vol. III. pp. 532-6.

[2] Lord Haddington's MSS. Decis. Ad. Lib. In the same way it was relentingly concluded, or argued, that however deplorable the fate of the issue of a traitor, and involving the last deprivations, they still were not to be "stript of their cloaths." This forcibly characterizes their condition.

[3] Acts of Parl. last Edit. vol. VII. p. 464.

Forfeiture.

again results, that a mere isolated grant might thus obtain, as in their case, without eliciting further consequences, or possibly enuring, as was gratuitously contended in 1787, to the far weightier effect indeed, of the absolute removal and abolition of attainder.[1] Neither can we, *in hoc statu*, attach material weight to the description of William Drummond, by the title of Viscount Strathallan, in the act 1746, so as to infer a previous restoration, or otherwise. Though the crown and government have been elsewhere equally misled, and *per incuriam* admitted Scottish titles much in the same way; that, in the event, has not proved of benefit to a party by whom they were unjustly assumed, or homologated his putative right. The case of the Viscounty of Oxenford, before the middle of last century, is here in point,[2]—to which we may add, the Parliamentary ratification of the Cassilis honours to certain heirs in the reigns of Charles I. and II., which however proved null and unavailing.[3] If there had been a restoration too, Sir John Drummond of Machany would have been at once reponed in all his inheritance, and there have would been no room or occasion for the charter 1695 to William, his son, or for any such circuitous measure.

Designation of William Drummond as Viscount Strathallan, in the Act 1746, not conclusive.

Secondly, it was strangely excepted by the Strathallan

[1] We had also various restitutions, *secundum quid*, in forfeiture. Of the latter kind, an instance will be given (p. 761) in respect to John Stewart, son of an attainted traitor, in the reign of James VI., where, though *himself* unattainted, and he had collateral heirs, *otherwise*, capable of succeeding to him, and to whom he, in like manner, might have succeeded, the rehabilitation is merely to that individual, and the heirs of his *body*,—to take and hold in a new character. Nothing again is here left to surmise or presumption. Dallas, our first legal conveyancer in the reign of Charles II. and down to 1697, introduces, in his Styles, the ordinary form of a qualified remission by the King to a traitor, "as to his life allenarly, *(only)* without prejudice always to his Majesty and his donators," of his forfeited property and goods; —while there is an express clause of rehabilitation, that he and the heirs of his body—only *extunc*—may hold and enjoy lands, offices, or goods they may acquire, or that may fall to them. There are some too, that the restored may serve on juries, and be a "habile witnes" in law, and be not further molested for his treason. Styles, Edit. 1697, pp. 652-3-4.

[2] See p. 62.

[3] See pp. 558-9.

Forfeiture.

Second plea of the Strathallan claimant in 1787, in bar of the attainder in 1690,—that there was no corruption of blood in our law.

claimant in 1787, "that, by the law of Scotland, there was *no* corruption" of "blood,"[1]—so that, in any event, his grandfather, William Drummond of Machany, the titular Viscount, and necessarily himself, (always on the supposition of there being no attainder in 1746), might make resort to William Drummond, the Strathallan patentee in 1686, or to Viscount James, his grandson, and take from them, through Sir John the traitor, in 1690, though deriving their "pedigree" through the latter, as in the analogous Athole instance.[2] But then, even admitting the fact, there would still be a specialty in the case, owing to the *express* terms of the attainder by the act 1690, which, whatever may be the case otherwise, *does* here enforce corruption of blood. For it is thereby explicitly declared, in most forcible language, that the "name, fame, memory, and honour" of Sir John are "to be *extinct*," and actually his "*blood to be* TAINTED," that is, clearly corrupted, "*sua* that (his) *posteritie*"—which removes all doubt in the matter—"may never—be able, *hereafter*, to brook, or joyse any *honours*, &c. titles, or dignities, in tyme comeing."[3] This enactment, therefore, unrepealed in the 18th century, of itself peremptorily excludes the succession in question. And when we combine with this, that we, in forfeiture, made no difference, in respect to corruption of blood, as in England, between entailed dignities, and those in fee-simple, to be shortly corroborated—independently of the general nature of our law, as may at the same time equally transpire—I think it may be held, that in 1711, after the extinction of the direct male line of the Strathallan patentee, both the Strathallan and Maderty honours became forfeited in the person of William Drummond, son of the traitor. He, being unrehabilitated, was fairly struck at by the Act, under the term "posterity," and unable to succeed either to the former, though assumed by him, or indeed to any honours. And as to the Act 1690, c. 104, saving certain entailed interests, upon which the claimant also founded, it evidently could not apply—having no reference to dignities, and owing to other reasons explained in the sequel. Such, it is conceiv-

At any rate irrelevant, owing to the *terms* of the attainder in 1690.

Only other argument of the claimant upon the act 1690, also irrelevant, as afterwards to be shewn.

[1] See printed case for the claimant.

[2] See p. 731.

[3] See p. 743. The condemnation and extinction of the memory of the family are directly imported from the Roman law.

ed, would have been the resolution of the Lords also in 1790, had the case, on the sustaining of the first plea—contrary to fact—been further pushed, and properly sifted;—so that there was the fatal obstacle of two attainders. It fortunately, however, now happens, that all objections and disabilities are removed upon this head, by the equitable and popular restoration, by Act of Parliament, in 1824, of James Drummond, Esq. second cousin and heir-male of the claimant in 1787, to the dignities in question, by whom they are at present held.

Forfeiture.

Conclusion.

I shall next proceed to the equally important and interesting subject, whether corruption of blood universally obtained by the Scottish law,—it certainly at least being enforced in Acts of Parliament. And here, I conceive, there exists as little difficulty or doubt. Whatever may have been objected in the Strathallan claim,[1] or supposed, and superficially entertained by certain modern Scottish Jurists,[2] our legal Code inexorably combined, in the instance of treason, all the rigour of the feudal law, with the uncompromising and blasting doctrine of the Roman; which was here, with us,—as is in part already evident,—a great rule. In unison with the latter, the Scottish penalties of treason were irremediable in every emergency, and vitiated, and obstructed every kind of succession. The name, fame, and memory of the criminal, and his family, thereby, were sunk and gone, while,—still after the example of Rome,—the crime was even visited upon the wretched bones and disjointed carcase of the *un*convicted offender, which could be tried and condemned posterior to his death, with the usual penalties, as a greater terror to others.[3] Accordingly, by our

Did corruption of blood hold generally by *our* law?

We followed the Roman law, in the main, in treason.

[1] The Strathallan claimant, in his printed case, peremptorily maintained, "that, by the law of Scotland, there was *no* such corruption of blood" in honours, to bar his right.

[2] Among others, Baron Hume, the learned Institutional writer, as will be seen in the sequel.

[3] By the *Lex Julia*, it is strikingly enacted, that the posterity of traitors, "paterno enim deberent perire supplicio—sint perpetuo egentes—ad *nullos* prorsus honores, ad *nulla* sacramenta perveniant; (hence, with us, they could not be jurymen, see p. 755, *n.*) sint postremo tales, ut his perpetua egestate sordentibus, sit et *mors solatium*, et *vita supplicium*." *Quisq. ad Leg. Jul. C.*——"etiam *post* mortem nocentium, hoc crimen *inchoari* possit, ut convicto *mortuo*, *memoria* ejus *damnetur*, (our pecu-

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ancient laws, as might at the least be expected, all lands and possessions of traitors, are declared to be generally and unqualifiedly forfeited to the crown, without recovery by *any* heirs—unless, in confirmation of what I before said,—and what is a natural paramount exception,—there was, *de plano*, a royal pardon,[1] that sufficed as a restoration. The same principle excludes the chance in law of any salving exemption, from corruption of blood, or attainder,—these being thus perpetual and absolute. And coming down to reported precedents and au-

liar phrase), et ejus bona successori ejus eripiantur." *Post. D. Marc. constit. ibid.* Agreeably to this, in further proof of my remark, sentence of treason was pronounced upon the bones of Gowrie, and his brother; as also in the instance of Mowbray, in 1603. Nay, the body of Logan of Restalrig, implicated in the Gowrie treason, as is notorious, was dug up for the purpose, years after he was buried; while further, to shew our rigour in the crime in question, the interesting Janet Lady Glammis was condemned, July 17, 1537, to be "brynt in ane fyre *as* ane *Traytoure*." (See Books of Adjournal, of that date.) The form, in the Gowrie and Logan cases, is proved, and declared by Act 1540, c. 1. to have been a part of our "*commoune* law." (See Acts of Parl. last Edit. vol. II. p. 356.) In virtue of it, therefore, had not our old treason law been superseded by the English, in terms of Queen Anne's Act, John Earl of Strathmore, (descended of Lady Glammis,) and massacred outright, in rebellion, by a dragoon,—after his capture, at the battle of Sheriffmure in 1715, would have been tried and attainted, through the guise of his helpless remains, with the forfeiture of his honours and estates. According to the cotemporary master of Sinclair, a "mill-stone" thus "crushed a *brilliant*," (the *Earl.*) (See Lord Mahon's last Hist. vol. I. p. 264, *n.*) But this nobleman's much lamented, and premature death, (the parallel incident recurring to an equally luckless, and accomplished representative,) was obviously fortunate to the present family,—by excluding, under the new practice, a trial and conviction.

[1] *Statut. Malcolm*, c. XII. § 1, 2, 3, which forfeits "*omnia*" in the traitor, "*sine recuperatione alicujus* heredis. *nisi* specialis gratia *Regis* intervenerit,"—including the infliction of death, "*sine redemptione.*" The Statute has no mention of Parliament, or the general Council of the nation, in reference to the pardon; and, by the authority of Sir James Stewart, Lord Advocate to Queen Anne, "The King, granting a remission after forfeiture, restores the person *entirely*." (Ans. to Nisb. p. 127). In the *Regiam, Lib.* IV. c. II. § 1. it is laid down, that the convicted traitor, "et *hæredes sui, perpetuo*, exhæredari debent." See, to the corresponding purport, *Quon. Attach.* c. 19, § 3—c. 48, § 17; also Acts of Parl. 1424, c. 3, and 1540, c. 1, (last Edit. vol. II. pp. 1, 356, &c.)

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thorities, that of Bisset, to the above purport, is clearly in point. Robert Bisset, of Lessindrum, fell at the battle of Corrichie in 1562 with the rebels, for which he was attainted; and, after his father's death, whom he predeceased, there arose a question between the daughters of Robert, and the crown, whether they could take as heirs to the above, their grandfather, or were excluded by the crown,—from their parent's attainder; —when the latter came to be preferred, though the traitor was never in possession. And why so, it may be inquired? Owing to this express *ratio*, assigned by Craig, a cotemporary, who reports the case, under the actual head of corruption of blood,— "*quod vitiata copula* (the tie being vitiated or corrupted) per quam *reptes avo suo conjungi* poterant, proinde *interrupta*, successio ad eos *non* poterat conjungi;[1]"—the case being identical with that of Lumley in England, formerly alluded to,[2] and where the same result was judicially enforced, owing to the very same reason that came here into play,—the corruption of blood of the descendants, in consequence of forfeiture of a predeceased heir-apparent, which thus equally barred with us. Archibald Wauchope, alleged to have been infeoffed, (upon a resignation,) though this was denied,[3] in the estate of Niddry, the transaction at any rate being incomplete and unconfirmed, had been, thereafter, in 1592,[4] attainted in the lifetime of Robert Wauchope, his father, the resigner, who still continued in possession. And on the death of the latter, in 1598, it was decided that the traitor, by his conviction, had forfeited his "*spem successionis* in the lands,"—in virtue whereof, these were expressly found to have devolved—in exclusion of the heirs —to the crown; with which they became consolidated without seisin; that not being required in this alternative, because the king is seised, "*be* his *croune*," "in all landis within his realme."[5]

Case of Bisset after 1562, in support of corruption of blood with us at common law.

Corroboratory doctrine of Craig.

Case of Wauchope, in 1598.

[1] *De Feud.* Lib. III. *Dieg.* 6, § 15. *et ibid. Lib.* II. *Dieg.* 18. § 23.

[2] See p. 736.

[3] It was objected by a party in the action to be noticed, that he "wes *never*" so "infeft." [4] Acts of Parl. last Edit. vol. III. pp. 532-6.

[5] Haddington's MSS. Decis. Ad. Lib. Upon the same ground, *jure corone*, the king *de plano*, without any service, or previous customary title, pursued, in 1588, a reduction *qua* heir-general, in the Angus case, (see p. 6.) It is remarkable that Charles II., in order to establish his right of succession to the Ducal House of Lennox, by the nearest male

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The law here is in accordance with that in the previous case. The children of Alexander Ruthven, attainted of treason, pursued, for payment of a legacy left to them by the Laird of Freeland, his "relict and executrice;" whose defence on this ground was sustained by the Session the 1st of February 1612, "that thair father being forfalted, and his *posteritie* declaired be Parliament disabled, (according to usual form), thay could have *no* action."[1] The posterity necessarily, from the attaching corruption of their blood, were infamous, and dead in law, and hence incapable either of legally taking, or acting in any shape. The Court, in this instance, may have been stricter than in that of Stewart against Hamilton in 1622, which, however, elicited the same exception,—evincing the general understanding of practice.[2] In the Ruthven case, it appears also to have been argued,—somewhat as in respect to William Drummond of Machany in 1695, in the Strathallan claim—in behalf of the children, and as an implied royal amendment, or amelioration of their condition, that the king had "givin thame ane tutour;" but to this it was conclusively answered, that "the tutorie wes" only "under the caschet; and that those (such as the children) who were disabled be parlement, could not be *rehabled* bot be the king, of his *certaine* knawledge,"—in consequence of which, the Session "refused to grant any process, at thair instance."[3] Counteraction, or removal of attainder, therefore, is rigidly interpretated in law, and must be with the full and unequivocal intention and knowledge of the sovereign; while, in this decision, we have additional proof of the identity of our treason law with the Roman, which in the same way inculcated that the posterity of traitors "*testamentis extraneorum nihil* capiant" *Quisq. ad Leg. Jul.*

Concurrent case of Ruthven, in 1612.

Bears upon that of Machany, in 1695.

Decision still in conformity to the Roman law.

propinquity, on July 6, 1680, was "*served* heir in special" to his cousin Charles Stuart, the previous Duke of Lennox, "The 14 eldest Lords of Session" being "members of inquest," and "the Lord Chancellor Chancellor to the assize;" while the "four macers were *judges*." As to which, however, Sir John Lauder observes, in accordance with our original notions, and practice, that "some called this service rediculous and unnecessary, and thought the *jus coronæ* supplied all *thir (these)* solemnities in the King's person." (See his Decis. vol. I. p. 106.)

[1] Haddington, *ut sup.* [2] See p. 754. [3] Haddington, *ut sup.*

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Rehabilitation of John Stewart in 1621.

Agreeably to the doctrine in question, the act 1621, c. 67. declares that John Stewart, son of the attainted and deceased Francis, "sumtyme" Earl of Bothwell,—although himself innocent, "wes," in consequence of his father's treason, "be ye *lawes*, actis, and constitutiounes of this realme, dishabilitate, and maid unhable to have bruikit, and possessit landis, offices, and honoures." And it was purely, as is set forth, out of the King's clemency, through the *medium* of a royal charter, that John was indispensably rehabilitated, and restored to "gude name and fame," and to certain subjects, of which he had been deprived by the attainder. Further still, the above act (in confirmation,)—the restoration being merely *secundum quid*—restricts the benefit to the son, and to the heirs of *his body*, to hold "lands,—dignities or honours,"[1] &c.—although he had *collateral* heirs, who would have taken to him at common law, and to whom he would have also succeeded had it not been for the forfeiture. The corruption of blood, therefore, *so far*, necessarily still obtained, as it incontestably did throughout, before the royal and parliamentary interpositions; which is moreover extremely important, as the descendants of Sir John Drummond of Machany, the convicted traitor in 1690, not being rehabilitated at all, must *a fortiori* have been debarred from succeeding to the *collateral* branch of Strathallan in the Strathallan honours.—Then again comes the strict act it 1663, in corroboration—plain enough[2]—that need not be descanted upon.

Its application to Machany case, in 1690.

Case of the Earldom of Melfort in 1695.

Proceeding further down, the Earldom of Melfort, &c. is limited by patent, dated August 12, 1686, to John Viscount Melfort, and the heirs-male of the body by his *second* marriage, "quibus deficientibus in hæredes ejus masculos de suo corpore quoscunque;"[3] under which grant the heirs-male, by the second wife, took, as in the instance of Somerset,[4] in exclusion to those of the first. But, on the patentee's forfeiture

[1] Acts of Parl. last Edit. vol. IV. p. 656. It also annuls previous attainting acts. [2] See p. 754. [3] Great Seal Register.

[4] See pp. 715-16, *n. et seq.* The unnatural order of succession, so far, was similar, in regard to the two wives, and the issue,—"sed *alia, alii.*" The spouse first married Sophia Lundin, unlike Katherine Fillol, Protector Somerset's first wife, was blameless, and unexceptionable in her

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by Parliament in 1695, it was at the same time enacted, that the attainder "shall *nowayes* affect, *nor taint the* BLOOD" of the issue *last* specified, which was to "be an *exception* in the doom of forfaultur."[1] Corruption of the blood, therefore, clearly held in the case of the statutorily unprotected posterity of the traitor, and would have done so by law, as to the others, had it not been for this marked interposition of legislature, by which it was alone eluded. It hence also follows, that we made no distinction between an entailed honour, and one in fee-simple—that in question being undoubtedly of the former kind; while, in virtue of the ultimate limitation, there might, through the guise of a remainder over,—calling English notions into co-operation,—have been another plea against the attainder, But, with us, on the contrary, without the saving enactment, every thing was gone.

Corruption of blood thereby instructed.

In addition to this, the Melfort forfeiting and rehabilitating Act in 1695, evidently refutes the other untenable doctrine, —as I am now further convinced,[2]—that corruption of blood in honours, though originally obtaining, had been fully removed by the *earlier* Act 1690, c. 104,[3] that refers to certain landed interests. Still continuing, as above instructed, at a *subsequent* period, the latter could have no such effect, besides neither specifying *dignities* at all, at a time when, reasonably enough, a full and apt specification was required to include them. And in this material conclusion, I am fully confirmed by the opinion of an eminent Judge, Justice-Clerk Macqueen, which will be adduced in the sequel. The act in

Act 1690 made here no innovation in respect to honours.

Opinion of Justice Clerk Macqueen.

conduct,—while the second, Eupheme Wallace, as is transmitted to us, was not.—Hence the facts, in the case of Somerset, though parallel, were reversed. But considerations of religion interfered, and the senior offspring were unduly postponed, remaining Protestants, while the father, whose example was followed by his *second* family, turned Papist,—like the Chancellor Perth, his elder brother; which ingratiated both with their unfortunate royal master. The Chancellor having also married a frail personage, with whom he had *had* a *liaison*, the malignity of the age said, that the brothers were faithful to their mistresses, but faithless to their God. No wonder that the *elder* Melfort's issue were favoured, as will be seen, after the Revolution.

[1] Acts of Parl. last Edit. vol. IX. p. 407.

[2] See pp. 127-8.

[3] See Acts of Parl. last Edit. vol. IX. p. 225.

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question, *inter alia*, under the limited head of landed succession, exclusively saves the right of the heirs by *strict* entail, notwithstanding the treason of the tenant in possession, it being thought but just (as there set forth) "that every man suffer for his owne fault, and not the Innocent with, or for the guilty." The statute thus approximated, in its nature, to the English statute *de donis*, though it never received such large construction. Indeed, it may be said to have been but ephemeral, coming soon to be abrogated by the treason act of Queen Anne in 1708, which, while it saved the right of heirs by remainder over, in honours, &c. failing previous *heirs* of the traitor's *body*, yet nullified that of the *latter* in all subjects, as well as of others claiming by general limitations in entails, in the way shewn, however strict and valid. It necessarily, at the same time, follows, that the additional plea of the Strathallan claimant in 1787, that by the act 1690 "the right of *heirs* in *dignities* was saved from all pretension, that *it* (the *Peerage*) could be affected by the attainder of the ancestor,"[1] was futile and irrelevant. And, moreover, even supposing that the act related to, and comprised honours, he could never be favoured or protected thereby, because those heirs are alone contemplated who held under the *strictest* entails, entered in the particular Register of Entails, "conforme to the act of Parliament in the year 1685,"—of which description and character neither was William Drummond of Machany, or his descendants. They were heirs, by such entail, to nothing; they had only right under the abstract Machany charter in 1695, containing but a simple substitution to heirs-male, without any irritant and resolutive clauses. Nor is even this all;—while the act of attainder of Sir John Drummond of Machany, passed the 14th of July 1690, the one premised, which has no retrospect, did not, until the *subsequent* 22d of the same month;[2] from whence it equally results, that his family could, in no view, be benefited by it, but that their case still depends upon our previous unqualified law; for I am not aware of any fiction with us, as hereto-

Act 1690 like English Statute *de donis*, but only applied by land.

Soon abrogated by treason Act of Queen Anne.

Act 1690 can in *no ways* benefit William Drummond of Machany, the son of Sir John the traitor, *previously* attainted in that year.

[1] So stated in his printed case before the Lords, and MSS. Informations, which I have seen.

[2] See Acts, *ut sup.* vol. IX. pp. 204, 225, and Append. pp. 61, *et seq.*

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fore in England,[1] of our acts not failing to take effect, according to their precise dates, but indiscriminately, in whatever situation, from the first day of the Session. On the contrary, it is laid down by our Institutional writers, and Commentators, that —consistently with the conceived inherent nature of law—the former have *no* "retrospect," and that they "are understood to take effect" solely from their dates.[2] In the Styles of Dallas, published in 1697,—our chief conveyancer, both before, and long *after* the Revolution, and Act 1690,—there are anxious clauses in the requisite forms of Royal rehabilitations for treason, that the "*blood*" of the traitor, and "of those descending of him, *tainted* and *suppressed* (the last even a stronger term than *corrupted)* by the *said* crimes and sentence, (of *lese-Majesty* and *treason)*—be now, by *our* royal grace and favour, &c. fully and entirely *purified* and redintegrated." This shews the *after* continuance of the taint.[3] And Macdowal of Bankton, our well known Institutional writer, in 1752, inculcates the law I maintain,—"that corruption of blood, upon an attainder of high treason, took place with us,"—both upon the authority of Craig, before cited,[4] and Royal rehabilitations, from Dallas, &c. *reponing* "the party, and all his *descendants*," against the incapacity "of enjoying lands, honours," &c. He here adds also, "that our kings could, by their pardon, restore the blood, which is *otherwise* at present,"[5] (after the Statute of Queen Anne,) thus again confirming another allegation. But to appeal to a still greater authority, not very remote, that distinguished lawyer Sir James Stewart, Lord Advocate to Queen Anne, and a leading member of Government from 1689 to 1708, (in which last year the English treason act passed), lays it down as follows, "By *our* law (indubitably after Act 1690, c. 104,) the blood of traitors is *tainted*, and their *posterity* disabled, *ipso jure*, &c. —but it is not thought, that it would deprive them—of any proper estate, *well settled* in their persons, (though generally held they ought to be restored and rehabilitated) independant on the father's forfeiture."[6] This latter restricting alternative, though

Argument of continuance of corruption of blood, from Dallas's Styles.

Concurrent opinion of Macdowal of Bankton.

Especially of Sir James Stewart, Lord Advocate to Queen Anne.

[1] See p. 745.
[2] See Erskine's Instit. B. I. T. 1, § 37, and *note*, Lord Ivory's Edit.
[3] First Edit. of his work referred to, p. 653. [4] See p. 759.
[5] Institutes, 1752, B. III. T. III. § 53. [6] Ans. to Nisbet, p. 316.

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he still expresses himself with some degree of doubt, may perhaps so far, in rather different, though analogous circumstances, involve the condition of the Machany disponee in 1695.—"The *posterity* of traitors, in strict law, are disabled: and this dishabilitation renders (them) incapable of possessing lands and *honours*, and even of *testating*."[1]—"There is no difference with us, betwixt the *ante-nati*, and the *post-nati*, in the case of treason committed by the father; for the dishabilitation of children is not *ex traduce*, (in the particular twig or stock, figuratively speaking). *But* it is the *rigour* of the law that *taints* ALL blood,"[2] hence every heir.—"A person is forfaulted, but still in life, if an estate should in that *interim* fall to him, as *apparent* heir, tho' he be *civiliter mortuus*, and not in a capacity to be served; yet, with us, the *first* (the *King*) would have claimed the estate," and not the "next heir."[3] This, in the case of an estate in tail, is nearly the Airlie claim; and is in answer to a query of Nisbet, where the latter admits,[4] that the heirs, as in the Bisset instance, "seeing their *blood* is *corrupted*,—cannot represent their father, being *nullus*."[5]—"If a man, having children by an *heiress*, come to be forfeited, the *children must* be *rehabilitate* before they can succeed to their *mother*, (and of course, upon principle, *through* her); but it were great rigour to refuse to rehabilitate them. Thus the husband of an heiress being forfeited, his *jus mariti*, and also courtesy, falls to the King. But whether she might dispone the fee without the husband's consent, in case of his surviving the forfeiture, may be doubted, but there appears no law to the contrary."[6] This, with the more favourable case of the husband's *predecease* however, seems to involve that in the reign of James II., of Anne, Duchess of Buccleugh and Mon-

Admission of corruption of blood, by Nisbet.

Other relative points in treason law noticed by Sir James Stewart.

[1] *Ibid.* p. 73.
[2] *Ibid.* p. 123.
[3] *Ibid.* pp. 122-3.
[4] See p. 756.
[5] *Steuart*, 123. Yet, in face of such authorities, what has preceded, and will follow, Baron Hume ventures to inculcate, that Craig, (through the *medium* of the Bisset precedent), "is the *single* authority for *any* such doctrine" with us,—namely, the "corruption" of blood; while he holds that the taint was "only—introduced" by the Act of Queen Anne. See Criminal Law, under Punish. of Crimes, Edit. 1797, vol. II. p. 478.
[6] Steuart, *ut sup.*

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Case of Buccleugh during reign of James II.

mouth, after the attainder of the Duke her husband in 1685, who made such conveyance of her estates and honours to *their* children *nominatim*, which the King authorized and confirmed,[1]—but these were also rehabilitated the next reign, in 1690.[2] At the same time Sir James inculcates, that, in the ordinary alternative, "the children of an heiress, in the case of their father's forfeiture, *must*, and also *should* be *rehabilitate*, that they may succeed."[3] We here, as almost everywhere, appear to have followed the Roman law, by which the posterity of a traitor, whose lives were spared by the Emperor, "a *materna*, vel *avita*, *omnium* etiam proximorum hereditate, ac successione habeantur *alieni*." *Quisq. ad Leg. Jul. C.*

Application still of the Roman law.

Decided opinion of Justice-Clerk Macqueen as to the general application formerly, of corruption of blood; and that the Act 1690 has no reference to honours.

But finally, upon the subject in question, independent of other authorities, I may refer to the concurrent opinion of that distinguished Judge, Justice-Clerk Macqueen, who, as evinced formerly, had such clear notions of our genuine Consistorial Law.[4] He, moreover, that he here—in marked distinction from the English law,—(as I have likewise done) puts entailed and simple succession upon the *same* footing,—clearly corroborates me in the ascribed interpretation of the Act 1690 c. 104, as will be seen by these excerpts.[5] "That Statute (the latter) does *not* apply to the case of *Honours*, but only in the case of such as had a patrimonial interest in the *estate* of the forfeiting person.—Upon the principles of the law of Scotland, even as modelled at the Revolution (in 1689), there was no reason why the honours should not be *totally extinguished* by the *forfeiture* of the person who was in the right at the time; and so, indeed, it seems to have been understood by the nation in general, as well as by the writers upon our law, and the contrary opinion is taken from the ideas of the *laws* of *England*;—it does not appear

[1] By a regrant, upon the Duchess's resignation, under the Sign Manual, in 1687, upon record.

[2] By an Act in that year, (Acts of Parl. last Edit. vol. IX. pp. 164-6-7.) The English honours, however, of Duke of Monmouth, Earl of Doncaster, &c., in the Duke's person, still remained forfeited, though the latter, with the Barony of Tyndale, were afterwards restored by Act of Parliament in 1743, Brit. Stat.

[3] In his work, *ut sup.* p. 123.

[4] See pp. 481-90-1.

[5] The original is in a private Charter-chest.

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to me, that, prior to the Act 1690, any such thing was known in the law of Scotland, similar to an estate in *remainder*, which was saved from the forfeiture of the person, who at the time stood vested in the right of the estate. On the contrary, no *tailzie (entail)* saved from the forfeiture of the person, in right of the estate at the time, the right or interest of any of the substitutes of the tailzie; but the *whole* went to the crown, in the *same* manner *as* if the estate had stood in the forfeiting person in fee-simple.[1]—And I am fortified in this my opinion, from the very style and conception of decreets of forfeiture, which ordained 'the name, fame, memory, and honors to be extinct,' which is usually inconsistent with the idea of honours lying dormant, until the succession open in favour of the collateral heirs of the forfeiting person; and accordingly, it appears to me to be the opinion of lawyers, as well as of the sense of the nation, that, prior to the Revolution, the estate went to the crown, and that the honours were *totally* extinguished by the forfeiture of the person in the right." Even the Act 1690, having, as already obvious, and directly admitted above, no influence upon honours, was of short duration, and fully superseded by the treason Act of Queen Anne. The actual style and verbiage, with that noticed by the same great lawyer, continued in our decrees of forfeiture after the Revolution; and from what transpires, or I can discover, the "tainting," or corruption of the blood, extinction of the memory of the family, with the blasting, and annihilating consequences as to the "posterity," in every event, of such prevailing occurrence, were either literally enforced or implied in every attainder, whether before the Justiciary, or in Parliament.[2] So that all convictions of forfeiture, having these consequences in the main, may be held to illustrate the corresponding understanding and import of our common law, as laid down.

Further conclusion on this head.

Our original treason doctrine, as set forth by Sir James

[1] In the same way, Baron Hume inculcates, that by "the *native* principles of the law of Scotland, there was no room for any more favourable construction of the forfeiture, even in the case of a *tailzied* estate,"—than in one "in fee-simple." Crim. Law *ut sup.* vol. II. p. 471.

[2] See also, in confirmation, Act 1663, p. 754.

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Stewart,[1] barring the issue of an heiress, the wife of an attainted person, also in respect to *her* inheritance, or what they might claim through her, when deceased,—agreeably to the principles of the precedents of Bisset and Wauchope,[2]—would obviously, if now in force, prove fatal to the existing right and title to the Earldom of Errol, and high hereditary office of Constable of Scotland. Upon the death of Mary Countess of Errol, &c. in her own right, and holder also of the Constabulary, in 1758, the succession to these old inheritances opened, in the corresponding character, to James Lord Boyd, the heir-general, her grand-nephew. It was under a common remainder over, including both,—to the "aires female" of the marriage of Sir John Hay, Earl of Errol, her father, taking *as* "ares of *tailzie*" *(entail)*—"without *divisione*,"[3] (on failure of direct heirs-male), in virtue of a nomination, the 16th of February 1674, executed by Gilbert Earl of Errol, and warranted by the crown, through the *medium* of a royal charter, upon a sign manual, formerly referred to,[4] dated 13th of November 1666.[5] James Lord Boyd here connected himself,

Case of Earldom of Errol, high Constabulary of Scotland after 1746, viewed by our original law, as stated by Stewart.

[1] See pp. 765-6. [2] See p. 759.

[3] This has reference to the estates, which were at the same time carried, and would otherwise have split among co-parceners. But honours do not do so with us, but descend, subject to no abbeyance, exclusively to the eldest, like the principal superiority in land.

[4] See p. 85; also Minutes of Evidence, Information in the case, &c. from which the present account is chiefly taken.

[5] This deed of nomination, the fate of which is rather singular, being at one time lost, and merely recovered at a critical moment, (see p. 85, *ut sup.*) is also itself curious in its terms. Earl John, the first nominee, is to marry, with "express consent" of *Earl* Gilbert, and to convert the bride's "tocher," and fortune, to *his* "behoof and profeit;" *after* which, he taking in the first instance, the honours are to go to "the aires male of the marriadge, *quich failzeing* (to) the aires *femall* of the saide marriadge, (including Countess Mary, and Lord Boyd)—to succeed *as* aires of *Talzie, (Entail)* and *provisione*,—without divisione;" remainder to Willam Hay of Drumelzear, he being bound in the same way in regard to his marriage, and to the heirs-male of his body, &c.; remainder to David Hay, second son of the Earl of Tweedale, (as before), and the heirs-male of his body, &c.; remainder to Earl Gilbert's former heirs-male, contained in his infeoffments. (Errol Charter-chest.) This nomination and deed of entail has irritant and resolutive clauses, the heirs being obliged to take the name and arms of Hay, and they were

through his mother, Lady Anne Livingstone, but more especially again through her mother, Lady Margaret Hay, who was the younger sister of the preceding Mary Countess of Errol; but then, it singularly enough happened that both these ladies, although never in possession, had been, respectively, the wives of traitors, namely of William Boyd, Earl of Kilmarnock, and of James Livingstone, Earl of Linlithgow, &c. who had been attainted of treason by Act of Parliament, the one, as is well known, in 1746, and the other in 1715. The case, accordingly, of Lord Boyd, thus aggravated in its kind, comes essentially within the category of that alluded to by Sir James Stewart, of *issue* claiming through the *wife* of an attainted person, *who* "must," he says, be "*rehabilitate*, that they may succeed" in such capacity; for he further inculcates, that "the rigour of the law" here "taints *all* the blood."[1] There having been no rehabilitation, therefore, of the noble heir in question—while we made no distinction, in the present matter, between entailed inheritances and those at common law, the honours necessarily, and interest of succession, so far, would have devolved to the crown, in unison likewise with the Roman law; certainly with us a great rule in treason, which, as has been shewn, so broadly excludes the issue of a traitor, "a *materna* vel *avita*, *omnium* etiam *proximorum* hereditate,"[2] —hence involving the actual point.

Forfeiture.

Could not have then stood.

But, on the other hand, agreeably with the Scoto-Anglo treason law, under which this case was included, it coming to govern since 1709,—from Errol being an entailed honour, James Lord Boyd, as in the Athole instance, owing to the predecease of the traitors, though he necessarily connected his "pedigree," through them, by their conjunction with the essential "materna" and "avita" ancestry, was entitled, in

Viewed by the *existing* treason law.

quite sufficient for the purpose without a royal confirmation, in virtue of the charter 1666, as resolved by the Lords 1797, contrary to what some English lawyers have been led to maintain. In this manner too, the Errol honours, after the present family, would widely diverge to cadets of that of Tweedale, of an ancient stock,—so much so, as hardly at least to be legally connected, in the male line, with the still ancienter one of Errol, now apparently extinct in the *male* line.

[1] Answ. to Nisbet, p. 123; also p. 765, *ut sup.* [2] See p. 766.

Forfeiture.

1758, at once to make resort to Gilbert Earl of Errol, the settler in 1674, and take from him *per formam doni*, without reference to the previous consideration.[1] Nay, *a fortiori*, as the *inheritance* did not, as in the Athole instance, *mainly* flow through a traitor, but only through the wives of traitors, who in respect to it were strangers. The English law, consequently, again here proves a boon to us, evidently sustaining a right, which, by the harsh inexorable Scottish system, would have gone.

The result favourable, and hence the above again a boon to us.

Supposing the honours of Errol not to have been in tail, but in fee-simple, or to heirs-general, what would *now* hold?

Suppose this, however, that the Errol honours were not entailed, but merely in fee-simple, or to heirs-general?—Cruise inculcates, that in succession in fee-simple "the attainder of a person, who *need not be mentioned* in derivation of the descent, does not impede, and therefore, where one may claim, as heir to an ancestor, without being obliged to derive his *descent*, *through* an *attainted person*, he will not be affected by such an attainder;" which case he exemplifies by that of a younger brother, taking directly as heir to his father, who had an elder attainted son, *pre*deceased without issue.[2] But there is evidently here a shade of difference; the younger brother in no degree traces his descent through any attainted blood,—the Errol claimant, on the other hand, doing so twofold; while the legal denial of *disseveration* to parties in matrimony would also force him, in the view taken, to include, in his line, the *husbands* of the Errol descendants, certainly his ancestors. I do not precisely know how the English law, which must chiefly govern, would decide in the latter instance, possibly favourably too, owing to the right not being in the families of the husbands,—though Erskine, with us, after Queen Anne's Act, lays it down broadly, that no "heir" can "succeed to an ancestor, where the propinquity between the two is *necessarily* connected by the attainted person."[3] There is this to be said

[1] The right of George Earl Errol, his son, to the honours, was sustained (see pp. 85, 260-1,) by the House of Lords, on other grounds, in 1797, against an objection by the Earl of Lauderdale, at the Election of the Sixteen Peers in 1796,—from the minutes of evidence on which occasion, informations, &c. and the public records, the previous Errol statement is taken.

[2] On Dig. p. 127.

[3] Inst. B. IV. Tit. IV. § 26.

Forfeiture.

Peculiarity in Scottish honours, descendible to heirs-general.

in regard to Scottish *honours* limited to heirs-general, that, as we have, so far, no co-parcenery or abbeyance, females, in such event, would take singly, the eldest being preferred; as under an entail, in the case of lands, to the eldest female heir succeeding without division,—whose right would otherwise split, —which thus approximates to an entailed interest:—though I am aware that the above may not materially tell, because the females still only take, as sons would in fee-simple. Of such class of honours is that of the Scottish Earldom of Newburgh, &c., conferred by patent, the last of December 1660, upon the patentee, "ejusque hæredes quoscunque,"[1] and which, not recurring to the relative matter of alienage,[2] has been constantly taken by certain female heirs, though sprung from the marriage of his grand-daughter, Charlotte Maria Countess of Newburgh, in her own right, with Charles Radcliffe, who was attainted of high treason in 1746.[3] James Radcliffe, the son and heir of this connection, as is well known, claimed the honours, (which he assumed,) upon a petition, and reference to the Lords in 1784, but no resolution has been come to in the matter. The petition is ostensibly for the purpose to "obviate any objections,"—owing to the petitioner being "born in a foreign country, whilst his father was attainted of high treason;"[4]—thus admitting that, so far, there was, in some degree, a demur.

Case of the Earldom of Newburgh.

Present situation of the Viscounty of Dundee, &c.

The dignity of Viscount Dundee, &c. is conferred by a patent, dated 12th of November 1688, upon the celebrated General John Graham of Claverhouse, "et hæredes masculos ex ejus corpore, *quibus deficientibus* in *alios* ejus hæredes masculos,"[5] many of whom still exist. He was attainted of high treason in 1690, in terms of the same Act that forfeited Sir John Drummond of Machany;[6] and his son, an only child, died an infant. In this manner the succession, under the patent, opened to heirs-male-general, of whom the first, David, the patentee's brother, was equally forfeited by Act 1690; and the next—James Graham of Duntroon, by a British

[1] Great Seal Register. [2] See p. 720. [3] Brit. Acts.
[4] Lords' Journals. [5] Great Seal Register.
[6] Acts of Parl. last Edit. vol. IX. pp. 61-2, *et seq.*

Forfeiture.

Act in 1746[1]—in whose branch also, in the person of William Graham of Duntroon, his *father*,[2] there had been a corresponding attainder in 1715.[3] The honours, assumed by the latter, would thus appear to be gone by the British treason law, taking, as they did, in a more aggravated way than in the Airlie case;[4] and certainly, as has been shewn, by the previous Scottish, owing merely to the attainder in 1690, which made no difference between entailed honours, and those in fee-simple.

— Of the Earldom of Dunfermling, &c.

The Earldom of Dunfermling, &c. too, (in a branch of the noble family of Winton), though originally constituted in 1605,[5] yet, in virtue of the regulating conveyance, the 6th of April 1611, (upon a resignation), settled in tail-male, with distinct substitutions or remainders,[6] is hence, in like manner, barred and forfeited to numerous existing heirs, through the exclusive attainder of Alexander Earl of Dunfermling, (a direct male descendant, who died without issue), by the same Act referred to, in 1690. And the same remark at least as forcibly ap-

[1] The Grahams of Duntroon were descended from Walter, "second" son of Sir William Graham of Claverhouse, and younger "brother-german" of George Graham of Claverhouse, grandfather of John Viscount Dundee; as proved by genuine documents, I have seen, in 1632, and 1643, among original Claverhouse writs. There is also, among the old Dundee papers, a letter of Charles II., 1st of March 1683, commanding the Earl of Lauderdale and his son to "dispone" the office of Constable of Dundee, and House of Dudhope, to Colonel John Graham of Claverhouse, (afterwards Viscount Dundee,) as one of the conditions of a discharge to the former, for their convicted "abuses in their trust about the Mint, and a remission of all crimes of a publick nature."

[2] Proved by a Testament upon record, dated 24th December 1729; also instructing, that James had two brothers, John and Robert, from which stock issue can elsewhere be shewn to have sprung.

[3] Brit. Acts. [4] See pp. 724-5, *et seq.*

[5] Great Seal Register,—on the 4th of March. The dignity is thereby conferred upon "heredes suos masculos,—quo quidem honore &c. dictum Alexandrum," (Seton, "Lord Fyvie," the patentee,) "per togæ cacumenis, *quam (sic)* honoris et dignitatis cappam vocamus, indumentum, *gladii cincturam*, et corone sue, circuli aurei, circa caput positionem, insignivimus, et investivimus." Here the belting, again, is but a part of the form of investiture or inauguration. Nor did it alone suffice, transmitting *per se*, forsooth an heritable right, according to Lord Mansfield and Rosslyn's wild *enactment*; for there is, over and above, a limitation. See pp. 680-1, *et seq.* [6] *Ibid.*

Dunfermling patent in 1605, further refutes Lord Mansfield and Rosslyn's conceit as to belting.

plies to the Earldom of Middleton &c. conferred by patent October 1, 1660, upon General John Middleton, "ejusque *hæredes* cognomen et arma de Middleton gerentes,"[1] in consequence of the attainder, by Act of Parliament, of his descendant, John Earl of Middleton, the 2d of July 1695.[2] The preceding—if Lord Mansfield could have been persuaded to construe it to heirs-*general*, (as he ought, after the Kirkcudbright decision,)—would obviously be a very broad substitution.[3]

Forfeiture. Of Earldom of Middleton.

There were, as has been seen,—besides that in 1690, attainders in 1715 and 1746, of the distinguished race of Drummond, who gave an ancestrix to the Royal family, in the person of Annabella Drummond, a daughter of the house, wife of Robert III.; which may have further tended to link their fortunes with the Stewarts. A settlement of the principal Perth estate, the 28th of August 1713, by James Lord Drummond, attainted in 1715,[4]—(son and heir of James Earl of Perth, Chancellor,) upon James, his son, the titular Duke of Perth in 1746,[5] and the heirs-male of his body; *whom failing*, to *his* other heirs-male whatsoever, was found by the Session, the 13th of December 1750, to be unavailable to the latter,—although under protection, as would seem, of a remainder over,—the lawful connection, or "bridge," as it was technically held, between the settler and them, being barred, and "broken down" by his intervening forfeiture.[6]

Several attainders in the House of Drummond.

Question of attainder of Perth estate, in 1750.

Ratio.

The above James Lord Drummond, the settler, was not, like the entailer in the Gordon of Park case, free from disability, but *e contra*; and that, in his instance, obstructed and nullified the closing remainder. Moreover, the settlement

[1] *Ibid.*

[2] Acts, *ut sup.* vol. IX. Append. p. 110.

[3] Besides the Viscounty of Dundee, there are other Scottish honours, with broad remainders over, to heirs-male whatsoever; yet the plea of exemption from forfeiture, in their case, on such ground, before the Act of Queen Anne, was never thought of, or at least legally attempted, further illustrating the relative law.

[4] By Act, 1*mo.* Geo. I. *c.* 32.

[5] See p. 746.

[6] Lundin against the King's Advocate, of the date in question, Falconer's Decisions, No. 171.

Forfeiture.

was not a *strict* one, like the Park entail, or recorded in the Register of Entails, requisites even indispensable by the superseded Scottish Act, in reference to forfeiture, in 1690,[1] as also, by proper analogy, with English principle,—as has been decided, by the Scoto-Anglo treason law after Act 1708.[2]

Specialty between the former and Somerset case in 1750.

Some may think that the above decision, in 1750, ruled by English doctrine, is at variance with the almost cotemporary precedent of the Duchy of Somerset, the 17th of Jan. 1750,[3] where

[1] See p. 763.

[2] Especially in the case of David Kinloch, against the King's Advocate, January 10, 1751. Falconer's Decisions.

[3] See p. 715, *et seq.*

Forfeiture at present, of the Perth honours, —as well as those of Melfort.

The male representation of the House of Perth,—to which there are many heirs, is now said to vest in the *French* (formerly *Popish*) Melfort line, sprung from Earl John, the Melfort patentee in 1686, (see p. 761,) who again was attainted in 1695, (see p. 762.) That nobleman was younger brother of the equally noted James Earl of Perth, the Chancellor, whose son, James Lord Drummond, and grandson, John Drummond, have been likewise proved to have been attainted, (see pp. 773, 747-8.) By the attainder of the former in 1715, the honours were lost by implied forfeiture, the succession having *opened* to him, as in the cases of Airlie and Wemyss; and the estate, (that had been previously saved through a family transaction,) by the forfeiture of the latter in 1746; which, in the same way also, would have affected the honours, had they not been already gone. It is to be observed, that both John Drummond, and his elder brother, the titular Duke of Perth, (see pp. 746-7-8,) were *descendants* of a traitor, which makes their case even worse than those alluded to. Neither were there any express or legal remainders over, to save. The patent, or regulating constitution of the Earldom of Perth some time in 1605, (as instructed by the act of creation, under the autograph attestation of Sir David Lindsay, then Lord Lyon, in the Advocates' library,) is not preserved,—so that the House of Lords would but hold it constructively to be in tail mail, —probably with an enlarged interpretation, owing to the title having devolved to, and been transmitted through John, the younger brother of the first Earl, who died without male issue, only leaving a daughter, —as to which formerly. Nor is this all; for the Melfort line, equally with the Chancellor's, being sprung from Earl James, son and heir of John, thus the second Earl of Perth, must be presumed, in any view, to take under the same specific limitation, and hence to be fatally compromised by such blasting and destructive conjunction, from the indelible vice in it, in virtue of the subsequent Perth attainders;—which is independent, too, of that of Melfort, still attaching in 1695, and its peculiar Scottish effect, as exemplified under the Machany instance in 1690. The Barony of Drummond, the oldest and principal dignity

Patent of the Earldom of Perth, created in 1605, not extant.

Forfeiture.

the heir, who took *vi juris*, in virtue of a remainder over, against a forfeiture for treason, was even descended of the body of the attainted patentee. But another specialty would appear here to obtain. The Somerset remainder in question, is conceived not, as in the Perth case, to the *attainted person's* heirs, (by Catherine, his first wife,) or to "*his*" heirs-male-general, which makes no essential difference, but to Sir Edward himself, the *un*attainted, in the *first* instance, *proprio jure*,—though styled, by way of description, the son of the parties,—and to the heirs-male of his body. Sir Edward thus taking, independently, in law, was the means of his own special exemption, and eventual perpetuation of the succession in his stock. It would follow then, in principle, in the Park case, so far, that the remainder over to heirs-male of the body of the settler, if attainted, (which he was not,) would have been admitted to equal favour,—although otherwise assailed, upon fatal ground, by the English law, owing to Sir William Gordon, the traitor, his eldest son, previously called *nominatim*, literally thereby *re*-taking. But, singularly enough, again, as before shewn,[1]—though I profess not altogether to deal with these subtilties,—the genius and force of Scottish practice, applied to the Park remainder, carried it against English notions; and by its protecting Ægis, repelled a difficulty

Qualifying weight still, of Scottish law on such occasions.

anterior to the constitution of the Perth Earldom, is much in *pari casu* the relative act of creation, on January 29, 1487, (see Acts of Parl. last Edit. vol. II. p. 181.) without any notice of the words of limitation, being alone transmitted to us,—a circumstance that would *now* make it descendible simply to heirs-male of the body. It is to be hoped, however, that, as in similar other cases, government may at last be induced to remove the disabilities, and, so far, heal the sufferings —owing, upon the whole, to consistent, and not uncommendable principle—of one of the most distinguished, and best allied of our families.

Barony of Drummond created in 1487, the oldest dignity in the family, much in *pari casu*, and also forfeited.

I need hardly add, that neither the original, or any proper legal exemplification, is extant, of an asserted regrant or *Novo-damus*, the 17th of December 1687, of the Perth honours and estates, to Chancellor Perth, (upon his resignation,) with a remainder, failing male issue, to his collateral heirs-male. It was founded upon in the claim in 1792, and thereafter, to the former, upon petition and reference to the Lords by James Drummond of Perth, the direct male Melfort representative, and then also of Perth,—that was never fully prosecuted, or pushed to a decision.

Neither the original, or any proper exemplification of an asserted *Novo-damus* of the Perth honours in 1687, preserved.

Claim to the Earldom of Perth in 1792, and thereafter.

[1] See p. 709, *note*.

Forfeiture.

here that might have been insurmountable. It hence may thus still rule in analogous cases. Had the Park entailer been subsequently attainted, and the remainder to *his* heirs-male of the body, the estate, by the Drummond or Perth precedent, would have been forfeited to the remainder men.

I have now, with certain exceptions, noticed and discussed what, I believe, may be most material in our Peerage law since the Union, which may be the more fortunate, as I find that want of room must compel me to be briefer, and more condensed, than I otherwise had been, in treating the remainder of the subject.[1] We now reach the stormy period of the

Barony of Aston of Forfar, created in 1627.

[1] According to the public prints in 1788, during a recent canvass, the reputed Baron of Aston, when applied to, declined to vote at an ensuing Election, first, because he was a Papist, (query, *then* ? see afterwards); and secondly, that he could not assume the title, or exercise the attendant rights, because it would then deprive him and his wife, who were in business, of the indispensable fruits of their industry; the necessary abandonment of the same being deemed incompatible with, and derogatory to the Peerage. The title in question, that of Lord Aston of Forfar, duly granted by patent, the 28th of December 1627, to Sir Walter Aston, "suisque *hæredibus masculis* in perpetuum, *cognomen* et *arma* de Aston *gerentibus*," (Great Seal Register), centered in Lord Walter, his lineal descendant, in 1713. Owing probably to the family being English, and having no Scottish property, nor concerning themselves in Scottish matters, the former had been omitted, not only in the Union Roll, but in the Rolls of Parliament, as far back at least as 1670; (see Acts of Parl. last Edit. vol. VIII. Append. p. 1.) But a protest for enrolment, in terms of the patent, by the Earl of Roseberry, on behalf of the same nobleman, at the Election in 1713, was strangely met by a counter one of exclusion, or non-admission, in name of the Earl of Forfar, upon no conceivable, or relevant ground; (see Robertson's Peerage Proceedings, pp. 63-4.) Nothing then followed; and, on failure of the direct male line of the patentee in 1751, the honours, (the estates separating to the heirs-general,) by favour of Lord Mansfield's construction of the *parallel* Kirkcudbright patent in 1633, (see pp. 622, *et seq.*) were assumed by Walter Aston, asserted *collateral* heir-male, apparently the individual glanced at in 1788, who, however, as "Walter Lord Aston of Forfar," had a pension from George III. in 1769. Having conformed to the English Church, he gave in a list of Peers at the Election in 1768, which was not admitted by the Clerks, owing to the dignity neither being in the Rolls of Parliament at the Union, or "many years past." (*Rob. ut sup.* pp. 335-7.) The petition to the crown for the dignity, by the Reverend Walter Hutchison As-

French Revolution, when, from the keen struggles between political parties—occasioned by the excitement of the moment, and agitation in public opinion, there were several contests involving the right of individuals to Scottish dignities, and either, to be returned themselves, or to elect others, as the Sixteen Scottish representatives in the House of Lords, that originated important questions in Peerage law. These have been in part already, and will be next further, referred to. They generally came before the Lords, the exclusive Judges, in the manner, and upon the principle formerly noticed,[1]—through the protests and petitions of those having an opposite interest, against the returns and votes in question; and were then fully discussed and disposed of by the noble tribunal. Under this head, I shall commence with the case of the Barony of Lindores.

Various Scottish Peerage questions started and decided at the period of the French Revolution in 1790-3.

There is a royal charter, dated the last of March 1600, in favour of "*Patrick* Leslie, *son* of Patrick, *Commendator* of Lindores,"—proceeding upon the demission of the latter,—of the Manor of the Abbacy of Lindores, and relative subjects, erecting them into the temporal Lordship of Lindores, with the *title*, rank, and vote of a Lord of Parliament; to be held by the said Patrick (the *son*), "hæredibusque suis *masculis quibuscunque* eorumque assignatis."[2] There past a Parliamentary ratification of the grant, the 15th of November in the same year, though merely to the grantee, under

Case of Barony of Lindores, in 1790-3.

Honours literally carried by charter, 1600.

ton, son of the former, was referred to the Lords, January 12, 1816, but has not been pushed. It prays for a declaration of his right, and insertion of the Peerage in the Union Roll, his predecessors being debarred from the exercise of their rights by their religion.—Lords' Journals.

Pending Aston claim since 1816.

The claim of Robert Colvil, a mere pretender, (such as have been exposed in our days,) to the Barony of Colvil of Ochiltrie, (created by Charles II.), in 1784 and 1787,—at the Elections in which years he voted without protest,—though not so in 1788,—through a visionary descent from an ideal James, asserted second brother of Robert, the second Lord, is too absurd and preposterous to require comment. Its fallacy came even formally to be admitted by his counsel. For the procedure thereupon at Peerage Elections, and in Parliament, by whom the claim was, in effect, maturely disallowed in 1788, see Robertson, *ut sup.* pp. 423-35, 443, 458, *et seq.* to p. 467 inclusive.

Futile claim to Barony of Colvil of Ochiltrie, in 1784—1788.

[1] See pp. 648-9.

[2] Great Seal Register.

But the former met by an adverse specialty in 1606, &c.

the description of "Patrick Leslie, of Pitcarelie."[1] But there especially followed, considerably afterwards, in 1606, an Act of Parliament in favour of "*Patrick, now* Lord of Lundoris, *(the father,)* sumtyme *Commendator*" of the "Abbacie of Lundores," dissolving the principal mansion—manor place of Lindores, and other subjects, from the temporality of the Abbacy in the crown; and upon a narrative of the antecedent grant in 1600, "to Patrick, *now Maister* of Lundoris, *than* stylit *son* lawfull to the said Patrick Lord of Lindores," it includes the same in the benefit; further ordaining a new charter of erection and infeftment of the temporal Lordship and dignity of Lindores, *again*, to the *disponee*, in 1600, and to "his airis maill and assignayis *foirsaidis*," i. e. to heirs-male *whatsoever* and their assignees.[2] A more favourable change of tenure is likewise bestowed, while the name and memory of the Abbey is extinguished;[3]—but such charter never appears to have passed. Thus strangely the Commendator was Lord, and the son only "Master," in 1606, utterly incompatible with the grant in 1600. The dignity, after the death of the former, devolved to the latter, who, during the lifetime of his father, is elsewhere *merely* styled Master of Lindores, and to the male descendants of the Commendator, the first Lord, until 1736; when, on their failure, it was assumed by the collateral heirs-male, on the faith of the charter 1600, and eventually, in the same character, by John Leslie; whose right to vote at the Peerage Election in 1790, being petitioned against, and thereafter discussed by the House of Lords, was disallowed the 6th of June 1793.[4] They here, from the striking circumstance of Patrick the son being only a commoner, and Master of Lindores, long *after* the charter 1600, which never appears to have been acted upon in respect to the dignity—presumed in favour of a later more valid grant, though unknown, probably upon resignation, to the father, and, according to *their adopted* rule, solely to the heirs-male of his body.[5] Com-

Claim of John Leslie, the heir-male collateral, disallowed in 1793.

[1] Acts of Parl. last Edit. vol. IV. p. 246.

[2] Under the same limitation as that in 1600, here premised.

[3] *Ibid.* p. 355.

[4] Lords' Journals.

[5] Lord Rosslyn, in his speech in the Moray case, (to be immediately

bining, as formerly shewn,[1] the often unstable and fluctuating nature of such grants of *Church* lands, so great an object of competition, their *reiteration* from invalid ones that have issued in the first instance, with the necessity of a thorough Parliamentary dissolution from the crown, that would seem only, in the case of Lindores, to have been by means of the supervening Act in 1606, though unaccompanied by the charter it enforced, there *might* follow to be room for the rejection; though no such presumed conveyance has yet been discovered. But certainly, if that passed, there, on the other hand, is every probability that it was not restricted,—as inferred, but still in unison with the other relative limitations, to heirs-male whatsoever. *Possibly* there may have been *truly* a flaw from the first, however disregarded, or soldered up. In this case, the assumption of the honour from 1736 to 1790, by the *collateral* heir-male, a period of fifty-four years, with voting at Elections of the Sixteen Peers, were held to go for nothing, which bears upon the law as to prescription in honours.

Possibly, some ground for the decision, though not for presumed descent to heirs-male of the body.

The defect of the right of John Leslie, or Anstruther, to vote at the above Election, in 1790, under the title of Lord Newark, also discussed, and rejected, the same day, in 1793,[2] (after the same form,) was even more glaring. He was not heir-male of the body, in exclusive terms of the patent of the dignity, dated last of August 1661,[3] but claimed under an alleged regrant of the latter, upon a resignation by General Leslie, the patentee, in favour of heirs-general, including himself. The regrant, however, apparently a fabrication, was found to be untenable, labouring under remarkable flaws and objections; among others, its date on a Sunday, &c. A claim to the dig-

Case of the Barony of Newark, in 1790-3.

Rejected, because the asserted regrant, upon which the claimant stood, was invalid.

stated), 29th of April 1793, thus alludes to the *ratio decidendi*. "In the case of the Peerage of Lindores, decided the other day, a charter was produced in favour of heirs-male whatsoever; but after this charter, the grantee was styled and treated as a commoner, and the claim under it, by an heir-male whatsoever, though backed by possession of considerable length, was rejected, because your Lordships presumed, that some other patent had been granted, limiting the honours to heirs-male of the body." The doctrine, obviously, may bear, in some degree, upon the Colvil of Culross case; see pp. 354-6, *et seq.*

Ratio, or resolution, in Lindores case, according to Lord Rosslyn.

[1] See pp. 238, *et seq.*, and pp. 245-6-7-8-9.

[2] Lords' Journals. [3] Great Seal Register.

nity, by the heir-female, had also been objected to at an Election in 1771.[1] It may be only added, that the Peerages of Lindores and Newark,[2] to members originally of the same family, were continued on the Union Roll.

Case of the Earldom of Moray in 1790—1793.

On January 30, 1561, there passed a royal charter of the *Comitatus* of Moray,[3] to James Stewart, prior of Saint Andrews, subsequently the noted Regent, and to the heirs-male of his body.[4] Certain considerations, however, inducing a grant to him by the crown immediately thereafter, the 7th of February 1561, of the Earldom of Marr, under the same limitation—which, with the attendant act of creation, have been already instructed,[5] had the effect of rendering the previous one in *suspense*. But, along with a change of circumstances,[6]

First grant in 1561 rendered in suspense, for a time, by reason of a circumstance.

[1] See Robertson's Parliamentary Proceedings, p. 360.

[2] The particulars as to them, are from the Informations, papers, and relative procedure, &c. The Lords of Session, in their Report about Scottish Peerages in 1740, after noticing the patent in 1661, state that none had sat or voted in any shape, under the title of Newark, since 1690. See Acts of *Sederunt*, Edit. 1790, p. 345.

Older unknown grant of Earldom of Moray about 1456.

[3] Although not mentioned in the Peerages, (by no means surprising,) the Earldom of Moray *had* been given, in 1456, upon forfeiture of the Douglasses, to *David*,—equally unknown,—a younger son of James II., as is proved under an *item* of the *expense* in an Exchequer Roll in that year, "pro domino *Principe* (afterwards James III.) *Davide Comite Moraviæ*, et domina Maria *filiis*, et filia Domini *Regis*," (James II.) David dying young, the Earldom became extinct, and was afterwards an appanage to illegitimate Royal offspring.

[4] Privy Seal Register.

[5] See p. 684, *n.* 2.

The political reasons qualifying for a time Moray grant in 1561.

[6] Lord Hailes (Suth. case, Chap. VI. p. 101,) ascribes the Marr grant to a "political reason;" and the matter, as is notorious, has occasioned historical discussion. There were strong *interim* reasons for the noble party not *forthwith* availing himself of the first Moray charter, his influence and address had procured from his sister, the unfortunate Queen, which, it has been directly maintained, was kept *in petto*, or *in retentis*. A principal one was a previous charter, (among other titles,) the 13th of February 1548, (Great Seal Register), of this identical and much coveted *Comitatus* of Moray, to a formidable rival, George Earl of Huntly, in fee, whom the Regent *afterwards* succeeded in crushing; but whom, in 1561, the measures for the purpose being only in train,—and not realized until the noted defeat and death of Huntly, in October 1562, followed thereafter by his attainder, (as in the sequel,)—it was inexpedient then to provoke, by a premature public assumption of the dignity, with the fief,—both indeed pre-claimed. Hence,—it being incum-

Previous grant of the Comitatus, in 1548, to Earl of Huntly.

the noble family of Marr having commenced a claim, as heirs-general, to the ancient dignity of Marr, that eventually proved successful, the new acquirer relinquished the style of Marr, he had actually taken, for that of Earl of Moray, in virtue of the corresponding charter referred to, upon which the Act of creation latterly obtained in usual form, the 10th of February 1562.[1] This further shews, that a Peerage, duly and solemnly constituted, such as Marr above, was not held, as it would appear to be, in England, indefeasible, and rivetted in the blood, but might be the subject of posterior challenge, and voided and recalled, on just and relevant grounds, at the instance of the righteous heir. And, at the same time, we see again, in respect to Moray, the effect of a charter of a *Comitatus* in 1561, as carrying an honour,[2] whatever Lords Mansfield and Rosslyn may predicate,—which has been rasbly denied, owing to the Moray dignity not being *immediately* assumed thereafter, of course, partly, *inter alia*, (as seen,) in absence of the creation, that has escaped attention. The fu-

Intervening grant of the Earldom of Marr in 1561.

Material inductions.

Irrelevant conclusions of Lord Mansfield, but especially of Lord Rosslyn, owing to inadvertence.

bent that the Royal favourite should be ennobled in 1561,—the *intervening* Marr grant, only a week after that of Moray, in its *peculiar* circumstances. Such being the case, it is curious to observe Lord Rosslyn, unaware of the true state of things, in all his shallowness, and superficiality, recklessly attempting, in his speech, (to be afterwards referred to,) in the Moray claim, through *such early* non-assumption of the dignity of Moray, by the Regent, peremptorily to refute the ascribed, and technical effect of the relative charter in 1561! Further, in refutation of Lords Rosslyn and Mansfield's crudities, as to an old grant of a *Comitatus*, Huntly again, in virtue merely of his Moray charter in 1548, is directly affirmed, by historical authority, to have assumed the dignity of Earl of Moray,—of which, however, his rebellion in October 1562, whereto he was driven by Moray, deprived him, when the first Moray grant to the Regent, confirmed by the later, took full effect.

Shallowness again, and erroneous reasoning of Lord Rosslyn through ignorance of facts.

[1] *After*, it is to be observed, the defeat and death of Huntly, as premised, (at the battle of Corrichie), in October 1562. The year then began on the 25th of March. The act of creation in question, is given, of the date mentioned in the text, by Sir James Balfour, Lord Lyon in 1630, in an autograph compilation by him, to be specially referred to in the sequel,—obviously from the official heraldic vouchers and appropriate register under his control, as King of Arms;—as well as identically, by Father Hay, a noted antiquary in the reign of James II. in his MSS. Collections, which, with the former, are in the Advocates' Library.

[2] Also, in 1548, in the case of Huntly: see previous note.

After first grant of the Earldom of Moray, in 1561, that took full effect, regrant of the same in 1563, and last and regulating one to heirs-general in 1566.

ture Regent, whose influence was great, obtained, the 22d of January 1563, a regrant of the "*Comitatus*" of Moray, to him, and the heirs-male of his body.[1] And finally, and particularly, on the 1st of June 1566, another of the same, upon his special resignation; but with an entirely *new* limitation, (he having only female issue,) namely, to himself and wife, &c. "et *heredibus*, inter ipsos legitime procreatis seu procreandis," whom failing, to his heirs *whatever*, or to heirs-*general*. This constituted the last, and regulating conveyance; and in such situation of things, the Regent was assassinated in 1570. It may be added, that afterwards, in 1592, there was a Parliamentary ratification *verbatim* of this charter in 1566, with but a summary reference to "all *utheris* charteris, infeftmentis," &c. in favour of the Regent.[2] The Act, thus virtually including that of the Comitatus in 1563, has occasioned surprise, owing to the conflicting limitation in the latter; but it was still an original title, once in force, and, what was material, duly instructed the subjects resigned, and subsequently carried in 1566; while this, as has been exemplified in the similar instance of Napier, and others,[3] independently of many more, was a usual form, in the circumstances. Modern impressions, in this way, frequently run counter to apposite ancient practice, occasioning futile and mistaken motions. There had been also a ratification of the charter 1563, together with one of Bræmar (1564) in 1567,[4] to be found among our existing Parliamentary Acts, (in reference to grants affecting private rights,) that are however not perfect at the period, which renders the thing, that could not have solid weight in any event, immaterial.

Modern misapprehension obviated.

The Regent Moray, having no sons, was succeeded by

[1] George Earl of Huntly having been forfeited, on account of his rebellion, the 28th of May 1563, (see Acts of Parl. last Edit. vol. II. p. 572,) there could be now no possible bar or scruple. January, as already obvious, then followed May in the calendar of the year. Sentence, thus agreeably to our practice, had been pronounced against the traitor, though dead; see pp. 757-8. The feud, owing to the Earldom of Moray, still continued, and led to the slaughter of James Earl of Moray, by George Earl of Huntly, heir of the former, in 1592: see p. 780, *n.* 6.

[2] Acts of Parl. last Edit. vol. III. pp. 629, *et seq.*

[3] See p. 661.

[4] Acts of Parl. last Edit. vol. II. p. 553.

Elizabeth, his eldest daughter, the only surviving one who left issue, she being thus entitled, as senior co-heiress, in the first instance,—which with us carried a right to the dignity and the chief superiority, in virtue of the regulating charter in 1566; who, marrying James Stewart, younger of Down, transmitted the honours and the fief to him by the courtesy, according to the practice which then obtained, and indeed long after,[1] as well as to their descendants. Eventually, but not until the next century, on the 17th of April 1611, there passed a charter of the Comitatus, on his resignation, to James Earl of Moray, their direct heir and representative, limiting the same to heirs-male, with a substitution to heirs whatsoever.[2] The lineal descent, both in the male and female character, from Countess Elizabeth, was perpetuated in the heirs *seriatim*, who duly succeeded as Earls of Moray, until the demise of Alexander Earl of Moray in 1700, when it split,—the honours and estates—to which last these had an undoubted right under the charter 1611, being taken successively as heirs-male, *alone*, by Charles, and Francis, his second and third sons,—to the exclusion of Emelia, wife of Alexander Fraser of Strichen, and her issue, the child of James Lord Down, his *eldest* son, who predeceased his father,—indisputably the heir of line. In 1790, Francis "Earl of Moray" was grandson and heir, by male descent, of the preceding Francis, while the heir-general of the family, and of Countess Elizabeth, was Alexander Fraser of Strichen, the grandson and heir of the preceding Emelia; and the right of the former *qua* Earl of Moray, to vote at the Peerage Election in that year, (which indeed had also been protested against at Elections in 1784 and 1788,[3]) being brought, upon petition, before the Lords, this question arose, whether the Earldom of Moray still went, as it had done originally, to the heir-general, or duly vested in the present assumer, who was only a singular successor; and stood precisely in the situation of Sir Robert Gordon, the claimant,

Subsequent descent of the Earldom of Moray to the heir-female.

Charter of the Comitatus in 1611.

Assumption of the honours after 1700, by the heir-male of the above heir-female, in exclusion of her heirs-general.

Question of the right of such heir-male, after being protested against in 1784-8, brought by petition before the Lords in 1790.

[1] See pp. 111-12. This can be additionally, and fully illustrated by various authorities.

[2] Great Seal Register.

[3] See Robertson's Peerage Proceedings, pp. 419, 442.

—but *unsuccessfully*—of the Earldom of Sutherland in 1771, with reference to the merits of that case.[1]

Conclusions in favour of the Frasers of Strichen, the heirs-general, whose case was then considered, though not in the field.

It would follow, that both in virtue of the regulating charter of the *Comitatus in* 1566,[2] and owing to the immediate descent thereafter of the dignity to the heir-female, it should have still continued in the female line, and therefore descended to the Frasers of Strichen, the heirs-general,—the far later charter, in 1611,—from the change of circumstances, and peculiar epoch of its passing in the 17th century, when greater strictness and precision, as has been set forth, are discoverable, and were enforced in Peerage conveyancing,—introduction then of *modern "patents,"* or abstract grants of *honours*, with, at least, constant insertion of the *same*, in *charters*, over above the fief and lands,—not being entitled to the former weight.[3] While, again, the recent assumption, comparatively, of the male line in the 18th century, with voting, and their being occasionally returned at certain Peerage Elections, from 1701, to 1784,—when their right did come, and repeatedly to be challenged,—was admitted in the relative discussion to be noticed, in 1793, not to be conclusive,—however it might serve as a presumption. Indeed, even the deciding Lord would not take it upon him to say,[4] that "such adverse pos-

[1] My statement is taken from the printed papers, MSS. informations, and relative particulars, including the public records.

Proof, *inter alia*, of grants of a *Comitatus* carrying the honour in 1564-5, 1551.

[2] For proof, independent of what may be else adduced on this head, of grants of a *Comitatus*, and even *Baronia*, carrying the honours, in 1564, 1565, and 1551, see pp. 44-5, (especially) 687-8, 532, *note*. To these I may add, the charters of the *Comitatus* of Moray, in 1561, &c. (see pp. 780-1-2); and of Marr, the 23d of June 1565, (Great Seal Register,) which exclusively confirmed the Marr *honours* in the Erskines, (and their heirs-general,) as was even *most consistently* admitted by Chancellor Rosslyn in the case of Moray.

[3] In the Sutherland claim too, in 1771, a charter of the *Comitatus* in 1601, under the sign manual, to heirs-male, quite in exclusion of heirs-general, and the *successful* female claimant, was especially held by the House of Lords to be utterly null, and inoperative in regard to the dignity. In the same way, in the Moray case, in 1793, the Attorney-General contended, that the above *later*, and identical Moray charter in 1611 "conveyed lands only, not the dignity. Territorial honours, (he added,) were then out of practice."

[4] Lord Rosslyn, the Chancellor, a transcript from a full, authentic copy of whose speech, the 29th of April 1793, in moving the resolution

session was sufficient in law" for ever to preclude another party, or that there was precedent or decision to that effect.[1]— But, *a fortiori*, agreeably to the ruling abstract principle, "settled" (to use their special phraseology) by Lord Mansfield in the identical Sutherland claim in 1771,—and which Lord Rosslyn did not dispute, but recognised *elsewhere*[2]—that rejected, and would here reject, the interference and import of *all* grants of *Comitatus*, however relevant at *any* period, and determined the descent of an old honour in favour of the heir-*female*, *de plano*, from the *mere* circumstance of its, *precisely* like Moray, *having before* gone to an heir-female,[3]—thus serving as a rule or criterion, accordingly, in future,—the Earldom in question ought to have *so* devolved in 1700, and continued ever afterwards in the female line. If, in the Moray instance, where this cardinal specialty and postulate so strikingly recurred, it be objected, that there was no constitution or conveyance of the *honours literally*, agreeably to the later prevalent fashion, to heirs-general, neither, it may be redargued, was there such to heirs-male; while this remaining feature, again, only tends to complete its identity in all respects with that of Sutherland,—where the same coincidence also precisely obtained. As long as law stands, I contend, without much fear of being refuted, that both cases are substantially identical in their individual merits, and must be ever so held. But the claim of an heir-female, it would seem, was not to be preferred by Lord Rosslyn, in any event, to that of his adored heir-male, or even to the semblance of such, however circum-

No bar from *opposite* assumption.

Identity of Moray case *truly*, with that of Sutherland, even upon Lord Mansfield's *ratio decidendi*.

The *ratio inconsistently* deviated from by Lord Rosslyn, out of his love to heirs-male.

of the Committee in the Moray case, I have, and to which reference is made both here, and (largely) in the sequel. Indeed I may once for all state, that when I notice any relative particulars as uttered, or argued by his Lordship, they are derived from this source.

[1] I shall state more on this subject under the Glencairn claim in 1797.

[2] Most explicitly in his speech in the latter claim.

[3] See p. 597. The simple *ratio decidendi*, as from the resolutions, March 21, 1771, (Lords' Journals) was, that the Sutherland Earldom (whose constitution is unknown,) had, in 1514, devolved to Elizabeth, the heir of Earl John her brother, and sole surviving issue of a previous Earl, in exclusion of the heirs-male then, and even now existing, descended of the original Earls of Sutherland, from which *abstract* fact the conclusion in the text was applied.

stanced; and hence his Lordship, who, as was remarked, had abjured his former notions for those of Lord Mansfield,—hugging himself therein,—now even transcending the latter, and, for his fond and bigotted purpose, even contemning his oracle, decided actually in favour of the *Moray* heir-*male*,—originally too, through a female,—the peer petitioned against in 1790, which resolution the Lords agreed to, the 6th of June 1793.[1] And simply upon the mere pretence and hypothesis, futile and visionary indeed, of a *new* creation, by "*Patent*," of the dignity, exclusively in favour of James Stewart, the husband of Elizabeth, the Regent's daughter,—which, of course, conveniently and dextrously enough, (I should rather say, *sinistrously*), as nothing could be gleaned thereof, its date, its passing, a single item, or tittle,—*must hibernicè*, (assuredly)—according to the bigotted and despotic presumption of this new-fangled law,—though to the palpable disseveration of the honours and estates at the time—a most credible, and likely arrangement forsooth,—go only to heirs-male of the body, and necessarily to the former! An utter novice in the subject, he thus concluded too, the miraculous intervention of a "Patent" abstractly, of honours,—of the novel form in modern times, such as we afterwards had, but not then. In this manner was the heir-female (though not personally in the field) cast. The pretexts or hallucinations of Chancellor Rosslyn, to support his *vital* induction of the *new* creation, exhibit a choice specimen of special pleading,—mongrel indeed, and anomalous,—he here availing himself of a tissue of glaring falsities, and empty facts in reality, amid contradictions,—plausible perhaps in part, when viewed through *modern* prejudice, or apprehension, but sufficiently brittle, and easily "pounded" by those versant in the matter, and by Scottish legal antiquaries. The following may be the most favourable sample of his efforts. He maintains, that as James Stewart, the husband of Countess Elizabeth, sat in Parliament as Earl of Moray, the 19th of May 1584,[2] it could not be by the *courtesy*, *because* "it is *proved* that *till then* (the *year* 1588) *she (Elizabeth)* was *never* considered a Countess," or so denominated.—"My

The latter feigns a *new*, visionary creation of the Moray dignity in favour of the husband of the first heir-general, and argues accordingly against her.

His evidence in support of this,—properly his *sole* argument—unfounded and irrelevant.

[1] Lords' Journals.

[2] Acts of Parl. last Edit. vol. III. p. 290.

Lords," he therefore triumphantly exclaims, the solution of the sitting, by the courtesy, is "impossible,—can it be so much as for a moment imagined?—it is absolutely a chimera. Her husband (hence) *must* have been created a Peer, and sat in Parliament in *his own right*." But, most unfortunately again for his Lordship, he is here, as elsewhere, signally wrong in his premises in a common point of fact, which he, as a judge, and ordinary investigator, ought to have known; for it is, *e converso*, as clear as noon-day, that this noble female party *was*, to use his own diction, "considered as a Countess," and actually so styled,—not only before 1588, but *before* 1584! Nay, an Act of Parliament, even *as early* as the penult of November 1581, specially recites a *previous* "compromit," or agreement affecting Colin Earl of Argyle, "dame Elizabeth Stewart, *countesse* of Murray, and Margaret Stewart hir sister, dochteris to *umquhile*[1] James erll of Murray, &c. *Regent* to oure souerane lorde," and "James, *now* (obviously in consequence of his marriage) erll of Murray, spouse to ye said Elizabeth, *for his enteres*."[2] She thus, I reply,—on the contrary,—at this material time, *before* the sitting,—*does* figure as a Countess, while the Earl *is* only so, by the *courtesy*,—though thus arbitrarily excluded by Lord Rosslyn. This is not only intimated by his being postponed to her on the occasion, but so inserted latterly—"for his enteres;" which identical words, it is not to be overlooked, his Lordship afterward asserts, indicated, and were necessary to indicate the right by courtesy.[3] There was hence no chimera at all in the conflicting plea with Lord Rosslyn's, which he so arrogantly rejects; and thus his rash and preposterous superstructure, the foundation being utterly worthless and untenable, at once crumbles to the ground. Were I here to probe further, after all superfluously, I could additionally refute his Lordship. Indeed, in the ser-

His glaring error as to the non-assumption by the above heir-general of the dignity till 1588.

She *before*, Countess in her own right, and her husband only Earl by the courtesy.

[1] Deceased.

[2] Acts, *ut sup.* p. 230.

[3] "It is well known (he predicates) that where a married woman is to execute a deed respecting property, the fee whereof is in herself, it uniformly is made to run in her name, with the consent of her husband, and by him, *for his interest only*,"—clearly here through the marriage and courtesy.

vice of the noble lady in question, the 1st of February 1586, (hence before 1588) to her sister Annabella, she is again specially described as "Countess of Murray." [1]

Other futile reason of Lord Rosslyn in support of his theory.

The Chancellor besides, owing to marked inadvertence, and ignorance of the then legal practice, founds in support of his *vital* theory, (it is always to be remembered,) upon the lady being styled only by her christian name and surname at an earlier period, but *subsequent* to marriage, while her husband figures as Earl. He consequently, again, must have been so by a new creation. If his Lordship had opened his eyes, and made the smallest investigation, he would have speedily found that at the *period—indisputable* Countesses are *often* actually so designated, while the above opposite—though neutral circumstance in this instance, equally *then* applied to their husbands, and sons. As in ornithology, the noble mate, in these days, (when women were not admitted as witnesses,) was in writs fully bedizened in the superior plumage of the honours, that were then, not unseldom, ungallantly withheld from the female, however legally entitled to them. It will not be denied, that Lady Agnes Keith, daughter of the Earl Marshal of Scotland, and wife of the Regent Earl of Moray,—the actual mother and father of Countess Elizabeth, was Countess of Moray. Indeed she is occasionally so described;[2] yet when a widow, in the identical way with her daughter, as has been objected,—in an Act 1592, regarding the Moray succession,—which Lord Rosslyn either saw, or ought to have seen,—she simply figures but as "dame Agnas Keith," —at the moment when, again, in compliance with the fashion in question,—she is likewise styled the spouse of "umquhile James Erll of Murray, &c. Regent,"—who thus, *e converso*, by it, has all his due honours and styles, &c.[3] The dowager Countesses of Huntly, in like manner, in a legal process in

Palpable refutation of the same, in the very instance of the Family of Moray.

In that of Family of Huntly.

[1] Act and Decree Register of the Sheriff Court of Perthshire. *Even* by the *Chancellor's* shewing, Elizabeth should have been *Countess*, through her husband, *long* before 1588.

[2] See, for instance, an Act in 1574, bearing mention of the Regent "James erll of Murray," and of "dame Agnes Keith, *countesse* of ergyll, and *Murray* his relict," she afterwards having married Colin Earl of Argyle. Acts, *ut sup.* vol. III. p. 85.

[3] *Ibid.* p. 630.

1526, are cited but as "*Mergerat Stewart* his moder,"—*i. e.* of "George erll of Huntlie," he having, as above, his full style,—"*Elizabeth Hay*, his foirgrandame,—and Elizabeth Gray, his grandschiris wife," though they can all be proved the undivorced wives, respectively, of Earls of Huntly, and certainly *aliunde* Countesses.[1]

Innumerable other such cotemporary instances I could give from record.[2] But it may be perhaps contended, that these were not Countesses or Peeresses in their own right,—such as I hold Elizabeth, the Regent Moray's daughter, to have been,—and that the practice did *not* apply to the latter. If so, I need only, in refutation, again appeal to the next authorities, to instruct the exact extension of it to them also. The old Baronial dignity of Dirleton, with large estates, devolved to the noble family of Ruthven and Gowrie, through Janet, the eldest daughter and coheiress[3] of Patrick Haliburton, the previous Lord.[4] Yet, after the succession had opened to her, there is a royal confirmation, 1st of March 1535, of the lands of Forteviot, to her husband,—"*Domino* Willielmo *Domino* Ruthven," but to herself only as "*Jonete Haliburtone*, sue *spouse*."[5] Here too, as little, is she even styled Lady Ruthven, in right of her husband. The usage had been ancient, and deep-rooted; for we find a confirmation, May 24th, 1367, by "Patrick Dunbar, Earl of March, and

In that of Family of Ruthven, or Gowrie.

—Of the Family of March and Moray.

[1] Act and Decree Register of the Supreme Civil Court. The process turned upon the jointures of the Countess, and aliment to the Earl, all then alive.

[2] Thus, *inter alia*, the then undoubted wives of "Gilbert Earl of Cassilis," and of "Alexander Earl of Glencairn," so explicitly described, on the 10th of January 1575, and 3d of December 1577, are only called "Dame Margaret Lyon," and "Jean Cunningham," as proved by charters of these dates in the Great Seal Register.

[3] We had no abbeyance in Scotland, the eldest coheiress alone, *ipso jure*, succeeding.

[4] William Ruthven, also her male descendant, Earl Gowrie, by charter 20th of October 1581, (Great Seal Register,) is, in the preamble, expressly styled "Lord Ruthven and *Dirletoun*." He is likewise so, elsewhere described.

[5] Great Seal Register. By the way, this is a fresh instance of the descent of an old dignity, whose limitations are unknown, to the heirs-female.

Moray," and "Agnes" his wife, as "Countess of March and Moray,"—the latter, the celebrated "black Agnes," heiress of the Randulphs Earls of Moray, and precisely like Elizabeth Stewart, Countess of Moray, in her own right,—her husband only taking by the courtesy; while, on the other hand, there was a royal charter, the 28th of June 1362, under the same circumstances, to a party, upon the resignation of the said Earl, in the full pomp and blazonry of his style, as above, but by the Countess simply, as "Agnes sponsa sua."[1] Yet it will not be pretended that she, the noted heroine of Dunbar, so masculine in her character, and arrogating far more than the usual privileges and attributes of her sex, would have been remiss and lukewarm in the assertion of her rights and pre-eminence. But, coming much further down, and to the actual period of Countess Elizabeth, after the death of the Regent Moray, I may cite one other charter of the lands of Bonnieton, &c. the 10th of March 1576, "Roberto (Douglas) *Comiti de Buchan*," and "Dominæ *Cristinæ Stewart* sue spouse,"[2]—which lady, be it observed, was then, as can be fully proved, Countess of Buchan in her own right, the dignity being only in Robert, the husband, by the courtesy;[3] and it was, under such identical and repeated right, as the heir-female of Cristian, that the Earldom again descended to Countess Mary, her grand-daughter,[4]—thus constituting even a stronger instance of female succession than the well known Earldom of Sutherland.

In the contemporary instance of Family of Buchan.

Enough therefore upon this subject, that enabled the Chancellor forsooth, according to his assumption, to give the case, victoriously, as he chose to mould it,—"upon its *true* merits,"—but in opposition to certain fact and reality, and to found an argument, it seems, in his own behalf,—his *cheval de guerre*—of the most irresistible kind, though perfectly futile and evanescent.

Pursuing this track, however, a little farther, he does not deny, nay he adduces evidence which proves that Elizabeth

[1] Regist. Dav. II. Lib. I. pp. 55-6, 29. [2] Great Seal Register.
[3] See, *inter alia*, Lord Hailes' Suth. case, chap. V. § 14. pp. 62, *et seq.*
[4] *Ibid.*

was *Countess* of Moray, and so recognised in 1588,—as he would pretend, in right of her husband only. According to his reasoning, therefore, she should always have been thus designated *thereafter*, for it involves the vital postulate of constant adhesion to, and observance of such special style; but it so happens again, that even *then*,—on the 21st of January 1589,—we still find her described, in a civil process, *but* as "dame elizabeth Stewart, dochter and air of umquhile James erl of Murray," while her husband is described as Earl.[1] This, at the same time, in perfect accordance with, and pointedly illustrating my former position,—the lady being *now*, at least, on *all* hands, *a* Countess, and *strictly* entitled to that rank with the relative rights,[2] &c.—clearly evinces the utter insignificance and inconclusiveness of the Chancellor's test, or pretext, based upon the occasional *non*-application of the style in question, from which *alone* he draws, at one epoch, the violent conclusion of its being foreign to the party, and which indispensably subsumes, that a *real* Countess in those days was never designated otherwise than as a Countess. The reverse is strikingly shewn, even in the very instance of Elizabeth; and he might, just as relevantly, in virtue of his argument, have denied that she had a right to the dignity in 1589 as *before*,—or *indeed* that of the latter indisputable Peeresses and Countesses mentioned,—who are exactly *in pari casu*; but with what truth and foundation, is now abundantly clear. Nay, in another litigation, even in additional illustration, the *very* day *after* the one quoted,—the noble Moray heretrix again, *has* her explicit strict designation of "deame elizabet Stewart, *countas* of *Murray*;" while upon this, as well as the former occasion, her husband only follows in her wake; a circumstance to which the late Lord Lauderdale, as

Further conclusive refutation of Lord Rosslyn here, even, upon his own ground, in the case of the Moray heir-general.

[1] Action, of the date mentioned, by James Durham of Duntarvie, against the lady, as in the text, and her husband for his interest, defenders, to pay certain debts incurred by the Regent Moray, her father. (Act and Decree Register of the Court of Session.) January was near the end of the year, it then beginning on the 25th of March. She is called "dame elizabet Stewart," exclusively.

[2] It will further be fixed in the sequel, in her *own right*.

will be afterwards shewn, affixed considerable importance.[1] No stress whatever, therefore, can be laid upon the mere occasional withholding from her, of the style in question.

Other futile and inconsistent attempt of Lord Rosslyn.

The Chancellor seeks, after Lord Mansfield's fashion, to disprove the right of the Regent, and his heirs, to the honours, under the grants of the *Comitatus* in 1561, 1563, 1566, which by our practice, as evinced, did carry them,[2] yet most *consistently* indeed founds upon that of the *Comitatus* of Marr simply in 1565,[3] to instruct the right and descent of the Marr dignity in the Erskines. These attempts respectively cut each other's throat; while he would even argue, that the mere limitations of the estate of Moray in the 17th century to heirs-male demonstrate "that the honours were limited to the same heirs."—But I shall now adduce conclusive evidence, and authorities, upon the material point under discussion.[4]

Conclusive authorities *e contra*, of Countess Elizabeth holding the dignity in her own right, &c.

1. Upon the strength of evidence, from 1595 down to modern times.

I. In a minute, and curious specification of the Scottish nobility about 1595, (in the British Museum,) by a cotemporary, who evidently had direct and accurate means of intelligence,—of their ages, connections, and religious tenets, &c. with an obvious view to important political purposes, it is stated that the then Earl of Murray was only ten; that his mother (Elizabeth) was "*daughter* to the Earle of Murray, *Regent*, BY *quhome this* Earles father *had* that *Earledome*," *(Moray)*; that he was "not maryed, his house Tarnway." This was James, in one view, through the right by the courtesy in his father, the third Earl, but by *descent* the second, who hence inherited the Earldom from Countess Elizabeth, and in no degree from the former, who, it is merely said, quite truly, had been "slayne by Huntly," (in 1592.) In a MS. genealogical compilation, and deduction likewise of the pedigrees and connections of the Scottish Peers, before, and at the beginning of the 17th century, once in possession of Sir

[1] Action by Archibald Earl of Argyle, the said "*Countas*" Elizabeth, and others, against William Douglas of Erlismiln, in relation to the succession of Agnes Keith, her mother, Countess of Argyle and Moray, 22d of January 1589. Act and Decree Register, *ut sup.*

[2] See p. 784, *n.* 2. [3] Great Seal Register.

[4] As far as I know, these under the following head were not adduced in the Moray case,—at least the most material.

Robert Cotton, the noted antiquary, and thereafter of Cambden, there are two, of the family of Moray, in which the husband of the daughter and heiress of the Regent is either only represented as "Jacobus" (Stewart), or paternally, as son of the "*Abbot*,[1] (or Commendator) of Saint Colms Inch;" while she exclusively figures as "Comitissa Moravie"—in her own right.[2] Sir James Balfour, Lyon King of Arms in 1630, still more explicitly sets forth, in an autograph account of the Scottish nobility, dedicated to Charles I. that "*James Steuarte* Lord *Doune*, (by a hereditary title in the *Abbot*, his father) wes, IN RIGHT *of his wife Isabel*[3] (Elizabeth,) eldest daughter to James Erle of Murray, and Regent of Scotland, *Earl of Murray*, and had issue 2 sonnes,—*James*" the eldest, "*now* Erll of Murray," his *cotemporary*, and the nobleman above referred to.[4] Neither this authority, the foregoing ones, or those that follow, (equally unadduced, so far as I am aware, in 1793,) Lord Rosslyn could have relevantly disregarded, because, as will be afterwards seen, under the Glencairn claim in 1797, he founded exclusively upon much inferior testimony,—that merely of a subordinate *English* Herald,[5]—to instruct the parallel vital fact of the constitution and descent of the Scottish Earldom of Glencairn in 1503. Independently too, the evidence of Sir James Balfour the Lyon, is irresistible in the circumstances, inasmuch as the Lyon King of Arms not only attended, and drew large fees at the creation of Peers, but moreover kept, *ex officio*, a Register of every peerage grant and creation,[6] wherein those of the Earldom of Moray must have been undoubtedly inserted, and from which genuine source—it being constantly under his personal control and observation, he must have drawn his informa-

Good, even upon Lord Rosslyn's *ratio decidendi* in the Glencairn case.

[1] This is another instance of appropriation, by one of "the Lords of the congregation," of church property, with the old clerical style, through a purchase or singular acquisition; see pp. 239-40.

[2] Advocates' Library. "Elizabeth" is *so* in *both* the pedigrees.

[3] Isabel and Elizabeth have been with us promiscuously used as denoting the same Christian name.

[4] Advocates' Library, *ap.* his other numerous Collections.

[5] One John Younge, Somerset Herald, an utter stranger to Scotland, where the event occurred.

[6] See pp. 7, 684-5, *n.* 629-30. The old Lyon Records have perished.

tion,—curious and searching withal, as he is known to have been in such matters, as is testified by numerous relative collections. Any new creation too, as pretended, in favour of the husband of Countess Elizabeth, could not therefore have escaped his attention, especially after the striking fact, not only of his having thus directed his attention to the Moray pedigree, but of his having even transmitted to us the actual date of the original, and only Moray creation, as formerly shewn, on the 10th of February 1562.[1] Hence his silence as to the former, and a renewed Moray constitution, fully excludes its occurrence. I may merely here add, that such evidence, and a certain class of historical, are admissible by the law of Scotland,[2]—which, moreover, according to Lord Rosslyn, ought to rule, as will be likewise shewn under the Glencairn claim. In the Latin account of the province of Moray, published by Bleau in 1662, the succession to the Moray honours is represented *continuously*, in the great-grandson of the Regent, then existing, without any *rei interventus*.[3] To the foregoing, I may add the testimonies of Sir George Mackenzie, Lord Advocate to Charles II. a legal antiquary, and of Principal Dunlop, historiographer of Scotland, in 1695,[4]—which last laid the foundation of a Scottish Peerage, as intimated by Crawford;[5] and who both, in their MSS. Genealogical Collections in the Advocates' Library, make Elizabeth the *second* inheritor of the dignity, and transmitter of it to her descendants. Sir James Dalrymple, even more acute, and distinguished in the same department, the noted author of Collections concerning Scottish History in 1705, is equally concurrent. He explicitly states, in 1695, that "*his* (the *Regent's*) only *daughter brought* this *title* (the '*honour*' of Earl of Murray) unto her *husband*, Sir James Stewart of Down."[6] All are uniformly silent as to any new creation in his favour. Then there is the previous Crawford, who did publish a

[1] See p. 781.
[2] This will be instructed afterwards.
[3] Scottish Atlas, p. 125.
[4] He also figured considerably before.
[5] In his Peerage (to be afterwards referred to), Pref. pp. iv. v.
[6] In his second edition of Cambden, published in the same year, p. 183.

Peerage in 1716, wherein he says that the above noble lady "was married with James Stewart, Lord Down, *who*, IN RIGHT of her, his wife, *became* Earl of Murray," by whom, "the *Countess* of Murray," he had "James the next Earl."[1] This author, also, of the genealogy of the Stewarts in 1710, —where he identically premises such statement,[2]—had access to most of the charter-chests of Scotland; and to the same purport are all the subsequent authorities and writers upon the subject, whom it would be tedious and superfluous to refer to,—thus, *inter alia*, pointedly refuting the rash and erroneous assertion of Lord Rosslyn in his speech,—that the Countess in question "is *no where* described as a Peeress in her own right."

Lord Rosslyn has nothing to oppose to the above proof.

And what has this legal dignitary to oppose to the above express and multiplied evidence, so consistent in itself,—to which he was *certainly* bound by his doctrine, as elsewhere exemplified, to give the utmost effect,—and bearing upon a simple, though material fact? Not one authority, not one circumstance, or tradition, nothing—saving *his mere* assumption and hallucination, that is, of a resident Londoner in our days,—with *his peculiar* qualifications, as ascertained, who, it seems, *alone* knew the truth—far better than the preceding attesters, of old, including some who laboured under the weighty objection of being even cotemporaries of the noble parties whom it deeply concerned, and whom they possibly knew,—nay farther still, as will next be instructed, actually than the parties *themselves!*

II. Insuperable authority, *per se*, in 1594, in support of my proposition.

II. I now come to an insuperable piece of evidence, *per se*,—that was adduced in 1790-3. It is an original precept of a charter of confirmation, the 14th of June 1594, of a former charter and infeoffment granted "per *quondam Dominam Elizabetham* Stewart, *Comitissam* de Murray, et quondam *Jacobum* Moravie Comitem, ejus maritum," of lands in the Earldom of Murray, in favour of Walter Mawer, *to be held* of the said Countess, the Regent's daughter, and the Earl her husband, the granters, "et de eorum HEREDIBUS Comitibus,

[1] Pp. 358-9, 360.

[2] Including with it the History of Renfrewshire; see last Edit. p. 230.

et COMITISSIS de *Moray*." The interest of the Earl here, though secondary, but undoubtedly by the courtesy, entitled him, as explained by a parallel instance in that century, "libero tenemento,—Comitatus,—cum annexis, &c. tenentibus, *tenendriis*, libere tenentium *servitiis*, molendinis—advocatione et donatione Ecclesiarum," &c. during his life.[1] Here then, as before, the Countess not only first figures, as having the real cardinal title, but the dignity is clearly proved to be descendible to heirs-general, by the marked inclusion, in the *tenendas*, of "*Countesses*" of Murray in their own right—among the successors and "heirs" thereto—who could never have been thus inserted, in the opposite view, if the descent forsooth, according to Lord Rosslyn, both before and after the Regent's time, had been restricted merely to heirs-male of the body. Combined with what has preceded, the matter hence may be set at rest; for none could have known better than the actual parties how it truly was. Against this plain and conclusive proof, which even his Lordship is forced to admit to be of some "weight," and to "cause—*hesitation*," he can only urge that there *must* be a "*blunder*"—by the writer or notary!—which was sensibly and forcibly replied to by the late Lord Lauderdale,—as well known, one of the prominent peerage authorities in his day,—that, in this manner, to "attribute *all*—to the *mere* blunder of the writer, will not do," in any event; for then, what is indeed incredible, "at least an *equal* degree of *ignorance* must be presumed *in* the *parties themselves*, as to *their own* situation; because erroneous as the deed is *said* to be, it is not denied that the Earl and Countess executed it." The pretence in question, therefore, "made no *such* impression on (his) mind," (as on Lord Rosslyn's); and, if true, "the Earl" would "have"

Gratuitous objection of error by Lord Rosslyn to the authority, with forcible reply to it by Lord Lauderdale.

[1] The authority in question is a royal charter of the *Comitatus* of Sutherland, the 1st of December 1527, to Adam Gordon *Earl* of Sutherland, *by* the *courtesy*, and Elizabeth his wife, Countess, in her own right, wherein such identical interests are instructed to have been in him, "ratione *curialitatis Scotie*" at common law; while, in the same way, in the relative clause, the Countess is mentioned first, and Earl Adam last. The grant is in the Great Seal Register, and was adduced in the Sutherland claim in 1771, and previously.

been named "first,[1] and not the lady."[2] But, in reality, the pretence, or bare supposition of any material error, is again here quite gratuitous, and visionary. All that the Chancellor—here, as, for the most part, signally misled, can advance in support of the same, are mere modern flimsy, or finical conceits and sophistries, which he contorts into capital exceptions.

First argument here, of Lord Rosslyn in support of the supposed error.

In the first place,—that the precise right in the Countess, with the precise interest in the husband,—through adhibition of his actual consent, in virtue of the courtesy, not being specially stated, and condescended upon in the conveyance, must have the sad and rueful effect of its utter voidance and jactitation,—though otherwise presumptively valid, and acted upon. This, with a witness, to use Mr. Canning's reply to the somewhat analogous attack or exception of his adversaries in the Copenhagen expedition,—though much more relevantly, on the part of the latter,—is like perishing with Vattel in our hand,—sacrificing all to absurd supererogatory form and punctilio. And it is amusing to see Lord Rosslyn so pedantically strict and punctilious in this instance, that makes against him, when he is notoriously so lax, remiss, and *indulgent* in evidence, and particulars tending his way. Yet, independent of the respective rights and interests of the parties being evident from their order and precedence, as things stand, by technical practice, there was no such unavoidable necessity for such minute detail and hypercritical explanation to eschew the outrageous conclusion in question. In proof of this, I need only recur to a parallel instance before cited,—at a time when not only the female succession prevailed, but there was approved nicety in feudal conveyances and tenures,—namely, the royal confirmation past in 1362, of a landed grant by Patrick Earl of March and Moray, and Agnes Randolph his wife, Countess of Moray, in her own right, wherein these exactly corresponding parties are even more summarily and shortly stated to have executed the important resignation that warranted the former. The relative retros-

Reply, and legal corroboration by practice, of the authority in question.

By case of March and Moray in 1362, and others.

[1] This also instructs a previous remark; see pp. 791-2.

[2] From an authentic copy of his Lordship's reply to Lord Rosslyn in the Moray question.

pective words are, "*quas* (the lands) patricius Comes Marchie, of Moravie, et Agnes spousa sua nobis, &c. reddiderunt;"—while the tenure, as generally, is but "sicut dicti Comes, et Agnes spousa sua, dictas medietates baroniarum (the valuable subjects conveyed,) &c. possiderunt,"[1]—and this without an *item*, or the *least* of such explanation as is demanded,—but which, however, as imperatively applied to them. The same briefness too, and marked want of Lord Rosslyn's supposed indispensable amplitude, in the case of other married parties, who had equally such identical distinct rights and interests, will be immediately demonstrated *ex terminis* even by original grants,—which tells, *a fortiori*, in the present refutation.

Second argument of Lord Rosslyn.

Secondly, the Chancellor excepted—in support of his strange vapid conclusion—to the words of the tenure in the instrument in 1594, as being loose, faulty, and untechnical. But he is again redargued by the above most relevant test, they being, on the contrary, legally faultless, and unchallengeable,—remembering, at the same time, that the interest of the husband of an heiress, already explained, *was* ostensibly great by the courtesy, (more so than now,) and gave him the semblance of a proprietor. Thus, remounting to strict feudal times and practice, there is an authentic grant, before the 22d of February 1221, by "Willielmus Comyn, *Comes* (in virtue of the courtesy), et Margareta sponsa sua *Comitissa* de Buchan," (in her own right,[2]) of the church of Bathelvy, in the Earldom of Buchan, to the abbey of Arbroath, to be held "in *elemosina*;" and which they—"*nos*, et heredes *nostri*," are to warrant.[3] Though this be a mortification, of course, without words of descent, yet the warrandice, as respects the heirs, is couched in parallel terms with those applied to the heirs in the *tenendas* of the Moray instrument; and what may be objected to the latter, may be as cogently to the former,

Reply, and legal corroboration as before, from instance of Buchan previous to 1221.

[1] Regist. Dav. II. p. 29. See also p. 790, *ut sup.*

[2] See Lord Hailes's Suth. case, chap. V. § 1, pp. 14-5. The same facts, too, can be *aliunde* instructed.

[3] Chartulary of Arbroath *(vet.)* Ad. Lib. The epoch of the passing of the grant is fixed by the royal confirmation, *(ibid.)*, of the date in the text.

which, however, he would be fool-hardy indeed to assail on such ground. Neither is there any explanation of the individual rights of the mortifiers, as Lord Rosslyn would have judaically demanded. In like manner, but more directly in point, there is a charter, the 3d of August 1373, by Walter de Fosselane, "Dominus (and elsewhere '*Comes*,'[1]) de Levenax"—who solely possessed the Earldom by the courtesy, in right of his wife Margaret de Levenax,—of the lands of Auchmar, "in Comitatu *nostro* de Levenax," in favour of Walter de Buchanan,—to be held, in effect, just as in the Moray instrument,—"de *nobis*, et heredibus *nostris*."[2] Nor is this a solitary case, for there are others by him in identical terms;[3] —while there again is, as before, no specification of the *actual* title or interests. What earthly ground there can be for the injurious, and condemnatory imputations of the Chancellor against the Moray *tenendas* in 1594, and how they can at all relevantly bear, it is indeed difficult to discover. The succession is defined by the common rule of the law of Scotland, applicando *singula singulis*, of course, under the concurrent control of the charter of the *Comitatus* in 1566. The succession, no doubt, might vary according to certain contingencies, and be notoriously different by the law of Scotland,[4] from that by the law of England; his ignorance, as usual, of which discrepancy appears to have founded, in part, his ideal exceptions on the footing of the latter. But the credit of the Moray instrument is not to suffer from his

By instance of Lennox in 1373.

[1] See Regist. Rob. II. Rot. III. pp. 113-14, where this person is explicitly styled "Walter Earl of Lennox;" and the same fact can be duly fixed by other legal vouchers. In the parallel way, that "*Dominium*" was applied, occasionally, to a *Comitatus*, or Earldom, (as will be proved under the Glencairn claim), *Dominus* was, also, as in the text, to a Comes or Earl.

[2] Chartulary of Lennox, (Levenax), printed by James Dennistoun, of Dennistoun, Esq. pp. 9—58, &c.

[3] See *ibid.* pp. 69, 70, still with the "tenendas—de *nobis* et heredibus nostris."

[4] Owing, as repeatedly noticed, to our having, in succession, *only* considered who is the heir of the person *last* in possession, without going further back, and determined it accordingly. Neither did we adopt the principle of *materna maternis*, as in England.

ignorance. Nay, further still, it by no means stands alone in its conception and phraseology, but is here identically sustained, in a remarkable degree, by the correct legal conveyancing of the same century. In support of which, there is an original precept of seisin, the 24th of July 1561, (upon an heritable grant,) in favour of Alexander Gordon, in the lands of Garrachie, likewise "*tenendas* de suprema domina nostra regina (Queen Mary) *et suis successoribus, regibus, et* REGINIS Scotie."[1] Here the crown of Scotland, like the Earldom of Moray, being, as indisputable, descendible to heirs-general, female heirs, in the exact way again, are justly, in prospect, included among the takers, under the name of "*Queens*,"—precisely as "*Countesses*" in the Moray instrument, and in the identical broad clause as there. If the crown of Scotland had gone, upon the Salick principle, only to heirs-male, *they alone* would have been specified above, *without* the broader terms resorted to, which at the same time illustrate, and relevantly fix the corresponding import of those in our immediate authority.[2]

Other pointed illustration of the authenticity and correctness of the authority in question, in 1561.

The Chancellor, at length, in despair, and quite unable to meet the latter, which he evidently dreads, is compelled to draw largely upon his imagination, and gratuitously to conclude, as a forlorn resource, that it was merely the clumsy fabrication of the *blundering* "Bailiff of the family,"[3]—thus seeking, after vulpine fashion, to vilify and depreciate what he could not master,[4]—and whom, poor innocent defunct—*little* guilty, or aspiring after such pre-eminence and notoriety, he curiously saddles with, and makes the *ignorant*—though in fact

Desperate and ludicrous resource of Lord Rosslyn in his straits.

[1] In the Charter-chest of Sir Robert Burnet of Leys, Baronet.

[2] In the regulating patents, also, in 1677, and 1706, of the Barony of Napier, and Dukedom of Queensberry, &c. (Great Seal Register,) likewise to heirs-*general*, we find, as above, a specification of the future heirs under the description of "Domini, et *Domine* de Napier," and "Duces, vel *Ducessas* de Queensberry."

[3] He actually maintains that it is "*to be taken* as the production of some *blunderer* who did not know his business,—the framer of it was, *most probably*, the Bailif of the Family." ! !

[4] This, besides, is in admirable keeping with his pointed remark, that, in weighing and determining a case of this kind, "*every thing* should be thrown into the scale," without being thus summarily rejected,—though even not wholly, or absolutely important.

correct author of the ideal *nullities* he pretends,—in reality only figuring in his own brain! This is indeed as little creditable to his resources, as to his legal perception.[1] There is, in fine, nothing that can be properly objected to the Moray instrument in 1594,—so plain, and, I repeat, *per se*, conclusive;—it stands impregnable and repels every attack, which only serve further to elicit its strength, and recoil upon the assailant. It is even stronger, than some of the relative authorities referred to, inasmuch as Countess Elizabeth figures first, instead of only latterly as there, a precedence that forcibly struck Lord Lauderdale; while it is remarkable, that in the earliest notices where James, her husband, is styled Earl, (of course, with the exception when he sat in Parliament, though still in her right), it is always in connection with the lady, who at the same time appears; she thus, in fact, ennobling him, instead of he, her, as is wildly figured. *Never* until *after* the marriage, and this is the *proper* test, is the husband styled Earl, which, there being no new creation, clearly points to the courtesy, then *fully* in force, as much as formerly. Even upon Lord Rosslyn's own shewing, the assumption of Elizabeth not being styled Countess before 1588,—independent of its falsity,—proves too much. There hence must, at any rate, have been a palpable error that ruins all; for even *then*, in his view, she *was* still a *Countess*, and *ought* to have been so described, in virtue of her husband's supposed creation, according to him, during the marriage, before 1584.

Moray instrument in 1594 insufferable.

Further corroboration.

Lord Rosslyn's argument proves *too much*.

III. But this remaining, and new piece of exactly cotemporary evidence, I have found (not yet adduced) may be even still more direct and clenching. It is in the shape of an ac-

Remaining cotemporary clenching authority.

[1] In fact, he here seems quite to bewilder himself; for he says, "*Had* the title, and the *fee* of these *lands* (of *Moray*) been in the Lady," &c. thus treating the matter doubtingly, as if there had been a question of this *veriest of truisms* in the affirmative,—*sed tædet harum nugarum*; and I may have devoted too much space to their refutation. Every Scottish lawyer knows that *general* verbiage and descriptive references, with which we have had to deal, and which have been so boldly rejected by Lord Rosslyn, *may* be even as strong and binding in law, as an attempted elaborate specification of relative particulars. Indeed sometimes more so, as was illustrated in the noted entail case of Roxburghe, as contrasted with that of Tillicoultry.

tion in 1588, before the Court of Session, at the instance of John Earl of Marr, who had the ward, and non-entries of "all lands, lordschips, &c.—quhilkis pertenit to umquhile James erle of Murray, *Regent*," &c. as also of "the marriage of dame Elizabeth Stewart, now (by the succession having fully come to her) *Countes* of Murray, eldest dochter, and ane of the tua airis of the said umquhile erle of Murray," against the said "dame Elizabeth Stewart, *Countes* of Murray," *and James* Stewart, now erle of Murray, hir spous, *for his enteres*,"—whereby the previous Earl pursues these noble defenders for payment to him of 40,000 pounds, the just value of her "marriage," that is, the feudal casualty due on the nuptials of the Countess with her husband,—an obvious relative incident in the Moray succession. And it is here expressly set forth, without contradiction, as a necessary condescendence and ground of the action, which was decided accordingly in favour of the pursuer,—that the Regent *had* possessed "ye *erldome* of Murray," and certain lands, &c. "to ye *quhilkis Erldome*," &c. especially,—"the saide dame Elizabeth Stewart, *as* ane of ye saide Erle of Murrayis tua dochteris,[1] and airis *female, hes* SUCCEDIT." The summons goes on to state that she "wes unmarriet ye tyme of hir said umquhile fatheris deceis;" but "marriet *sensyne*[2] wyt ye saide James, NOW *erle of Murray*," —WHY? because *he*—"*quha*,"—as immediately follows, "BE *his* MARIAGE *(alone)*, *wyt* ye said *deame elizabeth*, HES OBTENIT *ye* RYCHT of ye *said* ERLDOME, hail *landis*, and *uyeris* foirsaidis,—ye said deame Elizabeth (as finally transpires, in explanation) *being eldest* of ye saidis twa dochteris, and airis *femell* of ye said umquhile erle of Murray,—*quhais* HAILL *heretage* is *transferrit, wyt herself, be* hir *mariage*." As already observed, no denial is attempted of any of these allegations, and the judgment—on the 14th of March in the same year, is penned as before, against "ye said deame Elizabeth, *Countess* of Murray," and "James Stewart, now erle of Murray, *for* his enteres"—merely.[3]

Explicit strict legal proof, that the husband of Countess Elizabeth held the Earldom by the courtesy, while the *real* right to the same was in her.

[1] The younger, who can be proved to have been Margaret, died without issue.

[2] *Since then.*

[3] Act and Decree Register of the Court of Session.

The matter in question is now abundantly plain. The whole Moray succession—"*hail* heritage,"—including the dignity, thus came through Countess Elizabeth, as heir of her father, obviously in terms of the charter in 1566, and was merely imparted, as instructed, through her, in virtue of the courtesy, in a secondary way—to her husband. It was, further, the "Earldom," as well as the "*hail* lands," though carried *simul* et *semel*, that thus devolved. The succession, withal, is every way legally set forth, just as at the moment of the Regent's death, (in 1570,) and as it had ever continued, excluding any qualifying circumstance, or *rei interventus* in its case, which is, indeed, in a certain measure barred by the minority and occasion of the wardship. Lord Rosslyn admits at least, (as was indisputable,) the honours to have been duly borne by the lady in 1588; it hence again, and as thus can only be presumed, must have been by the charter 1566. There are, besides, other important actions in 1588, where strict accuracy was incumbent, for *exhibition* of the family *grants*, and those of the Earldom, &c.—still without any opposing or contradictory incident,—at the instance of "Dame Elizabeth Stewart, Countess of Murray, as dochter and air (generally) of umquhile James erle of Murray, and James now erle of Murray, hir spous,—for his *entres*,"[1]—just as before, the husband still figuring *secondarily*, and under the phraseology, even inculcated by Lord Rosslyn, to denote the mere courtesy.[2] And why, it may be pointedly asked, if, as his Lordship pretends,—in the material interval, there had been a new grant and creation of the Earldom, *alone* in his favour, under which—though quite visionarily—the Chancellor decided the lady only *inversely* bore the title,—does not that transpire, as it assuredly would have done, in some way or other, during the course of these relative proceedings? But so far from this, not only there, but everywhere else, there is not the faintest trace or semblance of such a thing, which, combined with the marked silence of Sir James Balfour, while he *directly* corroborates me in my argument,[3] fully disproves it. In my humble opinion, the case as attempted to be put and shaped by

Countess Elizabeth, *ipso jure*, the heir *in omnibus*.

Asserted *new* creation, excluded in every way.

[1] *Ibid.* [2] See p. 787. [3] See pp. 793-4.

Lord Rosslyn, is obvious and confest. But, over and above, I would even stake it upon this comparatively narrow issue. It being admitted that there is no *literal* grant of the honours, *nominatim*—certainly *abstractly*,—which, be it observed, whatever his Lordship may ignorantly suppose, did not then obtain,[1]—or otherwise,—and as little, with equal foundation, as I conceive, any *new* creation, such as pretended, which may be now fairly discarded,—while there yet *does* exist the regulating *charter* of the *Comitatus* of Moray in 1566,—after a form that, nevertheless, *did* carry *honours* at the time,[2] is it not a relevant, nay insuperable presumption, or conclusion in law, in the absence (as holds) of all to the contrary, that the subsequent possession, in perfect conformity *therewith*, must be ascribed to it, and is necessarily in favour of heirs-general; and if so, what then must the case be upon the *remaining* merits, with nothing still to traverse, but every thing flowing in the same current,—nay, moreover, of the preponderating and clenching kind that has been established? In further corroboration, the descendants of Countess Elizabeth, the heir-female, who undeniably bore the title, not only took through her, as the connecting link with the Regent the first Earl, but besides, as is proved by the decree of ranking of the nobility in 1606, had a precedence given them, in conformity, as nearly in the circumstances[3] as could be, with the above charter in 1566.[3]

Unavoidable result under the merits stated.

Even farther corroboration from the awarded Moray precedence in 1606.

[1] He is always, *then*, however, absurdly fancying, and conjuring up the apocryphal intervention of a strict *modern* patent—that is, entirely personal, without the least allusion of lands,—an ideal spectre with us, even at that period.

[2] See p. 784, *n.* 22, referring, *inter alia*, to precise authorities in support of the proposition.

[3] Immediately after the Countess of Buchan, whose honours were constituted considerably anterior to the close of the 15th century, and *before* the Earl of Orkney,—Patrick Stewart,—whose Earldom, inherited from his father Robert, is instructed, by a charter in the Great Seal Register, to have been at least conferred the 28th of October 1581, (upon this, however, see hereafter), long preceding the important actions mentioned in 1588, when there had been no *rei interventus* in the Moray succession. (See also p. 691.) There was in 1606, of date *between* the periods referred to, no Earldom but that of Moray. The decree of ranking, March 5, 1606, duly certified in her Majesty's General Regis-

The decree awarded a precedence, at least before the 28th of October 1581, while Countess Elizabeth and her husband being married in *January* 1580,[1] there could not have been a new creation *previously* of the latter, who only then came into the family. Neither could there have been on the marriage, when it assuredly would have happened in the same way as in her father's case;[2] for Calderwood, who specifies the occurrence, and relative ceremonies, is entirely silent on this head;[3] and what is generally conclusive, the right to the Earldom is proved to have been exclusively in the Countess, as heir-general, so late as 1588, and in her husband by the mere courtesy,[4] in which state it continued. The entire new creations too, are at least exactly fixed from 1579, to 1580, inclusive, by the public Records, including the *relative* Chamberlain's accounts; and yet there is no notice of the supposed one of Moray, which thus again may be rejected.[5]

Also, as bearing upon the asserted *new* creation.

ter House, further instructs that all the respective parties,—Mary, Countess of Buchan in her own right, James Earl of Moray, son and heir of Countess Elizabeth, the then holder of the Earldom, and the said Patrick Earl of Orkney, had been formally cited, while the decree of precedence is pronounced in respect to them, as stated. The preceding circumstance and evidence were not founded upon in the Moray case in 1790-3.

[1] The year then began on the 25th of March.

[2] On the occasion of the Regent's marriage to Agnes Keith in 1561, when he was *first* ennobled as Earl of Marr, (see p. 684, *n.* 2,) and there obtained great solemnities and festivities in the Abbey of Holyrood.

[3] He only says in his MS. Church History, Advocates' Library, that the marriage happened the 29th of January 1580-1, when there was running at the ring, justing, "and other pastimes in the abbey," thus as above, before the king, boat-racing at Leith, &c.

[4] See p. 802, and what preceded.

[5] With respect to the exact precedence of Orkney, it is proved by a bond,* the 7th of July 1576, affecting Robert Stewart, the first peer, and his natural children, that he had even then the style of "ane nobill lord," and "*Earl*," while the title of "Earl of Orkney" has also been given him earlier by historical authority; so that if there was thus an earlier ground for the former, which we cannot deny owing to the record of the productions in the decree of 1606 being lost, the above material conclusion is necessarily even still more directly settled. The subsequent charter 1581, may have been, substantially, in a measure confirmatory, and it does ratify the previous possession of the lands of Orkney to the disponee.

* Upon Record.

The *later* heir-male can only stand upon the irrelevant charter in 1611, which if admitted irretrievably voids in law, upon the intrinsic merits, the present right of the Family of Sutherland to their ancient honours.

It really seems that all the heir-male, after 1700, can possibly stand upon, is the much later charter in 1611, under a change of circumstances, as to which already; and which, from their special resolutions, and practice, I conceive we may safely predicate the House of Lord will never allow to carry honours.[1] In fact, if they did, then, *a fortiori*, it is indisputable that, in virtue of the Sutherland charter 1601, that is alluded to—Sir Robert Gordon, the *demi*-male claimant, and in the exact situation with the *later* Earls of Moray, ought to have been preferred to the Sutherland honours, under the noted claim in 1771,—instead of Countess Elizabeth, the heir-female and successful party,—who again stood incontestably in the *exact* situation, as *much* so, as in reciprocity of their names,—with the *other* Countess Elizabeth in reference to the Moray question—the solemn decision in favour of the first of whom, I contend, would then, in such alternative, be quite irreconcilable, and indefensible. Indeed to this strange dilemma, actually, though otherwise, Lord Rosslyn, I conceive, by the Moray decision, has unjustifiably plunged matters,—the Sutherland and Moray cases being *identical* in their respective merits, while the respective decisions are *beautifully conflicting*, and *incompatible*, the later one nullifying the former. Besides, the Sutherland heir-female, as above, is *utterly* barred.

In the disproved view, again, if it be still insisted upon, the Chancellor has rashly taken of the subject,—that the Moray heir-female did not *inherit* in the 16th century,—but to which, of course, I do not subscribe,—then still less, I reply, did the *subsequent* heir-male, in his very anomalous capacity, himself taking likewise, through a female; from whence it would inevitably result, that the dignity is now gone. And moreover, if it be attempted, I must deny the conclusion, both in law and logic, under *far* more favourable circumstances indeed, for the heir-male, than exist, and in fact *foreign* to the question,

[1] In the Moray claim, the Attorney General successfully argued for its rejection, (see p. 784, *n.* 3.) As stated also *(ibid.)*, they decisively held in 1771 such identical charter of a *Comitatus*,—that of Sutherland in 1601, exclusively to heirs-male, and *for ever* barring *female* heirs—under which Sir Robert Gordon, the claimant in the Sutherland case, took, to be in the same way quite null and effete.

—that because there *might* have been a new creation, *ergo* there *must*—though not unsuited to the *calibre* of Lords Mansfield and Rosslyn.

Probable reasons why the Moray heir-female did not move in 1793.

After the notable fashion we have seen, was the Moray heir-general excluded in 1793. Why he, Alexander Frazer of Strichen, (in whose shoes the present Lord Lovat now stands,) made no appearance on the occasion, is rather singular,—though, at the same time, his certain exclusion by the later settlement in the 17th century, from the landed possessions—the more substantial inheritance—may, if he was duly aware of the force of his rights and claim,—which may certainly be questioned, have rendered him rather passive and lukewarm. The discussion was indeed rather antiquarian, beyond ordinary reach; certainly that, as now turns out—of Lord Rosslyn—without, it is conceived, a full proper adduction and exposition of the necessary facts, which seem partly to have been unknown, at an unfavourable and prejudicial period of fierce public turbulence, and excitation, when the judgments of most men were more or less warped or biassed, nay frequently sacrificed to politics. How things now stand, may perhaps be gathered from what I have attempted to shew as to the weight and import of *our* peerage Decisions and Judgments. They clearly, together with the relative doctrine of prescription,[1] form the best guide or standard on such occasions. Nay, the Chancellor himself expressly admitted in his speech, that by "the *law of Scotland—our* (the *Lords'*) decision *should* be regulated."[2] The *dictum* too, in law, might assist, that wherever there is a right, there is, or should (accordingly) be a *might;* while the material, and, as I contend, the just party, the heir-general, not being in the field, or at all convened in 1790, and 1793, the decision then—that, moreover, did not proceed upon a reference from the crown,* or had its recognition or confirmation, or agreeably to the regular, approved, and *unrepealed* Scottish method, was one *quoad* the former, in *absence*,[3] which,

Present state of matters and specialties in the case.

* See also on this head, under the Waterford Peerage claim in 1832, Clark and Finnelly's Appeal Cases vol. VI. part I. pp. 133-4, *et seq.*

[1] For more upon the latter subject, as affecting the Moray case, see afterwards, under that of Glencairn in 1797.

[2] As to the form observed in the Moray instance, see p. 783.

[3] It is to be observed too, that Lord Rosslyn, in his speech, lays considerable stress upon the female party *not* being in the field and takes

Effect of previous judgment.

notoriously, by our law, goes for nothing. The plea too, in the last instance, may here apply *a fortiori*, honours not being generally, like subjects at common law, controllable by prescription, while governed by stricter rules, in point of form and legal solemnities. Any bar likewise from prescription, might be the less relevantly objected, owing to the facts of the case being still instructed, and capable as much, I conceive, of being now canvassed and weighed as formerly, according to the doctrine inculcated, as will be afterwards shewn, under the Glencairn claim. The precedent of Moray, at the same time, further pointedly illustrates the perplexity and contradiction introduced into Scottish peerage law since the Union, —again through the glaring errors and incompetency of Lord Rosslyn, who, instead of carefully ascertaining and rendering it uniform and consistent, as imperatively required by his situation, even there transcended Lord Mansfield in inadvertence and extravagance,—out-Heroding Herod,—and making confusion worse confounded. Of a truth it may be said, *his* Moray decision, with that of Sutherland, and the relative law :—

Lord Rosslyn has further confounded our law by the Moray decision.

"Non *bene* conveniunt, nec in *unâ* sede morantur."

Andrew Lord Ochiltrie,[1] and Andrew his son, having, at

great advantage of it in his emergency. "*When* the present contest is with *third* parties," he states, "and *not* with *those* whose right is said to have been invaded, (the *heirs-female,) such* possession (that by the later *male* heir) must weigh *very forcibly* in favour of the *present* Earl," —the *Peer* objected to. *Ergo*, if the heir-female *had* come forward, things would have assumed a different shape, as they may perchance do yet; and we here again find his Lordship deciding rather narrowly, and not upon the broad legal grounds, so as to meet the general merits of a case, as has been done by other legal dignitaries on such occasions. This is besides the more striking, as he is especially attentive to the interests of the *crown*, who did not claim, and at the same time fully founds upon the only other relative fact, in his *impartial* consideration, "that there has been (in the matter) *no* usurpation from the *crown*," who thus were not to be aggrieved, thanks to his Lordship, however the female party, owing to the similar abstinence, upon which he prejudicially seizes, might avowedly be.

Favourable loop-hole for a reconsideration of Moray case, according even to Lord Rosslyn.

[1] This barony had been heritably constituted, as appears by the Act of creation, the 15th of March 1542, (see Acts of Parl. last Edit. vol. II. p. 413,) in favour of a male ancestor, Andrew "*sumtyme* Lord *Avendale*," who, upon an interchange of property with a party, had relin-

the beginning of the 17th century, acquired property in Ireland, where they had resolved to settle, the former resigned his honours and estates of Ochiltrie, in favour of Sir James Stewart of Killeith, his first male cousin, (son of James, his younger paternal uncle, the depraved Earl of Arran, by his infamous Countess, who have already figured in our pages, and were justly stripped of their honours,)[1] upon which there passed a royal charter, the 9th of June 1615, of the lands, "cum omnibus *honoribus*, *titulis*,"[2] &c. to the same Sir James, "et etiam suis hæredibus *masculis* gerentibus nomen, et arma,"[3]—hence to the exact purport of the Kirkcudbright patent in 1633.[4]

Case of the Barony of Ochiltrie, in 1790—1793.

Its ostensible reconstitution in 1615, and immediate descent afterwards.

The noble resigner was thereafter, the 7th of November 1619, created Lord Castlestewart in Ireland, (of course, an inferior dignity,) which became his exclusive title;[5] and the

quished *that older* dignity, coeval with the reign of James II. whose original limitation is unknown. This, again, with repeated instances, shews, contrary to Chancellor Erskine's doctrine in England, (see p. 590) that a Peerage with us was not indelible in the blood, but could be demitted and relinquished. Indeed, the same thing was again illustrated, as will be seen in the case of this very family. The interchange of property alluded to, was that of the Barony of Ochiltrie by Lord Andrew, for his of Avendale, with Sir James Hamilton of Finnart, followed by a charter of confirmation, the 2d of September 1534, (Great Seal Register) naturally inducing thereafter the new style of Ochiltrie on his part. It was confidently attempted, in the Sutherland case (in 1771), to redargue the subsistence of the territorial principle then, by the assertion that Sir James Hamilton, though thus again the acquirer of the dignified fief of Avendale, did not in consequence become a nobleman by that title; with what foundation may appear, when, on the other hand, I have discovered, that in a legal transaction about 1540, he is styled "now Lord Avendale," (Act and Decree Register of the Court of Session,) and that he elsewhere, before his death, is described as a nobleman. The subsequent disgrace and forfeiture of Sir James, (so famjliar in history), with the qualified restoration only of his territory, eventually in 1543, to his heir, by a bargain with the Regent Chastelherault, may account for the future withholding of the title.

Original constitution of the Barony of Stewart, of Ochiltrie.

Objection to territorial principle with us in honours further refuted.

[1] See pp. 531-2—540, *n.* and previously at p. 7.

[2] It had then become the constant rule to specify the honours besides the lands, in illustration of a repeated remark.

[3] Great Seal Register.

[4] See p. 622, *et seq.*

[5] It is singular, however, that the Castlestewart patent, after 1619, remained long unperfected, and "deteyned from the seall," owing to

Ochiltrie honours were at the same time certainly taken by, and generally recognised in Sir James, the grantee in 1615, and in his family. The Lord "Uchiltrie" (the same as

Peculiarity in Castlestewart patent in 1619.

the death of Francis "Edgworth," (direct ancestor of that gifted family,) Clerk of the "haniper" in Ireland, from whom it came to his executors, and only after the death of the patentee, to "his son and heir, Andrew, the second Lord." This necessarily elicited a letter of Charles I. to the deputy of Ireland, the last of July 1632, where, on a recital of the facts, the merits and high descent of the family, and that no prejudice should thereby arise to their precedence, in terms of the grant,—owing to intermediate creations of other peers,—he orders that officiary, "with all convenient diligence, to append the seal to it," for which the letter was to be a "sufficient warrant." There, of course had been a previous royal signature. This ordinance, (with various important documents,) is in the original State Paper Register of Secretary Alexander, first Earl of Stirling, in the Advocates' Library; and such royal interposition was absolutely called for in the circumstances, as I have shown elsewhere, (see pp. 64-5, *et seq.* with what precedes.) The material defect in question was not otherwise capable of being remedied, owing to the predecease of the patentee. The second Lord thereafter took his seat in the Irish House of Lords. His family, of whom the Lords Downs are cadets, were sprung from a legitimated son of the princely branch of the Stewarts of Albany, before the middle of the 15th century. Touching the male representation of the Stewarts, the late Andrew Stuart, of Torrens, and Castelmilk, proved that the distinguished "Sir William Stuart of Jedworth, *knight*," *dead in* 1402, male ancestor of the Earl of Galloway, could not be, as maintained, "William Stuart, *Escuyer*" (*Esquire,*) younger brother of Sir John Stuart of Darnley, who *both* fell at Orleans in 1428-9. I also clenched this by further proof, while first showing, that the attempt of that writer to identify the mature "Sir William Stuart of Castelmilk, *knight*," in 1398, his predecessor, with this *young*, much *coveted* "*Esquire*,"—having such an *ideal* progeny,—was equally unsuccessful. See communication by me, to Anderson's Hist. of House of Hamilton, (Edin. 1825,) p. 44. *et seq. n.;* and my Reply to misstatements of Dr. Hamilton of Bardowie, (Edin. 1828,) pp. 23-4. I could additionally disentangle Jedworth from Darnley, by cotemporary evidence from the Exchequer Rolls, &c. But I have little doubt that the above Sir William Stuart, of Jedworth, was *otherwise* a *male* descendant of Sir John Stuart of Bonkil, (younger brother of James 5th. High Stewart of Scotland, before and after 1300,) whose male representation is now identified with the male chieftaincy of the Stuarts, through want of nearer heirs; though as to the origin of the Stuarts of Castelmilk, now extinct in the male line, it is not easy to say, they being rather isolated, in the

Question of the male representation of the Stewarts, especially as affecting the families of Galloway and Castelmilk.

Unascertained origin of that of Castelmilk.

Ochiltrie) especially, sat in Parliament among the higher Barons, the 7th of March 1617, and thereafter in the same year.[1] He is ranked, conformably to the old precedence of his predecessors. But it is remarkable, that these were the only sittings under the reconveyance. The son of the personage in question, "William Master of Ochiltrie," predeceased him in 1645;[2] and this strangely fluctuating family, that experienced every vicissitude, the former being a noted adventurer and spendthrift, who at length supported himself as a quack, or empiric,[3] fell into the utmost poverty and obscurity, and failed in the male line in 1675,[4] when there remained only female descendants, "meanly married."[5] But the Ochiltrie honours, after being long dormant, and disused,

absence of proper evidence to attach them to the prominent stems. Further, "*John* Stuart" is legally proved "of Castelmilk" in 1409.

[1] The 17th, and 28th of June. Acts of Parl. last Edit. vol. IV. pp. 581, 524, 7.

[2] As proved by his confirmed testament, 12th May 1646, Edin. Test. Register.

[3] The Lords of Session, in their report upon the Scottish Peerage in 1740, (see Acts of Sed. Edit. 1790, p. 341.) state that none "sate in Parliament under *that* title, (Lord Ochiltrie,) since the year 1617." The same title is yet included in the Roll of the Parliaments in 1670, 1672, and 1673, (see Acts of Parl. last Edit. vol. VIII. Append. pp. 1, 10, 26,) as well as in that at the Union. Scotstarvet even says, that he sustained "his family" by the *medical* art, whether beneficial or not, to the lieges, may be another thing. (Stagg. State, Edit. 1754, p. 11.)

[4] There were promise and talents in the last male descendant, Lord William, blighted in the bud by his dying a stripling in the above year.

[5] Such, like a scriptural visitation, was the marked fate of the progeny of the unprincipled royal minion Arran, and of his infamous Countess, (see *ut sup.* pp. 531-2, 540, &c.) One of them, Ann Stewart, daughter of Lord James, by his wife Mary Livingstone, who survived him, and died in 1683, figures in 1676 as the humble spouse of "John Murdoch, *Apothecary*, Burgess of Edinburgh," (Edin. Test. Register,) the latter probably partner or assistant of the noble parent in his final vocation,—in whose *boutique* the attachment naturally arose between Anne and Murdoch. A *bizarre*, restless, mischievous impulse appears to have prevailed in the family, for which the above nobleman, originally an ardent spirit, found a sedative in the *recipe* of a cool imprisonment of twenty years, owing to his vapouring charge of treason against the Marquis of Hamilton in 1630, so known in history.

Claim by the asserted *collateral* heir-male in 1790-3.

were claimed, by reference to the Lords, (upon a petition to the crown,) the 13th of April 1790,[1] by Andrew Thomas Stewart, Lord Castlestewart in Ireland,[2]—asserted heir-male and descendant of Andrew Lord Ochiltrie, afterwards Lord Castlestewart, the resigner in 1615,—who founded upon the charter in that year. From his shewing, necessarily as collateral heir-male, he was clearly, by virtue of the Kirkcudbright decision in 1772,[3] the heir in terms of the latter. But, after considerable discussion, his claim was disallowed, the 6th of June 1793, (the remarkable day when several other Peerages were either lost or sustained,)[4] upon the ground of the charter, which is only dated at Edinburgh, not having been duly warranted by the crown,[5] as was certainly incumbent, and consequently effete. The Lords, moreover, it is transmitted, were not satisfied with the evidence of the pedigree, although it had been held, by the Irish House of Peers in 1774, to instruct the right of the party to the Irish Barony, noticed, of Castlestewart, that had also been long dormant, and which, being limited to heirs-male of the body, turned actually, so far, upon the same hinge.

Rejected.

Grounds of rejection.

It must, notwithstanding, be confessed, that the Irish procedure in Peerage claims was occasionally lax and questionable in the last century, even more so than that of the British House of Peers. The resolution of the latter, in the Ochiltrie claim, necessarily involved—either, that the second, or new Barony of Ochiltrie,—however borne and recognised,—had

[1] Lords' Journals.

[2] He had previously, upon the calling of the title of Lord Ochiltrie, (that continued on the Union Roll,) at the Election in 1768, claimed to vote accordingly; but the clerks would not admit his right, upon which he protested, (see Robertson's Peerage Proceedings, pp. 343-4.) There was also a petition to the Lords by certain Scottish Peers, December 1, 1790, against the vote tendered by the claimant, at the previous remarkable Election. (Lords' Journals.) The noble party was afterwards created Earl of Castlestewart in Ireland, and was father of the second Earl, &c.

[3] See p. 622, *et seq.*

[4] Lords' Journals. The words are general and in accustomed form, "That the petitioner has not made out his claim to the title, &c. of Lord Ochiltrie."

[5] See p. 815, *n.*

never been properly constituted; or that there had been another more valid grant of the dignity,—though not now discoverable,—the terms of which being, of course, unknown, it could only, according to the arbitrary *fiats* of Lords Mansfield and Rosslyn, descend to heirs-male of the body, and was therefore extinct, the claimant being, upon his admission, but the collateral heir-male. In the first more probable and natural alternative, there having been sittings, as instructed, in 1617, it will thence again follow, that they, with us, were not indefeasible, or acted in the conclusive and irrevocable manner in England, according to Chancellor Erskine's but fanciful and rather poetical doctrine.[1] Corollaries from the same.

What may be accounted singular in this case, is a letter that was adduced by the crown, and afterwards founded upon by the claimant, by James VI. to the Privy Council, the 27th of May 1615, wherein, upon a narrative of the previous facts, and of the material motive that instigated Andrew Lord Ochiltrie, he commands them, after the resignation by the latter, of his honours and lands, to receive Sir James Stewart, the resignee, "*in his* (*Lord Andrew's*) place, inabilling him by *als sufficient* a *warrant as can be gevin* in *such thingis*," to enjoy all the honnouris, dignities," &c. of the "Lordschip of Uchiltrie," for which "their presentis sall be a sufficient warrant." In compliance therewith, the Privy Council ordained the Treasurer, and his Commissioners, to "expeid" Sir James's "infeftment and patent" accordingly,—"*notwithstanding*" the former prohibition (the preceding month of March,)[2] that none such of "*honours* sould be past; *unles —signed be* his *Majesties owne hand.*"[3] And then followed the Ochiltrie charter, merely dated at Edinburgh the 9th of June 1615, &c. It might be thought, though in another guise, that the royal power and authority for the charter, had been thus virtually, though circuitously, adhibited on the occasion; but still it was not held by the Lords in 1793, to compensate for the *express* want of the regular, salutary Remarkable letter of James VI. in 1615, in regard to the Ochiltrie constitution, founded upon by both the parties.

[1] See p. 590,

[2] It is the strict and peremptory one, through another letter of this monarch, that I have adduced at p. 257, and which certainly strikes at the subsequent Ochiltrie conveyance in the same year.

[3] Privy Council Register.

form last referred to, that had been so lately peremptorily enforced by the king himself. Neither might the subsequent commands of the prince have been deemed adequately, and technically obtempered and implemented, in terms of his commands, generally conceived,—he having there still in view, as was natural, the approved practice, as it governed at the time, which exacted his superscription to the grant, here omitted. This evinces the extreme strictness and rigour of the law,—not without *much* cause, on such occasions, and gives greater force to my remarks upon the state of the Earldom of Leven.[1] Even sittings in Parliament in the Ochiltrie instance, royal recognitions, public writs and instruments, and thus royal homologation, it might be argued, of the style and dignity —as can be proved—would seem not to have cured the original radical flaw, in the only discoverable conveyance. Indeed, mere Scottish "Exchequer charters," as they are called—though professing to run, as they always do, in the king's name—like that in question in 1615—without, in reality, a royal warrant under *the sign manual*, are dated at Edinburgh, and never at the royal residence; which last occurrence *alone*, *e converso*, legally induces or instructs the act. This was decided by the Lords in 1812, in the case of the charter of regrant of the Roxburgh honours and lands in 1646.[2] The decision of Ochiltrie, thus countenanced and supported, becomes here an important rule and precedent, and has accordingly been so relied on.[3] After all, what is curious enough, the only cer-

Extreme strictness, in consequence of the relative argument, and Ochiltrie resolution, necessarily enforced in the passing of Peerage grants.

The latter hence important.

[1] See pp. 56, *et seq.* [2] See also Errol case, as follows.

[3] In the Errol case, from 1796 to 1797, a charter of the *Comitatus* of Errol, the 4th of March 1674, (Great Seal Register,) not constituting the true and cardinal title, but, in reality, inoperative, was founded upon by the noble party, whose right to the dignity was contested, he also taking under it,—before the fortunate discovery of the *regulating* nomination in terms of the *valid* regrant of the Earldom of Errol, &c. in 1666, (see pp. 85, 768, &c.) But to the former it was replied, that being dated "not at the residence of the Sovereign, *but* at *Edinburgh*, of consequence, there neither was, nor could be a warrant for the grant, under the sign manual." Neither could honours be carried, it was truly affirmed, "*without* the interposition of the Sovereign himself, testified by his *actual* signature—nevertheless (as is added) there are many instances, and this of Errol is one, of charters purporting to convey honours passing the seal without such warrant, (see further as to this, p. 62,)

tain exception may be the patent of the original Earldom of Roxburgh, dated the 18th of September 1616, which, whatever the peculiar cause, bears the date at Edinburgh,[1] and to which all we may say is, that one swallow does not make a summer, or that *exceptio firmat*, &c. The curious court intrigue regarding the Ochiltrie transaction, in 1615, preceding the charter, shewing that the queen, as well as the king, were cognizant thereto, has been already alluded to.[2] The non-assumption and non-claim of the Ochiltrie, from 1675 to 1768, appears not to have constituted a material exception.

Isolated case of the Earldom of Roxburghe in 1616, in a previous particular.

Previous non-assumption of Ochiltrie honours.

Archibald, third Lord Napier,—his barony being only previously descendible by patent, dated the 4th of May 1627, to heirs-male of the body,[3] obtained, upon his resignation into the king's hands, a new patent or regrant of the same, the 7th of February 1677, failing heirs-male of the body, to his eldest heir-female, (none of which heirs he ever had); "*quibus deficientibus heredibus* ejus *talliæ*, et provisionis contentis in *carta*, et in *infeofamento* status, et terrarum de Napier de data 7mo Februarii 1667."[4] He had also at the time resigned his estates and honours, *moreover*, into the hands of the Barons of Exchequer, upon which a *charter* of regrant followed, under the sign manual, of the *same* date with the above *patent*, which *last* intended, through the clause quoted, to refer to, and to comprehend, *in gremio*, the further limitation or extension of the succession in the charter, to heirs-general, in terms of which, Francis Lord Napier took through a female; —and whose right to vote at the memorable Election in 1790 being objected to, upon the grounds to be stated, by certain

Case of the Barony of Napier, 1790—1793.

The reconstitution in 1677, both singly, *quoad* the honours, and including them *with* the estates.

but they have been considered as *inept*. This was expressly laid down by Lords Hardwick and Mansfield in deciding the case of Cassilis. *The claim* to the *Ochiltrie* title was *rejected* upon the *same* ground, in the last Parliament; it is a *rule not now* to be *shaken*." Printed Information for the Lord Lauderdale, objector in the Errol case.

[1] Original, produced at the litigation for the Roxburgh honours and estates, between the late Duke of Roxburghe and General Ker.

[2] See pp. 83-4. I have said there, that the conveyance was confirmed by the royal regrant (in 1615). It was ostensibly, but obviously subject to, what has shewn.

[3] Great Seal Register. [4] *Ibid.*

English authorities, and in the Napier discussion, received afterwards full corroboration in the House of Lords, *inter alia*, in the noted case of Roxburghe in 1812, where a resignation of the Roxburgh honours, merely as above, into the hands of the Barons of Exchequer, followed only by a *presumed* regrant under the sign manual,[1] hence rendering it not so strong as that of Napier,—was found to be, in like manner, unexceptionable, to draw with it the most important results, including the existing descent, not only of the Earldom, but of the Dukedom, and of all the honours of Roxburgh. The fact of the resignation into the king's hands being, *strictly*, weightier in form, (and here there might be an analogous question to the weaker one considered, under legitimation *per subsequens matrimonium*[2]) may, not however legally, affect or prejudice the other; in whose case there might again be, as stated, an interception of the patent, through means of its own prior regrant, &c. Upon the whole, the precedent of Napier is remarkable; for I am not aware elsewhere, of such twofold conveyances of honours, both under the authority of the crown, of which, while there was a clerical error in the one, the other, in its tenour, was faultless and correct. The noble party appears to have wished to make assurance doubly sure.

Napier case in this respect stronger than that of Roxburgh.

Other curious specialty.

Napier case remarkable by the *twofold* conveyance of the honours.

The claim to the Earldom of Caithness, before the Lords, the 19th of February 1790, (upon a petition to the crown,) and decision the 4th of March 1793,[3] together with the obvious merits of the question, and general state and descent of that Earldom, have been already alluded to.[4] His right, as a Peer, at the Election in 1790, not having been then formally instructed, it was further petitioned against by certain Peers, the 1st of December 1790.[5]

Case of the Earldom of Caithness, from 1790 to 1793.

such resignation, *de plano*, without more, in the interval, denuded the party, in favour of the crown. But it here *re-granted*.

[1] From the charter of regrant being dated at the royal residence, the signature being lost.

[2] See pp. 520, *et seq.* [3] Lords' Journals.

[4] See pp. 620-1, and from 606 to 620.

[5] Lords' Journals. "Walter Lord Lyle,"—Sir Walter Montgomery Cunningham, of Corshill, Baronet,—the 22d of December 1790, petitioned the Lords against the refusal of the Clerks to admit his votes as "Lord Lyle," at the previous Election in that year; but no more en-

Lyle claim in 1790.

On the 23d of May 1793, it was resolved by the House of Lords, that the votes of the Duke of Queensberry, and the Earl of Abercorn, that had been objected to, at the same noted Election in 1790, upon the ground of their being British Peers, created since the Union, "ought to be counted."[1] Resolution of the Lords in 1793, as to the Duke of Queensberry and Earl of Abercorn, *created* British Peers.

The claim to the Earldom of Perth, &c. has been likewise noticed.[2] It came before the Lords, upon petition to the crown, the 12th of June 1792;[3] but though a printed case was given in, and a procedure had, upon certain writs, after several postponements, the order for hearing was finally discharged the 11th of April 1796,[4] no resolution being ever come to;—subsequent to which, on the 26th of October 1797, the claimant, James Drummond of Perth, accepted a British Barony, under the title of Lord Perth, &c.[5] Case of the Earldom of Perth, &c. from 1792 to 1796.

The case of the Earldom of Errol, before the House of Lords, upon the petition of Lord Lauderdale, the 19th of October 1796,[6] with the subsequent resolution, on the 23d of May 1797,[7] in favour of the then holder, has been repeatedly stated and adverted to.[8] Case of the Earldom of Errol, from 1796 to 1797.

The Earldom of Glencairn,—which now furnishes the next subject of inquiry—was first bestowed by James III. the 28th of May 1488, upon Alexander Cunningham, Lord of Kilmaurs, (another old title in his family, coeval with James II. whose limitations are unknown[9]); and that the former was descendible to heirs-general, may be concluded by the accompanying grant of the lands of Drummond and Duchray,[10] in Case of the Earldom of Glencairn, in 1796 and 1797. Original constitution in 1488.

sued, though he craved to be heard by counsel. (Lords' Journals.) He was the heir-general, through a female, of the old Lords Lyle, of the same surname, who have been noticed at p. 370, in allusion to similar claims by a predecessor, in 1721, and 1722.

[1] Lords' Journals. On February 14, 1787, the Lords, however, resolved that the Earl of Abercorn, and the Duke, for the like reason, had ceased to be two of the representative Peers. *(Ibid.)* Such similar vacancies incurred, have not latterly been expeditiously filled up. Previous resolution also in 1787 respecting them.

[2] See p. 775, *n.* and what precedes, *ibid.* [3] Lords' Journals.

[4] *Ibid.* [5] *Ibid.* He was introduced as such, the 9th of Jan. 1798.

[6] *Ibid.* [7] *Ibid.* [8] See pp. 85, 260-1, 768-9, 770, &c.

[9] It was then also carried.

[10] Formerly belonging to Lord Drummond, then hostile to the king, and to another, as to which afterwards.

(not singular, as Lord Rosslyn fancies) to *heirs* general.

the charter of constitution, of the above date,—"in augmentationem sui vitalis redditus, et ad *sustentationem* sui status, et *honoris*," to the party, "et *heredibus suis*."[1] But the Earldom necessarily sunk for the time, by the act of James IV. thereafter, the 17th of October 1488, c. 19, rescinding all heritable grants and "creatioune of new digniteis," conferred by his then deceased father James III. *since* the 2d of February 1487,[2] comprising of course that of Glencairn. In consequence of this, Robert, son and heir of the grantee, who had fallen at Bannockburn, on the 12th of June 1488, by the side of the latter, then also slain, (which formed the actual cause of rescission,) in the singular and unnatural contest between the two monarchs, was reduced to the previous family dignity of Lord Kilmaurs. Cuthbert, his son and heir, again, also originally figured exclusively under such title; but, on the 18th of November 1505, he is entered in the Rolls of Parliament as "*Earl* of Glencarne;"[3] and there is a charter, the 24th of July 1511, of the *Comitatus* and *Baronia* of Glencairn, affording the first legal notice of the *Comitatus*, (an epithet, as repeatedly illustrated, then and considerably afterwards, carrying the dignity)—to himself in liferent, and to William his son (subsequently Earl) in fee, "et *heredibus suis*."[4] The Earldom had hence now been validly, and heritably constituted—as to the precise date, and nature of constitution, more will transpire. Long after, at the much later period of the 17th century, (before the middle), there are upon record, settlements of the lands to heirs-male. On the 21st of July 1637, Charles I. confirmed the original grant of the dignity of Glen-

Necessarily rescinded by an Act in the same year.

Constitution, *or* reconstitution thereafter, to heirs general.

[1] Original, produced in the Glencairn claim. Lord Rosslyn, in his antipathy to female descent, maintains it, with his usual want of knowledge and discrimination, to be "of a singular nature." But this by no means holds. In the valid constitution of the Barony of Hamilton in 1445, (see Acts of Parl. last Edit. vol. II. p. 59,) the honour is in the same way conferred without express words of limitation, and thus inferentially also, through an attendant grant of lands, to heirs-general. Nay, the concession for support of the dignity, is even, notoriously, in conformity to various valid English grants of honours.

[2] The year then began on the 25th of March. Acts of Parl. *ut sup.* p. 211.

[3] *Ibid.* p. 259. [4] Great Seal Register.

cairn in 1488, in favour of William Earl of Glencairn, the heir-general, as well as direct heir-male, and of his "heirs and successors;"[1] but the confirmation being strangely *qualified*, and only "SECUNDUM *validitatem*" of the *former*, thus added nothing more than *it* imported, and purely left things in their pristine condition. Down to 1670, the descent had always been to the heirs of line, who were at the same time the heirs-male; but the representation split in that year, John, styled Earl of Glencairn, the heir-male exclusively, *succeeding*, in prejudice of Lady Margaret his niece, the heir-general, only child of Alexander, undoubted Earl, his eldest brother. In 1796, John, also styled Earl of Glencairn, great-grandson and *last* heir-male of the preceding *Earl* John, died without issue, when the honours were claimed, by reference to the Lords, upon petition to the crown, by Sir Adam Fergusson of Kilkerran, Baronet,—the great-grandson and heir of Lady Margaret, in the character of heir-general; who held the intervening assumption since 1670, by the heir-male, an usurpation; but was opposed, upon petition to the *Lords, (only)* by Sir Walter Montgomery Cunningham of Corshill, Baronet, in character of heir-male,[2] in virtue of his asserted descent from Andrew, younger son of Earl William, already mentioned,[3] son and heir of Earl Cuthbert, who sat in Parliament in 1505.[4] The date of the petition is the 27th of April 1797.[5]

Inept confirmation by Charles I. of the original constitution in 1488.

Descent thereafter.

Claim by Sir Adam Fergusson, the heir-general, in 1796.

Opposed by Sir Walter M. Cunningham, the heir-male.

My remarks as to the Earldoms of Cassilis, Sutherland, Moray, &c. may here also nearly apply,[6] and giving effect to the favour with *us*, towards heirs-general, as well as to the import of the charter of the *Comitatus* in 1511, expressly limited to *them*—of far greater weight and importance certainly, than the mere settlements of the lands, long after, in the 17th century, at the decline and fall of the territorial principle,—upon these, and other grounds, I say, already, and to be further shewn, we may naturally, disregarding the circum-

Inductions as to the descent of the Glencairn honours.

[1] *Ibid.*

[2] He was likewise the heir-general of the old Lords Lyle; see p. 818, *n.* 5.

[3] See preceding page.

[4] Lords' Journals. The above facts also, and the other requisite particulars, are from the Informations, papers, &c. in the case, besides authorities specially referred to.

[5] *Ibid.* *He* was allowed too, to be heard. [6] See pp. 560, 595-6, 784-5.

stance last noticed, and the intrusion of the heir-male from the comparatively modern period in 1670, in the absence of all opposite relevant proof, incline to Sir Adam Fergusson, the heir of line.

Rejection of the claim of the heir-general in 1797.

But Lord Rosslyn, the Chancellor at the time, in his deciding speech in the case, the 13th of July 1797, followed by the resolution of the Lords, in accordance, next day,[1] at once discarded his claim;—siding, as usual, with the *darling* heir-male, who, however, did not proceed further. And why?—It will scarcely be credited, *merely*—and rather compendiously indeed—upon the strength of his old *Hudibrastic* expedient,[2] thus ventilated *ad nauseam*, and which I will not fatigue my readers with again exposing,[3] *because* the honour, at the date to be mentioned, had been constituted exclusively by "*belting*," and was *therefore* only descendible to heirs-male of the body![4] His sole authority for the belting is the intimation, in an account by one Young, a subordinate English herald, (from a printed compilation in 1770,) of the marriage of Margaret of England with James IV. of Scotland in 1503, that, on the 13th of August of that year, Cuthbert Lord Kilmaurs was belted, and proclaimed by the heralds, "*Conte* de *Glencarne*, Lord de Kylmarres, Baron, Banerett, and Lord of Parlement."[5] This was obviously but historical testimony at most, none strictly legal being adduced of the fact. But pray, Lord Rosslyn, we may next ask, have you fairly given all that even this Young, your favourite authority, and sheet anchor, has detailed of the matter? You certainly have not; for this very individual, Balaamlike, to your manifest exposure, and refutation of your conceit, not only transmits the usual, though

Preposterous and untenable *ratio* of Lord Rosslyn for the same, through the *medium* of an historical authority, whom he improperly, only partially cites.

[1] Lords' Journals. [2] See p. 700, *n.* [3] See pp. 680-1-2, *et seq.* &c.

[4] I quote here, and throughout, from a full and properly vouched copy of the Chancellor's speech, in the Charter-chest of the claimant. His Lordship states, "Accidentally" Young's testimony as to the belting "comes to our *aid* in this difficulty,"—of his own conjuring;—he decides upon the creation "by belting," and that thence, the honours by "such mode of creation,"—without any written grant directly, or indirectly,—which he here wholly repudiates,—went to heirs-male. For his concurrent *dictu* as to *belting*, likewise, in the Spynie case, see p. 681, *note;* also in the continuation, next page.

[5] Leland's Collectanea, Edit. 1770, vol. IV. pp. 299, 300.

neutral accessory of "belting" to the question, which you, however, confine yourself to, and so much exaggerate, for your particular purpose—namely, that James IV. "gyrdled" the Earl "with the *swerd (sword)* abouffe (his) schoulder;"—*but, moreover*, that he incontinently, "gaffe" him,[1]—of course *scripto*[2]—his "*Lordschip*," that is, the "*dominium*" or lordly fief of Glencairn,—which was applied to an Earldom, as well as to a Barony,[3] *further* explicitly stated by the former to be descendible to him and to his "*heires*."[4] Nor can it be less doubtful that it was coupled with the honour.[5] Here, then, you have chosen—only as we can gather with the above view—extra-

Conclusion from it, in fact, tends the other way, as regards the Glencairn constitution, or reconstitution in 1503.

[1] The entire words are, "*and* gaffe," &c.

[2] The era indeed had long expired,—if it ever occurred, with us,—when heritable subjects were exclusively bestowed, and conveyed by a mere symbolical form, or act, as elsewhere, in pimeval times, anterior to writs, by fixing a dagger at an altar, &c.

[3] Thus, the regulating charter of the Earldom of Lennox, November 9, 1392, carries the "Comitatum de Levenax, et *Dominium*," and that of the Earldom of Moray which has been referred to, the 1st of June 1566, (see pp. 782-4.) the "*Dominium*, et Comitatum de Murray." (Great Seal Register, and Acts of Parl. last Edit. vol. III. pp. 634, *et seq.*) In the last instance, the "*Dominium*," or Lordship, even precedes the *Comitatum*, of which there are also other examples. Glencairn originally was a *Baronia*.

[4] *Ibid.* p. 300. This will be immediately further supported.

[5] Such *general* descent, (as to which, and the latter facts in the text, the Chancellor is entirely silent,) would even follow, in the circumstances, by his Lordship's admission elsewhere, in his deciding Glencairn speech, that the simple accompanying grant of the new lands to "*heirs*" in the Glencairn charter of constitution in 1488, (see pp. 819-20.) raised an argument, of "considerable force," in behalf of a *corresponding* limitation of the *honours* there, though not specified as to them. Nay, he further says, that admitting "the *Patent* in 1488, (the said *charter*,) we *must* take the limitation (of the dignity) from the construction of that instrument," and that it was not "confined" to the grantee. The conveyance in 1503, of the old family lordship or *dominium* (of Glencairn) may make the present case stronger, as *directly* turning upon it. The intimation, by James VI., in the preamble of the constitution of the Dukedom of Lennox in 1581, of his desire for the standing of the House of Lennox in his *male* cousins, though not directly bearing upon the subsequent broad constructive limitation there, may possibly be thought antecedently to control it, and qualify what I have said at pp. 99-100, 176-7.

Lord Rosslyn's concurrent interpretation of the constitution in 1488.

ordinarily enough, to omit the cardinal part of your own evidence, at the same time refuting your hallucination, based upon the *visionary* effect of *abstract* belting,—which here, forsooth, *only* obtained,—while it pointedly confirms what is palpable, however gainsaid by you, that there was always, independently, on such occasions—a specific *heritable* grant in unison, including lands, or the exalted or dignified fief![1] I submit, if Lord Rosslyn's mode of argument, such as has been exposed, before a tribunal, naturally not the deepest Scottish legal antiquaries, and hence the more likely to be risked without detection, could be credibly expected of a Lord Chancellor of England; and does not savour rather, I am constrained to say, of the lower, and more subordinate walks of the profession.

Taken with the other circumstances, the conceived descent still to heirs-general in the conveyance in 1503.

Such specific heritable grant, therefore, as now shewn, obtained also in the present instance to "heirs;" and, coupling the circumstance with the *concurrent* limitation in the first subsequent royal conveyance, and erection upon record, of the *Comitatus* of Glencairn in 1511, that became the leading title,—all we have next to consider,—expressly in favour of Earl Cuthbert, and to his son, "et *heredibus suis*,"[2] we may relevantly conclude that such actually, likewise, was the descent in the grant in 1503, equally relating to Glencairn. And this descent and limitation was most natural, being besides in exact unison with the original Glencairn constitution in 1488,

[1] See, *inter alia*, the constitution in 1488, of the *Comitatus* of Bothwell, pp. 684-5, also pp. 685-6, *et seq.*

Material fact and consideration omitted by Lord Rosslyn.

[2] This charter is already partly alluded to at p. 820. It had been discovered, as we are informed, by the *quequidem*, that the greater part of the lands, or fief of Glencairn, had legally escheated to the crown by recognition; and hence, to obviate this vital flaw, and "forfeiture," as it is termed, the indispensable necessity for this *novo-damus* and erection, by the charter, of the *Comitatus*, &c. which formed a new and exclusive title—of course, by the practice, including the honour,—even although there had been a previous constitution of the same, with which, however, the latter may presumptively correspond, instead of being, according to Lord Rosslyn's conceit, arbitrarily only to heirs-male of the body. To give the charter greater effect, and as was not uncommon in such emergencies, it proceeds upon a resignation. But these facts, *rather* material, it is thought, are again wholly overlooked, or suppressed, by Lord Rosslyn.

in favour of Alexander the disponee, and his "heirs" or heirs-general, which might serve as a model and pattern; especially as James IV. might have justly felt *some* compunction and regard, operating to that effect, towards the latter, the loyal and devoted adherent of his deceased father, his unnatural and baneful contest with whom, the occasion of his lamentable death, he, in the sequel, so deeply repented of, and deplored. It is well known, that, in expiation, he subjected himself to a grievious act of penance; and the same feeling of contrition and remorse might have induced an honourable tribute to the memory of the *friend* of the ill-fated monarch in question, who fell with him in the same field,—but, slenderly indeed, in a retrospective shape, either by a final restoration of the dignity, or *corresponding* corroboration of it, *(inter alia,)* in 1503, upon a joyous occasion, to his heir. This, at least, James IV. certainly then did in a great degree, and the pious motive might have been wholly followed out. Though somewhat capricious likewise, in the destinations of his previous grants, Earl Cuthbert, the heir in 1503 and 1511, had various, afterwards, to his heirs-*general.* [1]

Sir Adam Fergusson, the Glencairn claimant, a celebrated jurisconsult, modestly admitted, towards the conclusion of the case in 1797, that although founded upon, he had latterly "given up hopes of the Patent (as it was called) in 1488, being supported."[2] But I have, on the other hand, discovered a piece of evidence, that possibly may aid or realize my antecedent induction even of an actual restoration of the Earldom, *ex terminis*, by means, apparently, of the no longer existing *heritable* grant in 1503—*suppressed* by Lord Rosslyn, and, in fact, confirmed in 1511 to Earl Cuthbert and his heirs.

New evidence in support of the restoration or confirmation of the original Glencairn constitution in 1488, subsequently,—as may be presumed in 1503.

Previous to the 15th of January 1515, Earl Cuthbert obtained a brief from Chancery, directed to the Sheriff of Dumbarton, to be served heir in the lands of Drummond and Duchray, expressly "be ye decis of umquhile *Alexandre* ERLE *of Glencairne*, his *grantschir*," the *material* party, who *had* been stript of the dignity first granted to him in 1488,—upon

[1] Proved by the Great Seal Register.

[2] Proved by his autograph statement, dated *July* 13, 1797, after the decision, in the Family, or Glencairn Charter-chest.

The noble disponee in 1488, held to have been Earl subsequent to the rescinding Act mentioned in the same year.

which a service, accordingly, past, of that date. It came subsequently to be reduced by the Session, the 13th of January 1516, at the instance of the king and Lord Drummond, &c. owing to the alleged execution of the brief by incompetent officiaries, the erroneous description of the lands as in the county of Dumbarton, with the faulty procedure there, instead of Stirlingshire, their asserted true locality, and other objections in form; and because the jury had found "*Erle*" Alexander to be the last vassal therein, when the same had belonged, in their respective capacities, to the crown, to Lord Drummond, and to another individual.[1] The judgment, however, was not final, it being, *inter alia*, qualified the same day by the admission of the pursuers, and the Court, that, notwithstanding thereof, John Earl of Lennox, Sheriff Principal of Dunbarton, and the inquest, should be entitled to the legal pleas and exceptions to be urged in their behalf; while eventually, on the 14th of January (1516), it was contended for the Earls of Glencairn and Lennox, the latter an obvious party, —that the lands *did* then lie within the County of Dumbarton, and that the acting Sheriffs, the Deputies of Lennox, were duly *competent*, for which a term of probation is sought. Further still, on the Court intimating, by an "Interlocutor," they would "*proceid (only)* in the said matter,"—shewing it was still unconcluded, the procurators of the parties protested that because the crown did *not* appear to pursue, they "myt haif yer just *defensioun*," *(defences,)* and that there had been no proof led of the lands of Drummond and Duchray having "pertenit to ye kingis grace, or to ye said lord Drummond." —In this strange, contradictory state of things, thus in a manner but inchoate, the action, which was not disposed of, appears to have remained.[2]

The title, in the person of Earl Cuthbert, to the above lands being, as already shewn, in virtue of the Glencairn

[1] There is, however, no mention of the rescission of the charter 1488, nor is it founded upon.

[2] These particulars are derived from the Act and Decree Registor of the Supreme Civil Court for the time, where I have been unable to discover more. There may have been a subsequent compromise of the parties in the process.

charter or "patent" (as it was called) in 1488, to Alexander his grandfather, by which they were bestowed[1]—if good—as was in effect maintained in the proceedings, necessarily at the same time supported the corresponding grant, *semel et simul*, of the honours to heirs-general. And it would seem singular, *e converso*, on the still subsisting invalidity of the charter, that the previous point should have been ever a subject of discussion. But, be this as it may, it is incontestable, that during the *whole* stage of the litigation, notwithstanding the other objections mooted, Alexander, the above noble progenitor, in 1488, is *repeatedly* and uniformly designated, without a vestige of cavil, both by the crown, the court, nay even by the subject pursuers, *as* "Erle of Glencarne," as well as "Lord of Kilmaurs."[2] The obvious corollary from which appears to be a clear admission of his right to the Earldom, because, again, if the act rescissory in 1488, recalling the dignity, so far, had stood, this, in conformity even to the ordinary law, and still more rigorous observances of the time, had not obtained; and consequently, as already observed, there must have been—to explain the incident at an epoch when the facts were known, and could not be mistaken,—some *later rei interventus*, changing the aspect of things, in the shape of a corroboration, and in fact, restoration of the Earldom,—of course, retrospectively benefiting Earl Alexander, as we may conclude, through the grant in 1503; to which even the Sovereign's act *then* was *alone* competent. The disability, in the way of such restoration, might *thus* be removed, *a fortiori*, from the relevancy of the same abstract cure, as has been shewn, to that, in consequence of adjudged attainder, the most serious and usually most indefeasible infliction of the kind,[3] even supposing there

Relative remarks.

[1] See pp. 819-20.

[2] The *court*, especially in their finding, style him "Alexander Erle of glencarne, Lord of Kilmaurs;" and the brief, by the pursuers, is even unexceptionably stated to have been to him, under the first of these titles.

[3] See pp. 752-3 (and previously,) 758—764. Yet Lord Rosslyn denies, in his speech, that "the King" subsequently "could give effect to the former patent, (the Glencairn *charter* in 1488,) which had been done away by Act of Parliament." He says it "was impossible;" but we have seen, in the instance of Moray, (see p. 787), and elsewhere, the nature of his Lordship's *impossibilities*, not such, certainly, as

were no Parliamentary rescission, the converse of which might here be presumed, owing to the imperfection of the relative Records. And this independently, as obvious, of the king—in 1503, being capable of bestowing another grant of the honours, in terms of the former one.

The matter in question is deserving of further research and scrutiny, especially as the inference drawn may be stronger when contrasted with *another* relative incident.

The curious circumstance in question, therefore, should elicit further inquiry, and it behoved me to notice it.[1] The preceding evidence is stronger too, than might perhaps at first seem, and may the more warrant what is thus maintained, when it is in proof, that on the 4th of November 1488, immediately subsequent to the important rescinding Act noticed, Robert, the son and heir of the unfortunate Earl *Alexander*, (and father of Earl Cuthbert), legally made up certain titles to the *former*, likewise by service—in virtue of a special salving act in the same year for the purpose,[2] *but not* to *him* in the above character, under the description of an *Earl*, but merely by that, according to his *prior*, unrecalled designation, of "Alexander *Lord Kilmaures*."[3] This was confessedly his just, exclusive style at the *time*, and *had* been always, under the *same* circumstances. There is besides, later down, on the 20th of January 1493, a "declaration" by James IV. "that the Parliament made no further inquisition, (as respected the foregoing nobleman, but in what particular does not appear), and so was sufficient to purge" him. But here, he is still again only entitled "Alexander *Lord Kilmaures*,"[4] and certainly not as in

the Traveller in Rhodes (in the fable) had to realize. On the contrary, they are usually very easily *overleaped*.

[1] No satisfactory light can be thrown upon the subject by the order, or noblemen ranking at the time, in the Rolls of Parliament. Lord Rosslyn observed in his speech, that the "marking of the Peers" there "has little regard to precedency;" and he supposes that "their names were taken down as they came in, without regard to that point."

[2] C. 7. on the 17th of October 1488, (Acts of Parl. last Edit. vol. II. pp. 207-8.) It enables the heirs of those, who, like Earl Alexander, had fallen in battle, against the existing Sovereign at Bannockburn, to make up titles to the former, their predecessors, under the warrant of a writ of Privy Seal, first shewn, and produced with the requisite view in Chancery.

[3] This fact, as instructed in the case, was explicitly founded upon by Lord Rosslyn.

[4] The authority also, pointedly referred to by Lord Rosslyn, is from an old inventory of Family title-deeds, produced in the claim.

1515 and 1516. While the *mere* purging—for other unknown purposes—could not affect, or homologate the original grant in 1488, owing especially to the explicit terms of its rescission by Act 1488, c. 19—in force at least until 1503—this peculiar, and striking discrepancy in the posthumous style of the identical personage, at the distinct periods mentioned, can only, it is submitted, be regularly explained by my induction of the specialty, and *rei interventus*, as premised; for otherwise, the same form and practice would have equally obtained, as it palpably does not, in both emergencies.

Counter possession, or assumption by the heir-male in the Glencairn case, not held a legal bar to the heir-general.

The counter possession, or assumption by the Glencairn heirs-male, for the considerable period of 126 years, from 1670 to 1796, that would have been so fatal at common law in ordinary succession, was not held a legal bar in the way of Sir Adam Fergusson, the heir of line. He nevertheless was allowed fully to go into the merits of the question. And this, although the preceding had voted without protest at Peerage Elections. Nay, James Earl of Glencairn, elder brother of John, the last Earl, had even been returned to represent the Scottish Peerage in 1780,[1] and had sat, and voted accordingly, in the House of Lords. The same thing has also been illustrated in the instance of the Earldom of Moray in 1793, where there was alleged adverse *possession* from 1700 until 1784, when it came first to be challenged,[2]—thus evincing the existing legal understanding, to which I do not demur, as it seems not at variance with *our* law. Further still, in the Errol case, that has been likewise noticed, James Earl of Errol, father of Earl George, whose right came formally to be questioned in 1796, and 1797, had been equally returned as one of the representative Peers in 1770,[3] in virtue of a title and succession recognised since 1717; but this "possession" also, as it was maintained, when founded upon by him, was not deemed conclusive by Lord Rosslyn; for he said, "whatever inclination" he might have "to give every possible presumption to long possession, I cannot admit it against *evidence*, nor can I admit it in the present case, because the title of Earl of

Such law and doctrine recognised in other cases.

Opinion here of Lord Rosslyn;

[1] Robertson's Peerage Proceedings, p. 404.

[2] See p. 783.

[3] See Robertson's Peerage Proceedings, p. 353.

and that Peers sitting at the Union had not thereby, an indefeasible right to their Peerages.

Errol is set out distinctly, and fully, your Lordships are aware of every thing respecting it, and as such, you must determine upon it." He obviously inculcated also, that the Union had not given "an indefeasible right," in respect to their dignities, "to the Peers of Scotland, then sitting in Parliament."[1]

Opinion of Lord Lauderdale, in 1793.

In the Moray case, again, in 1793, Lord Lauderdale, in his speech,[2] rejected the plea of prescription in honours altogether; while Lord Rosslyn said on the occasion, that he never *intended* to represent it as an effectual bar; farther remarking, that "when honours are usurped from the crown, no length of time can justify the possession."[3] The case of Lindores is moreover in point, where the assumption of the honour, with voting at Elections from 1736 to 1790,—a period of fifty-four years,—was found to go for nothing, on the right to that Peerage being thereafter discussed, and disallowed by the Lords in 1793.[4] I need hardly observe, that when there has been no adverse possession, but only dormancy, and non-assumption of a dignity—however long continued,—it is of no substantial importance; for even by our common law, *jus sanguinis nunquam prescribitur*,—unless the right, in the interval, through the requisite term of prescription, vests in another.[5] This last alternative has recently been strikingly illustrated in the matter of General Services,[6]—however, the also recent Rutherford resolution of the Lords, to be afterwards referred to, may tell otherwise in honours.

No prescription at least ever runs in honours, when there is no counter assumption or possession.

Lady Harriet Don, sister of the last Earl of Glencairn, of the male line only, admitted as a party in the Glencairn claim.

Harriet Don, "commonly called Lady Harriet Don," eldest sister and daughter, respectively, of John, last Earl of Glencairn, (deceased in 1796), and of the previous William Earl of Glencairn, the male assumers of the dignity, was at once permitted by the Lords, the 2d of March 1797, (upon her petition), that was referred by them to the Committee of Privileges, to be heard by "counsel" against the claim, and in support of

[1] From cotemporary notes of his Lordship's speech, in the hands of the family agents.

[2] Referred to, *ibid.*

[3] In his speech referred to, *ibid.*

[4] See p. 779.

[5] See Stair, B. II. T. XII. § 15. Erskine, B. III. T. VII. § 12.

[6] See p. 142, *et seq.* The case of Nelson, *ibid.* is affirmed on appeal.

her "right and interest."[1] Whatever this party sets forth in her petition, as to her conceived preferable claim to the Earldom, the only discoverable interest she had, was in the preservation of *her* peculiar title,—not in law, but through courtesy, as the daughter of an alleged Earl,—however identified with the contested right to the Earldom in her line. This evinces, together with a similar procedure, though on a weightier ground, in the Sutherland claim in 1771, in respect to Lady Elizabeth Wemyss,—the heir only after the claimant, who was equally permitted to be heard, that the Lords are thus far from being precise or scrupulous, but on such occasions freely grant such favour and indulgence of moving and opposing to any upon a secondary interest merely, nay hardly tangible, or upheld by law.[2] And, such being the case, we here, as well as elsewhere, look in vain for the invariable strict procedure, as asserted, of the House of Lords in Scottish Peerages. After the above fashion, likewise, in the Sutherland instance, the Earls of Crawford and Errol, utter strangers to the succession, were appointed to be heard, because the matter might affect their right of precedency.[3] And, further, Sir Walter Montgomery Cunningham, who has been alluded to,[4] was allowed by the Lords in 1797 to oppose the Glencairn claim, in the express character of heir-male of the body of an Earl of Glencairn,—although Lord Rosslyn explicitly admitted that he had merely given "*some general* evidence of his propinquity in the male line," *but* that it was "NOT *in evidence—whether* he *be* such heir-male or *not*." Thus much again for the asserted *extreme* strictness of the House of Peers in their procedure, especially in matters of evidence, which may be next referred to.

In fact, could only defend her title by courtesy.

The practice of the House of Lords here, is far from scrupulous but indulgent, contrary to the notion of any strict ratio.

Sir Walter M. Cunningham also admitted as a party, though he had not proved his *descent*, upon which *all* turned.

So little of a legal, and profound inquirer was Lord Rosslyn, —in such marked contrast to the late Lord Redesdale, and other eminent English forensic authorities, in the antiquarian and Peerage department—that, not recurring to his clinging to Young, the subordinate English herald, as his sheet anchor, instead of purely ransacking, like the former, the original strict,

Laxity of Lord Rosslyn in his legal procedure, and his want of proper and recondite research.

[1] Lords' Journals. [2] See p. 606. [3] See p. 607.
[4] See pp. 818, *n.* 5, and 821, and Lords' Journals, 27th of April 1797.

and recondite sources of information,—he is fain to betake himself, with this view, in his Glencairn oration,[1] to a modern History of Scotland, published in 1797, by John Pinkerton, the very year when it was delivered.[2] Such evidence would be discarded by our law, as well as by the English; and this, with abundance of what has been set forth,—and will *additionally*, in the sequel,—strikingly refutes the doctrine and notion, (already glanced at), entertained, I know, by a modern legal authority of distinction,[3] of the necessity "of evidence of the *strictest* kinds in matters of *Peerage* (Scottish), in the House of Lords;" nay, further, of "the probable *rejection* by the House of Lords of *any book*, or document as evidence, *not strictly* admissible by the *Law* of England." The latter heterogeneous proposition, in such marked contrast again with what has been repeatedly instructed, and will further, necessarily forming a relative rule though thus disowned, books and documents of all kinds, nay mere unauthenticated copies, having been, at different times, both argued upon, and admitted as evidence, indeed remains to be substantiated; while he, moreover, inculcated novel and astounding intelligence certainly, and subversive of *all our* law and practice, both in principle, and otherwise, though secured and guaranteed to us by the Articles of Union, and acted upon, not adverting to its obvious fallacy and irrelevancy, that in Scottish Peerage cases "the House of Lords *has not yet* acknowledged *any* rule of evidence, *but those* established by the *English* Law." The

His law and practice refutes the notion of extreme strictness, as asserted, of the House of Lords in Evidence.

[1] As bearing upon the important circumstances attending the "Patent in 1488," &c.

[2] Nor is my comment here by any means singular, or unprecedented. I have likewise an opinion before me, of the late Mr. Sergeant Lens, a respectable English counsel upon another peerage claim, in which, it being necessary to take that of Glencairn fully into consideration, he observes, that "the case of Glencairn seems to have been decided by Lord Loughborough *(Rosslyn) merely* on the particular *historical* ground in that case." In order to make the said Pinkerton the more deserving of such high weight and distinguished notice, Lord Rosslyn styles him "a gentleman of much accurate research," who has "lately thrown great light upon this *entangled* portion of history," (under James III. and IV.)—no doubt to Lord Rosslyn.

[3] As by an opinion exclusively regarding a Scottish Peerage claim.

English, thus entirely to predominate! All we need add to such fulminating dogmas is—

> "Tutius est igitur fictis contendere verbis
> Quam *pugnare manu*,"—

they being, when we come to practical collision and scrutiny with them, so capable of such instant demolition. In particular, with respect to printed books, including old histories, writings, and multifarious proof in general,—independently of the threefold refutation here in point, from the precedent of Glencairn,[1]—the direct reverse, as is notorious, perpetually and strikingly obtained in the celebrated *tripartite*[2] Sutherland controversy in 1771, and before—so long, copiously, and keenly agitated,[3] as well as in various others, almost unnecessary to refer to,[4]—clearly *not* in accordance with such *supposed* exclusive strict, or rigorous English practice in the House of Lords,[5] but with that *chiefly* of the law of Scotland—so un-

Proof in support of my proposition.

The strict practice, or the English principle, has not ruled as contended.

[1] Illustrated in the testimony of Young—especially, merely through a printed version brought so vitally to bear,—of Pinkerton,—and in the admission by the Lords, of an alleged heir-male, as a material party, upon secondary, and confessed *inadequate* proof; (see p. 831.)

[2] There being *three* contending parties in *Foro contentiosissimo*, all with opposite claims quite hostile to each other.

[3] For proof of this, I need only quote the well known bulky and elaborate printed papers in the case, with the Lords' speeches.

[4] See pp. 566, 583-4, and especially the procedure in evidence under one branch of the Caithness case, pp. 613-14, (which, however, was so lax and hasty, as to be below the level of any approved law,) pp. 639-40, &c. together with what will transpire in the sequel.

[5] It may be perhaps urged too, that the English law *proper*, is not always *very* strict or punctilious in evidence. It admits any *hearsay* in pedigree of the *nearest* relatives who have an interest, even as to *remote* facts, *which (hearsay*, in general) Glassford, a lawyer, and the latest enlightened writer upon the true principles and philosophy of evidence, holds to be but "secondary," "imperfect," and "suspicious," nay generally "inadmissible." (See Essay on Evid. p. 358.) Our law, though now here assimilated with the English, peremptorily rejected probation in the former shape, not without reason, as I can fully prove, from an early period. Monumental inscriptions, insertions in family Bibles, rings, and an unvouched pedigree hung up "in a dining-room," (as inculcated by Chancellor Brougham, in the Kelly case in 1835,) nay even in lesser circumstances, are in England admissible proofs of pedigree. I have been said publicly to know something of such matters, (though a knowledge of which I am far from being conceited,) but I must de-

The English law proper, not even *always* strict in evidence, as shewn by certain instances.

On the contrary, the Scottish has chiefly in honours, notwithstanding certain irregularities.

ceremoniously discarded.[1] I say *chiefly* too, because it is, at the same time, *somewhat* difficult to predicate, judging from ascertained proceedings of that Tribunal, where there appears to have been a *degree* of contradiction, precipitance, and want of clare, that judging by *ourselves*, I cannot fancy more fertile sources of error, empty aspiration, falsity, and delusion than the latter, of a looser character, or more likely to mislead if consulted. Monuments with inscriptions too, of course by the *heirs*, (if by the deceased it might be different,) for the behoof of which first they *chiefly* are reared, like the noted one in London, but too often lift up their heads and lie. It seems a family propensity. Bibles, *ut supra*, as has notoriously proved, are admirable engines for forgery, affording, through the prefixed autograph Family insertions, like a copy in a writing-school, the easiest means of exactly imitated interpolations in the subsequent intervening spaces, or in the closing blank, so invitingly, below. Parish Registers, &c. are received at once in England, but of old *not* with us, *per se;* they were but adminicular, and demanded corroboration. (See Tait on Ev. pp. 51-2.) "Engravings upon rings," or poesys, are legally probative in England,—why?—because "a person would *not* wear a ring," ("paltry," according to Shakspeare,) valuable, or endeared though it might be by a fair giver,—even inveigling, "with an error." (See Vesey, Rep. v. 13, p. 144.) But, according to Horace, the natural blemish or error of the polypus, in the otherwise faultless and handsome face of Agna, was deemed a further merit and attraction. The above *ratio* appears artlessly innocent, and better fitted for the Saturnian age. Monumental inscriptions are similarly defended, because it turns out they are but "the *natural (unsophisticated)* effusions of a party," (see *ibid.* p. 514,) as to which, in the general run, *credat Judæus!* But as I have, in substance, admitted elsewhere, most of the above legal ingredients, in certain predicaments, with other accessories, in the shape of circumstantial evidence, may well tell; and he would be bold generally to predicate as to probation,—though I am much mistaken if the preceding is not the way in which certain portions of our law have been criticised,—rather *isolatedly*, perhaps—in the sister kingdom.

Our law indeed, according to other English authorities, and not the English, ought to rule.

[1] Various English authorities too, and in the House of Lords, will be subsequently adduced, proving that *our* law, as might be expected, justly rules in Scottish Peerage claims; and if in one particular, why not in all? Stair, our usual oracle, says, "Histories are probative in all cases where *fame* is relevant, if they be authentic, and not contradicted, as in the case of propinquity,—and priority of *dignity, titles* of honour." Inst. B. IV. T. XLII. § 16. And Erskine expresses himself to the same effect, specifying "in the proof of ancient facts,—histories—by writers of credit, near that age when the facts happened." Inst. B. IV. T. II. § 7. Young, therefore, the subordinate English herald referred too, though a foreigner, if his History be authentic, (as to which I cannot

Historical evidence, how far recognised with us.

common principle and precision, through the instrumentality of Lords Mansfield and Rosslyn, what exact binding rule here, they can be said properly to embrace. But this, in a manner, as compromising all genuine law, cannot truly compromise the Scottish. No doubt, the strictest evidence, everywhere, when attainable, falls to be preferred—a common legal truism, though that will not meet the question, what is to be done *in facts* ostensibly, or morally true, as not unfrequently happens, susceptible only of inferior testimony,—as to which hereafter.

Case of the Baronies of Belhaven and Stenton, in 1790-3, and in 1795-9.

The existing Baronies of Belhaven and Stenton were conferred by patent, the 10th of February 1675, upon John Hamilton, of the family of Barncleuch, husband of Margaret Hamilton, the grand-daughter, though not apparent heir of line of the then John, Lord Belhaven,—the original holder of the honours, by an earlier patent, dated the 15th of December 1647, to him and his heirs-male lineal and collateral. And by that in 1675 the limitations comprise "Heredes masculos ex *ejus* corpore (the *patentee's*) procreatos seu procreandos; quibus deficientibus, *ejus* proximos Hæredes masculos quos-

precisely say, it only coming to us, in a modern printed form, in 1770, from an asserted MS. I have not seen,—see Lel. Collect. *ut sup.* vol. IV. p. 258.) may be perhaps admissible evidence in absence of better, he being certainly cotemporary with the facts he details. But why, I may ask, was the mere modern *printed* version exclusively founded upon by Lord Rosslyn, and received, without adducing the original, that ought to have been alone taken, or independently corroborating, nay, even adminicling the former? As far as I can discover, this most common and obvious practice, was not adopted by his Lordship; and if so, we have here again a precious sample of the superior rigour or strictness, as contended, (see p. 832.) of the House of Lords in evidence, in Scottish Peerage claims. The *autograph* testimony of Sir James Balfour, Lyon King of Arms in 1630, may be, *a fortiori*, admissible, in the circumstances, upon the material Scottish fact alluded to in the Moray claim, (see pp. 793-4); but as to the mere recent compilation of Pinkerton in 1797, and his *ipse dixit*, they fell, on all hands, to be rejected, especially because access might have been had to all his authorities, and ground-works, that ought, in the above way, to have been directly consulted and adduced, without such negligent secondary method. I may here infer, that cotemporary MSS. *private* Reports of cases by the Judges of old, when admitted to be so, and ordered to be published by the crown, for the public benefit,—of which I know an instance,—may be classed with the highest species of historical proof.

Further laxity and negligence in the Glencairn claim, in the matter, as respects Young's authority,—Sir James Balfour's far stronger in the Moray case.

Higher class of historical authority with us.

cunque."[1] It was with reservation too, of the peerage in liferent to the aforesaid *Lord* John, who had no sons, but only daughters, and whose original patent, so far, was ratified according to a form formerly adverted to.[2] The respective disponees mentioned in 1675, and 1647, were of distinct lineage; John, the first Lord, being illegitimately descended of the noble House of Hamilton, after the middle of the 15th century; while John, his adopted heir, legitimately, through the noted and numerous stock of Udston, which produced that of Barncleuch, at an earlier period. The latter, thus a singular acquirer, took and succeeded accordingly, as second Lord Belhaven and Stenton, and the dignities were transmitted *seriatim* in his male descendants, until their failure in the person of James, fifth Lord Belhaven, in 1777; when the first limitation in the patent 1675 becoming exhausted,—there arose this question, who next was entitled to take under the closing, and now regulating remainder there, to "heirs-male whatsoever,"—namely, of the patentee? There were, as little, any male descendants of a brother, or of any paternal uncle of the same John, the second Lord, so it became necessary, with a view to the succession, to remount to the *anterior* generation,—to James Hamilton of Barncleuch, his grandfather, whose direct male line had also consequently failed, and who happened to be the middle of three brothers,—namely, of John Hamilton of Coltness, the eldest, and of William Hamilton of Wishaw, the youngest, the joint progeny of John Hamilton of Udston,

Whether by the patent 1675, on failure of male issue of the patentee in 1777, the honours under the remainder, went to his elder, or younger collateral heir-male?

[1] Great Seal Register.

[2] His male ancestor, John Hamilton of Broomhill, was "natural son" of James Lord Hamilton, father of the first Earl of Arran, by "Janet Calderwood;" under which character, he figures in a charter upon record, of part of the Hamilton property, in 1474. In a process before the Session in 1541, he is retrospectively described "*carneuale*, sone gotten betuixt umquhile James Lord Hamilton and Janet," shewing, *inter alia*, that "*carnal*" has been used with us to denote bastardy,—John the offspring being otherwise indisputably proved illegitimate. Crawford, in a MS. in the Advocates' Library, transmits that the lady was in hopes Lord James would have married her, but that, on learning his marriage, as is notorious, with the Princess Mary, she "threw" the luckless child "out of her lap, and broke his thigh," declaring "she would be married to a handsomer man than he was, before she slept."

the common ancestor. As these two brothers specified had left male descendants who existed at the period, the honours would necessarily devolve under the broad remainder stated somehow in their line; and it fell now to be decided, whether the heir-male of the said Coltness branch, or of that of Wishaw, ought in law to be preferred?

The votes tendered by Captain William Hamilton, the male Coltness descendant and representative, (who had actually since 1777 assumed the dignities), being petitioned against, at the remarkable Election in 1790, by certain Peers on the ground of their illegality; and his right, accordingly, thereafter coming to be discussed, in the customary adopted form, the Lords resolved, the 6th of June 1793, that the former were "not good,"[1] owing to his *not* being the heir to the Peerage. They espoused the argument urged against the party, that the Peerage here, instead of *ascending*, *jure representationis*, to him, as heir-male of John Hamilton of Coltness, the eldest of the three brothers mentioned, (from the middle of whom the Belhaven patentee sprung) and first of the elder branch, must *descend*, and necessarily, through the deceased William Hamilton of Wishaw, the *youngest* brother, by the same admitted principle of representation, to his male issue, who were instructed to exist. This, I need hardly add, was in exact conformity to the common law of Scotland. An estate, acquired and settled like the Belhaven honours in 1675, would necessarily go to the male issue of the conquestor—*in pari casu*, with the Belhaven patentee,—who, unavoidably taking, as heirs in the general and indefeasible course, what had been *conquest*[2] before in his person, would thereby become heritage; and, owing to the repeated male descents afterwards, would still *more* descend—*invariably*—if that were practicable, according to the relative law of heritage, and consequently, as premised.[3] There was here, in fact, no room for the *law* of conquest. If Lord John, the patentee in 1675, had died

The question decided in 1793, against Captain William Hamilton, the *elder* collateral heir-male.

This in perfect conformity to the law of Scotland.

No room here for the law of conquest.

[1] Lords' Journals.

[2] *Feudum novum.*

[3] "Conquestus dicitur ratione primi conquestoris, et *cum transmittitur* ad ejus *hæredem*, *exuit* naturam conquestus, et *induit* naturam *hereditatis*." Skene *sub voce*, besides various corroborations. See also case of Watson and Johnston in 1681, stated in the sequel.

How the latter could have applied in a different event.

without male issue, then certainly, *e converso*, through operation of the latter, which would *now* come—though *thus* but *once*, into play,—the male descendant of Coltness, in right of his descent from the eldest brother of the grandfather of that Lord, would, by representation, be preferred,—after which, this very law of conquest, on the above account, would be transmuted into that of heritage even in his line.[1] In the same event, there would be *two* sets of heirs, the honours, and whatever had been "*conquest*" by Lord John, (the *feudum novum*) only going to the Coltness representative, while all his paternal property (the *feudum antiquum*), with the heirship, &c. unfettered by their limitation and condition, would still *descend*, by the law of heritage, in their case, to the younger Wishaw branch, the heirs of line, and favourites, *generally*, under our system.[2] This is partly admitting the law of con-

Then two sets of heirs, though the honours might have gone to the heir by conquest.

[1] See Stair, B. III. T. V. § 10; Erskine, B. III. T. VIII. § 15. The peculiar law in question makes, at any rate, the deviation from that of heritage, to which it forms a single exception, as narrow as possible. Upon this principle, though there be many elder brothers of the conquestor, it exclusively favours the younger, and never the elder or eldest, as elsewhere. Nay, Nisbet, as conquest merely ascends *gradatim*, is not disinclined even to prefer the *youngest* son of such deceased elder brother, before the eldest. See his Doubts, p. 82. As to the *gradatim* ascent, see *Quon. Attach. c.* 88,—97, Stat. Rob. III. c. 3. "The custom of *England*," as Stair inculcates, "is contrary; for thereby, the *eldest* brother succeedeth *(in conquest)* to *all* his brothers, failing the issue of each; but with us the *immediate* elder or younger doth always succeed," &c. *Instit. ut sup.*

The distinctive features of the law of conquest, and as opposed to heritage, to which it is but a slender exception, illustrated by original old Scottish authorities.

[2] The distinctive features in conquest, (familar to the feudal law, and Normandy) with us, though occasionally disputed, may be gathered from ancient practice. William Govane, in the reign of James VI. "*conqueist*" lands and annual rents, "to him, and his *airis*," and died without issue, upon which, Alexander, his "*younger*" brother, took the succession, under the limitation, by service; but the latter, with his consequent title, were thereafter reduced, by the Session, the 25th of March 1588, at the instance of Patrick Govane, lawful son of the deceased James Govane, styled "*elder* broyer to ye saide umquhile Williame," whose preferable right, through representation of his said father, as the "*immediate* elder broyer," was adjudged,—"be *resoun* of *conqueis*, of ye law and pratik of yis realme." (Act and Decree Register of the Supreme Civil Court.)

Case of Govane in 1588.

James Johnstone, burgess of Edinburgh, the second of four brothers, Herbert Johnstone being the eldest, William the third, and Adam

quest in honours,—as to which afterwards. But, in the palpable absence of the above *special* alternative, Captain Hamilton, in 1793, sported this singular and gratuitous theory, that not- Futile attempt of Captain Hamilton to induce the law of con-

the fourth, left two sons, Mr. William and Mr. Andrew Johnstones, which last owned *from* Mr. William his brother, who died without issue, certain heritable subjects, that were thus transformed from their original conquest state into heritage, in the full sense. But Andrew himself, who stood essentially in the shoes, *quoad* the property, of the last Lord Belhaven, in 1777, also died without issue. Who, then, did the Session find, in 1574, to be his heir? Not Herbert, his eldest uncle, or any of his branch,—in the shoes again of Captain Hamilton in 1793, but Mungo Johnstone, the grandson and heir of the said William Johnstone, third and immediate younger brother of James the burgess, (father of the above Mr. William, and Mr. Andrew, his sole offspring,) exactly situated as the Wishaw heir, and who accordingly took, and was reponed by the Session, against an inadvertent service that came to be reduced, obtained by the heirs portioners of Adam the fourth brother, of the original stock, without any challenge still, from the *eldest* or *Herbertine* members of the Family. *Ibid.* Case of Johnstone in 1574.

Robert Reid, Bishop of Orkney, had two brothers, an elder and *younger*, the first, ancestor of John Reid of Aikenhead, and the younger, of Walter, Abbot of Kinloss; and the question, affecting the succession of the Bishop, who died without issue, *qua* heir-general, and of line, being controverted by these two descendants before the Session, it was decided in 1561, that the Abbot, by the "commone" and "municipal" law of "yis realme," was "*general air*" of the Bishop, "be resoune of ye law and practique, *all* airschip *discendis*, there being *inferioure (younger)* heir, to ye *deid (deceased)* in ye samyn degree, and in sa fare as ye *elder* brodar succedis to ye deid, yat is *allanerlie (only)* to *landis conquest* be ye deid of ye *special* provisione of ye municipall law, quhilk provisione is *not extendit attour (beyond) yat singular* caice in landis conquest, be resoun yat landes hes allanerlie ye name of conquest, quhilk is not *extendit* nor applyit to moveable guidis, and *airschip* &c. *(yat) descendis.*" Such *airschip* goods with us, go like heritage to the heir of line. And accordingly, the service that John Reid had unduly obtained, as "air in general, and universal," of the Bishop, was reduced at the Abbot's instance. *Ibid.* The Abbot stood precisely in the situation of the ancestor of the Wishaw branch, the confessed favourites of the law, like him. The above is the oldest, and most minute judicial explanation of heritage and conquest I am aware of, and shews that the very narrow right of succession by conquest was a single exception to the general law, which presumed in favour of, and gave almost every thing to the heir-general, or of line; while heritage, with the family representation, always *descended* to the next in degree, under such character, *after* the deceased. The above cases being new, and Case of Reid in 1567. Distinction between heritage and conquest, &c.

quest in his favour, that of heritage only ruling.

withstanding the fatal and irretrievable *intervention* of the direct male descent from the patentee, for ever barring its effect, the law of conquest, still in nascent vigour, *lurked* in the family, in a state of preparation, ready to start, and actively to propel the *ascent* of the succession, *on failure* of the patentee's male issue—for he could not altogether surmount this difficulty—to the elder line, and by representation to himself. In support of which extraordinary and visionary protraction of conquest, which, at the most, is by no means favoured or extended by our genuine law, he could betake himself to nothing but an irrelevant twisting of the ordinary authorities, always more or less practicable in a case (under shelter of his *assumption*), which, even upon his showing, could not assist.[1] But, in fact, the point is *res judicata;* for the Session decided, in December 1681, in the case of Watson and Johnston, where, of three brothers, one "conquered" lands, that these "*became heritage*," *because* they had "*descended* to his son," and hence fell to be wholly regulated by the *relative* law, in bar of any plea or pretension of conquest.[2] And indeed, *after* the devolution of a subject to one, *qua* heir by blood, to determine *his* future succession and representation, our law only inquired who was

the earliest, properly reported, being the kackneyed one of Lady Clerkinton, July 20, 1664,—which solely arose out of a conceit and error of Craig, who, as usual, is always misrepresenting and mistaking *our* law, in that instance, in opposition to two good practical lawyers, Oliphant and King, (see Stair, B. III. T. V. § 10.), I have been induced thus to refer to them. The first oldest authority, the statute of Robert III. c. 3. briefly enacts that "proximus ante natus *superior* frater ejus,* ad dictas *terras (de conquestu)*, &c.—succedet, gradatim ascendendo." The authorities from the *Quoniam* Attachiamenta, c. 88, and c. 97, may be held to have nothing more material on the point, unless taking for granted that infeftment has there preceded, while inculcating too that heritage, on the other hand, must descend.

* The *conquestor*.

[1] He availed himself too, in order to found an invincible presumption in favour of primogeniture, of the ordinary legal preference of the eldest son of the elder brother of the conquestor in conquest, nay, of the eldest always, including his descendants, under his construction of *Quon. Attach.* c. 97; but "*primogenitum*" there, is qualified by "gradatim," and still more by the statute of Robert III. c. 3. where the relative phrase is, "ante natus *superior* frater," even supposing this could assist him; as it does not, being *jus tertii*.

[2] Sir John Lauder's Decis. vol. I. p. 167.

his next heir, or of line, of course by *descent*, without any *retrospect*, as obtained in the earlier case of Johnstone in 1574.[1]

Captain Hamilton of course, held the slender exception or specialty of conquest, his only *ostensible* auxiliary under the Scottish law,—for, as will be seen in the sequel, he further despairingly, though pertinaciously, clung to another irrelevant and even still weaker plea—equally to apply to honours,—upon which point—however, I am not aware, as yet, of any *explicit* legal *dictum* or precedent, there are, by no means, wanting relevant facts and arguments for the affirmative.

Of course, he held conquest to apply to honours. Does this obtain strictly in any event?

The law of conquest, no doubt, as already partly obvious,[2] is inculcated with us, to obtain in feus and heritable rights, upon which infeftment has passed, or in their general complexion (even while absent) associated with it, or where it "*might*" have obtained.[3] But infeftment anciently *was*, moreover, incumbent in grants of honours when they were territorial, nay even did afterwards obtain, when they happened to be conveyed by charter with lands; so that, combining the identical original nature of the first, with their constituting a real inheritance, the doctrine of conquest, and certain intrinsic legal results,—*as* is obviously elsewhere discoverable in the case of dignities,—may still follow, and be admitted in their case, notwithstanding the *modern* absence, so far, of the feudal symbolical form of possession. The old rule has undergone much extension, and it is notorious, a general service as heir of conquest, merely, is now competent. Upon this head, I may specially observe, that in valid conveyances of honours, down to as late as the reign of Charles I., and indeed still later, after the middle of that very century—as I can *fully* establish, we yet hear of *infeftments* of the "title, *honour* and *dignity*,"[4] while

Arguments for the affirmative.

Scottish honours originally carried by infeftment, the groundwork of conquest, of which traces are still discoverable at a later period.

[1] See pp. 838-9, *n.* [2] See p. 840, *n.* [3] See Macdowal, B. III. Tit. IV. § 21. and Erskine, B. III. T. VIII. § 16, &c.

[4] See, *inter alia*, a strong example in the case of the Earldom and honours of Angus, nay *first seat* and *vote* in Parliament, &c. in the reign of Charles I. pp. 159-60-1. And Dallas, in his Styles, Edit. 1774, vol. II. pp. 258-9,—merely to refer to him,—gives us the regrant of the Earldom of Rothes, &c. in the reign of Charles II. which proceeds upon the resignation of the Earldom, and "*title of honour*—for new *infeftment* of the *same*," &c. *Infeftment*, at one place, is also declared in the charter of the Crawford honours and lands, in 1648, to be sufficient for the "*title*, hon-

the same also bear to be carried in infeftments. Hence they may be then presumed, at least, *ex figura verborum*, not to be estranged from seisin, and even to come within the strict rule. Nay, even upon the antecedent principle of the connection between land and honours, the noted English Statute *de donis*, 13 Edw. I. as we have seen, though merely concerning "*tenements* and *lands*," has been brought to apply to dignities; and the modern *personal* Earldom of Ferrers,[1] created but in 1711, *included* within its benefit, solely from the *shadowy* semblance certainly, of still attaching or lingering locality or territoriality thereto, from the second accompanying honour under the common patent, the Viscounty of *Tamworth* being taken from a place.[2] This, then, is an illustration fully in point,[3] equally authorizing, by parity of reasoning, indeed *a fortiori* in the circumstances, the intervention and application of the Scottish regulation of conquest, in the same way territorial, as much so as the English statute in its especial object, to modern Scottish honours, that are also derived from places, —honours with us, withal, retaining far longer their territorial character than in England. Nor does the parallel cease even here; for the *Statutum*, enforcing the law of conquest in the *Quoniam Attachiamenta*, c. 88, treats of it in the exact way as in the *English* case above, in reference to "*terram* et *tenementum*," which were *there* held, in its relative statute, to imply dignities. The statute of Robert III. c. 3, also, when enforcing the former in the same manner, has allusion to lands. Hence the cases, both of feudal parentage, being identical in the material bearing, you cannot relevantly hold to an admitted construction in the one, without extending it also to the other. And besides this, to come directly home, Nisbet, in the reign of Charles II., whom, I believe, none will dispute as a

That fact backed with the original territorial principle, and interpretation of the English Statute *de donis*, in favour of the application of conquest.

Singular coincidence here, between the English Statute, and the Statutum regarding conquest in the *Quoniam Attachiamenta*.

our and dignity," &c. (Great Seal Register.) And yet Lord Mansfield, in the Sutherland case, maintained that the territorial and feudal notion in honours had quite ceased before 1214!

[1] Taken from a surname.

[2] See pp. 734, *n.* 4; 732, *n.* 4; 722, &c.

[3] Of course, it is thus quite competent to refer to English legal doctrine, and precedent, in the same way as to that of any other country, where there is, as on the present topic, not the most direct determination, and *practical* rule at home.

respectable authority, states, that even "Patents of Honour" are "*quasi feuda*," and should be subjected (obviously in the main) to the same rules.[1]—*Quid Juris*, I may ask, is there, as to the descent of a British Peerage, granted, under a Scottish denomination, to a domiciled Scottishman, the third of four brothers, who all survived him, with limitation to himself, and "his heirs male whatsoever,"—which now, after the English Devon decision, must include collaterals in both kingdoms,—in the event of the patentee's decease without issue? There can be no doubt that his second brother, by seniority, according to our law, and admitting conquest as above, would be the heir,—both to the exclusion of the eldest and of the youngest,—though different by the law of England. And though the dignity be British, it is not English *(abstractly)*, for there now cannot exist *such* English dignity; so that may it not, as circumstanced, and in virtue of the Scottish *ingrediential* influence, involved in the description and combination of "British," comprising Scotland as well as England, upon the principle, applicandi *singula singulis*, be regulated by the Scottish law, and hence under the application of that of conquest, descend as stated? However, I daresay, most lawyers in the sister kingdom may scout such a conclusion, yet it *may* obtain some countenance, by analogy, from the reasoning of Chancellor Brougham, in the Waterford Peerage case in 1832, who admitted that "there is now no more an *English* Parliament;" that the present upper House (of Peers) is "*equally* composed of the peerage of the *several* parts of the united kingdom,—that which now sits being not the Scotch, the English, or the Irish Parliament, but a new *Parliament identically*, constituted of *each*, and *which* therefore must be taken *with reference* to the *preceding* devolutions, (that is, as regards their old peculiar notions, and distinctive law, &c.) to stand in the *place* of the *Parliaments* of these *three* portions of the empire."[2] Hence, if the Scottish Parliament still exists, so far, as an element of the British, so

Corroboratory doctrine of Nisbet.

Can a British Peerage from a Scottish place, in a domiciliated Scottishman, be ruled by the law of conquest, holding it to apply to honours?

Argument in the affirmative by analogy, from the doctrine of Chancellor Brougham in the Waterford case.

[1] Doubts, p 124. So much, again, for honours only being feudal or territorial before 1214, according to the searching law of Lord Mansfield!

[2] See Report of the Waterford Peerage claim, in Clark and Finnelly's Appeal Cases, vol. VI. P. I. pp. 148, and previously at p. 147.

may congruently, a Scottish honour in a British Peerage, that gives the right to sit there, and may be *as much* Scottish as English or Irish, especially, as above, in the person of a domiciled Scottishman; from whence it might follow, the laws of *his* country too, being preserved by the Articles of Union, that the descent of his British title, under a Scottish denomination, ought to be accordantly fixed and regulated by them.

Concurrent opinion of counsel in behalf of the Bowes claim, in 1821.

My conclusion is at least supported, *a fortiori*, by the opinion of those lawyers who advised the son of John Earl of Strathmore, (a Scottish dignity), by Mary Milner, to claim the *British* Barony of Bowes, (as will be afterwards seen,[1]) limited in 1815 to the Earl, and the lawful heirs-male of his body; the said son being only capable of being lawful by the subsequent marriage of his parents, according to the doctrine of the Scottish law, that is wholly rejected in England. It is true, the claim was unsuccessful; but that was upon the specialty of the parties being *held* as *English*, and not as Scottish, both being domiciled in England, where they uniformly resided, and the father of the child had large estates.

Discarding the law of conquest in Scottish honours, those in the Belhaven instance would have always descended, and *never* ascended.

Discarding, however, the law of conquest with us in honours, the general presumed one then, of heritage,—as opposed to conquest,—wholly applying, without any control, the Belhaven dignities, of course, would have invariably *descended*, even in the opposite contingency considered, according to its distinctive attribute, as has been fully instructed, to the Wishaw line. And this must also be taken in reference with what has been speculated as to the *British* honour, where there still would be room for disceptation, in the same way, owing to the marked contrariety of succession in the two kingdoms.

Successful claim of the younger collateral Belhaven heir-male, though preferable heir of line, in 1795-6.

In consequence of what had preceded, as stated, in 1793, William Hamilton of Wishaw, not then a party, but male descendant and representative of the William Hamilton of Wishaw mentioned, *youngest* of the three Udston brothers, owing to the way being thus necessarily cleared for him, claimed forthwith the Belhaven dignities, in a more solemn and effectual manner, by a royal reference, upon his petition in 1795; and after legally establishing his descent, with the necessary extinctions, that

[1] Under the Strathmore Peerage case, in 1821, see p. 848.

now formed the only obstacle, had them awarded to him, by the Lords' resolution, on the 19th of April 1799.[1]

I am informed, and it transpires from the Belhaven procedure, that, by the law of England, the party in 1790, and 1793, of the elder, or Coltness branch, would have been preferred; but with us, it was obviously different,—thus additionally instructing—independently of other weighty authorities, even including English lawyers,[2] and the plain sense and reason of the thing, to the same purport, that the law of Scotland must relevantly and exclusively govern, as it here clearly did, in the case of Scottish Peerages,—instead of the *foreign English*,—or an anomalous intermediate system, such as has been crudely, and gratuitously affected by some, in modern times. Certainly too, you cannot, at the same time, both approbate and reprobate in law; and hence if you enforce the appropriate Code,—besides so solemnly reserved to us by the Articles of Union,—even but in *a* particular, especially in the above essential one, (among many, as actually obtains,) you must do so in *toto*. There is no subsequent room for any contrary qualified, or party-coloured doctrine. Indeed, admitting the latter,—not adverting to its gross illegality,—the most baneful and inextricable legal consequences would ensue; Peers, hitherto admitted and recognised, would then fall to be deprived of their honours;[3] there would indeed be no definite, practicable, or consistent rule. Our Peerage law would be at the mercy of mere fluctuating whim and caprice,—not to add any plausible, though in fact dangerous innovation, under Lord Mansfield's undescribable, deceitful and elusory maxim of expediency, besides so unauthorized in itself, to be afterwards adverted to.

Scottish law here entirely ruled in opposition to the English, which is different, and the fatal consequences of the adhibition of any contrary irrelevant system as pretended.

[1] Lords' Journals. Of course, it was agreed to by the crown.

[2] This will be proved in the sequel, under the closing remarks.

[3] The Peerage determinations, moreover, in the Stair, Errol, and Roxburghe cases, &c. would all be void in effect, as the honours in every one of them were awarded to claimants by regrants, upon resignations, altering the original established descent, quite in the face of the English law, that absolutely scouts and rejects such mode of conveyance. And I need not add, that there are other striking discrepancies between our law of succession, and the English, independent of what is noticed, as capable of producing the condemned results above.

Unsuccessful Belhaven claimant also wildly attempted, under countenance of Lords Mansfield and Rosslyn, to make the English law the sole test—which was rejected.

Under favour, however, of the above crude and absurd conceit and hallucination, Captain William Hamilton, likewise, the putative, and rejected Peer in 1793, sought, in his extreme straits, as a forlorn hope, to bring foreign law, and that of England, to his aid, in the weighty matter of the succession, where, under the relevant Scottish, he was wholly excluded. He founded, not unnaturally, upon the strange arbitrary rule of Lords Mansfield and Rosslyn, since the Union, in respect to the descent of our honours *only* to heirs-male of the body, *their* peculiar presumptions in descent, and upon the irrelevant construction of our limitations by the former, after the *special* method in the Kirkcudbright instance, with certain relative precepts and *dicta*, which, he truly said, were quite contrary to the law of Scotland, and which last being fully discarded, under the mistaken assumption, moreover, of such extraneous innovations being *solely* by the law of England, he next contended accordingly, that it therefore should *solely* rule in his important point, and necessarily give him the preference as the heir. This was indeed *rather* a violent resource and expedient. We hence again see the *deep* obligations we owe to the preceding legal dignitaries, and that error only engenders error. Nay, under their shield and countenance—for if you transgress one law, according to *original* precept, you *may* perpetrate every ruin,—he went further, and even maintained, that all Scottish Peerage grants after the Union of the crowns, must be regarded but as English, and construed accordingly, in their limitations, &c.! But the House of Lords, now under the direction of other wiser counsels, would not listen to such absurdities, as little as to the previous plea, and at once rejected his claim.[1]

Important point in extinctions fixed in the Belhaven claim, in 1795-9.

In the final Belhaven claim in 1795, and afterwards, this important point was settled under the head of extinctions, which rather abounded, not unnaturally, owing to the compass of the pedigrees, that when the existence of a preferable heir

[1] I am informed, that this Captain William Hamilton, and his male stock, that of Coltness, have since failed; so that the present Lord Belhaven, the son of the claimant in 1799, is now, in every possible view, the heir-male; and consequently male representative of the common Udston branch of the family of Hamilton.

is merely established by secondary or historical evidence, if he happen thereby, at the same time, to be *extinguished*, that *ipso facto suffices* in law, always supposing that nothing further is recoverable. The objection comes thus, in fact, to be entirely neutralized, the evidence itself proving a fair antidote to any baneful effects it may bear, *in gremio*.[1]

Case of Borthwick from 180 to 1814, and of Queensberry in 1812.

The case of the Barony of Borthwick, from 1808 to 1816, &c. has already been discussed,[2] as well as those of the Dukedom of Roxburghe,[3] and Marquisate of Queensberry, &c.[4] decided respectively, the 11th of May, and 9th of July 1812.[5]

Case of Roxburghe, also in 1812.

The former involved the import of the patent of the Roxburghe ducal honours, the 25th of April 1707,[6] having reference to, and under control of the regrant of the Earldom, (first created in 1616,[7]) upon a resignation, the 31st of July 1646,[8] in terms of which, through the medium of a relative entail,[9] including moreover the lands, the family honours, with express exception, however, of the *Barony* of Roxburghe, were awarded to a female heir. The constitution of the Barony not being preserved, though the date of the act of creation is transmitted, as on the 16th of November 1600,[10] it was held to descend only to heirs-male of the body, and to be extinct, owing to their failure.[11] This was, in a measure, according to Lord Mansfield's law, though the cotemporary descent of the estates was to heirs-male. The opposing claims, also by royal references, of Lady Essex Ker, the *nearest*

Barony of Roxburghe disallowed in 1812.

[1] The above account is taken from the papers, pleadings, and procedure in the case, &c.

[2] See pp. 584—594, *incl.*

[3] See pp. 77, 96, 199, 201, 218-19, 729-30, 814-15.

[4] See pp. 668-9. [5] Lords' Journals.

[6] Great Seal Register.

[7] In favour of heirs-male only. (Original Roxburghe Charter-chest.)

[8] Great Seal Register. [9] Upon Record.

[10] Under the autograph attestation of Sir David Lindsay of the Mont, Lord Lyon at the time, Ad. Lib. This was, of course, not *the previous* Sir David Lindsay of old, *so* noted, but a later relative, who discharged the same functions. The former Sir David, of the date given in the text, states there that "the Laird of Cessfuird" was created "Lord of Roxburgh."

[11] Stress was also laid upon the non-assumption of the dignity since the death of Robert, the first Baron, without heirs-male of his body.

Roxburghe heir of line, and of General Walter Ker of Littledean, a very distant heir-male collateral,[1] under that character, equally founding upon the above regulating conveyances, which they construed their own way, were rejected.[2]

The case of the Earldom of Airlie, in 1812, &c. has likewise been given under the article of Forfeiture.[3]

Case of the Earldom of Strathmore, in 1821.

The case of the Earldoms of Strathmore and Kinghorn, &c. (already glanced at[4]) in 1821, merely involved a point of legitimacy, whether the domicil of John, the last Earl of Strathmore, was English or Scottish; and the former being established, John Bowes, his natural son, was adjudged not to be legitimated by the subsequent marriage, in London, of his said father, with Mary Milner, an English woman, though "solut persones."[5] It is further observable, that the Earl was nearly *in extremis* at the date of his marriage, the 2d of July 1820, being carried to, and taken from church in a chair for the celebration, under the mortal malady of which he died next day. This would, moreover, have founded an objection by the canonists.[6] The case came before the Lords by royal references, upon the respective petitions of the offspring in question, and of Thomas, present Earl of Strathmore, the next brother, and heir-male of his father, both claiming under the regulating grants of the honours, the 30th of May 1672, and the 1st of July 1677,[7] (on a resignation) to heirs-male in the first instance; and, in terms of the Lords' resolution, Earl Thomas was necessarily preferred, on the 29th of June 1821.[8]

It merely involved an immaterial matter of legitimacy.

[1] See, on this head, pp. 401, *et seq.*

[2] Lords' Journals.

[3] From p. 724, to p. 730, *incl.*

[4] See pp. 418—844.

[5] This was agreeably to the present law; see pp. 417-8.

[6] See pp. 483-4. Of course, the unsuccessful party here objected, as in point, and as rebutting the exception by our law, (according to modern fashion in such emergencies,) the inaccurate report of the case of the Master of Sempill, by Craig. See pp. 484, *n.* 2; 463, *n.* 4. &c. According to Craig, the Master was carried to the celebration in *lectica*, while the Earl of Strathmore in a sedan chair.

[7] Originals in the Family Charter-chest, and Great Seal Register. They proceeded upon a resignation, *extending* the *original* descent, according to the old system.

[8] Lords' Journals, papers in the case, &c. John, the natural son, also unsuccessfully claimed, in the same way, in 1821, his *father's* British

Heritable Office of carrying the crown of Scotland at Parliaments, contended by a party to be connected with the right to the Earldom of Angus, in 1822-3.

On June 14, 1823, there occurred the discussion before the Privy Council, between the Duke of Hamilton, Marquis of Douglas, &c. and the late Lord Douglas, respectively, male and female descendants of the noble family of Angus, touching the claim of the latter, that was opposed by the former, to the office of bearing the crown of Scotland, (still preserved), at royal processions. Strictly, the hereditary right in question was that of bearing the crown at Scottish *Parliaments*,[1] of course merged now in the British; but the same had received a liberal interpretation at the Scottish coronation of Charles I. at Edinburgh, when it was determined in Privy Council, the 12th of June 1633,[2] "that the *honours*, (comprising the crown,) be carried be the *same* persons at the *coronation*, who are to carie the same at the parliament; to *witt*, the eldest in creation,"—which *adjunct* has been differently interpreted; and accordingly, the crown *was* borne at this other solemnity by William Douglas, Earl of Angus, created Marquis of Douglas, ancestor of the preceding noble parties, and undoubtedly the hereditary crown-bearer in Parliaments. From thence, by strong induction and reason, the hereditary privilege was naturally argued to extend to all public and royal processions where the crown might be carried. The Duke of Hamilton's claim or interest, in opposition, upon the same ground, *quoad* the *office*, stood upon his alleged right to the Earldom of Angus, still unconfirmed,[3] with which he contended the office was connected, and upon the older grants of the *Comitatus* of Angus to heirs-male, *specially* conveying it. Lord Douglas claimed upon the *subsequent*, and *now* regulating grants of the fief, latterly under the sign manual, to the like import, towards the end of the 17th century, and beginning of the 18th, (before the Union,)—but introducing heirs-*female*, and necessarily himself, in exclusion of the former. The

Extended by former practice to carrying the crown at coronations.

The office claimed, in 1822-3, by the heir-male, and heir-female, under older and later grants, independent of the previous argument from the Earldom.

Barony of Bowes, &c. (now extinct,) created the 7th of August 1815, to *him*, and the heirs-male of his body.—Lords' Journals.

[1] See p. 157. [2] See Acts and Decrees of Privy Council, of that date.

[3] It was claimed, by a royal reference, upon petition, by Douglas Duke of Hamilton, his male predecessor, in 1762,—as also, in the same year, by the late Lord Douglas, see pp. 649-50; but no discussion or resolution obtained,—the matter not being prosecuted.

Relative Report of the Privy Council in 1823, approved of by George IV.

British Privy Council, after the discussion noticed, represented to George IV. by their report, the 8th of August 1823, that while the hereditary privilege of bearing the crown at royal processions, *generally*, was not made out, Lord Douglas's claim, so far as it went, involving an heritable right, might be discussed and decided by the Courts of law (Scottish), which his Majesty approved of accordingly. There has, however, been no later procedure. The report, in the closing resolution, was obviously in consonance with our Peerage practice before the Union.[1]

Are high Hereditary Offices analogous to Peerages in their character and devolution, &c. or if *e converso*, now *in commercio*?

The leading decision in the case of Cockburn of Langton, 23d of July 1747,[2] as to the hereditary office of King's Usher in Parliaments, and General Assemblies, &c. has shaken an idea entertained of our high hereditary offices being analogous, in certain attributes, and their devolution, to Peerages, and not *in commercio*; and the late Lord Lauderdale, when he objected to the right of the Earl of Errol to his dignity in 1796-7,[3] admitted that the latter would still continue hereditary Constable of Scotland, in virtue of its being carried in his favour, like an ordinary subject, by a mere Exchequer charter, without the sign manual, that was also invalidly founded upon, in respect to the honours, before the fortunate discovery of the solemn and regulating conveyance transmitting both.[4] But this material question may not be properly settled; and I formerly referred to *opposite* legal conclusions and authorities, in the reign of Charles II. as to the nature and descent of the high hereditary office of Constable, as well as Great Marshal of Scotland.[5]

The question *may* be still, in a certain degree, doubtful, though, generally, the latter conclusion prevails.

Resolution of the Lords in 1822, forcing remoter heirs

The Lords resolved, the 13th of May 1822, upon a report of their committee, to whom the matter had been referred, under the same authority, that none, "upon the Decease of

[1] From the printed papers and authorities, &c. in the case. For more minute particulars of the same, that grew out of contending claims of the noble parties to carry the crown at the procession of George IV. to the Castle, when in Edinburgh, in 1822, see Mr. Maidment's "Heraldic and Antiquarian Tracts," published in 1837, pp. xxviii-ix. *et seq.*

[2] See Falconer's Reports. [3] See pp. 85, 770, *n.* 768-9.

[4] See pp. 85, 260, 814-15, *n.* where the Exchequer charter in the text is explicitly noticed.

[5] See p. 24, including *n.* 2.

any Peer, or Peeress of Scotland, other than the son, grandson, or other lineal descendant, or the brother of such Peer, or the son, grandson, or other lineal descendant of such Peeress, shall be admitted to vote at the Election of the Sixteen Peers, &c. or at the Election of any one, or more, of such Peers (Scottish), to supply any vacancy" in the Scottish representation accordingly, "untill, on claim made on behalf of such person, his right of voting at such Election or Elections, shall have been admitted by the House of Lords;" it being at the same time resolved, "that the right of every person voting, or claiming to vote, or having voted or claimed to vote, at any Election of the Peers of Scotland, shall be subject, and liable to every objection to which the same would have been subject and liable, had the foregoing Resolution not been agreed to."[1] And accordingly, Henry David, Earl of Buchan, the paternal nephew of the last Earl, upon his petition to the Lords simply, grounded upon the previous Resolution, to be allowed to establish his right to vote at such Elections, had the matter referred to a Committee of Privileges, the 14th of July 1830, who reported the 21st of July thereafter, that the petitioner "hath made out his Claim to be admitted, as a Peer of Scotland, to vote at the Election of Peers," &c.;[2] which being agreed to, the consequent "Resolution and Judgement" was ordered to be forwarded to the Lord Clerk Register of Scotland.

and claimants to instruct their right to Peerages before *them*, on the death of predecessors.

Claim of the Earl of Buchan allowed accordingly, in 1830.

It must, seemingly, as formerly remarked,[3] be incidentally with a view to the Election of the Sixteen Scottish Peers, ne-

This as a compulsator can only have reference

[1] Lords' Journals. [2] *Ibid.*

[3] See pp. 648-9, 288, n. By the Irish Act of Union, 39 and 40 of George III. (1800), c. 67, Art. 4. the British House of Peers have power and authority given them, in Irish Peerage Elections, and relative claims, with right of decision. This might follow naturally, in a *certain* measure, from the former dependence of Ireland upon England, and similarity of their laws and institutions, after the abolition of the Irish Parliament; but in the Scottish Act of Union in 1707, there is *nothing* of the kind on the head of Peerage Elections, nay, no Peerage jurisdiction at all is given thereby to the present noble tribunal,—naturally enough owing to the fact I have shewn, of the Supreme Civil Court with us, being here the Ordinaries, and its strictly being only competent, by our law and notions, to the British House of Peers, upon *appeal*, as in *any* civil case, to cognosce in the matter. See also pp. 640-1.

Different situation between the Irish and Scottish Peers, as to claiming, in reference to Elections.

to Scottish Peerage Elections, for the Lords have otherwise, upon the English principle, no innate jurisdiction in Peerages.

cessarily and indispensably to ascertain who are the legal component members of their body, the upper Chamber of the nation, that the House of Peers came here to act; for differently, as respects the Irish Peerage, they have no corresponding fixed power by statute; and upon English principle, contrary to the Scottish, as has likewise been explained,[1] they, *de plano*, have, directly at least, no peerage cognizance without a reference from the crown, that may be delegated to any persons. It might, however, be as well if Parliament would conclusively legislate, in every view, in the Scottish, as well as in the Irish case; for besides, the above resolution of the Lords, in 1822, has not met the general evil, so much complained of; it does not apply to parties, the asserted claimants to Peerages, that have been *previously* assumed, owing to the failure of immediate heirs, without the range of the privileged relationship specified, as is illustrated, *inter alia*, in the late futile pretensions to the Earldom of Stirling. Under colour of the preceding motive too, of extrication of necessary right, it is possible to imagine that the Lords might, in fact, in worse times, (still upon the English principle), encroach upon the exclusive cognizance of the crown in honours, and ultimately decide in Scottish Peerage claims in general. Hence it may, *perhaps*, be partly dubious, whether the case of the Earl of Buchan in 1830, not springing from a contested Election, or immediately touching the noble tribunal in question, was thus strictly determinable as it stood, without a special reference from the crown, which might have been more regular and satisfactory.

Their privilege, so far, should not be greatly stretched, and might be better defined, and fixed by Act of Parliament.

Petition in 1832 by the Marchioness of Downshire to the Lords, against the assumer of the Stirling honours, in support of her own prior interest, even upon his own shewing.

On the 16th of March 1632, Mary Marchioness of Downshire, Baroness Sandys, &c. petitioned the Lords against Mr Humphrys Alexander, whose claim was utterly nugatory, in so far as regarded his voting at Elections of the sixteen Peers, and taking the dignity of Earl of Stirling, upon the preamble that the known patent of the Stirling honours was only to heirs-male, and that, upon his own shewing, if there was a valid extension of them, as he pretended, (in 1639), to the eldest heir-female, without division, of the last heir-male, they did not belong, as he stated, to him, but to her Ladyship, as the

[1] See pp. 648-9, *ut sup.* &c. also p. 853.

direct descendant of Lady Judith Alexander, sister of Henry, the last Earl of Stirling, who died in 1739.[1] This consequence was perfectly correct, as has been further since corroborated; and the noble petitioner concluded with praying, that the Lords would require the intrusive party to prove his right by due course of law, until which he may be enjoined not to assume the dignity, or exercise the relative privileges; or that they should make such other order therein, as may be proper for the protection of the privileges of the Peerage, and their honour and dignity. The petition was referred to a Committee of Privileges, the 19th of March of the same year,[2] previously constituted by the Lords in reference to Peerage matters; but nothing followed of importance.

Referred to in Committee, without more following.

The Countess Dowager of Northumberland, in 1672, had petitioned the Lords in like manner, against James Percy, (an impostor, as transpired,) taking the title of Earl of Northumberland and Lord Percy, "to the dishonor of that family," when the House referred the matter to the Committee of Privileges; but, as Cruise pertinently observes, "the house *(afterwards)* applied to the King for permission to proceed in the claim," on the part of Percy, "which was granted," so that all difficulty and exception were here obviated.[3] This subsequent form (upon English principle) might hence have been also adhibited, through application of the Lords, or of the party, in the case of the Marchioness of Downshire, (the Dowager); for Cruise again justly inculcates, "that without a reference by the crown, the house of lords has no right to entertain a claim to a dignity."[4]

Similar Northumberland case in 1672.

Better, if, in the above Downshire procedure, the sanction of the crown had also intervened.

The case of the Barony of Polwarth, before the Lords by royal references, upon the petitions of successive heirs, under the same character, from 1818, until the 25th of June 1835, when it was decided, has been already stated.[5] I still contend,[6] that by our genuine—at least older law,—in virtue of the limitation in the Polwarth patent in 1690, to heirs-male

Case of the Barony of Polwarth, 1818-35.

By our *genuine* law, and in terms of the Polwarth limi-

[1] I need hardly add, that such regrant was quite visionary, and an actual forgery; see p. 293, *n*.

[2] Lords' Journals. [3] On Dig. p. 257. [4] *Ibid.*

[5] See pp. 177, 673-8. *incl.* [6] See p. 196.

tation in 1690, the heir general or female of the *last* heir-*male* in *possession*, would have excluded the heir in such capacity, of the elder heir-male.

of the body, and to their *heirs*,[1]—the heirs-male being construed *first* to be exhausted, (as to which there is now elsewhere a question, that did not fall to be solved in the above claim,[2] the claimant being alike the heir female, or general, of *all* the heirs-male), the daughter or heir-female of the heir-male *last* in *possession*, though a *younger* heir-male, would exclude the daughter or heir-female of an older one, who had happened to take before. *Our* peculiar distinctive law, I conceive, different from that of England in these respects, merely inquired in such cases of succession, who was the heir of the *last* in possession, without looking back, as there, or weighing or tracing it, *ab origine*.[3] In this way a father, as heir of an only child, deceased without issue, still succeeds to a feu, that had *vested* in the latter, through his mother, an heiress, to whom the previous parent had no blood relation,—although the original superior and granter merely contemplated the blood of the mother's ancestor, the *primus investitus* and disponee, and intended that the property should strictly go to him and his heirs.[4] Nay, by the strong cotemporary and corresponding understanding, even the crown of Scotland (thus also comprehending far more than honours) stood descendible to the House of Darnley or Lennox, the paternal heirs *only*, of James VI. *qua* such, *after* he had been *invested* in the kingdom by his coronation, and put in real possession, —in the event of his deceasing childless.[5] The crown, it is to be

Difference here, between our law and the English, with illustrations.

Case of the crown of Scotland, after the middle of the 16th century, taken with its regulating limitation by the Act of Settlement in 1373.

[1] "In dictum Dominum Patricium Hume (the patentee) et hæredes *masculos* de corpore suo legitime procreatos seu procreandos, et *hæredes* dictorum *suorum* hæredum." Great Seal Register, and Books of Parl.

[2] Still, in effect, *in pendenti*; as will be obvious in the sequel.

[3] See Stair, B. III. T. IV. § 34,—thus completely at variance with the English principle, *materna maternis*.

[4] See Stair, *ut sup.*

[5] See pp. 196-7. The effect of the coronation, or investiture, upon the feudal principle, was great; and this, among certain political deliberations in 1568, was one, that there should be an *Act preserving* against *prejudice* the right of the Hamiltons, (as next heirs of Mary), just at *the time* of her marriage,—i. e. *before* James's birth and coronation, that thus *ex necessitate*, seriously deterioriated it. (Secretary Cecil's "Deliberations," of that date, Paper Office.)

On this head Sir Nicholas Throckmorton, in his Letter, quoted under

observed, merely came to James VI. through *Mary*, his mother, of *whom* the Hamiltons, excluded as above, after him, were the next strictly *by blood*, and certainly not the House of Lennox, in its various lines, who, although preferred, as stated, were *here* strangers. And, what is even additionally remarkable, and renders this precedent peculiarly apposite, the succession, in their instance, had opened to Mary and James, under a remainder,—failing repeated ones to heirs-male of the body, to the "*veri* et legitimi heredes *de sanguine*, et *parentela* regali, extunc, et inantea,"[1] in terms of the regulating parliamentary settlement of the crown in favour of Robert II. and those appointed to succeed, in 1373.[2] What is this, but to the *identical* lawful heirs of the Stewarts—far more emphatically than in the Polwarth patent, deriving by *blood* from the person of *the* "Stewart" then upon the throne? while the House of Darnley or Lennox could only trace their male descent from Sir Alan Stewart of Darnley, in the reign of Robert Bruce, long anterior to the accession of the former. Nor, whatever genealogists *may* pretend, *can they*, by proper *conclusive* proof,

Presumption in favour of the House of Lennox, as *paternal* relatives of James VI.

It bears in principle, *a fortiori*, upon that of Polwarth.

the last reference, also adds, that the office of "Tutor to the *Prince*, (James VI.) and *Governor* of the realm in his minority,—be the opinion of the *best learned* in the law,—doth and *justly*, appertain to the Earl of Lennox." The latter, *Mathew* Earl of Lennox, grandfather of the king, *as* the "*nearest* agnate" *succeeding* to him, capable of acting, and discharging the office, was entitled to that high situation, (formerly, in the same way, discharged by the Hamiltons, in the infancy of Queen Mary,) in terms of Act 1474, c. 6. Charles, his only younger son, brother of Darnley deceased, was thus, though next heir, on account of his minority, out of the question; and accordingly, the Earl became "*lauchfull* tutour and *Regent*." See Acts of Parl. last Edit. vol. II. pp. 106-7; vol. III. p. 65. The Act of Tutory in 1474, under the first reference, legally gave Lennox the tutory, though "nocht *imediate* to *succeid* to the *childe*," (because, as it specifies "of *yonger* breder," *brothers.*) The general principle of succession applying here by legal understanding, clearly involved the higher eventual right, after the Regency, to the kingdom, though not originally inherent in, or derived from the Lennox family.

[1] *Extunc* is plain enough, and *inantea* is rendered by Du Cange, *(sub voce) in posterum*—so the sense of the adjunct here is obvious and natural, and both *literally* involve the *constant Stewart* descent.

[2] Original, in her Majesty's General Register House, among the chief muniments of the kingdom, &c.

remount to an earlier ancestry, or legally connect themselves with the royal stem. It is true, no doubt, that, by our original law, there was only succession to a mother, or her relatives, such as the Hamiltons, in the above instance, after the paternal line,[1] though now wholly excluded,—which may make the Lennox case stronger; but still the principle remains in point; and the *express ratio* assigned for the Lennox preference was, that the family were "*next heirs*" to the individual last "*invested*" in, and in "*real possession*" of the crown,[2] whereby they alone took—in identical words, *as* the *heirs* of the *last* in possession. Upon this exclusive ground is their right precisely based, which, at the same time, fully substantiates my proposition, as it prefers, in principle, *every* heir in *that* situation.

The Hamiltons, the next heirs strictly by blood, thereby excluded.

The essential law in question, independently of older corroborative authorities, has besides, even, been inculcated by Erskine in modern times, who explicitly says, "*no* regard is had to the question, (in heritage), *From* what *quarter* the estate of the deceased has *come?* If the right appears to be once *vested* in the *deceased*, the *only* remaining question is, who is *his* heir at law? *without* considering whether such heir stands *related* to *him from whom* the estate *descended* to the deceased."[3] In the same way, Macdowal before inculcated here, that "*we* (but) consider in whose person the right *last* subsisted, and titles must be made up by *his* heirs."[4] And, as shewn under the head of *conquest*, the succession, under that naked and narrow exception, always paternally *descends*, and never ascends, when there is a corresponding heir of line in the same degree, or downwards (by representation); in support of which every legal presumption transpires.

Concurrent doctrine of modern lawyers, at least in the ordinary case.

In these circumstances, it is curious to observe by that strange vicissitude and anomaly in human sentiments and occurrences, an English legal dignitary in the Polwarth claim, supporting the effect and construction I have given to the Polwarth limitation,—upon, as I conceive, the natural and

Curious inversion of opinion here, between a high English, and a high Scottish legal authority.

[1] See Reg. Maj. Lib. II. c. 25, § 5, and Macdowal of Bankton, B. III. T. IV. § 19. [2] See p. 197, and especially case of Gray, p. 861-2, *n.* 4.

[3] Erskine, B. III. T. VIII. § 10. Stair's authority, as referred to before, is to the same purport.

[4] Inst. B. III. T. IV. § 19.

genuine Scottish principle;[1] while, inversely, it is rejected by a Scottish legal dignitary, upon what may be only construed by us, the English—who, in the case agitated, would prefer the daughter or heir-female of the *eldest* heir-male.[2]

The latter respectable personage further appeals, in support of his conclusion,[3] to the similar succession (in *fact*), of Anne Duchess of Hamilton, the eldest daughter and heir-female of James, first Duke of Hamilton, to the Ducal honours, *after* they had vested, on the death of the said Duke James, her father, without male issue, in Duke William, his

Hamilton precedent, in 1643, upon which the latter founded, irrelevant.

[1] This again corroborates that English authorities admit the exclusive application of our law in the case of Scottish Peerages, which (however strangely denied,) is besides strikingly evident, in the other leading respects, from the Polwarth claim.

[2] Chancellor Brougham, in the Polwarth resolution, June 25, 1835, inculcated that the party taking, under "*whom failing*, to the heir *whatsoever*," ("*et hæredes* dictorum suorum hæredum," i. e. of the heirs-*male*) in the Polwarth patent, (see p. 854, *n.* 1.) "is the heir-general of the *last* of such heirs-male of the body of the first patentee," who had succeeded before, &c. "That," he adds, "is perfectly legitimate, *according* to the law of *Scotland*." And Lord Lyndhurst would appear to have coincided, (as has also been understood on our Bench;) for he stated "that *the heir* in general of the last *heir (male)* in tail, *is* the heir-general of the first *heir (male)* in tail." (From the notes of the speeches of the above Lords, taken, *in causa*, by Gurney.) But the President of the Court of Session, in the similar case of Lockhart *v.* Macdonald, July 24, 1840, (to be afterwards noticed), in adverting to the former of these opinions, replied, that the party in question "*is no* such thing (*such* heir-general) by the law of Scotland; it would be the daughter of the *eldest* branch of the heir-male." (See Dunlop and Bell's Reports, vol. II. p. 386.) Though this important matter was mooted, and in a pointed manner, both affirmatively, and negatively, as thus contended, by the litigants in the case *last* cited, according to their argument, no special authorities, or precedents, other than the above legal *dicta* in the Polwarth claim, were referred to. (See, *inter alia*, Dunlop and Bell's Report, *ut sup.* pp. 414-15.) On this account, and *that* case being both curious and keenly contested, I may perhaps be the more pardoned for attempting to contribute my mite upon the relative controverted subject, (as in the text,) in the dearth that seems so far to prevail.

Opinions of Chancellor Brougham, and the late Lord President, in the matter of the Polwarth limitation.

[3] Dunlop and Bell's Rep. *ibid.* p. 386. His Lordship's illustration turning upon mere mistake in fact, though important in its consequences, I have taken it upon me to correct, under favour of the known candour and liberality of the eminent legal authority in question.

younger brother, by whose daughters and heirs-female again, (he likewise having left no male descendants,) who survived him, equally with Duchess Anne, and had issue, there was here no counter-claim or opposition. If this had been in terms of such a limitation as we have been considering, the precedent assuredly would have been good; but, with every submission, it is, in truth, as it *stands*, clearly irrelevant, and does not apply. The limitations in the patent of the Dukedom of Hamilton, &c. dated the 12th of April 1643, which wholly ruled in the matter, are quite different, being first *nominatim*, to *James* the patentee, then *Marquis*, but in consequence thereof, Duke of Hamilton, and to "the heirs-male of his body;" *whom failing*, to Duke William, also *nominatim*, (under his appropriate title then, of Earl of Lanark), his younger brother, and to "the heirs-male of his body;" "*quibus etiam deficientibus*," which comes immediately after, "heredi *femelle natu maxime* absque divisione, *de corpore* dicti *Jacobi Marchionis* de Hamiltoun,"[1] &c. Duchess Anne being then, and always, indisputably such heir-female, so clearly and expressly designated, hence took by special remainder, as an absolute stranger, being, in this abstract and unequivocal manner, *factus* hæres, without the least chance or possibility of an opening to the force or intervention of common law, or to any material question, owing to the confessed discrepancy between the two cases, as occurred in that of Polwarth; upon which the present, from its different scope and import, cannot bear. The Hamilton patent is far fuller and more definite than the Polwarth, and as little could ever originate the other doubt there, as to the preference of the succession of the heirs-male of the body,[2] who all in the former fell *expliciter* to be exhausted before the heirs-female could take. Nay, the *prior* succession of Duchess Anne, so much relied upon, may be said rather, from the *express* and anxious manner it which it is secured, to oppose the important conclusion drawn by the preceding Scottish legal functionary, inasmuch, as contrasted with the Polwarth substitution, the special remainder in her case might have been indispensably inserted to preclude her actual

The case of Hamilton seems rather to bear the other way.

[1] Great Seal Register. [2] See p. 854.

extrusion, or postponement, through the use of less definite phraseology, as in terms of the latter, owing to the admitted force of common law, by the daughters and heirs-female of Duke William, her uncle, the last heir-male in possession. And such especial care was further observed on this head, that in a final settlement,[1] by the upright Duke William, of the estates, &c. after his succession, dated the 19th of March 1650, in failure of heirs-male of his body, he calls Duchess Anne again under an explicit remainder, as before, though further *nominatim*.

The general, so far, indiscriminate word "their," moreover, prefixed to heirs in the Polwarth limitation, referring to any heir-male,—to the youngest, as well as to the eldest,—strikingly quadrates with my interpretation, which, I conceive, it may uphold; the former being thus resorted to, in the necessary uncertainty as to the precise event of the succession, that depended upon natural contingencies it was impossible to anticipate, and which therefore was left under its agency, applicando *singula singulis*, to the disposal and obvious arbitrament of common law. This, at least, seems a fair technical presumption; and if the intention of the ruling party was different, all we can then say is, *quod voluit non fecit*.

The term "their" in the Polwarth patent, seems to support the present material induction.

The important case of Bargeny in 1738-9, is different in terms[2] from that of Polwarth, inasmuch as the disputed limitation of the estates there, in 1688,—failing his elder and younger sons *seriatim*, and the heirs-male of their bodies,—is to the *father*, John Lord Bargeny, the settler, and the *other* heirs-male of his body, (of whom he had *none*)—"which failing,"—and this is now the material clause,—"to the eldest heir *female* of the body *of the said John* Lord Bargeny, and the descendants of her body,"—the succession here obviously devolving, in the latter instance, to the heirs of line, or at common law, with the sole immaterial exception, from the ordinary condition adjected, that the eldest heir-female shall succeed "without division." The heirs-general, therefore, of *John* Lord Bargeny, the entailer, and not generally of the

Important Bargeny Case in 1738-9, different, in a certain degree, in the point in question, from that of Polwarth.

[1] See relative charter, 15th of June 1661, Great Seal Register,—also p. 864.

[2] I may not properly have marked the specialty in a corresponding case, I have glanced at, in pp. 196 and 199.

The Bargeny decision in 1739, preferring the heir-female of the eldest, instead of the younger heir-*male*, who had been in possession, not apparently supported by our genuine law.

heirs-male before called, as in the Polwarth destination, were hence to take *strictly*, *ex figura verborum*; and upon this footing it was decided, upon appeal, in 1739, in terms of the relative limitation, that the female descendant of the younger son and heir-male, though, as it turned out, the last in possession of the estate, fell to be excluded by the female descendant of the elder son and heir-male, notwithstanding the inheritance had *previously passed* from that line, owing to the failure of heirs-male of the same, to the aforesaid younger heir-male, whose male issue came also to fail. But it may be fairly questioned, whether this was a fitting decision, according to *our* genuine, at least original notions, the substitution still not being sufficiently precise[1] for the material purpose,—combined with the noted received brocard, that "the *heir* of my heir is *my heir*,"—a character assuredly that vested in the rejected party; and moreover, again, with the strong, nay irresistible bias by our law, as has been evinced,[2] except only in the *inapplicable* exception of conquest, *cæteris paribus*, of landed succession to *descend*, necessarily here, to such last younger heir, and not to *ascend*, as was found, in 1739. It seems too violent an effort in the circumstances, and more akin to the untenable attempt of Captain Hamilton, the *elder* Belhaven heir,[3] to make the same thus ascend—against the ascertained force of the current,—notwithstanding the intervening lapse—in both instances—to the *elder female* heir, in the present case. Nay, by the general feudal law, it was a question, whether in such succession, "si fæminâ per masculum *semel* exclusâ, isque masculus postea decedit sine liberis, an *adhuc etiam* fæmina excludatur?"[4]—that is, irretrievably, in *every future* event, there being no competition here, between female heirs,—while it is, at the same time, admitted, that "*postremi* masculi *filia*, etiam sorori, in priori gradu, in successione avi aut proavi prefertur,"[4] thus showing that no exclusion,—far from it, obtained as to the other heir in view.[5] More definite and conclusive terms, therefore, or a special remainder in

Difficult still, to make the succession there ascend after descending, as it was *found* to do.

[1] See further, as to this, in the sequel.
[2] See pp. 838-9, *n.*
[3] See, under Belhaven case, pp. 839-40.
[4] Craig, De Feud. Lib. I. Dieg. 14, § 13. Craig is, of course, a *better* authority upon general feudal law, than in *ours*.
[5] *Ut sup.* § 3.

favour of the elder Bargeny heir-female specifically, as was technically and wisely done in the analogous Hamilton instance in 1643,[1] should have been resorted to, as a relevant and effectual lever of ascent, to exclude the *depressing* influence of the common law; in behalf of which, as has been remarked, there is always a strong presumption, and which must invariably rule, *in dubio*. I rather suspect that English doctrine and precepts, which were particularly referred to, and argued upon in the Court below,[2] as well as strong English bias, and legal impressions, in the ultimate Appellate Tribunal, by whom the rejection, likewise, of the heir of the last Bargeny heir-male by the Session, in 1738, came to be affirmed, so diametrically at variance with ours properly,—must have more or less weighed.[3] Hence, what seems now regarded by some unexceptionable and irrefragable law, would rather strike us, upon the whole, to be, in effect, but inadequately sustained, being irreconcilable, at least, with radical admitted principle, of which regulating traces elsewhere, are still discoverable in our Code. I cannot bring myself to think, that a half brother could properly have taken by law, in exclusion of a full sister of an elder brother, who had died without issue, *last* seised in an estate, as heir of their deceased father, the *primus investitus, under a limitation* to "*his* (the *father's*) heirs," that is, to heirs of line;[4] or that a property, accordingly, could have de-

English doctrine may have ruled too much in the Bargeny decision, apparently irreconcilable with *our* notions in general.

Adverse illustrations or precedents.

[1] See pp. 857-8-9. [2] See Elchies's Reports, vol. II. p. 370.

[3] The Lord Justice Clerk however held, that giving "heir-female" in the Bargeny destination,—as was in fact finally decided,—the construction of "heir whatsoever," the same confessedly as heir of line, *the* Bargeny heir, just alluded to in the text, fell, in *opposition*, to be preferred; thus in full corroboration of my induction. It is to be observed, that the Session had found in 1738, though by the narrowest majority only, that the only *daughter* of John Lord Bargeny, the settler in 1688, and her descendants, took preferably to *all*, under the same description of "heir female," including *her* heir, a party; which was reversed by the House of Lords in 1739, who construed it as stated, *but* in favour of the only child (a daughter) of the first and elder heir-male, agreeably to the sentiments of the great minority in the Court of Session. See Lord Elchies's Reports, vol. II. pp. 370-1. This Bargeny statement is taken from the papers, pleadings, and procedure in the case.

The Lord Justice Clerk was for the younger heir-female in that case, upon a natural construction.

The previous one here, of the Court of Session.

[4] At least such certainly was the old law. There are various royal charters of offices and lands, including the Barony of *Longforgund*, in 1488,

volved to the *maternal* relatives of a son, who had also departed issueless, the *last* infeft as heir to his mother,—in exclusion to *his* father, or his heirs,—under a corresponding title in *her* fa-

Remarkable case of Gray, before and after the middle of the 16th century.

1500, 1503, 1508, 1509, &c. to "Andrew Lord Gray, and to *his* heirs." He was, accordingly, succeeded by his son and heir, Patrick Lord Gray, who had two full sisters, married, respectively, to the Laird of Laurieston, (of the surname of Straiton), and to John Lord Glamis; and a half brother, Gilbert Gray of Buttergask. He died vested in the family property, though he had previously executed an entail of the same, still including the Barony of Longforgund, confirmed by a Royal charter, 16th of April 1524,* upon Buttergask *nominatim*, and the heirs-male of his body, whom failing, to other heirs-male, (Great Seal Register, which also contains the previous conveyances mentioned); but even in this crisis, so strong were their rights in law, as heirs of Lord Patrick, the *last* seised, and in possession, that Andrew Straiton of Laurieston, his nephew and heir of line through his full sister, and the Glamis family, the next heirs, in the corresponding capacity, (then represented by the crown, on account of their forfeiture,) were held still to be the heirs to the family estates, from which they had been solely barred, *ex terminis*, by the settlement, and that stood, by the previous and only other investiture, "to Andrew Lord Gray," the grandfather of the latter, and "to *his* heirs," of *whom* Patrick Gray of Buttergask, son and heir of the above *now* deceased Gilbert Gray of Buttergask, (essentially, though not literally in the shoes of Sir Hew Dalrymple, who gained in the Bargeny case,) was strictly, correlatively, the representative. The same Andrew Straiton of Laurieston, was actually entered by service as heir of his noble uncle, in the Barony of *Longforgund*, expressly descendable, as has been seen, to "Lord Andrew, and to *his* heirs," with the estates, &c. And although it came to be reduced by an action before the Session, at the instance of young Buttergask, in 1542, still it was exclusively on account of the entail in his favour in 1524; while that party, nevertheless, felt so little confident of his right, that he was obliged to purchase a solemn resignation, or renunciation of the estates from Straiton, "as one of the two heirs and successors" of Patrick Lord Gray, as is proved by a charter in the Great Seal Register, the 28th of April 1542. This case directly conflicts in its import with that of Bargeny. The above facts I can legally establish. I shall, however, annex this legal proof of the material relationship in question. Reduction, upon the ground mentioned in 1542, of the retour of Andrew Straiton of Laurieston, "as ane of ye nerrest and lauchful airis of ye saide umquhile Patrik lord Gray, his *eme*," (uncle).*—Act and Decree Register of the Court of Session. Action in 1573, by John Lord Glammiss, "ane of ye tua airis of lyne of umquhile Patrick lord gray, his grandame broyer," (that is, his grandame's brother,) "against Patrik gray, sone and air of umquhile gilbert gray of buttergask, *half* broyer

* Also confirmed in 1542.

It conflicts with the Bargeny decision.

* See also *Gray Papers*, pub. 1835, Append. p. iv. where the *female* representation is *thus* again legally proved.

ther. And yet these cases, upon the general rule laid down, so far as I can see, are tantamount to that of Bargeny, the rejected heir-female there, as was adjudged, coming equally under a limitation to the *settler's* "heirs," or "heirs whatsoever" (of the body), and being the heir, equally with the full sister, and father, and heirs mentioned, of the last in possession. Nay, the Bargeny destination, again, also corresponds with the solemn settlement of the crown, previously noticed, in 1373, namely, as in the case of the former, to *repeated* heirs-*male* of the body, but *whom failing*, more emphatically, to the *true* heirs by *blood* and lineage of the main Stewart stock; under which, as set forth by received legal opinion, the heir of the last in possession, without any retrospection, took, *whoever* he was, though strictly by no means falling within such category. If it be objected—supposing there be any thing in the exception, that the Bargeny settlement constituted an entail, that is still more than obviated by the last, which is the strictest entail in the *veriest* sense, having several explicit remainders, and moreover, under explicit authority of a public Act of Parliament, proceeding upon the universal voice of the nation. But really, it strikes me, upon the relevant basis, I conceive, I adopt, that Sir James Stewart, Lord Advocate to Queen Anne, the first lawyer of his day, has virtually put, and concurrently answered the present question, through another illustration of the kind premised, which, in effect, seems still to bear me out. He starts the case, that a "Feudum *Fœminium* is (limited) *only*[1] to a *man*, and HIS *heirs*[2] whatsomever," that is, essentially identical with the Bargeny limitation, owing to the term "his," different from "their," as in that of Polwarth; while the adjunct "whatsomever," cannot properly detract. Well, then, he goes on to state, "and that his daughter, succeeding to him

The former notions entertained as to the descent of the crown, under the entail in 1373, inimical.

Case also put by Sir James Stewart, and his solution of the same.

of umquhile Patrik Lord Gray," &c. actually for reduction of the entail in 1524. Andrew Straiton of Laurieston here figures as the other portioner. *(Ibid.)* This process, strengthening the impression as to *the* female heirs, evidently, either has not been pushed, or been compromised.

[1] The word "only" here, is also important, shewing he gave little force to such a limitation, corresponding with the Bargeny.

[2] "*His* heirs" must be tantamount to *John Lord Bargeny's* heirs, being actually of the settler, while the *nominatim* form is not indispensable.

therein, leaves a *son*, who is also her heir,—*if he* die without issue,"—what then? We now come to the exact point; in that event Sir James says, "the succession *must* fall to *the (his) father*, and to the heirs on the father's side," precisely as in the case of James VI. "And it *cannot* fall to the heirs by the mother, *(though* strictly of the '*man*' at the *outset,) unless* it were by *special provision;* as if the feu were granted to a daughter, and the heirs of her body, *which failzieing*, her heirs and *assignees* whatsoever,"—just equivalent to the instance of Hamilton cited, where, in order to secure the succession to the corresponding preferable heir by blood, of the *original* disponee in the strict sense, there is also recourse to such special remainder, as in this case, as I have remarked,[1] in order adequately to prevent the very contingency I contend for. And to clench the parallel, Sir James now, *e converso*, admits that then, in this altered state of things, "the son dying without issue,—his mother's heirs *designative* would succeed to him," not certainly under a limitation, as in the Bargeny instance, which would be here inept, but *specially* "as heirs of *taillie (entail)* and provision," precisely in the character of Anne Duchess of Hamilton.[2] The Gray case, formerly adverted to, may still *more* bear me out in principle.[3]

Case of Gray even more directly unfavourable to Bargeny.

Under the Polwarth limitation the daughters of the elder brothers *might* be for ever excluded.

In the Polwarth case, the daughters of the elder brothers, or heirs-male, &c. might hence *possibly* be irretrievably excluded; but that, besides receiving express countenance from feudal notions in general,[4] may not weigh by the law of of Scotland, which was peremptory, and had here no retros-

[1] See p. 858-9.

[2] See Stewart's Ans. to Nisbet, p. 205. The latter, while he admits that the rule *materna maternis* with us, "has no place," thinks, not unnaturally, that the law in this respect ought to be otherwise; but Stewart unflinchingly upholds it, without respect to exclusion of the blood. *Ibid.*

[3] See pp. 861-2, *n.* 4.

[4] See p. 860. It was maintained, in the case of Lockhart *v.* Macdonald, that the heir-female of the elder heir-male, being excluded by the younger, could not succeed at all. (See Dunlop and Bell's Rep. *ut sup.* p. 425.) By our *present* law, however, she evidently could, to such younger heir, in the event of the latter having no direct heirs, or who could take on the *descending* principle; the succession *then*, as a *last* resource, would ascend to the former, in exclusion of the crown.

pect, only considering the immediate contingency,—*extunc*, to use the relative term in the settlement of the crown in 1373. Neither can the above be objected as a fair anomaly; for, as we have seen elsewhere, upon the strength of confessed, and still admitted rule, those who were once, equally the heirs under a limitation, nay, ought *literally*, to have taken accordingly,—might not only be so excluded by the same varying fortuitous incident, but also for the mere behoof of, and to make room for strangers. And further still,—though, it is admitted, a case not in point, *ex terminis*,—in several modern entails, there are limitations *specifically*, to the heirs of the *last* in possession, which shews, that instead of being condemned, or unauthorized, such an arrangement was not thought without its advantages, but even fitting and judicious, at an advanced period.

But this alone is not a relevant or sufficient objection.

But, with all this, I am fully aware of the *natural* untowardness and incongruity, as strikes one, of applying the corresponding criterion and principle in question, to honours,—our more immediate object,—which certainly is obnoxious to the received impressions, and ordinary notions of nobility, including *genuine* descent; and, in behalf of which, there may not *now*, be the most cogent and direct authority, owing to the conflicting, and recenter precedent of Bargeny, affirmed upon appeal. The latter, inasmuch as involving legal succession, may be held preferably to rule,—especially after the considerable interval that has even elapsed in its instance, so far as I am conscious, without any rebutter.[1] The converse assuredly

The old law or principle here, however, is *naturally* untoward and objectionable, especially in respect to honours.

[1] On the contrary, the Bargeny principle was lately applied, unavoidably as held, by the Session, in the case of Goodinge Johnstone against Johnstone, 19th of November 1839, under a charter of the Annandale estates, &c. April 3, 1662, to James Earl of Annandale, &c. and to the heirs-male of his body, whom failing, to the heirs-female, without division, of the *said Earl James's* body, and to the heirs-male of the body of such eldest heir-female, &c.; whom failing, to the heirs and assignees whatsoever of Earl James. (Great Seal Register.) The pursuer claimed accordingly, as heir-female, under an alleged descent from John, *second* son of the noble disponee, whose grandson Thomas, he asserted,—but upon no strict and conclusive evidence,—had survived as the *last* heir-male; but the Court, even upon his own shewing, preferred the defender, the direct female descendant of William, first Mar-

Case of Goodinge Johnstone against Johnstone, in 1839, in the face of the old doctrine.

The former too *may* give way to the Bargeny and Johnstone decisions, and also especially again in honours, to the import of the Mordington patent in 1640.

receives no countenance or support in England; but it was imperative upon me to state impartially what appeared to be *our radical*, or older law on the point, however it may bear. And, no doubt, I am happy in having first adduced, akin with that of Bargeny, the remarkable and older authority still, of the patent of Mordington in 1640, whose preamble and inductive grounds are, *strictly*, in favour of the true descent and representation in honours, being identified with the blood, and *thus* flowing *continuously*, and *undivergingly* from the *original* taker,[1] however English prepossessions here may have also irrelevantly operated in a certain degree, owing to the date after the union of the crowns, either in the mind of Charles I., or of his advisers.[2] In the case of Lockhart against

quis of Annandale, *eldest* son of the above Earl James, as heir under the settlement, (the heirs-male being admitted to have failed,) agreeably to the Bargeny decision. (See Dunlop and Bell's Rep. vol. II. p. 73, *et seq.*) Judging, however, from the relative papers and reports, no specific precedent, or new authority was adduced, in opposition, by the pursuer, and in behalf of his argument. The matter, in fact, seems to have been but slenderly litiscontestated.

[1] See pp. 180-1, 198-9.

Succession in the case of the Earldom of Moray (in the Dunbars), before and after the middle of the 15th century.

[2] The succession to the Earldom of Moray, (in the Dunbars,) during the reign of James II. though rather conflicting in its nature, is far from prejudicing my former argument. By the ordinary account, Mary, it should be *Elizabeth*, who married Archibald Douglas, is represented as younger coheiress, with Janet, her supposed elder sister, of the collateral branch of Frendraught, and to have held the Earldom through the power or assumption of her husband, in prejudice of the latter. Archibald Douglas, whether thus by the courtesy, or under favour of a new constitution, figures as Earl of Moray at the middle of the 15th century, and shortly after. But the same Elizabeth, who, subsequently to the death and *forfeiture* of her husband in 1455, was first jilted by George Earl of Huntly, (see p. 527,) and then married to John Colquhoun of Luss, in the character of "Elizabethe, Dunbar *olim* Comitisse, Moravie," and the wife of Colquhoun,—and, moreover, as "Elizabethe de Dunbar *filie* quondam *Thome* de Dunbar Comitis Moravie," is receiving payments, or the benefaction of Government, respectively, in 1458, 1462, 1463, and thereafter, &c. as is proved by the Exchequer Rolls. Earl Thomas was of the *elder* line, distinct from the *younger* of Frendraught, to the former of which, therefore, Elizabeth belonged, (thus in correction of an error at p. 500.) Yet, at the same time, Janet Dunbar, the heir of this younger branch of Frendraught, to whose progenitor, as heir-male, probably by a regrant and

Macdonald, referred to,[1] decided by the Session, January 24, 1840, but now under appeal, the disputed substitution, in effect like that of Polwarth, (which is not *directly* compromis- Case of Lockhart *v.* Macdonald, in 1840.

entail, the Earldom seems to have devolved in the first instance, figures in a deed in the Errol charter-chest, the 8th of November 1454, as "Janeta de Dunbar *Comitissa Moravie*, et domina de Frendraught," &c. independently of later authorities to the same effect. There were thus two cotemporary Countesses of Moray. Janet may have lawfully succeeded as the heir of the younger heir-male, while there was some questionable earlier settlement, if even that, which came to be enforced, through the power and despotism of the Douglases in the kingdom, qualified again by the counteracting influence of the rival Crichtons, whose chief had married Countess *Janet*. In his attainder too, in 1455, Archibald Douglas is only styled "*pretensus* Comes Moravie." (See Acts of Parl. last Edit. vol. II. pp. 76-7.) On the subject of Genealogy, I might be curious to know what English antiquaries thought of the evidence I adduced, conclusive, as I apprehend, against the descent of the *English* Courtenays, from the French *Royal* stem, in refutation of Lord Asburton's latter corresponding origin of them. (See my remarks on Scottish Peerage Law, pp. 169, *et seq.*) But I may, however, add, that the name of *Florus*, erroneously given to Peter of France, husband of the heiress of Courtenay, the ancestor of the *French princely* Courtenays, *in quality also*, of visionary ancestor of the English, upon the strength of an English Chronicle, (see pp. 171-2, *ibid.*) seems actually to have been borne by Lewis VII. or "*le jeune*," the *elder brother* of Peter. The Abbé Expilly states, that Lewis had the endearing *soubriquet* of "*Florus*," (or "*Fleury*,") or "Ludovicus *Florus*," from his father Lewis VI. or *Le Gros*, from whence, he curiously adds, arose the French *fleurs de lys*, first borne in their original form, *sans nombre*, by the cherished Florus, and this, upon the authority of "Les Memoires de la chambre des comptes," &c. (See Dict. Geograph. Histor. &c. in 1764, by the Abbé, *sub voc.* "Fleurs-*de-lys*.") Talking of the latter, the term should have been "Liligeri," properly, instead of "Loligeri," in the verses on Magdalene de Valois; (see p. 448. *n.*) Upon the footing of modern French notions at least, "*illustration*," viz. fame, or public *notoriety* of *some* kind, go into the enhancing merits of a pedigree, in accordance with those of George, first Earl of Cromarty, an antiquary, who said, "it is an old proverb, that it is a *scanty* kin which hath neither whore, nor thief in't; and it is difficult to find an ancient and considerable kindred, wherein some one or other have not been criminals." (Gowry Conspiracy, pub. 1713, p. 2.) On this account, though certainly not of such *heinous* sort, the little incidents connected with the Keir family, &c. (see pp. 412-13, *n.*) so characteristic of that feudal period, and even worthy of the pen of Sir Walter Scott, may not detract from the baronial im-

It probably illustrates the old law in question.

Disproved origin of the English Courtenays from the French royal stem.

What may enhance the merits of a pedigree, according to French and Scottish notions.

[1] See p. 857, *n.* 2.

ed by the Bargeny decision), may be said to resolve in one to "heirs-male of the body, *and* to *their* heirs whatsoever." It has given rise upon the point, whether or not the heirs-male should be wholly exhausted, in the first instance, (which was found in the negative by the Court of Session), to considerable argument and discussion, from which I am unfortunately barred by my limits. And I can only repeat, that the flexible nature, in our untoward and unseemly conveyancing, of the terms "heirs," "successors," "eldest heir-female," nay, even of "eldest daughter," &c. with their strange attendant incidents and anomalies,[1] is a plague-spot and torment in our law. It is such, that I have seldom found it very difficult, with reference to legal *dicta* and precedent, to draw plausible, though the most opposite constructions, from the former, under the same literal combinations. Nor does English interference, or southern apprehension, tend to mend the matter.

Inconvenience and perplexity occasioned by our flexible phrases and terms.

The Viscounty of Fenton, Earldom of Kellie, and Viscounty of *Fenton (again)*, &c. were, respectively, constituted by patents, dated the 18th of March 1606, and 12th of March 1619, in favour of Thomas Erskine, "Lord Erskine of Dirletoun;"[2]—the former being limited to him, "et heredibus masculis de corpore suo legitime procreatis, et procreandis, *quibus deficientibus*, hæredibus suis *masculis quibuscunque* in perpetuum;" and the latter, "heredibus suis masculis *cognomen* et *insignia* de Erskine gerentibus."[3] These honours were held successively by the heirs-male of the body of the patentee, until their failure in the person of Methven Earl of

Case of the Earldom of Kellie, Viscounty of Fenton, &c. in 1830-5.

The dignities constituted by two patents, in 1606 and 1619.

portance they have so long supported, and is now meritedly inherent in them, with further aggrandizement, under fairer and happier auspices. Neither was there a more public and influential character, as our Records abundantly evince, than Sir John "Strevelin" of Keir, in the reign of James V. who figures, like *similar cotemporary* chiefs, in the graphic and delightful poem of "Squire Meldrum."

[1] See from p. 202, to p. 222. *incl.*

[2] The existence of this Barony, which was not claimed, is solely, as yet, proved by this description accordingly, of the noble party in the first patent, and intimation in that of Kellie of its creation in his favour. There being no heirs-male of the body of the original taker, the Lords, in the circumstances, would now hold the barony extinct.

Constitution of the Barony of Erskine of Dirleton, before 18th of March 1606, unknown.

[3] Great Seal Register.

Kellie, in 1829, subsequent to which they were claimed by a royal reference to the Lords, the 23d of March 1830, upon his petition,[1] by John Francis Earl of Marr, as collateral heir-male, he being the male descendant of John Earl of Marr, Regent, during the minority of James VI. elder brother of Alexander Erskine of Gogar, Master of Marr,[2] father of Thomas, the aforesaid patentee. In respect to the Earldom of Kellie, &c. he founded upon the precedent of the Barony of Kirkcudbright in 1772,[3] quite in point, where the heir-male collateral was accordingly adjudged to be entitled; while no doubt could be entertained of the corresponding descent in regard to the *older* Viscounty, in consequence of the explicit ultimate remainder in the patent to heirs-male *whatsoever*.[4] And consequently, after some discussion, natural owing both to extent of the pedigrees, and existence at one time of many nearer heirs, the right of the noble claimant, (with which landed succession combined,) was allowed by the Lords, the 3d of September 1835;[5] who thereupon, in addition to being, in fact, the premier Earl of Scotland, in virtue of the Marr dignity, became necessarily, also, the premier Viscount. The first Viscounty, as a Peerage, strangely enough, conferred in Scotland, was that of Fenton, only as premised, in the year 1606.[6]

Adjudged to the heir-male collateral in 1835, the Earl of Mar, who thus became premier Viscount of Scotland.

The main difficulty in this case, the respective descents and other matters, being fully instructed to the satisfaction of the Lords, may be said to be the extinction of Sir James Erskine of Tullibody, younger brother of Thomas, first Earl of Kellie,

Difficulty in the case merely by an extinction.

[1] Lords' Journals.

[2] He was so styled after the French *fashion*, adopted by us, from having been at one time heir-apparent of Marr,—"*Master*" being thus analogous to "Monsieur." The same Alexander had also a younger brother, Arthur Erskine of Blackgrange, whose heirs-male of the body, if such now existed, by *our* law, would have taken, *preferably*, as has been illustrated in the case of Belhaven, (see pp. 835-6-7-8, &c. 844-5); but Arthur died without issue.

[3] See p. 622. *et seq.*

[4] There were no resignations of any of the dignities, so that in reality, there now exist two Viscounties of Fenton, one created in 1606, and the other in 1619.

[5] Lords' Journals.

[6] Selden is here quite right; see Titles of Honour, p. 699.

the patentee, and thus a degree nearer than the claimant's ancestor. He was a reckless spendthrift, in consequence of which, being driven to Ireland, with a blank patent of the dignity of an Earl, from James VI. (of whom he, and his kindred, were favourites), thereby to recruit his bankrupt fortunes, he acquired, by its sale to the highest bidder, by the purchase-money, in return, the estate of Agher,[1] and died in that country, leaving several sons. He happened to be an eleventh brother, but, by the eventual failure of the remainder, the third;[2] and his male line was continued in Ireland down to the reign of Charles II. in the person of James, or Colonel James Erskine. There was, as the Attorney-General contended, no conclusive evidence of the extinction of the latter, a married person. Administration of his goods was granted in 1675 in favour of a principal *creditor*,[3] but that clearly does not touch the point, and is the last authentic notice of him; while even, *e converso*, in a process before the Session in Scotland, in the same year, it was contended that he *had* left a son or grand-

The extinction not *strictly* made out.

Expedient of James I. to enrich or sustain his favourites.

[1] The above was one of the notable expedients of James, profuse enough in honours, when his Exchequer had been drained by his liberality to his Scottish favourities, and others, still to sustain and recompense them. The patent in question was thus advantageously disposed of, to Thomas Lord Ridgeway; afterwards, in 1622, through this *honourable* transaction, *Earl* of Londonderry. These facts are derived from the curious Life of James Bishop of Clogher, (whose daughter, Archibald, the son of such trafficker in dignities, had married,) *ap.* the MSS. Collections in the Advocates' Library, of Father Hay, prior of Remiremont, &c. a well known antiquary, before and after the year 1700, and descended of the Bishop.

[2] This was proved by Sir James's funeral certificate, March 10, 1636, Ulster's Office, Dublin, the relevant admission of which as evidence in the case, gave rise to curious and rather interesting discussion, for which I regret I have not room. To shew the fidelity and correctness of *our* Peerage writers, not a *vestige* of this Sir James, his marriage or descendants,—independently of the *numerous* progeny of his father—(*as* obtained), is to be found under the relative pedigree of Kellie or Gogar, in Douglas's and Wood's Peerages. This circumstance certainly may but little surprise the *initiated*—however, erroneous withal, as they *so often* prove, certain London solicitors have by *no means* been indisposed largely to draw upon, and to borrow from them, as I have experienced, in Peerage cases.

[3] See Minutes of Evidence in the Kellie claim, p. 31.

son.[1] In the confessed want of written proof, the *banished* branch in question was only directly *extinguished*, (if such a thing can be even fancied), by the parole testimony of an existing respectable neighbour—not a relative—of the last Earl of Kellie,—that he had heard his Lordship say it had failed. We hence have again additional means of judging of the foundation for the assertion of a legal authority referred to, of the necessity "of evidence of the *strictest* kind in matters of *Peerage*," *(Scottish)*.[2] The extinction of a material remote branch, sprung from the main stock, as far back as the time of Queen Mary, who had left Scotland, with which they had ceased to have any bond or connection, and who had thus expatriated themselves, being left in the equivocal state too, in which it was, to the mere summary adminicle of modern hearsay, only in this manner admitted in English practice, *valeat quantum*, owing to exigencies,[3] and, at the most, far from being held of much account by legal authorities, in Evidence.

Only by secondary hearsay.

This again refutes the notion of the necessity of strict evidence in Scottish Peerage cases, in the House of Lords.

There, however, being no *competition*, the judgment was *good*, according to the law of Scotland, which, as has been stated, was indulgent in such respects,[4] and hence relevantly

The judgment, however, good, according to the law of Scotland,

[1] *Ibid.* p. 51-2.

[2] See p. 832.

[3] See Cruise on Dig. p. 272, and further, the subsequent Huntly case.

[4] See p. 42. As illustrative of our law of extinction, in the 16th century, I may cite this pointed instance. A summons of error, or action of reduction, in 1562, before the Court of Session, was brought by one having interest, against the service of John Grief, as heir to his father, upon these grounds,—that it was well known to the Inquest and the neighbourhood, that John had an *elder* brother, *Thomas*, who fell to be preferred; that it was *not* "*any wise* knowin lauchfullie, to yame, yat he wes *deid*," *(dead)*; that, "of ye *presumptione* of ye *law*," he must be "halden *levand*, *(living,)* be resoun it wes *not* knawin of his deid," (death), more especially backed, as was equally notorious, by Thomas—of whose fate there was evident uncertainty,—being *within* the age of *fifty*, *which* may have *been* thus held a *mortal terminus*. And further, "consultatiounes of certane men of law, and practitioneris of *yis realme*," were "opinlie, and expreslie red," in support of the conclusion, "yat ye said *elder* broyer of ye law *is* presumit to be levand, *les nor (unless)* it be provin yat he is deid,"—which necessarily excluded and voided the service. The above might indicate what the law here *had* been, or as entertained by some, far stricter than afterwards; for the Session were not thereby moved, but, on the 27th of April, of the same year, "assoilized," or fully absolved the

Illustration of our law as to extinctions in the 16th century.

It may have declined from its original strictness.

which relevantly ruled, in refutation again of another previous assertion.

sufficed, in reality, properly ruled,—thus even, *ex abundanti*, in refutation of the same authority referred to, who, as has been seen, exclusively recognised and prescribed the law of England, together with the strict rule and principle, in such Scottish Peerage matters.[1] Our old remedy for the above apparent laxity is also obvious, and will be recurred to, with more upon the subject of extinctions, under the next case.[2]

Case of the Marquisate of Huntly, Earldom of Enzie, &c. in 1837-8.

The Marquisate of Huntly, Earldom of Enzie, with the subordinate honours, are stated by historical evidence to have been conferred upon George Earl of Huntly, the 17th of April 1599;[3] which can also be legally established the date, by

Inquest from the process,—of course sustaining the service, and the *contrary* presumption as to the extinction in question, under the circumstances. (Act and Decree Register of the Court of Session.) In a competition of brieves, that is, of persons claiming to be served in the *same* character with each other,—when issue was mutually joined, the practice must always have been strict; but this was neither a case of the kind, nor upon a *direct* contradictor; and from these considerations, modern law might conclude, at once, in favour of the served, and have as little allowed the objector to have appeared, as he is also proved to have done, and opposed *at* the service. The latter faculty was extended by our former law, to *any* one who had the least interest, as can be fully proved, (see, *inter alia*, p. 37,)—though now excluded, and certainly gave greater effect to such general service when obtained, it thus passing through a severer ordeal. Indeed, it is to be regretted, that the practice is not somewhat restored. According to the present less exacting method, it is only there, as notorious, by the *subsequent* process of a reduction, (as *lutterly*, above,) that a legal party, not a competer originally, and hence barred in the first instance, can have redress, though certainly sure when it comes. But circumstances may not speedily evoke such a party, or an emergent interest. In so far as constant later taciturnity, and moral probability go, the extinction in the Kellie case may be now admitted; but this does not altogether meet the material question.

Advantage, differently, from now, of allowing any one, on qualifying, but a secondary interest to oppose at a service.

[1] See p. 832.

[2] The preceding Kellie statement, so far, is from the various authorities, printed Case, Minutes of Evidence, MSS., Notes of the Pleadings, *res gestæ*, &c.

[3] See the act and form of creation in Sir George Mackenzie's Works, vol. II. p. 535. It hence transpires, as might be expected, that there was, moreover, a written constitution, in further refutation of Lords Mansfield and Rosslyn, the champions of *abstract* "Belting," as they had proved likewise on this occasion. A most *suspicious* unauthenti-

proof not adduced in the claim to be presently noticed. He is likewise styled Marquis of Huntly, &c. in 1600, and 1603, in legal deeds, and sat in Parliament accordingly in 1606. And although the *first* limitation of the honours, owing to the loss of the original written heritable constitution, be now strictly unknown, yet the estates, both antecedently and down to the accession of Alexander, seventh Marquis of Huntly, and fourth Duke of Gordon, in 1752, stood to heirs-male,[1] a circumstance deserving notice, especially as Lords Mansfield and Rosslyn, with their usual *consistency*, as has been seen, toy and coquet with such argument, or indication sometimes, as may suit, wholly repudiating, while, at others, *e converso*, founding upon it in honours, as a clue of descent. The Marquisate, &c. descended to Lewis, third Marquis of Huntly, grandson and heir-male of George, the original Marquis of Huntly, (through George, the second Marquis, his son), who

The original constitution, though in 1599, not preserved.

Huntly estates descendible to heirs-male.

cated copy on parchment, imperfect, and without a date, from the Gordon Charter-chest, which professes to be an unintelligible, anomalous recognition or declaration of the constitution of the Marquisate, &c. and limitation of the same to "heirs-male," by James VI. even *after* the union of the crowns,—that happened in 1603,—was adduced in the Huntly claim; but though received in evidence, it was not held *per se* to suffice. Its epoch is thus indirectly evinced from James, the granter, being there styled King of *Great Britain*, France, &c.; but from what motive the original emanated, if actually warranted, which may indeed be questioned, does not satisfactorily transpire. This copy, however, that will be recurred to, may be now viewed of no moment, as was even admitted by the counsel of the claimant. His claim likewise originally involved the ancient Earldom of Huntly, with the older honours, but so far it was not prosecuted. It appears, by legal documents in the Gordon Charter-chest, that Alexander, first Earl of Huntly, (male ancestor of the grantee, in 1599,) was Lord Gordon in 1444, and Earl of Huntly in 1446,—while "Alexander Earl of Huntlie," is a witness to the Parliamentary ratification of the Barony of Hamilton, the 3d of July 1445. (See Acts of Parl. last Edit. vol. II. p. 59.) He was thus Earl in 1445, an earlier date assigned than usual; and an old Chronicle, very consistently, makes the constitution, and creation, not now extant, in that year. (See Ford. Goodall's Edit. vol. II. p. 541.)

Suspicious and anomalous copy of a supposed declaration of James I. after the union of the crowns, as to the constitution of the Marquisate, &c

True date of the constitution of the Earldom of Huntly,—in 1445.

[1] These facts, and others to be stated, are from relative authorities, either condescended upon in the claim, or upon record in that year. The title of Marquis was known to us, as early as the 29th of January 1487, which is the date of the constitution of the Marquisate of Ormond, a locality in Scotland, as well as in Ireland. (See Acts, *ut sup.* p. 180-1.)

The title of Marquis known to us in 1487.

Important Act in 1651, restoring Lewis, the second Marquis, to the honours, which now regulates their descent.

obtained, the 25th of March 1651, "*Rege presente*,"[1] an Act of Parliament, reversing the attainder of the above George, second Marquis of Huntly, his father, and of certain near relatives, by the previous rebellious authorities,[2] and restoring him, *inter alia*, to the *Marquisate* of Huntly, "with *all*, and *whatsoever titles, honores*," &c. that "*did* pertine" to the same George, just *as* if there had been *no* forfeiture, in favour of the said Lewis, "and his airis *maill*, and *faillieing of him* and *them*, be decis, to the *next* apparent *air maill* of his said umquhile father," —which last epithet, "heir male," though here in the singular, has been similarly used in our patents in a collective sense; and being, besides, when here occurring, interchanged and identified in the context, with "airis maill" in the plural, in reference to the lands, that are accordingly carried,—*simul et semel*,—it further relevantly argues the common descent of the honours, in the exact manner, to *all* such heirs-male.[3]

The Act is presumptively in terms, so far, of the original constitution in 1599.

This Act may presumptively too, exemplify the original destination of the honours in 1599, which may have been also so conceived; while the same is entitled to far greater weight and importance than our usual Acts of Parliament after the union of the crowns, affecting *private* rights, the king having been thus indubitably present at its passing, and hence directly authorizing and warranting it, as was indispensable, owing to the conveyance of the dignities,—in respect to which I have now stated all that is material.

Upon the death of the gallant George, eighth Marquis of Huntly, Duke of Gordon, &c. (with which *last* higher dignity we have nothing to do, it being only by patent in 1684, to heirs-male of the body[4] of George, *fourth* Marquis of Huntly, *his exclusive* male ancestor, and expiring with him), the Marquisate, and the attendant honours, were claimed by a royal

[1] Charles II.

[2] The attainder of this Marquis in 1645, was likewise rescinded by Act of Parliament, the 3d of April 1661, after the Restoration. See Minutes of Evidence, pp. 12—14.

[3] A properly certified extract of the said Act of Parliament, (the full original Record not being now extant,) from the Gordon Charter-chest, with other corroborations, was, for the *first* time, adduced in this claim. See Minutes of Evidence, pp. 8, 9.

[4] Dated on the 1st of November, in that year. Great Seal Register.

reference, (upon petition,) the 4th of February 1837,[1] by George, fifth Earl of Aboyne, direct male descendant of Lord Charles Gordon, first Earl of Aboyne, so created in 1660.[2] The latter was a younger brother of Lewis, the third Marquis of Huntly, restored in 1651, father of the preceding Duke and Marquis George, and, of course, younger son of George, second Marquis of Huntly; and the honours were accordingly allowed the noble claimant, his male descendant, as stated, in virtue necessarily of *such* Huntly representation,—by the subsequent resolution of the Lords, confirmed by the crown, on the 22d of June 1838.[3] According to the noted *inclination* of the House of Lords, irresistibly backed by the Act 1651, and by every collateral circumstance that could be referred to, the honours in question, that had been never resigned,[4] clearly devolved to heirs-male, including the claimant, who succeeded in establishing his pedigree, as above, by *strict* legal evidence, which, apologizing, however, for the manifest legal truism, falls always to be adduced where it exists. The only difficulties in the case, the other points being also properly fixed, turned upon two *important* extinctions, especially upon the alleged strict rule,—*first*, of Lord Lewis Gordon, of much nearer male descent, who was younger son of Alexander, second Duke of Gordon, (son of the first Duke mentioned), dead in 1728; and, *secondly*, of Lord Henry, *another* younger son, with Charles, first Earl of Aboyne, (ancestor of the claimant,) of George, second Marquis of Huntly,—or, at least, in proving him younger than the Earl. The former being attainted by Act of Parliament in 1746, in consequence of the

The honours claimed by, and allowed to the Earl of Aboyne, as heir-male in 1838.

The former clearly descendible to heirs-male.

The two difficulties in the case comprised, 1st, the extinction of Lord Lewis Gordon, and, 2dly, that of Lord Henry Gordon,—or at least in proving the latter younger than Lord Charles, the claimant's ancestor.

[1] Lords' Journals.

[2] By patent, *then* on the 10th of September, Great Seal Register.

[3] Lords' Journals.

[4] Nay, there is, on the contrary, a formal reservation of them in the patent of the Dukedom of Gordon, mentioned in 1684, agreeably to the more strict practice, which even makes this a stronger case than that of the Marquisate of Queensberry, (see pp. 668-9,) there being *none* such, of the latter, or of the attendant dignities,—(claimed by a collateral heir-male, in that character, through the patent of the Marquisate, &c. in 1682, and allowed him in 1812,)—in the regulating patent of the Dukedom of Queensberry, (though further proceeding upon a resignation,) in 1706, also with a different limitation. See Great Seal Register.

The Marquisate of Huntly reserved, as *before*, in the patent of the Dukedom of Gordon, in 1684.

Lord Lewis a difficult extinction, and attempted by means of but indirect secondary reputation.

rebellion, betook himself abroad, where he constantly thereafter resided in obscurity, and is exclusively stated by a British newspaper[1] to have simply died in France, in July 1754. Even this obviously, admitting the statement, did not extinguish him; and the only mode by which that came to be attempted was through the negative, or rather neutral reputation of the Earl of Aberdeen—the grandson—of the brother—of the wife—of the eldest brother of Lord Lewis,—(such was the connection,)—merely that he "never" *heard* of the latter "having left any descendants,"[2] which nevertheless *might*, *e converso*, have happened. It hence was by no means at all satisfactory, or stringent, even so far as it went;[3] and this was all, for Lord Aberdeen did not speak to his death, which remained quite unestablished, for even the newspaper was *unappealed* to.—I must apologize; there was indeed *another* most *weighty* argument pressed into the service, and it is as follows. In a decree or judgment of the Court of Session, the 24th of December 1755, given in favour of Henrietta Duchess of Gordon, mother of Lord Lewis, sustaining her claim, (since 1746), *as* a *creditor*,[4] for payment, out of his small forfeited estate, of certain sums she had originally advanced to him, he happens to be there described as the "*late* Lord Lewis Gordon, attainted;"[5] and will it be believed, it was upon this ground, conclusively argued, and contended with, that inadvertence and modern bias or prejudice, which I have often attempted in vain to resist in Peerage claims, that Lord Lewis was then

Other strange and preposterous attempt, for the purpose, through "late" being applied to Lord Lewis in 1755, *as* if he was *thereby* fixed to be dead.

[1] The Caledonian Mercury, 1st of August 1754. Of course, the notice was copied into one or two of the other cotemporary prints.

[2] See Minutes of Evidence in the case, p. 43. Why was the venerable Duchess of Richmond not examined upon this head, the grandniece only of Lord Lewis? She *was* examined in later matters, and if *she* knew nothing certainly about his Lordship, it might be supposed that Lord Aberdeen, thus indirectly, must have even less.

[3] It seems assuredly but weak and vague, while, besides, Glassford, the latest and most intelligent writer on Evidence, upon the whole, holds "hearsay," (negative), or borrowed traditionary impression, as above, in small account. See Essay on the Principles of Evidence, p. 358.

[4] In terms of an Act, Geo. II. 1747, c. 41, vesting the forfeited estates in the king, and for satisfying the claims, &c., upon them by creditors.

[5] Act and Decree Register of the Court of Session; see Min. p. 31.

actually, *naturally* dead. Although every legal antiquary knows, that, in the circumstances, the epithet "*late*,"—all that came here to be appealed to,—has no such necessary or decisive import, but was applied (according to original genuine acceptation) to any traitor—as much when alive, as dead—after the time of his attainder, having exclusive reference to his *civil* demise, he, then, quite according to the feudal precepts, being put at the ban of society, and expelled from its communion and pale, where he was no longer considered a coexisting member, but a mere nonentity for the future, and deprived of all his rights and interests, which had, by his treason, suffered a total erasure, and annihilation. I ought, I believe, to ask pardon of my readers, for obtruding upon them, as I have done below, legal proof of the fact in question, so fully applicable to the case of Lord Lewis.[1] From thence it follows,

Obviously futile, from the noted acceptation of "late," under the circumstances.

[1] In letters and reports in the original cotemporary Record of Exchequer, Advocates' Library, dated, respectively, May and July 1748, and in 17th of June 1749, there is specific mention of the "*late* Earl of Cromarty—the *late* Lord Elcho, attainted,"—and of the "*late* Lord Pitsligo." Oh, then, the procurators in the Huntly claim would have said, there is here indubitable proof of their deaths at least before these periods. Unfortunately, of all these notoriously attainted noblemen, or rather fortunately, it however, *e converso*, happens that ample proof exists of their survival long after; Lord Cromarty, with a large family, then bemoaning, as is transmitted, his unhappy fate, and not expiring until September 1766, in Poland Street, London, Lord Elcho *then* complaining of Charles Edward's recreancy at the battle of Culloden, like Bonaparte, declining to retrieve matters by a personal charge, and not making his exit even till 1787, while Lord Pitsligo did, as little, till 1762, a model of Christian piety. Again, in March 1748, there is allusion to the forfeited estate of "the *late* Sir James Kinloch" (of Kinloch); but lo, and behold, in a public letter afterwards, in November in that year, while he is again described as "*late*," and as "convicted of his treason," there is authority for granting a pension to his wife, Lady Kinloch, "*during*" his "*natural* life;" clearly shewing he was still alive, and that "late," like the cholera, does not always kill. By evidence, too, before me, he was at least alive in 1751. Various other similar instances could be produced; but what would the former think of the following? Lord George Murray, actually the hero of the Stewart crusade in 1745, in two official documents in 1752, and 1753, is likewise styled "the *late* Lord George Murray;" but it is equally indisputable, however, they might have, more divinely than the fates, cut his career so much shorter, that he did not die (in Hol-

Instances shewing that the application of "late" to persons after their forfeiture, did not prove their *natural* death.

therefore, that "late," in his Lordship's case, *after* 1746, becomes perfectly neutral and insignificant, and, intrinsically, no more proves him dead at the period, than the writer of these remarks at this moment,—far less goes to extinguish him. Yet the English concocters or framers of the Huntly claim in 1838, rested so material a point as this weighty extinction upon the preceding *single* fact in evidence, without condescending upon or specifying an *item* more, in any tangible or dilucid shape.[1]

It was only, on the crown not being satisfied with the other inadequate proof of the extinction, that the secondary reputation was resorted to.

It was only, on the Attorney-General requiring, as was indeed incumbent, more proof of the extinction, that the still vague and feeble adminicle of Lord Aberdeen's negative hearsay, was resorted to,[2] the only remaining feather that could be thrown into the scale. And, moreover, such a self cut-throat piece of business was this, that actual evidence was *acutely*

land) until October 1760. The last instance, I need hardly add, is exactly identical with that of Lord Lewis Gordon, both having been forfeited, besides sons of Dukes, and holding their titles by courtesy. All these authentic authorities are from the official Record premised. The form was old and deep-rooted: to go a little further back, in a printed Report, under express authority of Parliament, just beside me, in 1717, concerning the estates forfeited in 1715, we have then also the "*late* Earl Marischall,"—the "late Lord Nairn,"—and the "late Master of Nairn," (a title again by courtesy), all attainted on account of the earlier Stewart rebellion, and who notoriously survived long after. Indeed, the Earl Marshal, the famed friend of the great Frederick, died at the advanced age of eighty-four, in 1778; yet it would have been argued, in the Huntly claim, that he was dead in 1717, though more than an age beyond that, he starts up in Dr. Moore's amusing travels, and maintains, to the deep regret of the Duke of Hamilton, and the Doctor, that having been born before the Union, he was nearly the only true remaining Scottishman, all others produced after that national suicide, having lost the status. (See Trav. vol. II. pp. 258-9.)

[1] See printed Minutes of Evidence generally, and p. 31, where an excerpt of "a certified copy of the Decreet of the Court of Session in Scotland, sustaining the claim of Lord Lewis's mother, Henrietta Duchess Dowager of Gordon, to his estate, dated the 24th of December 1755," &c.—that expressly referred to,—and containing the adjunct "late" in question, is alone given,—in the total *absence* of any other relative emerging fact, or adminicle, that otherwise ought to have been added, and especially noticed, "to prove the death of Lord Lewis Gordon," and to shew that he "was *then* (*in* 1755) dead."

[2] *Ibid*, p. 43.

and most consistently produced for the claimant, whose cause the pretence as to "late" was vitally to assist, according to received principle, directly refuting it, inasmuch as *this* "*late*" *is* there applied to *the* "Marquis of Huntlie," (*George* the *second*, father of Marquis Lewis) in 1647,[1] that is, at the *very* time when he happened to be *alive*,—indeed he did not die until (as was also carefully proved) in 1649;[2] in this manner most sagaciously and providently apprizing the crown and the public of the utter nugatory nature and nullity of the former, and at once beating the bottom out of the very case. There being no succession with us, of a mother to a son,[3] which indeed would be barred here at any rate, by the forfeiture of Lord Lewis, the previous claim of the Duchess, so far, merely as a *creditor* too, clearly proves nothing; all that may be hence inferred in the circumstances is, that he had not been married, or had issue, *before* his attainder; for otherwise there might have been a claim, under settlements, &c. also by his widow or children; though whether this argument came to be adopted in the claim or not, I am uncertain. It would thus appear, that unless to profit, or to take advantage of the Lords' antiquarian unproficiency—no high complement certainly—who, however, deserve every full and proper explanation—or, what is more probable, and a more charitable supposition, and, as we may conclude, owing to the rashness and ignorance of the projectors, such *exclusive* method of killing Lord Lewis,—not even the newspaper being adduced—could hardly have been ever well resorted to, or looked for.

Plea as to "*late*" even refuted by evidence adduced by the claimant.

Sole claim of the Duchess of Gordon after 1746, merely goes to prove that Lord Lewis was unmarried before his forfeiture,—even the newspaper account of his death *not* being adduced.

We now come to the remaining important subject of Lord Henry Gordon, formerly alluded to. As he was pointedly adduced and inserted into the pedigree as younger son of George second Marquis of Huntly, and brother of Charles

Other important extinction, or obstacle, owing to Lord Henry Gordon.

[1] By a solemn act referred to, the 24th of March in that year; see Minutes of Evidence, p. 14.

[2] By another Act of Parliament in 1661, where it is explicitly stated, that this, as he had been described, "late" Marquis of Huntly, in 1647, was, *in* 1649, (*first*, it is to be presumed, unless, like the Hydra of antiquity, he had many lives,) "cruelly deprived of his liffe by a *publict* execution." *Ibid.*

[3] The brothers and sisters of Lord Lewis, and their descendants, bating his attainder, were his heirs-at-law.

first Earl of Aboyne,—in order to discuss him, it was incumbent, either to *prove* that the Earl was the elder, or to establish that the former died without issue. But neither of these methods were adopted; *all* that transpired on this head, was a slovenly passing remark, in an insignificant note attached to the printed case,[1] of a line and a half, gratuitously assuming both Lord Henry's juniority and extinction, upon a vague *anonymous* reference to "*writers*,"—thus shadowy phantoms, it would seem, whom it was left to the reader to feign and to imagine,—it being only added, that "no trace" of him "has been found upon record,"—as to which hereafter.

Here even no attempt at any proof at all.

Yet the Lords were induced to hold the preceding difficulties to be fully obviated,—thus even still more refuting the notion of the necessity of strict evidence in Peerage claims.

Yet the Lords were induced to resolve, upon such *irresistible* proof of extinctions, and removal, so far, of the material impediments, that any objections upon this head had been justly obviated and vanquished, and the claimant infallibly entitled to the honours, as the *next* heir-male. We have thus again an *admirable* exposition of the truth of the doctrine inculcated by the legal authority repeatedly referred to, of the necessity of "evidence of the *strictest* kind in matters of Peerage (Scottish) in the *House of Lords*," [2] and the rejection by them of what is not rigidly so, and below the mark.

Nothing of the latter kind in respect to Lord Lewis.

Why, excepting the slight and inconclusive negative hearsay, or reputation, of the *existing* Lord Aberdeen, as it may be held, —not a blood relative of Lord Lewis, and, however highly respectable, most certainly but an indirect connection, and not nearly so close, correlatively, as "the ghost of Prologue's grandmother, by the *father's* side," &c.[3] while figuring at so remote a period,—there was, in fact, nothing whereby to extinguish him. And, moreover, what *stress* is to be attached to the former, may be even further obvious, when, independent of concurrent enlightened authority,[4] it had been inculcated by Lord Redesdale, in the Roscommon Peerage claim, only so recently as 1828, that evidence of "a reputation" was "very easy to raise;" and who specifically alluded to a case, where it came to be "*utterly* rejected," on examination, *though* by "a person *highly respectable*." It proved, after that sure test, to be such, as to be both improbable, nay wholly unworthy of

The secondary reputation as to him, quite insufficient.

[1] See p. 2. of the *same*. [2] See p. 832. [3] See p. 876. [4] See p. 833, *n.* 4.

credit; and, in fine, he adds, "that *mere* reputation, *without* any proof to support it, (exactly as in the present instance,[1]) is a *very miserable* species of evidence in cases of this description," identically again, of descent and extinctions.[2] Yet, in the Huntly case, Lord Lewis Gordon was a far preferable heir, and indeed a grave and weighty extinction, upon the claimant's own shewing, owing to his unrepealed attainder, even at this day—his being, in consequence, rendered a perpetual exile, and thereby excluded from all Scottish communion and succession, which necessarily threw a veil and mystery over his *subsequent* fate in that country, and barred, so far, the likelihood of any written and parole evidence respecting him. Having thus lived, as is stated,[3] and *closed* his career in France, in obscurity, there was indeed but little chance, independently, through political estrangement and precaution, of his Scottish relatives learning much of him, and still less of Lord Aberdeen, only distantly through them. In lieu of what was so weakly relied upon, therefore,—in these circumstances, a full investigation abroad, where the *best*, and *hence* far more eligible, and certainly only sure intelligence could be gained, especially according to the *strict* rule *or ratio*, (as has been shewn), contended *exclusively* to apply in such emergency, became indispensably necessary. But this was never fairly attempted, all being prematurely left to the "very miserable species of evidence," yclep'd "reputation;" which was here, besides, both irrelevant and inadmissible, because, "in order to let in" even that, as was again solemnly resolved in the important Roscommon Peerage claim in 1828, "it should *first* be shewn that *searches* were made for *regis-*

A "*very miserable* species of evidence"—according to Lord Redesdale.

Yet the extinction of Lord Lewis was weighty, and peculiarly demanded proof.

The faint reputation here even irrelevant.

[1] Of course, most indirectly through Lord Aberdeen,—as to Lord Lewis not having left issue.

[2] Report of Roscommon Peerage claim, by Clark and Finnelly, under their Appeal cases, vol. VI. Part I. p. 112. When reputation or hearsay is admissible, not certainly in this case, as it stands, and hence immaterial, will be seen in the sequel. The legal profession are assuredly much obliged to the above learned gentlemen for the work in question, which, it is to be hoped, they will still continue, according to their welcome intimation, with reports of Peerage cases.

[3] By the evidence only of the Caledonian Mercury, (see p. 876,) which even was *not* adduced, though in the utmost, *penuria testimonii*.

ters,"[1] of course, foreign ones, &c.; and written proof, in the present instance, in France,—thus while no report of such prior necessary investigation there, was ever made to the Lords,—directly confirming the course I have anticipated. I fearlessly contend too, that on the previous strict principle or criterion patronized—so belied again by *the* "*reputation*," even although Lord Lewis had been described as "*naturally* deceased" in the decree of the Session in 1755,[2] instead of simply as "late," still that, inasmuch as it by no means precluded the possibility of issue,—which yet remained to be unequivocally disproved, as it happened not to be, was far indeed from sufficing.

There should have been consistently, prior investigations, and abroad.

Upon the strict *ratio*, in every possible view, the extinction was unsupported.

At the same time, likewise, we have seen how Lord Henry Gordon was disposed of, though so prominently brought forward, only by a gratuitous passing remark, in a hardly discernible *note* to the printed case; in the proof led, and in the Minutes of Evidence, by *nothing*—without even the shadow of an adminicle—in a way that would scarcely have been risked in a subaltern Scottish service, though, in the *gross*, so much affected to be condemned by English authorities.

Lord Henry, the *other* extinction, or obstacle, in *no* way disposed of.

With every submission, in these circumstances, instead of sole-

[1] See Clark and Finnelly's Appeal Cases, *ut sup*, p. 105. The Roscommon was an Irish claim; and the Committee, in delivering the above resolution, added, that "it was extremely important to observe conformity on English and Irish claims of Peerage." *Ib.* Hence such rule not being applied in the Scottish Peerage claim of Huntly, in 1838, we have additional refutation of a former assertion risked, that, in Scottish Peerage claims, "the House of Lords has *not yet* acknowledged *any* rule of evidence, but those established by the English Law." See p. 832.

Huntly claim further shews that the English law does not rule in Scottish Peerages.

[2] See pp. 876-8. Lord Lewis would, assuredly, have been a far better peg, whereon Peerage adventurers, (of whom there have been so many in our days,) might have hung a supposititious pedigree, than certain others that have been resorted too. In the much later confirmation of the Testament of Lord Charles Gordon, brother of the former, in 1790, (in the Edinburgh Testamentary Commissary Register,) Lord Adam Gordon is styled "only surviving son" of Alexander Duke of Gordon, their father; but this too, labours under an obvious objection stated, while the confirmation here of Lord Adam, as an executor dative, "*qua* nearest in kin," in such matter of executory, would not, by our law, extinguish the issue of Lord Lewis, even if then existing, because they could not have taken, not being upon the same line, but would have been thus excluded,—*even* too *bating* the forfeiture.

Testament of Lord Charles Gordon in 1790 in no view extinguish Lord Lewis.

ly clinging to "a *very miserable* species of evidence," according to Lord Redesdale, in the strict—probably most eligible and approved view, and far from being unprecedented, for full, and proper satisfaction, the obvious course available in this extreme and *clamant* case—supposing all other sources exhausted—should have been to have stated and adduced *every* thing transpiring in regard to Lord Lewis,—certainly including the newspaper account of his death,[1]—*all* we yet have upon that head, not so much perhaps in the character of evidence, as to shew the Lords, who may be considered as having just right to every attainable information in the solemn exercise of their duty, that the claimant had made all due investigation in his power, and had fairly and honestly submitted the results to them, with which they might deal as they chose. There may certainly not have been much to go upon, but still it was better, in the present particular, rather to tender that much, than nothing—rather than the blank, or pure evanescence that was hazardously trusted to in its stead. As long as there is a distinction between *majus* et *minus*, between something or

Method that should have been here adopted as to Lord Lewis, in the circumstances.

Every thing should have been here adduced for the *full*

[1] Such identical form too,—that of thus adducing newspapers,—is quite relevant in practice. In the Borthwick claim in 1812, the Edinburgh Gazette, Advertiser, Courant, and actually our *old* friend the *Caledonian Mercury*, (see p. 876), with various newspapers, were given in as evidence, and admitted by the Lords without scruple, to corroborate the pedigree and extinctions, through the evidence of advertisements by the claimant, therein inserted. This was likewise, as intimated, in conformity to the precedent of the Zouche claim, where the same procedure had been directly enforced, even by the Lords, for the means of publication and information. (See Minutes of Evidence in the Borthwick case, pp. 87-8-9.) Nor are the above solitary instances. The late Clerk Hamilton was a leading counsel for the Borthwick claimant; and in the printed case, (containing the usual statement, and requisite authorities,) of the Marchmont claimant in 1820, now before me, framed and revised by him, and by Mr Brougham, afterwards Chancellor, whose name, as well as that of the former, are appended thereto,—in order to prove, in the identical way, as in the present instance, the death *abroad*, in Ireland, of John Hume, a material extinction, in 1738, the *Caledonian Mercury, again*, singularly enough, is legally referred to, and actually "produced" for the purpose. (See p. 5.) That paper, though excluded in the Huntly case, had thus prescriptively acquired, independent of the legal relevancy, the right of *killing*, and giving due and approved testimony on such occasions.

Newspapers relevantly adduced in evidence in Peerage cases, and under express authority of the Lords.

Caledonian Mercury might have been equally here founded upon, as in the Marchmont case.

satisfaction of the *Lords*, &c. instead of nothing.

nothing,—by which *last* worthy method, in fact, (when there was besides still *another* remedy, as will be further apparent in the sequel), Lord Lewis was only attempted to be dispatched, this may be accounted the most appropriate, and indeed only course. Nay, it is but recently supported in principle by the resolution of the Lords again, in the Roscommon Peerage claim, repeatedly adverted to in 1828, whereby they held that even "documents put before the House by a claimant, although *not* admitted *in evidence*," were yet "fit matter for observation," with a view to *ulterior objects*, and, as above, to expiscate truth and justice,—however, it had been contended, that, owing to the former being "not in evidence," it was "unnecessary to observe upon them."[1] At the same time, what I have proposed might, by the very publication, (in the same way as the Lords' order, through newspapers[2]), have elicited a clue to strict legal proof of the necessary extinction, which must constantly be preferred. Neither is evidence always immutable, and to be precisely defined. On the contrary, as is notorious, it is occasionally flexible, and changes its hues and complexion from circumstances, so that what may well fall to be rejected in a certain alternative, may not in another, such as the present; while, bigottedly to maintain the reverse, and to *withhold*, in this extreme emergency—as *was* done in the Huntly instance,—the newspaper in 1754, a kind of sheet anchor, on a limited scale, would be tantamount in one of a political kind—though with far greater relevancy there, (recurring to a former illustration,) to perishing with Vattel in our hand. But again, to shew the *consistency* of the management and procedure in the same Huntly respect, in a point of far less importance, a wretched, indeed suspicious copy or writing, upon a scrap of parchment, undated, unfinished,[3] ungrammatical,

This corroborated by the procedure in the Roscommon case.

Peculiar nature of evidence.

Inconsistency in the Huntly case in withholding the evidence of the newspaper, and yet founding upon a *copy* of what seems an ignorant fabrication.

[1] See Roscommon claim, in Clark and Finnelly's Reports, vol. VI. P. I. pp. 97-8, 107-8.

[2] See p. 883, *n*.

Specimen and peculiar nature of the copy, and writ in question.

[3] It stops shortly thus,—"In cujus rei testimonium, huic presenti, magnum nostrum sigillum in testimonium præmissorum, apponi præcepimus," ..... without insertion either of the place of execution, names of any witnesses, or, what was still more material, of the date. See, in contrast with this, *inter alia*, the constitution of the Earldom of Winton, dated at Holy-rood, 1600, &c. the year only after the Hunt-

unauthenticated, and of peculiar and foreign hand-writing—being even, I might say, an ignorant *fabrication*, but professing to be an anomalous retrospective royal declaration of the fact of the constitution of the Huntly Marquisate in 1599,[1] *was*, on the *other* hand, expressly *adduced*, nay, even admitted in evidence, though with an intimation to the claimant, that it should be corroborated in "the absence of the Great Seal,"[2] such

The latter even, though strictly below notice, received in evidence.

ly creation, in the Great Seal Register, which has all these usual solemnities, independently of the royal subscription.

[1] Whatever might be superficially thought, these facts are sufficiently obvious, on inspection, to a Scottish legal antiquary. There is not the least vestige of the necessary tag, far less seal, to give the parchment an air of originality, or any thing to that effect, though a small hole or abreption at the bottom has been made, suspiciously enough, as it were, to induce such an impression. The grant, besides, begins in the *present* tense, *ex tunc*, and then peculiarly goes off into the *past*,—first *wishing* to exalt the grantee,—and then stating that he *had been* created, and so exalted *in* 1599,—thus *hibernicè* analogous, though inversely, to the case of *the* "*first* of *Irish* commanders,"—who "*died* at Antigua, *fighting* in Flanders." Independently of the hand-writing being strange, the document running in the name of James, king of *Great Britain*, *France*, &c. while the date of the creation referred to, *in græmio*, is in 1599, may authorize its having been by a foreigner, who thought that the king had been *then* of Great Britain, and not until 1603, the true era of the Union of the crowns. In further corroboration, I might add, that the words in the original, are James, king "magni Britanniæ," thus *masculating* Brittania, but an odd error, and not likely to be perpetrated, at the outset of the deed, as it is, during a reign that produced the *best* Scottish Latinity, even by an ordinary conveyancer. What occasion too, was there for such later declaration, when, from the official account of the Huntly creation in 1599, (in Sir George Mackenzie's Works, referred to, see vol. II. p. 535), it transpires that there *was* a patent *then* given to the disponee? The former may have been much more by an ignorant bailiff, than the Moray instrument, according to Lord Rosslyn, (see pp. 800-1.) It having been explicitly admitted by the counsel for the Huntly claimant in 1838, "that *this* Document did *not* appear to have any particular Bearing on the case," (see Minutes of Evidence, p. 7,) it now only affords a topic of harmless, though curious criticism.

[2] See Minutes of Evidence, p. 7,—and Clark and Finnelly, under, it is to be regretted, their very summary and brief account of the Huntly claim, (Appeal cases, vol. V. p. 351,) wherein they state, that "the Committee received the *instrument*, (the sorry *copy* in question,) after some discussion," adding, that the Lord Advocate "did not oppose its

defect not being, *per se*, fatal. I need hardly observe, that the suggestion, resolving into an order to illustrate what was *obscurum per obscurius*, elicited no further results,—and hence so much again, for the rigorous notions and procedure as to evidence of the House of Lords in Scottish Peerage claims![1]

But, independently of the above, Lord Lewis, and any supposed issue, could have been fully dispatched, according to strict law and precedent, owing to his attainder, upon the relevant authority of the Gordon of Park case, fully in point.

But, independently of all this, it so happens, that, owing to the *very* circumstance of the *attainder* of Lord Lewis Gordon in 1746, both he, and any supposed issue withal, could at once have been discussed and removed, as obstacles to the claim, upon valid and unexceptionable legal precedent and authority, namely, in terms of the relevant and noted decision in the case of Gordon of Park in 1754, which is admitted to apply equally to honours as to lands. In exact conformity with the latter, the Marquisate of Huntly being an entailed honour, with a *remainder over*, in virtue of the regulating conveyance by the Act of Parliament in 1651,[2] precisely the same, so far, both in conception and phraseology, with the regulating Park entail, while any imaginable offspring of Lord Lewis must be presumed to have been born *abroad after* the attainder,[3] these and their descendants, being thus, as is held, *aliens*, would indisputably, be in the identical situation of the *also foreign* issue, of the *also* previously attainted Gordon of Park traitor, all included under a perfectly corresponding limitation. Hence the former, as fixed by the Park decision, in consequence of their birth abroad, and the antecedent flaw, elements common to both cases, would be equally beyond the pale of law, and utter nullities thereby, as much as if they had never existed,—in which event, as was further conclusively found by the important decision in question, in favour of the next Gordon of Park heir-male, (he taking again, and similarly, by a remainder over,) immediately on failure of

reception, but submitted whether it was sufficient proof of the creation and limitation of the dignity in question."

[1] See p. 832.

[2] See pp. 873-4.

[3] See p. 879. If he had been married too, and had had issue *previously*, in this country, there would have been full means of fixing the facts, the utter absence of which relative proof, necessarily disproves such supposition.

the prior heirs-male, in terms of the first limitation, in the Huntly act, in 1651,[1] in the person of George, last Duke of Gordon, Marquis of Huntly, &c. the Marquisate and the subordinate honours, on the supposed alternative of heirs-male of Lord Lewis, (he, at length, as we may hold, being fairly dead[2]), in virtue of the closing remainder there, to the "heirs-male whatsoever," that now would come into play, would instantly vest in them, and necessarily in the claimant, as the first under that character. By the settled law, in the contemplated event, the claimant had nothing to do with the remaining nearer heirs-male, *(de facto)* in the limitation, who were barred, as above, by such absolute deprivation and loss of caste, or obliged to notice, or account for them, as he took too, as was shewn under the law of forfeiture,[3] by a title, (through the remainder over), quite independent of them, that was distinct from, and wholly uncompromised by the guilt of the person in the previous limitation.[4] Yet this argument, barring

Lord Lewis and his issue were, in consequence, legally quite out of the question.

[1] See pp. 873-4.

[2] See also p. 876, the confirmed testament in 1790, if it can be fully received as certain, in reference to his Lordship, whose issue, however, it clearly would not extinguish.

[3] See pp. 712-13-14-15-16-17-18, &c.

[4] This report of the Gordon of Park case, a leading one, is thus given correctly by Cruise. "The *issue*, (heirs-male of the body of the traitor, under a first limitation, as in the text,) must be *capable* of inheriting the *dignity*, *otherwise* the *remainder* will *take effect*. Thus, in the *case* of Gordon against the King's Advocate, (*that* of Park,) the following question was put to the Judges by the House of Lords: 'Tenant in tail-male of lands in England, with remainder over, is attainted of high treason, and the estate tail thereby forfeited to the crown. *After* this *attainder*, tenant in tail has issue *male*, *born* in *foreign* parts, out of the ligeance of the crown of Great Britain, and dies leaving such issue male.—*Quære*, is the estate, or interest in the lands, which were forfeited to the crown, as aforesaid, continuing, or determined? The Lord Chief Baron of the Court of Exchequer, having conferred with the other Judges present, delivered their unanimous opinion, that the estate or interest in the lands, so forfeited to the crown, as aforesaid, was determined.' In consequence of this opinion, the *person* who was *next in remainder*, recovered the *estate*, (*that* of Park) from the crown." *On Dig* p. 123. The entail in the Park case, by his father, was to Sir William Gordon of Park, the *traitor*, and the heirs-male of his body; *whom failing*, to the *heirs-male* of the body of

Printed cases, 1754.

exception in any adverse hypothetical event, and imperatively, I conceive, demanding adduction, not only in the regular course, but in such *penuria testimonii*, and consequently the commonest regard and duty to the client, whom it certainly was far indeed from injuring, has been as little resorted to,—though before a Tribunal, so *scrupulous*, and *exacting*, as has *been contended*, in the matter of evidence, and requiring full, and *strict* authority and substantiation in every thing. Instead of which, all was thus *providentially* left to the glaring vacuity, in the present particular, in respect to the still outstanding difficulty as to Lord Lewis, which, according to highest authority, and doctrine elsewhere, as we will see in the sequel, in virtue of a later decision, (that of Rutherford,) would, *a fortiori*, have been utterly fatal and insurmountable.

This material argument, however, was unadduced.

Then again, as to Lord Henry Gordon, the remaining impediment and obstacle, after the parallel precedent in the case of Belhaven,—where such course was decisively sustained,[1]—besides being followed in the recenter Scottish case of Lovat, though his existence and filiation are established by historical evidence, (by the way, it may be observed, conclusive, according to Lord Rosslyn[2]), yet, by that *very* evidence, his juniority to Charles, the first Earl of Aboyne, ancestor of the claimant, that amounts to the same thing, if not extinction too, are fixed, which also solves the point.[3] What is further remark-

Lord Henry again, could be equally dispatched, according to the legal precedents of Belhaven and Lovat.

his father, under which last, John, the successful claimant, took. Cruise, it will be observed, gives the above, as ruling in the case also of dignities, and he says further, in *a* Peerage opinion I have by him, in 1818, "I have no doubt but that the principles adopted in the *second* case of Park, (the above,) are equally applicable to dignities."

[1] See pp. 846-7. [2] See pp. 822-3, 831-2-4, *n.* 1.

[3] Spalding, an Aberdeenshire person, and a cotemporary, styles Lord Charles (the Earl,) the "*fourt* sone" of George, second Marquis of Huntly, (see his History, last Edit. vol. II. p. 106,) from whence, as we can indisputably fix, that the *three elder* were George Lord Gordon, James Viscount of Aboyne,—who both died without issue,—and Lewis, afterwards third Marquis of Huntly; Lord Henry necessarily must have been the fifth, and youngest. Now, as to Lord Henry's filiation and juniority, *simultaneously*, by one and the same evidence, both Gordon of Sallagh, another equally esteemed cotemporary, the continuator of Sir Robert Gordon's History of the Earldom of Sutherland, (see p. 545,) and Gordon, in his History of the Family of Gordon, pub-

able too, this identical extrication and argument had been even expressly inculcated and enforced by Lord Redesdale, in the recent Roscommon Peerage decision in 1828, a great English rule in so many respects, and that ought to be familiar to all Peerage lawyers. A MS. pedigree simply, was there adduced, to prove the existence at one time, of four *nearer* heirs than the claimant, sons of the first Earl of Roscommon. And how did his Lordship meet the objection? just precisely as above; for he replied, that while it did so, "the pedigree states them to have died without issue," which sufficed,—"*that*," he observed, "which proves their existence, *proves* their *death without issue*; for the whole document," he most pertinently and logically concluded, "*must* be taken *together*, and not a part of it; so that there is no evidence, on the part of the crown, that there were such *persons* (the above Roscommon *sons*,) except this pedigree, and this shows them to have died without issue."[1] Hence the very evidence, in a parallel way, proving Lord Henry's existence, likewise proving his juniority, (which is enough,) must have equal favour and effect. The corresponding facts and arguments, here again, therefore, should have been, moreover, deferentially adduced in the Huntly claim, out of due regard to the Lords, as *subjecta materies*, as much as those in the antecedent extinction, after which all, (including Lord Lewis,) would have been fairly set at rest, in *every* view,—instead of *actually* standing, as before, in a shaking quagmire.

Farther still, most pointedly according to the identical doctrine in the Roscommon case, by the English law.

Yet these relevant facts and precedents were never stated.

Upon the strict *ratio*, assuredly, as inculcated by certain

lished in 1726, (see vol. II. pp. 179-80, and 281-3,) do represent him as *son*, and the *youngest* son, of the above George, second Marquis, while the latter too, in such a manner as to induce perhaps a likely impression, that he had been unmarried, and left no issue, inasmuch, while he is *otherwise* communicative as to his brothers, &c. he neither mentions any marriage, or issue of Lord Henry. This therefore tells, as in the text. In the *unparalleled* culpable note, formerly noticed, in the printed Huntly case, (p. 2.) it is further erroneously stated, that "*several* writers,"—*nameless*, as was remarked,—"*all agree* that *he (Lord Henry)* died *without issue*." This last fact is hardly capable of being inferred from more than one, even if that.

[1] See the statement of the Roscommon Peerage claim, among Clark and Finnelly's Appeal Reports, vol. VI. Part I. p. 129.

Upon the strict *ratio*, at least as espoused by some English authorities, the Huntly case lamely and most inadequately concocted.

authorities, chiefly English,—independently of the more eligible course, as may be thought, on all hands, it must indeed be confessed that the Huntly claim, with its capabilities, was, in part, very lamely and inadequately concocted by the agents or framers.[1] By some strange fatality, besides, as was elsewhere shewn, gross error, and misapprehension seems to have environed it, owing to what reason I shall not stop to inquire.[2]

The negligence and deficiency here a serious consideration, and may induce baneful consequences.

But, with every deference, the striking want and deficiency in the proof in question, as above,[3] when actually available, by legal precedent and authority, is a serious consideration, as it may thus open a door, ostensibly under the high countenance of the Lords, to loose and exceptionable practice and conduct hereafter, in respect to extinctions,—dealt with, as they have been, in the Huntly instance.[4] Nay, under colour of the latter, to the harsh, injurious, and unjust consequences, in the noted case of Willoughby of Parham, the slightest chance of the recurrence of which, however differing, as our law may here do, from that of England—should, above all, be avoided.

In pointed refutation too, of a previous authority, the

What is, notwithstanding, at the same time, curious and remarkable, although, as has been seen, it was inculcated by a repeatedly quoted authority, that evidence would not be autho-

The recent Rutherford case, to be shortly stated, shews the necessity of full preparation and concoction.

[1] The danger of such rashness and negligence, with the prudent necessity of a different course, such as I have here suggested, will be evident from what will transpire, under the also recent Rutherford claim. In a Peerage case, every thing should be fully and correctly concocted for the Lords,—with as little retention as possible. This, I know, quadrates with the opinion of some enlightened English lawyers, at least, while the Lords, owing to their various important avocations, require every due premonition and information. On this account, I cannot help thinking, that the original Scottish mode of procedure is preferable to the English.

[2] See pp. 341, *n.* 342, *ibid.*

Negligent custom as to pedigrees in Scottish Peerage claims.

[3] On this head, I might further advert to the practice of submitting printed pedigrees and statements, in Peerage matters, to the Lords, upon the simple authority actually, (though uncondescended upon), of Wood and Douglas. This only creates additional and unnecessary expense to clients, from the indispensable correction of manifest errors afterwards, (as might be expected), through the *proper* channels, that ought to have been before explored in Scotland.

[4] How the procedure *quadrates* too, or is to be reconciled with later doctrine and practice, as illustrated in the Rutherford Peerage case, will be seen in the sequel under that claim.

rized or admitted in a Scottish Peerage claim, by the Lords, "not *strictly admissible* by the Law of England;"[1] yet unquestionably, the relative procedure, in the matter of the Huntly extinctions, in the obvious dereliction again (as in the Kellie instance) of the latter, was far more in accordance with the law of Scotland,—upon which it must, in a measure, not irrelevantly rest; seeing that law, when, as in the Huntly case, there existed no competitor, is more indulgent, in the main, in respect to extinctions,[2] however it may still naturally authorize, and prefer, when attainable, the best evidence, and means, to meet and to obviate them.[3]

Huntly case was determined more according to the Scottish law, and not by the English, or on the strict *ratio*.

The notion, therefore, of superior strictness, or in the extreme always, by the Lords' practice, in evidence, has now been repeatedly refuted, latterly through the medium of these remarkably lax precedents of Lords Lewis and Henry Gordon;[4] while the bent and character of our law, as was instruct-

Notion of the superior strictness of the Lords in Evidence in Scottish Peerage cases, further here glaringly refuted.

[1] See p. 832. [2] See p. 42.

[3] On a competition, however, our law appears to have been strict, (see p. 42); and on the occasion of every probation of a pedigree by service, different from present practice, any one, even upon an indirect interest, was allowed to object, which submitted it to the test of a much more constant and rigorous challenge, (see p. 37.)

[4] I have recently discovered, I am happy to say, various notices of "Lord Henry Gordon," described as "*brother* to the last Marquis of Huntly," (*Lewis* the third), and "*sone* to the *late George, (the second)* *Marques* of Huntly," in the original Register of Privy Council, in her Majesty's General Register House, from 1664, to 1667 inclusive, that may be further favourable. While his brother Earl Charles is elsewhere presumptively, shewn to have been more advanced, and to have prominently figured before the Restoration, besides being rewarded with the Earldom of Aboyne in 1660, and other grants, immediately thereafter, it transpires from the above, that Lord Henry had been neither provided, or properly alimented until 1667, when he is classed, in this respect, even with his nieces, the daughters of the deceased Marquis Lewis, his brother. From hence we may conclude, independently of the historical evidence, to that import, that he was the youngest son of George the second Marquis, the common ancestor. And when Lord Henry actually is provided, as a son of the family in 1667, in virtue of a general settlement, it is by a grant of 5000 merks, allocated on lands to himself in liferent merely, without any extension thereof, according to the old custom, by way of appanage, to issue, who are in no event, or any relative notice, contemplated. He may have probably been hence intended

New authentic, and favourable particulars about Lord Henry Gordon; see p. 880.

Apology and special reason for the comparative mildness of the Scottish law as to extinctions.

ed, had an apology for its comparative mildness and indulgence in extinctions, from the future competency with us, denied, or unknown in England, to question or open up, in emergencies, the admission, or constitution of a Peerage, whereby, as well as through the instrumentality of *interim* possession only, a remedy was afforded to the evil of the English consequences noticed. I have been indispensably pointed in my remarks upon the Huntly claim, owing to its peculiarity in part, and negligence, and inadequacy, in the previous concoction, that always demands comment and animadversion. How far the Huntly precedent, with the result, may bear upon extinctions in future, as might be expected, in introducing a *lenient* or relaxed rule, it is not for me to say, But, I apprehend, it is only by adopting the course I have done, that the law in general can be properly illustrated and matured; and beyond doubt, without any scruple or hesitation in the instance in question, the claim being certainly intrinsically good, upon the available merits,[1] however unestimated or overlooked; according, I conceive, as I have treated, and disposed of it, in the only points, that may be otherwise deemed weak and insufficient.

Will the Huntly precedent introduce a more lenient and lax law in regard to extinction?

My pointed remarks in the Huntly case required, while they are far from prejudicing it.

I have only to add one other circumstance in the present case, in regard to a matter of form. The Earl of Aboyne, the Huntly claimant, having merely petitioned that he might, as entitled, be entered under the higher honour of the Marquisate in the Union Roll, without praying for declaration of his right to the dignities in question, it was found that a new petition for this additional purpose should be presented. His counsel suggested that the petition should be to the

Obvious question of form, decided in the same.

for the Romish church, (there being as little allusion to his marrying,) to which, and long after, the House of Gordon strictly adhered. We have, in the transactions referred to,—the curious information, that the rental of the Huntly or Gordon estate, then amounted to 24,771 pounds Scots. It is perhaps too, the more incumbent to state these particulars, as the more that is known of Lord Henry, may save him from being the prey, as ancestor, under some imaginary character, to future impostors, (of whom there have been so many lately,) in their eager attempt to foist themselves upon noble families,—especially ours.

[1] I need hardly add, there is besides every human probability of Lord Lewis's extinction, *naturally* also; but that is not *hujus loci*, or meets the obvious legal points I have in view.

Lords; but the Chancellor, of course, would not adopt such procedure, quite contrary to just rule, and notions, upon the English principle, but agreed with Lord Shaftesbury, the chairman of the Committee, that it "*must*" be to the *crown*, because, as the latter justly said, "their Lordships had no power to add to, or alter the petition. They were only to *report* upon the petition, which was referred (by the crown) to them." The above, accordingly, was complied with; and thereafter, upon a second petition being tendered to the crown, containing the further prayer of an express declaration, as premised, and on its being again referred to the Lords, and by them to a Committee, a resolution past, the 22d of June 1838, in favour of the claimant; but at the same time, that not having insisted in his claim to the ancient *Earldom* of Huntly, (for which he had also petitioned), he had not established his right thereto. The evidence, under sanction of the Chancellor's opinion, was not gone over again.[1]

Quite in conformity to just principle; and any emendment of a petition by a claimant in such circumstances, must be by another to the crown.

No decision come to, upon the claim to the Earldom of Huntly.

Andrew Rutherford, afterwards Earl of Teviot, (a dignity now extinct, and in which we have no interest,[2]) was created by patent, the 19th of January 1661, Lord Rutherford, with limitation to him, and the heirs-male of his body; but, in default of them, in favour of "*quamcunque aliam* personam, seu *personas quas sibi* (the *Patentee*), *quoad* vixerit, *quinetiam*, *in articulo mortis*, ad ei succedendum, ac fore ejus hæredes talliæ, et provisionis, in eadem dignitate, nominare, et designare placuerit, *secundum nominationem*, et *designationem manu* ejus *subscribendam*, subque provisionibus, restrictionibus, et conditionibus, a dicto Andrea, *pro* ejus *arbitrio*, in dicta *designatione* exprimendis."[3] The patentee, accordingly, executed a

Case of the Barony of Rutherford in 1833-5, 1837-9.

Regulating patent of the Barony in 1661, with powers of nomination to the patentee.

[1] See Minutes of Evidence, and Clark and Finnelly's Appeal Cases, vol. V. pp. 351-2-3.

[2] Being only granted by patent, 2d of February 1663, to him, and to the heirs-male of his body, (Great Seal Register,) and hence becoming extinct at his death, as he left no issue.

Earldom of Teviot, granted to the former in 1663, extinct.

[3] Great Seal Register. Such phraseology may rather seem like that in our legitimations, *peculiarly* ample, and high sounding, and to fall, in the same way, to be taken *cum grano salis*. Giving the "in *articulo mortis*" condition, as above, full scope, a weak Peer, *moribundus*, might, not unlikely, have thus *nominated* his sick nurse, or any of his menials, under whose exacting control, and care he necessarily might

Power of nomination in 1661 broad, and may be taken with some restriction, though there be no de-

final *motley* nomination, in the form of a testamentary disposition, dated at Portsmouth, the 23d of December 1663, of his entire estate and succession, &c. at the moment of embarking on his last military command, which closed his career, in 1664; whereby he did "nominate and appoint Sir Thomas Rutherford of Hunthill, my heir to succeed in my *whole estate, and dignity* of *Lord Rutherfurd*, according to the power given me by his Majesty's Patent under the Great Seal,[1] whom, by these presents, I nominate my only *executor*, universal legatar, &c.—Providing always, and it is hereby specially my will, that the *said* estate *and lands*, or if in monies, to be employed in lands, LEFT *hereby*, by me to the *said* Sir Thomas Rutherford, shall *still* remain to *the eldest son* of the said Sir Thomas Rutherford, and *failing* thereof, to the *nearest* heirs male of the said Sir Thomas, *which failing*, to the *eldest daughter* of the said Sir Thomas; providing always, that *he* to whom she shall be married, be obliged to take the *name* of *Rutherford*, *arms*, *and* TITLE, and *so continue* from *time* to time; and by this my present will, and upon this condition specially,[2] I nominate Sir Thomas Rutherford, and aforesaid, my heirs, executors, etc. that they, in no manner of way, shall contract (debt, or burden the estate, &c. a mere, and hence ineffectual legal injunction,) but that they leave it free without *any* burden, or debt, from heir to heir, *in futuram*

Nomination executed by the patentee accordingly, in 1663.

be. Yet, at the same time, I know of no instance, where the power or faculty *from* the crown, *once* properly *given*, as in the present instance, has been either questioned, or judicially denied, with us,—but *e contra*. In the case of the Barony of Coupar, in 1671, something outrageous and akin to the previous enormity, though lesser in degradation, had nearly been *curiously* perpetrated,—but the Royal sanction had happily not been secured, (see pp. 85-6-7.) I have said at p. 87, that if the latter intervention had been there, the Coupar conveyance noticed might have been "adequate." Of course, I mean *ex terminis*, without reference to the strict legal question.

cision settling the point.

Curious case respecting the Barony of Coupar in 1671.

[1] As above, in 1661. As far as yet shewn, and whatever might be the tradition, Sir Thomas, *legally*, was but a stranger to the noble party, who appears, though a Rutherford, to have been but of obscure origin.

[2] Rather indirectly, as affecting him.

[3] Vain hope indeed!

rei memoriam, and for *maintaining* of the *name* of Rutherford, *so lang* as *may be*." [1]

The noble settler appears to have been a rough soldier, who, upon the strength of this faculty of nomination, not irrelevantly conferred upon him by our practice, was unfortunately without *much* foreign aid, at least, in the habit, pernicious, as may be deemed, in most ways, by the legal profession, — of *himself* executing various settlements or nominations accordingly, during the locomotive nature of his profession; which, being different and repeatedly recalled and altered, induced the not unappropriate remark, considering such delegation of the royal prerogative in his instance,—that "he made a Peer at every port." But his rash and wholly unwarranted confidence in his own qualifications as a conveyancer,—nay, even scrivener, but on a very small scale, had especially this unfortunate result, that the *amusement* evoked settlements, as might naturally be expected, which defied law and ingenuity *strictly* to unravel; and of such a kind was the above notable production, "hurriedly executed," as is ingenuously admitted by the counsel in the present claim,[2] on the sudden emergency of a last and fatal expedition.

Peculiar *amusement* of the patentee, a rough soldier, and by no means qualified for the above legal task.

It is *strictly*, and according to usual professional rule or exactitude, evidently in certain respects inexplicit, in no small degree; imperfect, incoherent, or incongruous, and irreconcilable; in this manner inadequate to the intended purpose. Rendering "estate" there, on its *second* occurrence, as often, in the same way, *pleonastically* obtains, even when thus coupled with "lands," by its ordinary territorial acceptation, as denoting nothing more, there is certainly no conveyance of the *honour*, which *ought* besides to have been, *per expressum*, *specifically* repeated, failing the institute, Sir Thomas Rutherford of Hunthill, (who, so far, however, may be properly nominated and appointed), either to his "eldest son," to the subsequent heirs-male, or to the single heir-female. It is to be observed also, that "whole

Nomination according to *strict* professional rule and exactitude, imperfect, anomalous, and inadequate.

Illustrations of this by the settlement.

[1] The will was duly proved in the Prerogative Court of Canterbury, 24th of July 1664, as by the evidence in the claim in question.

[2] See printed case for the claimant, which is candidly and judiciously drawn up.

estate," in the *first* instance, may be further held to comprise lands, as opposed to the attendant term "dignity" there; for *such previous* grant, accordingly, can only justify the after intimation, in the material clause affecting the *remaining* heirs, that "lands," prefixed too by "*said,*" were, (or had been) "*left* hereby, by *me* (the *settler*), to the *said Sir Thomas,*" the institute—thus fully in the *past* tense, and inevitably involving, and so explaining the former *word* (*estate*), in the absence of any *separate* previous grant *relative*. And hence, if "estate" shall be admitted, in this manner, to have such meaning, on its *prior* employment, it may be relevantly argued still to retain it in the latter,—the direct result of which, owing to the dignity, of course, not being at all carried, grounded withal upon the *very* phraseology and proved acceptation of the *settler*, would evidently be ruinous and fatal. As for the other term, "*lands,*" coupled with "estate," I need not add, there can be no dispute. Then besides,—still, under the view in question,—this succession *but* of the "estate and lands," so explained, is merely to go on failure of "the eldest son," and the "heirs male," most consistently, it would seem, alone to "the eldest daughter" of Sir Thomas, and to no other female heir; for there is no such corresponding adjunct extending the female descent, as on the last male occasion, although the avowed wish and intention transpires afterwards, to preserve and perpetuate "the name of Rutherford," (to which southern clan the settler belonged,) "*in futuram rei memoriam*—so lang as may be." But what seems still more preposterous, notwithstanding this, and the necessary desire, of course, that the Rutherford clan and *blood* should have *some* interest, at least, and concern in the succession, as premised, and while there is still only a conveyance of the "estate and lands" to the solitary "eldest daughter," her husband, a mere unknown undescriable *stranger*, is, on the other hand, to be much more, and of a truth, signally favoured; for there is actually, most consistently again, and in excellent keeping with the above, a personal, perpetual transference to him, *exclusively*, of all the other heirs, after the institute—of the "*title,*" besides the arms, and the cherished name of Rutherford. Although too, such stranger "be obliged to take,"—as in duty,

and gratitude, he indeed ought—the name, "*title*," and arms, &c. it is, however, only in the way of a simple order, in a simple destination,[1] which resolves into nothing; for there are no irritant and resolutive clauses of forfeiture adjected, to *compel* him to do so, and to forfeit his right and interest explicitly, in the event of contravention, which are notoriously indispensable for the purpose. And then again, supposing the husband a higher peer, and otherwise fettered to the contrary, as may well happen with us, or, from some motive or caprice, actually not to have implemented the injunction, where then would have been the honour? certainly nowhere,—it would be extinct; for it strangely happens, I repeat, *not* to be granted (*expressly*, it must be allowed,) to her, or to any beyond,—notwithstanding the earnest desire, on the part of the nominator, for the Rutherford *immortality*, and the continuance of the name or family until "crack of doom," as long, in effect, as "water runs, or the grass grows." Under the test and criterion, therefore, as premised, grounded upon strict, or even usual professional notions or rules,—of the noble settler in question, we may justifiably say, that in this—his peculiar fabrication, articulate-

Further anomalies and inconguities.

The conclusion unfavourable by this test.

[1] This practice, through the *medium*, of course, of fuller and better phraseology, is yet, occasionally, to be met with in conveyances, after the middle of the 17th century. Thus, there is a Royal charter, dated at Edinburgh, the 3d of September 1686, *not* under the sign manual, (Great Seal Register,) to George Master of Ross, and the heirs-male of his body, whom failing, to William Lord Ross, his father, and the heirs-male of his body, whom failing, &c. to such whom the latter might name, &c. of the Lordship and Barony of Melvill, &c. the *lands only*,—but with a *collateral* injunction, that the heir-female, and the descendants of her body, use "the surname, armes, *title, honor*," &c. of "Ross of Hawkhead." I need not add, that such insertion, not warranted by the crown—certainly in this instance, is inept so far as regards the dignity. From similar insertions in the Bargeny entail, in reference to heirs-*female*, it has been supposed that the patent of the Barony of Bargeny, not preserved upon record, might have comprized them. But this is further disproved by what other evidence we can here resort to. In a MS. collection of patents in the Advocates' Library, the patent is given, as on the 22d of October 1639, to heirs-male of the body only, while in an original letter, in a private charter-chest, 11th of April 1736, it is stated, that "My Lord Bargenie (James, the *last* heir-male) is dead, &c.—and the *title sinks*," nor was it since assumed.

Singular mode with us, of unduly inserting the "title" and "honour" in collateral clauses, in landed settlements.

Question of descent of the Bargeny Barony.

ly at least, so confused, inconsistent, and inexplicable, he has been signally unsuccessful, and *quod voluit*,—whatever that might have been,—*non fecit*.

The drift of a feasible *intention may*, however, still be discernible, through the *general* nomination, which in the circumstances *may* tell, while the latter, in some degree, is borne out by practice.

A kind of glimmering or indication, however, of a plausible or feasible general intention, seems, at the same time, to diffuse itself through the general tenour of this rude and curious composition, the more perhaps to be respected from the testamentary form adopted, backed by the broad delegated powers conferred by the crown, authorizing any nomination or designation, ad *libitum*, for the purpose, *etiam in articulo mortis*,—thus, so far, too, untrammelled, and beyond the usual legal restraints; while, especially, will and intention, owing to the previous consideration, and in this privileged case, falls accordingly to be consulted. Hence, as the gallant officer may yet obviously, from what has been shewn, have well *designed*, that more than one female should eventually take, nay further, heirs-general at large, we may not only thus admit the latter construction,—to a certain degree indeed authorized by the collective import given to the identical phrase "eldest daughter," in the noted Roxburghe case,[1] but besides, analogously apply, or extend it, in principle, to the previous one of "the eldest son" of Sir Thomas, as equivalent to male offspring, or rather "heir male of the body," which also, though only in the singular, has been employed in practice as equiponderant to "*heirs*-male of the body," in the *plural*.[2] In this instance the term in question would fall necessarily to be more narrowly interpreted than in the former, owing to being controlled by the substitution that follows to the "nearest heirs male." And hence, af-

[1] To the eldest daughter of Hary Lord Ker, and to their heirs-male, (as by the noted destination in 1648,) which was found to include the four daughters *seriatim*, and the heirs-male respectively, of their bodies.

Corroboration from the Primrose patent, in 1703.

[2] Thus the patent of the Viscounty of Primrose, &c. dated 30th of November 1703, (Great Seal Register) is to Sir James Primrose, and the "heir-*male* of his body," whom failing, to the "heir-*male*" of Sir William Primrose, his father. It can never fairly be supposed that the honour was merely to go but to one male-heir, thus literally of the respective parties; but further, in an exemplification of the warrant under the sign manual, "heir-male" is rendered "heirs-male," in the plural, which reconciles, and makes things all plain, as I state.

ter the above fashion,—upon the criterion of probable intention and design—while giving, on the other hand, "estate" coupled with "lands," on its second occurrence in the nomination, a meaning that it *sometimes* does possess of *general* family rank or representation, comprising *honours*,—in reference to which *last* likewise, being flexible, it is also sometimes partially used,—the whole might accordingly amount to a destination of the honours, with the other subjects, in favour of Sir Thomas Rutherford, and the heirs-male of his body, whom failing, to his heirs-male whatsoever, whom failing, to his heirs whatsoever, the eldest heir-female succeeding without division, her husband taking the title and arms. At the same time, the qualified acceptation of "estate," by the context, as was formerly shewn, and that may, *per se*, prove a *cardinal* or material objection, is not to be overlooked, as it may tell still even in the present alternative. Some may be inclined to think, that the subsequent insertion of heirs-female should control and narrow the immediately preceding male succession, so as to confine it to heirs-male of the body, for otherwise, on the former very broad male interpretation, the heirs-female might probably *never* take,—in support of which arguments may not be wanting;—but still, especially owing to the striking desire of the settler to perpetuate, for ever, the *name* or family of *Rutherford*, and other such *clannish* considerations, transpiring from the nomination, I should be disposed to adhere to the identical extended signification as before. Nor is it to be omitted, that we have strictly such concurrent substitutions in practice in the 17th century to heirs-male whatsoever, whom failing, to heirs whatsoever.[1]

Still there may be a cardinal objection here, from the qualified use of the term "estate" employed, tho' sometimes referring to an honour.

[1] I may here select the instance of the patent of the Earldom of Breadalbane, the 13th of August 1681, as in fact the same with the Rutherford nomination, rendered above, the substitutions embracing "hæredes masculos, &c. ex *corpore* dicti Joannis Campbell (the patentee) quibus deficientibus propinquiores et legitimos heredes ejus masculos, (of course *collateral*, from the context), quibus deficientibus, propinquiores et legitimos heredes ejus quoscunque." (Great Seal Register.) The settlement of the Marchmont estate, last of January 1704, is also in point, having substitutions to Patrick Earl of Marchmont's "heirs-male *whatsoever*," (*failing* heirs-male of the body,) whom failing, "to his nearest lawful heirs-*female*," the eldest succeeding without division;

What may be held the preferable construction of the nomination, is supported by the Breadalbane patent, and the Marchmont settlement, in 1681 and 1703.

The present, at best, is a narrow case, and *possibly* a legal tribunal, *ex terminis* of the deed, might not sustain the claim of the heir-male-general, both upon our notions, and those in the Borthwick case in 1813.

But indeed, after all, it may be a *stretch* in law to arrive at, or *eke* out these latter constructions—notwithstanding the broad power of nomination conferred, (inducing favourable relative conclusions)—which yet must have *some limits*,[1] and be taken, as I hinted before, *cum grano salis*—so that it may be still doubted, whether a judicatory, at present, in the matter of honours, would *willingly* sustain, or incline to the same, (failing the institute.) And this, although the Rutherford dignity, even after the death of that disponee, without issue, had been twice taken by his two brothers *seriatim*—of course, the *collateral* heirs-male, and held by and recognised in them, with repeated sittings of both in the Scottish Parliament, in the corresponding capacity.[2] For, coupling what is premised with the remarkable finding and resolution of the Lords in the recent Borthwick case in 1813,[3] independently of our genuine notions, that are still more friendly to such exception, it *might* not *altogether* be incompetent, even by *British* law, to dispute the right of *another*, though claiming in the precise character of the *two aforesaid* heirs-male, *seeing*, owing to their *extinction*, he *cannot* possibly be *descended* OF THEM. In

whom failing, "to his nearest lawful heirs, and assignees *whatsoever*." (See Acts of Parl. last Edit. vol. XI. p. 200.

[1] The authority of the crown, in this, and certain other particulars, cannot be held, with us, to be exactly ascertained. Sir John Nisbet strikingly says, that "the *Prerogative* is *instar* littoris, which is defined *quo fluctus Hybernus exæstuat;* so that, as the sea does not go beyond the shoar, when the sea is most full; so the Prerogative and *Plentitudo Potestatis* does never go *beyond law, which* is a great *littus*, and *Boundary* of *just* power." *Doubts*, pp. 137-8.

[2] It was proved in the late Rutherford claim, that Sir, or Lord Thomas, the institute, made a settlement, 8th of April 1668, of his *title* and estates in favour of these two brothers, *seriatim*, (Archibald and Robert,) and the heirs-male and female of their bodies, &c. with a remainder to his heirs-*male* and assignees, &c.; which, though ineffectual, as respected the title,—*so far* as yet known,—*may* have either positively, or by misapprehension, sustained the right of the latter. The service of Captain John Rutherford in 1737, as heir-male and of *provision* of Lord Robert, (see afterwards,) evidently also had a reference to *lands;* while the character of heir-male-general, that he claimed, quadrated both with the Rutherford settlement in 1668, as is set forth, and with that in 1663. This makes the service stronger.

[3] See p. 586, and what precedes, *ibid.*

these circumstances, by means of such specialty, in the Borthwick instance, a dignity constructively limited to lineal heirs-male, was resolved, in like manner, to be challengeable in a party standing precisely in the shoes of him to whom the honour had been solemnly adjudged by the Lords in 1762,[1] *but not* of *his* body. Yet I must likewise confess, there still would be a marked colour of difference between the Borthwick and Rutherford cases, inasmuch as there was the *compulsator* of an unfavourable res *noviter* veniens ad *notitiam*, by the *common* attaching exception of bastardy in the former—only on the occasion of the recent claim,—while nothing of the kind, unless by way of new argument or illustration, (if that tell) upon the *same* original facts, can be urged against the latter, which thus stands upon a more advantageous footing;—however, the striking Borthwick resolution may evince that even a British Peerage decision, upon a royal reference, in a Scottish claim, may not (in effect) be indefeasible, or beyond the chance or possibility of challenge. And if so, then public recognitions and sittings, merely, in the Scottish Parliament, without the benefit of the *res judicata*, (as in the Rutherford instance,) may still less relevantly operate as an exclusive invincible ingredient in a Peerage case,—especially by our peculiar notions.

But there is still a marked specialty between the Borthwick and Rutherford cases, which is favourable to the latter.

Whatever there may be in these remarks, the objectionable and anomalous Rutherford settlement, the "prentice-work," as may be held, but of a rough soldier, from some hasty or rude draft of the kind, at most imperfectly imitated, cannot be entitled to *much extra* favour in law; and, far less, as nevertheless has strangely happened, be quoted, or referred to, as a proper rule or illustration in the matter of Peerage conveyancing, especially in limitations. It can never there be a fit subject of technical or fair precedent; nay, to appeal to it in a case for support, with this view, would betray a confession of the weakness, indeed desperate character of the latter. It is quite enough if the Rutherford nomination, *quoad* honours, shall succeed in sustaining itself without sinking, instead of attempting, however charitably, to tender its weak and feeble

At any rate, it is absurd to found upon the Rutherford nomination, as a fit and technical rule in Peerage conveyancing.

[1] See pp. 579, *et seq.* and pp. 584, *et seq.*

aid to some other distressed kindred claim, in an analogous, though not certainly *identical* dilemma.

Sir Thomas, the Rutherford institute, succeeded accordingly to the honours, in 1665.—Also his two brothers, Archibald and *Robert seriatim*, after him.

Sir Thomas Rutherford of Hunthill, the institute, who, at least, was thereby exactly or indisputably nominated, succeeded accordingly to Andrew Earl of Teviot, first Lord Rutherford, in the latter dignity. He made up titles to his general succession, by service, the 16th of March 1665,[1] and, as already in part obvious, dying without issue, had for his heirs in the same, *seriatim*, his two younger brothers Archibald, and Robert, the third and fourth Lords Rutherford,—under which title, as further intimated, they were publicly recognised, and who claimed in virtue of the words in the nomination in 1663, to *his* (Sir *Thomas's*) "nearest heirs male." But after the death of Lord Robert himself, without issue, (in like manner, as Archibald, his elder brother, previously), in the reign of George I., the dignity of Lord Rutherford was first assumed by George Durie of Grange, who voted as Lord Rutherford without challenge, at the Peerage Election in September 1733,[2] and who besides, on the 1st of November 1733, under the description of "George Lord Rutherford," was served "heir of line, entail, and of provision," of Andrew Earl of Teviot, "*abavunculi*,"[3] through his descent from a sister of that nobleman. Durie thus, though ostensibly excluded by the nomination in 1663, claimed, as heir-*female* of the Earl, the first Lord Rutherford; while neither he, or his family, ever succeeded in establishing a prior legal and better ground, (as far as is discoverable,) under which they could take. But, at the Election in June 1734, the vote of the former, then given, was protested against by Captain John Rutherford, who peremptorily denied his right,[4]—and who, in the relevant, and pre-

Claim and service of George Durie, as heir-general of Andrew the first Lord, in 1733, after the death of Lord Robert, as is maintained, without issue.

Of Captain John Rutherford, in 1734, with his service to the latter in 1737, as his "heir-*male*

[1] Upon record.

[2] See Robertson's Peerage Proceedings, pp. 133-5, *et seq.*

[3] Upon record. It may be presumed to be in virtue of other settlements, besides that *in* 1663, though he *did also* claim upon *it*. But the party based his right by reason of the ascertained *propinquity* through this service,—of *which* there could be no doubt,—in respect to the *honours*. See Robertson, *ut sup.* pp. 191-5, 258, &c.

[4] Robertson, *ut sup.* pp. 154—160. Lord Marchmont then also protested against any person voting as Lord Rutherford. *Ibid.* p. 154.

ferable character, was subsequently, on the 1st of September 1737, served "*nearest* heir *male*, and of *provision*" in general, to Robert last Lord Rutherford, there styled "nepoti fratris proavi."[1] He had thus as good a claim as Lord Robert, admitting his descent; and therefore also became Lord Rutherford. It would be tedious to detail the incessant contest and wrangling between him and Durie, who founded chiefly upon what he called *his* "*possession*," i. e. his earlier *assumption*,[2] as well as by their heirs, for the Peerage, most keenly and obstinately maintained in public,[3] more especially at Elections,[4] where they *jointly voted*, and claimed to vote, under the dignity,[5] down to the 15th of March 1762; when Alexander Rutherford and David Dury, the respective heirs of the former, were prohibited, by an express order of the Lords, from doing so in future, or styling themselves Lord Rutherford, *until* they had pointedly established their claim.[6] With this command, and injunction, Durie never complied; and, although the other "Alexander Lord Rutherford" had claimed the Peerage, by a reference to the Lords, upon petition to the crown, in 1761,[7] he adopted no further steps. It has been speculated to have been owing to some link in his pedigree, that required corroboration; however, his service, as heir-male, has always stood, without being in the least shaken;[8] while his limited,

and of *provision.*"

Keen contention by both for the title, which they assumed until 1762,—when they were prohibited by the Lords.

Alexander, son of Captain Rutherford, had claimed before the Lords in 1761, but did not insist thereafter.

[1] Upon record. This, as already remarked, was likewise in reference directly to the family landed settlements, which makes the evidence the *more weighty*.

[2] See Robertson, *ut sup.* pp. 191, 194, 195, 232, 258, 260, 272, &c. &c.

[3] The press was also called into play; for, in 1748, "George (Durie) Lord Rutherford," printed an indigant Memorial in support of his right, and in opposition to his rival.

[4] Robertson, *ut sup.* and pp. 187-8-9, 190-4, *et seq.* 233-4-9, 243, &c. &c. Indeed this competition, including the legal forms, and deeds adduced, &c. and a singular speech of "George Lord Rutherford" in 1747, fills no secondary portion of the record.

[5] See Robertson, *ut sup.*

[6] Lords' Journals.

[7] *Ibid.*

[8] What would appear, too, to give the service greater force, was the attempt of George Durie to oppose it, and an action of reduction of the same before the Session, in 1738, by Henry Ker, the grand-nephew and heir-general of Robert last Lord Rutherford, (see afterwards,) both of which were unavailing. See Robertson, *ut sup.* pp. 191, 233-4.

Claims of Alexander and John Rutherfords, as collateral heirs-male of the Rutherfords of Hunthill, in 1833 and 1837, both rejected by the Lords.

depressed means and condition, or adverse politics, might have proved a weighty, if not a sufficient bar. But be this as it may, after failure of his male line, in the person of Alexander his son, the Barony of Rutherford, at a remote period, was again claimed, in the same way as in 1761, before the Lords, (upon a reference,) the 5th of June 1833, by John Rutherford, Esq. still in the character of heir-male collateral of Hunthill, in virtue of such alleged descent before 1600, though unsuccessfully, as was resolved the 11th of April 1835.[1] And although such identical procedure, with discussion as before, was repeated, quite competently,[2] by John Rutherford his son, through another royal reference, the 1st of February 1837,[3] it shared the same fate, as by a second resolution of the Lords, on the 26th of July 1839.[4]

Both parties were cast, upon the mere preliminary objection of the *non*-extinction of Robert, the last Lord.

In this situation things still stand, in the *continual* absence, throughout, of any independent claim, by any supposed *direct* heir-male of the Lords Rutherford. The procedure in this recent Rutherford claim, (especially on the last occasion, in 1839,) appears to have been peculiar, and truly abrupt and summary. The claimant was cast, (indeed all along) merely by the *preliminary* objection, *without* going into the merits, that he had *not extinguished* Robert, the fourth, and last Lord Rutherford, who has been noticed. It was started by the crown at the outset, and indispensably, and conclusively pressed by Lord Brougham, notwithstanding the former had *further* adduced in 1837, independently of the service of Captain John Rutherford in 1737, as *nearest* and *lawful* heir-*male* of this very Lord Robert, on the previous reference,—which here speaks sufficiently plain,—*another ser-*

[1] Lords' Journals.

[2] As formerly shewn, a resolution of the Lords, upon such reference, is not a judgment, until fully confirmed by the crown; previous to which it is viewed but in the light of an opinion given to the latter, whereby it is not necessarily bound, but may order a reconsideration of the claim, either by the Lords themselves, or by any individuals. Upon the English principle, the crown here is paramount.

[3] Lords' Journals.

[4] *Ibid.* The words of the resolution are in the usual, and, as I humbly conceive, too general form on these occasions, that the party "hath not made out his claim."

vice, on the 12th of December in the said identical year, of Henry Ker of Graden, as *lawful* and *nearest* "heir of line," still of the nobleman in question, his grand-uncle,[1] in virtue of *his (Ker's)* direct descent from his grandmother, Lilias Rutherford, the actual *sister* of that Lord. This operated, besides the corroboration, more fully and forcibly in regard to the extinction, as it at once dispatched *any* possible issue of his Lordship, female as well as male. But, what even attached greater weight and effect to this additional service, that had also connection with heritable property,—was the striking fact, independent of the general concurring verdict, of the material propinquity being positively sworn to and attested by two individuals, who must have had the best sources of knowledge from being near relatives, as there is every reason to believe, of Lord Robert, and his family,[2] which is proved by the existing record of the *res gestæ*. Lord Brougham, however, who may be said to have ruled, or to have given the tone to the resolution, would not admit, or even listen to any portion of the preceding proof of the extinction, because, *First*, he maintained that unless a service was special, or carried lands, it was of *no value whatever*, as *evidence* of the facts, *in grœmio*, or supposed to be established thereby. Nay, it was with difficulty he would altogether here admit a special one, a matter he put *in retentis*,[3] but he absolutely scouted and rejected a *general* service, such as of the above kind, or the two in 1737, with which we have been dealing. And, *secondly*, because the corroboratory proof offered, of the relationship of the two jurors in the Ker service, in order to enhance their testimony in the peculiar circumstances, was incompetent.[4]

Though in the claim in 1835, *another* general service in 1837, was adduced, of Henry Ker, as heir of that Lord, his grand-uncle.

The two *rationes decidendi* here, of Lord Brougham.

[1] "*Proavunculi*" upon record.

[2] They are Alexander Burnet, and William Elliot,—while it was offered to be directly established by the claimant, (besides other corroborative proof), that two individuals, identically so named, were married, respectively, to two sisters of Robert last Lord Rutherford.

[3] A *special* service certainly, must for the most part weigh more, in its effect, than a general one, carrying as it does a substantial succession, and of real value, and hence the more likely to invite challenge, and competition, if undue or unfounded.

[4] I have derived my information, in these particulars, from, as I have every reason to think, direct, and unexceptionable authority.

The first *ratio*, wholly rejecting general services as evidence in Peerage cases, unprecedented, and maintained to be invalid.

I. With respect to the former of these allegations, as to the *utter* rejection of general services as evidence of *their* facts in Peerages, although by so eminent a person, I am constrained, both as a Scottish lawyer, and going upon true relevant rules and precedent, to dispute so novel, and indeed bold a doctrine. Nay, further, to maintain its invalidity,—which, I submit, has already been fully established in this performance. In direct opposition to the above, as we have seen, not only before the Union, but *thereafter*, and down to modern times, by the Scottish Peerage practice, general services have had *every* effect, and were the usual and technical method by which Scottish Peerage claimants established their pedigree, and disposed of, and dispatched extinctions before the Lords. I may here, in pointed confirmation, allude to the obvious instances of Somerville, Colvil, Cassilis, Borthwick, and Caithness, (the *last* in particular), independently of various others.[1] Indeed, it is impossible for me to turn up any printed Peerage case, or Minutes of Evidence, without likewise constantly finding general services, of all dates, still adduced and admitted, with the same view.[2] But what, besides, surprises, nay,

Proof *e contra* of their striking validity and adoption since the Union, and down to the present.

[1] See pp. 350-1-2, 355, 385, 578, 583, 611-12-13-14, 617, 620-1-2, 627, 639, *n.* 3. 640-1, 644, *n.* 2, &c. &c. These references speak sufficiently plain in the matter, besides our purely concurrent Scottish notions and impressions,—which, by Lord Brougham's just and striking adoption of them in other respects, in the Polwarth instance in 1835, might have been expected to have had here more weight with him. See pp. 856-7, and what transpires on this head, in the sequel.

Other cogent proof to the same effect.

[2] To take what happens to be next me of the kind,—the Minutes of Evidence in the successful Polwarth, and Queensberry claims in 1818, and 1812;—in the first, there are General Services tendered, and at once received, in 1740, and 1781, (see Polwarth *Min.* pp. 9—23); while in the Queensberry case, they abound with as little challenge, for the years 1695; 1734, 1738, 1749, 1779, 1797. (See Queensberry Min. pp. 32, 48-9, 43, 44, 45-6, 43.) But what will be here said, moreover, of a general service of Charles the claimant, 20th of April 1811, as heir-male of William first Earl of Queensberry, so created in 1633, "*proavi sui proavi*," and of another, of the said date, as heir-male of William first Marquis of Queensberry, grandson of the latter, so created in 1682? (See *Min. ut sup.* pp. 17, 18.) Both of these, though modern, and going so far back, much more even, than the Rutherford services, which are in 1737, are exclusively but as heir-male, and general, in the utmost sense; and yet were admitted by the Lords without the slightest dubiety, or

startles me, and renders the present matter, as it was handled in 1839, and shortly before, still more strange, and inexplicable, I find, by very recent procedure, even Lord Brougham here, the antagonist of himself,[1] and an evident opponent of his own doctrine;—inasmuch that, in the Kelly Peerage claim, that has been noticed, from 1830, downwards, *when* he was Chancellor, and under his special authority, and auspices,—general services, not only in 1648, *(repeatedly)*, *have been* put in and freely admitted without question, but also of a much later date, than those of Rutherford in 1737, namely in 1755, 1766, 1777, nay even in 1830, all singly, and respectively, to prove most important portions of pedigree and extinctions.[2]

General services even admitted and not objected to, by Lord Brougham, in the Kelly case in 1830, and thereafter.

scruple, to prove the material descent. Were it not for fatiguing the reader, I could indeed establish my position *ex abundanti*. Out of various instances, however, I shall conclude with one from the Belhaven claim in 1799. Sir Archibald Hamilton of Rosehall, who figured long before 1700, and after, had two sons, Sir James, and Sir Hugh, who succeeded him *seriatim*; and as this stock, at one time comprising *other* members, were nearer heirs-male of the Belhaven patentee in 1675, (see pp. 835-7, *et seq.*) than William Hamilton of Wishaw, the *claimant*, it behoved *him* to extinguish them. And how was this effected in the Committee of Privileges? By the adduction of a *General* Service, 5th of April 1758, of John Lord Belhaven, grandson of the patentee, and eldest brother of James the last Lord, dead in 1777, as "heir male" *simply*, of the preceding Sir James Hamilton of Rosehall, "*sui proavi fratris filii.*" (From the evidence in support of the Belhaven claim.) This service is obviously not so strong as the rejected one of Captain John Rutherford in 1737,—far less when coupled with Ker of Graden's, as proof of extinction. And can it be said after this, (as by Lord Brougham,) that General Services are inept, and wholly to be disregarded in Peerage law and practice? If so, the important Rosehall branch are still thus properly unextinguished, and the present Lord Belhaven may *truly*, in conformity, have no right to his dignity. The above General Service, in 1758, is duly on record.

[1] This perhaps is not altogether so much out of keeping, as it may be said of his Lordship, with his high and varied talents, that "*none* but *himself* can be his *parallel*," or better able to support or meet his own arguments.

[2] See Minutes of Evidence in the Kellie case, *for the year* 1832, (when, as well as in 1833 and 1834, Lord Brougham was Chancellor), pp. 24-5, 43-4, 59. These general services are, in effect, the same either with Captain John Rutherford's, or Henry Ker of Graden's, in 1737, both which referred also to lands.

In the circumstances too, such proof was *a fortiori* admissible, in the recent Rutherford instance.

If then, but *one* general service, as here happened, at such recenter and modern epochs, has been thus held in the several cases to suffice, in establishing, I repeat, material links and extinctions,[1] how much more so, ought not merely one, but *two*, perfectly concurrent, as *those* in the Rutherford instance, both, as yet, unimpugned, and presumptively good and valid, while even, so far, more convincing and insuperable, to be entitled to a corresponding credit and force in the single point of extinction at issue, of the simplest and plainest kind, and notoriety. There seems, indeed, with regret be it spoken, a manifest contradiction under this legal department, the reason for which may not be very intelligible. Nay, the perplexity may be said to continue to the present moment; for, contrary to Lord Brougham's doctrine at one time, a general service, so late as the 27th of July 1836, without any repugnance on his part, was fully admitted, in the very modern Huntly claim, on the 31st of May 1838.[2]

Perplexity and contradiction here in practice, from that also in 1838.

Second *ratio* of Ld. Brougham, on the conceived incompetency of corroborating, as offered, the Ker service in 1737. This also disputed.

II. What has been stated, might, of itself, be enough in support of the two *condemned* services in 1737, without offering more. In regard, however, to Lord Brougham's second allegation or ground, by our law, no doubt, there might have been a bar to going into the proof of the relationship of the two important jurors, from the legal presumption in support

[1] For instance, that dated 19th of March 1777, to extinguish the eldest son and grandson of Charles Earl of Marr, and to prove James Erskine, of Grange and Marr, the direct ancestor of the Kellie claimant, *next* heir-male of the Earl. (See Min. *ut sup.* in 1832, p. 44.) Sir George Erskine of Invertiel, second brother of Earl Thomas, the Kellie patentee, and a much nearer heir-male than the claimant, was another weighty extinction. And how was he dispatched? Merely by two *general* services, (upon record,) dated 26th of April 1648, of his *two female* descendants, as his heirs. (See Min. *ut sup.* in 1832, pp. 24-5.) Chancellor Brougham in no way opposed the evidence, while even the Attorney-General admitted that the claimant had thus fully "likewise disposed of Sir George Erskine of Invertiel;—they (his counsel, he *distinctly* added,) *have* shewn," by the service, that "he died without male issue." (From authentic MS. copy of the pleadings.)

[2] Minutes of Evid. *ibid.* p. 29. As to special services, if general ones abound, as is the fact, in our Peerage procedure, the former do so in a reduplicated ratio, and swarm in every direction.

of their credibility, as well as of the peculiar Ker service in general, that might therefore exclude it, though demanded by an adversary. But supposing it to be deemed relevant, as in the present instance, by high authority, *inarticulately*, and *rather* irregularly, it is thought, according to our notions, and in the face of the striking and cogent practice just unfolded, to redargue, or disregard *such* a service, which has stood for such a period, then, in this *extreme* case, I apprehend, the conclusion in question of the same legal dignitary, involving an absolute *de plano* rejection, of any palpable intrinsic corroboration thereof, in absolute self-defence, may not be so obvious. Here, holding the service to be just, a material interest, or right, has in fact vested, or enured in favour of others, while it is a common principle in law, that wherever there is a right, there should be or ought to be a might, or proper means directly, or otherwise, of rendering it available, which in the present circumstances, in the *singular* disclamation of the substantial evidence *in toto*, can only be mainly done by means of such corroboration offered. The authority too, and the warrants of the service, through the *testimony*, by analogy, might be as much brought into play, and sifted, and subsidiarily evinced, as those of a *patent*, to shew that *it* proceeded upon proper powers from the crown, as is notoriously done in Scottish Peerage claims. For this purpose, in the Roxburghe case, the *collateral* fact of Charles I. having been at Newcastle, at the date of the once disputed royal Roxburghe charter from thence, in 1646, and similarly and vitally bearing upon its effect,[1] was duly shewn and taken into view, thus in order to its corroboration. And when I have further appealed to our procedure, in actions of reduction of services—to which Lord Brougham's attack in the Rutherford instance amounts—nay, in proving the tenour of an imperfect, questionable, or lost document, I think I may be borne out in my position.

Grounds for my induction.

With every submission, too, aware, although I be, of the occasional laxity in *our days*, in respect to general services,— still, however, not without a cure or remedy,[2]—I cannot, upon

The two concurrent services, on the material point of

[1] Great Seal Register.

[2] I must, at the same time, continue to express my regret, that the old salutary form of permitting others to oppose at a general service,

extinction, might at least have been received in evidence, after the admission of a wretched paper or fabrication in the Huntly case in 1838.

the whole, but help entertaining, in the circumstances, and under the striking attaching *specialties* and *concomitants*, a higher and different notion from Lord Brougham, of the presumptively good, and far older one of Ker in 1737. It at least, *a fortiori*, apparently,—nay, with the congruent service, *moreover*, of Captain John Rutherford in the same year, might have been received in evidence, even independent of other corroborations, and the especial accordant practice, as elsewhere unfolded, after the actual admission of the indeed suspicious and wretched undated copy of the putative Huntly declaration,[1]—which I cannot view but as a fabrication; for, while there is every thing to *detract* in the latter, there is nothing, so far as I can see, to question or mistrust in the former.

Other evidence of the sole extinction in question, upon the relevant ground of most striking taciturnity, since the three services in 1733 and 1737.

There was besides, in behalf of the simple, and single Rutherford extinction, the most favourable and convincing taciturnity, for even more than a century—since the dates, not of two services, but, in effect, of *three*, (including that of Durie in 1733,) striking *termini* assuredly—and all conspiring, though the two former more directly, to this material end. It is here important, that while the Rutherford dignity was neither held then, as indeed as little now, to be extinct, there were, from the first, two *especial* claimants to it, namely, George Durie, *qua* heir-general of Andrew Earl of Teviot, first Lord Rutherford,[2]—but *only* after the death of Lord Robert, who constituted a previous bar—and Captain John Rutherford, *qua* the COLLATERAL heir-male of that nobleman alone, independently of the claim in itself, even more cogent, and turning upon the same hinge with the latter, of Henry Ker of Graden to the heritable succession, still but as the *collateral* heir of line. Nor did these parties by any means conceal their pretensions, so far, of the above character, under a bushel. On the contrary, they were not only ventilated and proclaimed from the earliest period, but all regularly and publicly enunciated by the respective services in 1733, and 1737, which had undoubted reference to them. Nay, the two claim-

upon qualifying an interest, even though not very direct,—and without a competing brief,—has been abrogated with us.

[1] See pp. 884-5-6, &c. Yet *too* a corroboration of it *was* allowed, *ibid.*

[2] See p. 902, *n.* 3, &c.

ants of the Peerage, from the dates of theirs, actually assumed the title of Lord Rutherford, by which they were universally known, amid keen argument and competition of a very peculiar kind. It was tedious, and long protracted in the face of the whole world, whose attention was signally directed thereto, especially at Peerage Elections, the very records of which are loaded, nay in a manner infested with the procedure, distinguished withal by no ordinary vehemence and excitement. And notwithstanding even the solemn order and resolution of the Lords in 1762, precluding the parties from using the title until they had fully established their right, the heir in the shoes of the original heir-general[1] of Andrew Earl of Teviot, first Lord Rutherford, still took the dignity of Lord Rutherford, and voted at an Election in 1788, which moreover originated further proceedings, with a renewed order of the Lords, also against his assumption,—that was met again, and contested by the claim of another in 1788, the predecessor of the *last* Rutherford claimant in 1833,[2] &c.

The taciturnity here irresistible, and only capable of being solved by the extinction.

Can it then be supposed, under these circumstances, after such striking and diversified facts and procedure, so constantly repeated, and of such palpable publicity and notoriety, that if Robert Lord Rutherford had left male issue, which comprises the *whole* Rutherford extinction,—and considering besides, the necessarily clear and immediate character of the descent, that they would not, during *all* this period, embracing more than a century, have come forward, in some way or another, by a protest, at least, if not by a claim, to vindicate their far preferable, nay, indeed, confessed right, that only required their presence to its establishment? Or that there would not have been *some* trace or surmise of their existence, however reduced or distressed their condition, that besides, even in that case, might have only served further to expiscate them by goading them vigorously thus to move and to act to improve it? The supposition and idea, I conceive, is absolutely impossible; more especially as, in this instance, there was no attainder, and inevitable expatriation, as in that of Lord Lewis Gor-

[1] John Anderson, of Golan; see proof next referred to.

[2] See Robertson's Peerage Proceedings, pp. 443, 456-7, and printed cases for the recent Rutherford claimants.

Contrast between the evidence in support of the sole Rutherford extinction, and that of Lord Lewis Gordon in the Huntly claim, which, though *most* weak indeed, and far inferior to the former, *was* yet *admitted*.

don in the Huntly case, and such contemplated preferable Rutherford heirs-male—*so unlike* the *latter* or his *issue*,—would have been at full liberty to shew themselves, and to act as they chose, quite unfettered and unclogged in any respect—in any quarter. Yet, during the entire space of the time in question, down to this day, there never has been an inkling, or the slightest whisper, either of such individuals, or of such an attempt,—which invariable silence necessarily, among so many legal provocatives to its invasion and interruption, founds, and unequivocally constitutes, as I have maintained, the strongest evidence of taciturnity in favour of the extinction of Lord Robert.[1] And, *a fortiori*, how much not only the above argument in the present instance, but moreover, the reiterated direct legal proof in behalf of this main fact, must tell, after what *was admitted*, by the bye, as *fully conclusive* in the identical matter of extinction, as respects the previous Lord Lewis Gordon, in the remarkable Huntly case, where all the recited infallibly detecting, or eliciting clues or expiscations were glaringly wanting as to him or his issue, where there was no succession, (such as has been set forth,) that they, in any event, both owing to the attainder, which rendered them complete blanks in law, and *their cadetship* could lay claim to, or that, thereby, could possibly drag them, for the important purpose in view, into public notice. In the absence of all which, they were merely extinguished, at most, according to Lord Redesdale, by a "very miserable species of evidence," in the legal sense,—upon secondary inexplicit reputation, but by a *modern existing* individual, unnecessary

[1] Every later notice too, regarding him, so far as I can discover, affords no countenance to the idea of his having had issue. Descending to secondary evidence, (though such as Lord Rosslyn would clearly have adopted, see pp. 831-2-3-4), Nisbet, in his Heraldry, first Edit. published in 1722, vol. I. p. 180, states that this individual, "Robert, *now* Lord Rutherfurd,—*made over* his estate, *Title*, and arms, by disposition, with a procuratory of resignation, in favours of Thomas Rutherfurd of that ilk, (or of Edzerston,) chief of the name," which, nugatory as the act may be held, in respect to the title, being after the Union, yet may further strengthen the notion of his having died childless, because, *e converso*, he cannot well be presumed to have then made such alienation ultroneously, to one, legally a stranger, however chief of his family.

to recur to.[1] While, so far from this, again, on the other hand, the material Rutherford extinction was, in a solemn legal manner, judicially and positively sworn to and established, upon the oaths of nearly thirty persons, as *remotely* even as 1737, in terms of two public brieves, or proclamations, by two concurring services, obtained for an important end, powerfully backed and corroborated by the striking concomitants that have been stated. They supply abundant evidence of the fact, at least such as was invariably, nay is still received in our Peerage claims; and what, I really apprehend, is, besides, fully deserving of attention, have only as yet been *gratuitously* assailed, without any discoverable *item*, or particular, any way to compromise them. In this view, every legal presumption conspires in their favour. Then again,—to continue as before, and finish the Huntly contrast,—as to Lord Henry Gordon, the remaining pressing extinction, or impediment in the aggravated Huntly case,—for there, there were *two*, instead of only one, as here,—though likewise victoriously *got over*,—it was even *without* an *adminicle*, or phantom of evidence, or any thing adduced in its behalf, which indeed makes that but a short matter. Upon the most superficial comparison, surely, between the two cases, that of Rutherford far outweighs Huntly, and was hence entitled to much more favour; so that, I conceive, with every submission, upon the strength of the latter precedent—only a year before—the Rutherford extinction might, *a fortiori*, have been allowed, without proving, *in limine*, as it did, an absolute bar to the claim. Likewise *must* further be allowed to ask,—and here I have the *utmost* countenance and support from the universal British practice,—why were the two extinguishing Rutherford services, not entitled, at least, to the usual, and qualified privilege, *de bene esse*, when the far weightier obstacles in the Huntly instance, in the shape of the two altogether unvouched-for extinctions and *clearances*, on the other hand, never for

Lord Lewis was only extinguished by a "very miserable species of evidence," while the *sole* Rutherford extinction was sworn to by an inquest of nearly thirty persons, *immediately* after its occurrence, independent of *other* strong relevant proof.

Every legal presumption is for the latter.

Nay, clenching the contrast between the Huntly and Rutherford cases, Lord Henry Gordon, another outstanding extinction or obstacle, was not disposed of *at all*.

A fortiori, then, the sole Rutherford extinction might have been allowed.

At least, the evidence in support of it might have been received, *de bene esse*, without the supposed objection here, at once casting the claimant.

[1] See pp. 880-1. I should think too, that as good evidence of the kind could be obtained upon the Rutherford point, even from blood relatives of Robert Lord Rutherford,—thus better than in the Huntly instance,—that they had *never* heard of his having left issue. See p. 876. Dr Johnson *sneeringly* said, "*much* faith was due to *tradition*."

A fortiori again, when the noted Huntly fabrication was further even *received* in *evidence*.

a moment occasioned much demur or difficulty, or ever stayed procedure, but were so complacently glossed over, and admitted? Nay, not only that, but to recur to it once more, when the suspicious or fabricated *copy* merely of the unfinished Huntly declaration, &c. was exalted forsooth into legal evidence, even beyond the honour of *de bene esse*, by far too high a rank for it indeed—peace to its manes.[1]

The striking taciturnity in the Rutherford instance, moreover, is by English law perfectly relevant proof—in accordance also with ours.

But, moreover, in regard to the striking and confessed feature of taciturnity in the Rutherford instance, which really seems to have been overlooked, I cannot but still more appreciate it, and necessarily the Rutherford evidence in the gross, of which it is an element, even upon the English footing,—when I find that high legal authority in Peerage law, the late Lord Redesdale, so often charged with being too rigid and scrupulous, actually, in the important Roscommon Peerage claim in 1828, laying the utmost stress, in the identical matter of extinctions, upon the lapse *merely* but of *thirty-five* years, since the claim had been mooted in the Irish House of Peers, during an agitated and repeated discussion like that of Rutherford, *without*, in the same manner, as there, a nearer heir, having been instructed. Nay, when, in his deciding speech, he founds, as conclusive proof, not merely of one, but of *several remote* extinctions, upon this "*length* of time,"—but short indeed with what we have been contemplating,—"which has elapsed *since this* dignity (*the Earldom* of Roscommon) came into *competition*, *when*, if there had been any *other* persons, they *would* have *naturally come forward* and made a *claim*. I submit," therefore, "to your Lordships," this dignitary ends with pointedly inculcating, "*that* is a ground of presumption *so strong* that it *cannot properly be resisted*."[2] And upon such *ratio* and argument, the extinctions were exclusively dispatched. It is almost superfluous to observe, how much this doctrine, *essentially*, applies in the Rutherford case, there having been, independently of the original claimants, and the *incessant* public competitions and disputations from 1733, and 1737 to 1762, and 1788, two other claimants, by two

This fixed by the decision in the Roscommon claim in 1828, where, though in a lesser degree, it, in a similar case, *per se* dispatched *several* remote extinctions.

[1] P. 834-5. For the Huntly precedent, see pp. 875—882, *et seq.*

[2] See Report of the Roscommon claim, illustrating material points in Evidence, according to English practice, by Clark and Finnelly, in their Appeal Cases, vol. VI. part I. pp. 126-9.

distinct references, before the Lords themselves, from 1833 to 1839, the matter having been thus continued for more than a century, down even to our day, with *as little* the appearance —nay indeed *without* the very *semblance* or *shadow*, (which is different from what transpired in the more complicated Roscommon case,[1])—of any nearer heir, that is sprung from Robert last Lord Rutherford; whose extinction—the only one—in like manner, should therefore much more be legally held.

We thus, by resorting to British modern practice elsewhere, see how the law stands in the minds of other high authorities accustomed to decide in Scottish Peerage claims,—the more to be weighed, as not conflicting with *ours*. So that things may be clearly brought to this remarkable and untoward pass, that if we admit, as conclusive, the strictness and rigour adhibited, notwithstanding, as to extinctions in the Rutherford instance, we cannot but confess the inevitable *necessity*, of there having been certainly, *much more* proof and corroboration in that of Huntly, where they besides were more cogently required, owing to the recenter era of Lord Lewis, the principal extinction, who, not alluding to Lord Henry Gordon, (as to which last, there happened to be a perfect blank,) was left quite undisposed of by any peculiar *distinctive* taciturnity, that nowise could be—or by any of the striking, at least morally irresistible legal circumstances and accidents, unnecessary to repeat, in behalf of the *only* one of Rutherford. Indeed, with the material view, there was, as has been seen, nothing, except at the most a vague, inconclusive, and "very miserable species of evidence." With every submission, the obvious jarring and contradictory nature of Peerage practice here, and, as it would seem elsewhere,[2] may be deep matter of

A fortiori again, then, by the English law, as well as by ours, *the* Rutherford extinction was fixed.

The Huntly and Rutherford resolution being, so far, quite contradictory and incompatible, untoward and inextricable consequences are introduced into practice.

This also follows by contradictory procedure elsewhere in evidence.

[1] There indeed, at the twelfth hour, however unfounded their claims, two claimants did *present* themselves, upon the pretext of being nearer, which makes the Roscommon, not so convincing, or irresistible as the Rutherford case.

[2] It is remarkable too, that what may be regarded a genuine and veracious paper, in the reign of Charles II.,—so far as can be seen,—illustrating, as it professes to do, in the shape of an "Information," by Haldane of Gleneagles, a respectable cotemporary, the essential matter in the Kelly case, of the pedigree of the Irish branch, (see pp. 869-70-1), —besides being derived, like the putative Huntly declaration, just allud-

regret to all the well-wishers of, what is so desirable, some steady and uniform rule and criterion.

Upon the head of services, Chancellor Erskine held *Inquisitiones post mortem*—in other words, the former "much superior" even to the modern received probation of the kind by registries of births and baptisms, so highly preferred in England.[1] Yet, as things at present stand, combining the Rutherford resolution in 1839, with the judgment of the same tribunal, in its appellate character, in the *still* recenter case of Neilson, or Neilson against Cochrane, the 19th of March 1840,[2] our general services, as above, older than a century, presumptively good, and unimpeached, may be thus doomed to be worthless and inept, in proof of pedigree, in *Peerages;* while one, in the same view, *at common law*, in terms of the Act of the vicennial Prescription of Retours in

The utter rejection by Lord Brougham of general services in Peerages, is strongly contrasted by their unbounded effect, with us, at *common law*, by statute.

ed to, (see pp. 884-5-6,) from the charter-chest of the family of the claimant,—however, equally, in an unascertained handwriting,—was, *e converso*, after discussion, in 1832, in the first place, "received only de bene esse." (See Min. of Evidence in the Kelly claim, p. 30.) And, in the future argument and pleading, Chancellor Brougham said, "There is *no pretence* for receiving *this*, (the *paper* in question,) it *cannot* be *admitted*, it is *no declaration* that *can* be *admitted;* if it had been in a Bible, open to every one, it would have been a different thing, though that is subject to contradiction." (From authentic copies of the pleadings and discussion in the Kelly case.) But *quære*, is there not here, *in fact*, again, a contradiction, contrasting the procedure with that of Huntly, which, as has been shewn, *did admit* the declaration, as above, even in evidence, of far less weight and account, certainly, to say the most of it? At the same time, his Lordship's detraction, in part, from the usual weight given to insertions in family Bibles, goes to support me in a former remark, (see p. 833, *n.* 5.)

[1] See Cruise on Dig. pp. 272-3.

[2] Affirming a decision, to the same purport, by the Court of Session, who thought they were imperatively barred by the Act 1617, to be noticed, from applying any relative redress, though there demanded in truth and equity, or in such emergencies, as follow in the text. See Robinson's Appeal Cases, under the preceding date, and p. 142 of this performance. The same Judge, Lord Cottenham, Chancellor at the time, presided, and delivered the deciding speech, in the above case of Nelson against Cochrane,—as in that of Rutherford in 1839. Neither Lords Lyndhurst or Wyndford were present, nor was allusion made to the subject of honours, or how, if in any respect they might chance to be affected by the decision.

1617, c. 13,[1] is yet perfectly valid and indefeasible, after the brief lapse but of twenty years, however incontestably bad and vicious on its face.[2] Nay, even we may conclude, though, through the medium of such a process, a son and a father should be erroneously served to each other in their *inverted* relationship, or a mother as *heir* to her son, most incongruously with us, (in *every* view,) in like manner, in quality of his daughter. In short, a service, in the prior case, far beyond the term of prescription, or of any date, may be worth nothing, while, howsoever monstrously, as in the latter, every thing—a state of things, apparently, deserving the consideration, and interposition of the legislature.

The latter, in terms of Act 1617, c. 13, may go too far, and might be qualified by legislature.

It might be premature to go further into the merits of the late Rutherford claim, which the Lords did not properly broach, though it is curious to find the same objection made there, as formerly, upon the exclusive footing of English notions, of the *supposed* inefficacy, in point of *form*, of a Scottish Peerage regrant, upon a resignation, or through the medium of a nomination, as by the Rutherford patent in 1661, to carry a dignity,—always fated, as it may be still, to be *repeated*,—however, always sure, eventually, to be disregarded and repelled, as in the instances of Stair, Errol, and Roxburghe, &c. Such prior *attempt* savours rather of English bigotry.

Strange and irrelevant objection in form, *repeated* in the Rutherford claim.

On the 18th of June 1841, the Lords "resolved and adjudged," on a previous petition to them, exclusively, which had been referred to a Committee of Privileges, that "John Hamilton Dalrymple, of Cousland and Fala, Earl of Stair, Viscount of Dalrymple," &c. "hath made out his claim to be admitted, as a Peer of Scotland, to vote at the Election of Peers, to represent the Peerage of Scotland," with further, an order that the Clerk of Parliament transmit such resolution to the Lord Register of Scotland.[3] This procedure was in obvious

Case of the Earldom of Stair in 1841, exclusively before the Lords, and decided by them *alone*.

[1] See Acts of Parl. last Edit. vol. IV. p. 544-5.

[2] For the curious, conflicting, and untoward consequence this may induce in the case of a *Peerage*, descendible with the estates—by a strict entail, as is not uncommon with us—in respect to such inheritances, see pp. 401-2, *et seq.*

[3] Lords' Journals. This exclusive cognizance of the Lords in *Scottish* Peerage claims, can only vest in them by practice, and, *ex necessitate*, in regard to voting and due choice at Election of the Sixteen Peers.

This was under authority of their order in 1822, also complied with in the case of Buchan in 1830.

conformity with the order of the House, formerly stated, the 13th of May 1822,[1] his Lordship being a distant collateral heir-male of John William, the last Earl of Stair, who died in 1840, and hence, in terms of the same, obliged to petition or claim in the above form,[2] which, as we have seen, had also been complied with, by Henry David Earl of Buchan, in 1830,[3] though a much nearer collateral heir-male of his noble predecessor. The petitioner John, the present Earl of Stair, though not descended of the body of John the first Earl, was yet fully entitled to the honours in virtue of a special remainder in their regrant, the 27th of February 1707, in favour of John the second Earl of Stair, his son, the celebrated Marshal, (already referred to,[4] and proceeding upon his special resignation), whereby, failing certain others, that are now spent, the former are limited to *his* heirs-*male descended* of *James Viscount Stair*, his *grandfather*,—of whom the claimant in 1841 is now the nearest, in consequence of his lineal male descent from Sir James Dalrymple, younger son of the said Viscount James, the well known President of the Session. It is unnecessary to go beyond this regrant in 1707, because it is now the regulating conveyance; but it is remarkable, that the noble party would have still been equally entitled, in terms of the original constitution of the Earldom, by patent the 8th of April 1703, where, failing heirs-male of the body of the patentee, John the first Earl of Stair, there is still another corresponding remainder, embracing "hæredes masculos *defuncti Jacobi Vicecomitis* de *Stair*,"[5]—*i. e.* the *same* distinguished *lawyer*, as before, *father* of the patentee, and the first Peer of the family.

The Stair claimant was the undoubted heir, both under the regulating Stair regrant in 1707, and the original Stair patent in 1703.

Similar procedure, partly, with that of Stair in 1841, in the case of the Barony of Duffus, in 1832,—though otherwise eventually different in form in 1838.

Under this head, I may add, that the male and female representation of the Lords Dúffus becoming disjoined, upon the death, in 1827, of James the last Lord, without issue, (who was restored by Parliament in 1826, against the forfeiture in 1715,) and the patent of the honours in 1650, not being preserved,[6]—while, at the same time, they have never gone to an heir-female, in exclusion of an heir-male—all the

[1] See pp. 850-1. [2] *Ibid.* [3] See p. 851.
[4] See pp. 386-7, 280, *et seq.* [5] Great Seal Register. [6] See pp. 375-6.

previous takers, though males, being also heirs-general, Sir Benjamin Dunbar of Hemprigs, Baronet, the direct heir-male *(alone)* of the body of the first Lord, and second cousin of the last, thereupon assumed the dignity, according to the noted presumption of the Lords, in favour of such identical heir in the circumstances. But, on the 15th of May 1832, "Eric Rudd of Thorne, in the county of York, Clerk," the heir-female, through his mother, the eldest sister of the said Lord James, dead in 1827, conceiving himself, nevertheless, to have a preferable right to the dignity, petitioned the Lords against such assumption by Sir Benjamin. He insisted, in his petition, that the Baronet, who had likewise attempted to vote by proxy at the Peerage Election in 1830, should be called upon to show, by production of the Duffus patent, and upon what ground he took the Peerage; that, in the meantime, his doing so was an infringement of the privileges of the House, in terms of their resolution in 1822,[1]—until due compliance with which, the step was wholly unauthorized on his part; that he believed that, upon recovery of the patent, which was not to be found upon record, his claim would turn out to be best;—and he concluded with praying, that the Lords, at least, may take such measures as will be fitting in the matter. The petition, resembling that of the Marchioness Dowager of Downshire, in the identical year, however the party objected to by her Ladyship stood in a very different situation,[2] was ordered to "lie on the Table,"[3] but without further relative procedure, although Sir Benjamin Dunbar, taking the hint, still under the title of Lord Duffus, like Lord Stair in 1841, *did* subsequently present a petition in the same form with his Lordship's, in terms of the resolution in 1822, claiming to vote at Elections, which was referred, the 30th of July 1832, to a Committee of Privileges.[4] But he eventually, after a considerable interval, during which nothing material ensued in the business,[5] changed his course of action, and petitioned her Majesty for the dignity, upon which there was a special

Duffus patent in 1650 not extant, and honours therefore assumed by the heir-male of the body *(alone)* of the first Lord.

Such assumption complained of by the direct heir-female, by petition to the Lords in 1832.

The heir-male claimed afterwards in 1832, in terms of the Lords' order in 1822.

But finally proceeded upon a reference from the crown in

[1] That before noticed.
[2] See pp. 852-3.
[3] Lords' Journals.
[4] *Ibid.*
[5] Although, on the 2d of August in the said year, Lord Reay was sworn to give evidence. *Ibid.*

1838, always the best course upon the English principle, especially when there is any question.

reference to the Lords, the 2d of June 1838.[1] This was clearly upon the English principle, (for, as I have repeatedly shown, *our* method, on the occasion, hitherto unrepealed, would have been different,) the best and relevant step in the emergency; for, as it is justly laid down in Clark and Finnelly's Reports,[2] and is illustrated by the Waterford claim in 1832,[3] "*if* there is *any question* affecting the dignity, (as in the present instance, different from that of Stair,) the petition *ought* to be to the *crown*." It must always, from what I further formerly stated,[4] in the above view, be the safest and most satisfactory side to lean to; but strangely, the same pause, as before, still obtains, in respect to the Duffus claim, which absolutely continues *in statu quo*.

The Duffus claim is still *in pendenti*.

I have now brought down the Law and Practice in our Peerages since the Union, as far as *may* be, having at length stated and discussed—probably with much *tædium* to the reader—every decided case. Other proceedings, either pending, or intermitted in *undecided* Peerage claims,[5] it may naturally be

[1] *Ibid.*
[2] *Ibid.* p. 133, *et seq.*
[3] Vol. VI. Part I. p. 98, *n.* b.
[4] See p. 852.

Similar undecided Annandale, Marchmont, and Airth claims.

[5] Of these, I may briefly notice the respective claims made by the heir-male, and heirs-female, to the Annandale honours, (including the Marquisate, by the former *only*,) constituted in the 17th and 18th centuries, which have been long in dependance;—the claim to the Earldom of Marchmont, &c. under a patent, dated the 23d of April 1697, "heredibus *masculis quibuscunque*," by a very distant heir-male collateral, properly much longer,—and that of the female heir of line, recently, to the Earldom of Airth, under an original patent in the Montrose charter-chest, dated 21st of January 1633, embracing the patentee, "et *Hæredes suos*," &c. The claimant, in this last instance, was held by the crown lawyers, to have duly established his descent, with any necessary extinctions,—which remark may apply also to the claim to the Barony of Lovat,—that, in effect, attempted from a new quarter, in the Courts below, hitherto proving utterly fruitless, without any chance of success. But the noted forfeiture of Simon Lord Lovat, in 1746, clearly attaches to the Lovat dignity, the obvious reason, I conclude, for its not being further pursued. There is, however, this important result, under direct countenance of this Lovat precedent, that a party may prove his pedigree before the Lords, even in the case of an *attainted* Peerage, from which he is *thereby* barred. I find I have anticipated in my remarks, (see pp. 774-5, *note*,) the merits of the claim to the Earldom of Perth, by the male descendant of the French Mel-

Barony of Lovat, recently claimed, clearly irredeemably forfeited; yet proof of the pedigree allowed.

Perth claim *in pari casu*.

premature and unadvisible to notice. Independently of being, in part, barred here by private professional considerations, it would be rash and blameable to go into such details,—in a different emergency, *so inviting*,—unaware, as we must be, *in hoc statu*, of the special *rationes* that are to influence the minds of the noble tribunal to whom the former are referred, in expiscation of the final resolution; which it may besides be difficult strictly to anticipate, in some instances, owing to the peculiar—rather variable state still, as I apprehend, of our Peerage law, taken in the aggregate. Such contemplated discussion, therefore, might be imperfect and unsatisfactory. I will not deny, that in certain points English doctrine is occasionally resorted to, not unnaturally on the part of English lawyers, who are chiefly employed in our Peerage claims; but that may not suffice, in the face of our ascertained, and hitherto unrepealed law[1] and practice, whose relevancy and preference, of course, at least in the main, has, at the same time, been repeatedly admitted (as will shortly be additionally proved) by the highest authorities, even including those of the sister kingdom. Neither can our legitimate system well be compromised by any anomalous opposite practice, whose rules and precepts, if they can be discoverable, are by no means fixed or stable,—all that could be objected. Indeed, for the most part,—because constant and long usage *may*, in the minds of some, here operate inversely, (as to which matter I shall speak in the sequel,)—it may not inadequately be said of the latter,

Our Peerage practice since the Union has been brought down, and discussed, as far as may be.

fort line, that has been recently referred to the Lords, upon a petition to the crown;—and from what I have there stated, and consequently cannot now withhold,—according to my declared observance, as to *other* such *pending* claims,—the same must, *a fortiori*, be held to be forfeited. Pointed allusion to any *remaining* Scottish claims of the kind, without equal consideration of all, would be objectionable, and might appear invidious.—I therefore must content myself with only further referring the reader, for additional information upon this head, to the Lords' Journals, where their scope and nature, to a certain extent, may be discovered.

[1] Our law, as is notorious, has been lately partially repealed by statute, and assimilated to the English, in so far as removing the former bar with us, palpably observed from an early period, to the admission of parole testimony, owing to consanguinity and relationship.

Our law in evidence, partially assimilated, of late, to that of England.

that a breath may unmake *them*, as a breath, very summarily, if not capriciously, has made.

New discovery in the curious case of the Barony of "Culross," —(erroneously awarded in 1723 as that of "Colvil of Culross,") of another charter of the temporary Barony of "Culross," with the title, in 1604.

It may appear somewhat remarkable, but I have very recently discovered *another* royal charter of the temporal patrimony of the Abbey of Culross, with an *additional* erection into a hereditary Lordship, including the Parliamentary dignity of "Culross," in favour of "Sir James Colvil, of Easter Wemyss, knight," and his "heirs male and assignees whatsoever," dated at Hampton Court, the 10th of March, 1604. It is recorded in the original protocol book of James Primrose, a notary of eminence, containing various authentic instruments from 1598 to 1624, in her Majesty's General Register House; —so that the singular case of the "Barony of Culross," as well as that of the "Barony of *Colvill* of Culross,"[1] now stand thus. On the 20th of June 1589, there is a charter to "Sir James Colvil of Easter Weems," erecting Culross into a temporal Barony, with the title of "Culross" only, to him and to his heirs-male, direct and collateral.[2] On the day of March mentioned, in 1604, there is that just discovered, and referred to, at the outset and earlier parts, merely in favour of "Sir James Colvil of Easter Wemyss," *(repeatedly,)* though in the subsequent portion and conclusion, after the erection—thus for the *second* time into a temporal Barony, with the title again,—he receives the style of "now Lord of Culross," and of "James Lord Culross." On the 20th of January 1609, there is another charter to the said disponee, *but only* as "Sir James Colvil of Easter Wemyss,"—though much earlier, as has been seen, "Lord Culross," of the same possession, having a third erection into a temporal Lordship, with the title of "Culross," still exclusively (as before,) to him, and the heirs-male of his body, whom failing, to his heirs-male whatsoever; and where he is described throughout as Sir James Colvil, and not as Lord Culross. It proceeds upon the resignation and demission of John, "*nunc*" Commendator of Culross, who had acquired, and held *then* an heritable right in the possession.[3]

Statement, or summation now of the general facts and result.

[1] See p. 354-5, *et seq.*
[2] Great Seal Register.
[3] Great Seal Register.

On the 9th of October 1616, there is a charter, but not under the sign manual, in favour of James, son of the *late* "Robert Master of *Colvil*," &c. of the Lordship and Barony of Culross, proceeding upon the resignation of the previous Sir James Colvil, his grandfather, there described, not as "Lord Culross," but as "Lord *Colvill* of Culross."[1]

In 1617 there was a Parliamentary ratification to the same "James Lord Colvil of Culross," of the "Lordschip and Baronye of Culross," in terms *exclusively* of the charter 1609, though without specifying the dignity, particularly dissolving the former from the *crown*, to which it *had been annexed* by the general annexation of Church lands in 1587,[2] thus evincing its *previous situation*,—but *ordaining* a "*new* infeftment," and necessarily grant or charter *still*, to Lord James, his "airis male and successoures, &c. to be extendit in maist ample forme, with all clausses *necessar*."[3] The latter charter, however, though such identical order and arrangement likewise obtained, and was fully complied with in the corresponding case of Spynie,[4] never appears here to have past.

Original and material objection in the Culross instance.

Doubtless, the repetition of the Culross grants may be held to imply an original flaw and defect, as is to be inferred also from the prior interest in John, the Commendator of Culross, and the *annexation;* and it so happens, that Sir James Colvil, the grantee in 1589, certainly thereafter remained a commoner, without *any trace* of nobility. This is proved, *inter alia*, by a much later instrument, in Primrose's Protocol, referred to, dated 24th of September 1603, where he figures but as "*Sir* James Colvil of Easter Wemyss."[5] Neither did even the charter 1604 take effect in respect to the "*Culross*" honour, as is proved, more especially, by the *same* description of the

That combined with another, and taken too with the *repetition* of the several grants, evince an inherent flaw.

[1] *Ibid.* It was under reversion, which I did not allude to formerly.

[2] See p. 238.

[3] Acts of Parl. last Edit. vol. IV. 569. It thence is to be presumed there had been no *proper* previous disannexation, that could *only* thus be by Parliament. It is merely the charter 1609 that is ratified, and not those in 1604, and 1589, which therefore remained truly inept and null, as before. I can find no other Parliamentary disannexation.

The other Culross charters, besides that in 1609, not ratified in Parliament.

[4] See pp. 659, 660, in virtue of the Spynie act, and charter, respectively, in 1592-3,—also pp. 703-4.

[5] At p. 33. of the Protocol.

All the Culross conveyances were, in fact, null before the salving act in 1617,—which alone applies to that in 1609.

disponee in the Culross charter 1609, which also, in its turn, *has* been effete, though strangely, *per se*, *without* a particle of corroboration, found by the House of Lords in 1723, to transmit the extraneous title of Lord "*Colvil* of Culross;"[1] because, if valid and effectual, what occasion was there, not alluding to the conveyance in 1616, for the Act 1617?—which indeed lets out the secret, as premised,—quite unknown at the time to the Lords,—and the non-compliance with which, through a subsequent *fourth* royal charter—*expressly* from the king, in order directly and fully to vest the subjects in the party, leaves things (so differently from in the Spynie instance,[2]) still *rather* in an inchoate or imperfect state.

The older Baronny of "Colvil of Culross" presumptively differently constituted, and in a different situation from that of "Culross" simply.

But, in these very circumstances, though not in reference to the *patrimony* or "*baronial territory* of Culross," or *in grœmio* of any of the conveyances noticed, but *aliunde*, including Primrose's protocol, Sir James Colvil, from June at least in 1604, inclusive, and ever *afterwards*, *is* styled "Lord Colvil of Culross," and his son Robert, the "Master of *Colvil*;"[3] while there is evidence, in a distinct shape, from the Act of creation, formerly referred to, on the *25th* of *April* 1604, that he had *then* obtained the identical preceding title of "Lord Colvil of Culross," *according* to *which* too, his *precedency*, and that of his family, were *adjusted* by the *decree* of *ranking* in 1606.[4] Further, as they did not use the title of Lord "Culross" simply, and as neither their actual Peerage, "Colvil of Culross," can be ascribed from the denomination, and *ranking* to the Culross charter in 1609,[5] which, utterly incompatible *therewith*, would have plainly deteriorated the *ranking*—there being, at the same time, as little, *any* resignation of the

[1] See pp. 354-5. [2] See, as before, under the Spynie references.

[3] He has the above style in instruments, in Primrose's Protocol, in 1605, in 1608 *(repeatedly)*, in 1609 *(repeatedly)*, in 1612, 1617, 1622, 1624, &c. &c. Sometimes he is styled "Lord Colvill," but he never uses the title of "Culross" simply. Though in the Culross charter, in March 1604, (invalid as it proved,) he, as has been seen, is to be *now* "Lord Culross," yet in the infeftment, in terms thereof, *(ibid.)* 29th of June 1604, he is still designated, as above, "James Lord Colvill of Culross;" while Robert, his son, elsewhere, *(ibid.)* is styled repeatedly "Master of Colvil." The Act of the "*Colvil* of Culross" creation was (as stated in the text) in April 1604, hence after the Culross charter.

[4] See pp. 356-7-8. [5] *Ibid.* and pp. 359-60.

party,[1]—is there not ground for the presumption, that there was, though not now extant, a restricted *personal* patent, (as has then happened elsewhere in such emergency), of the Barony of "*Colvil* of Culross," upon which, implemented by the relative Act of creation, as above, his right as a Peer stood, and was properly authorized? This would follow still more irresistibly by the Spynie decision.[2] If so, what would *then* be the consequence, according to *modern* notions, may be sufficiently obvious;—and while we cannot but still be surprised at the House of Peers adjudicating the title of Lord "Colvil of Culross," upon the faith of the charter 1609, *exclusively*, indeed a frail member but of a frail confraternity,—it is to be regretted that the claim had not been shaped in reference simply to the Barony of "Culross,"—the only one which the House of Lords, under their law, will be disposed now to identify with a limitation to heirs-male whatsoever, necessarily comprising the present male representative (*collaterally merely*) of the ancient family of Colvil—but vitally and indispensably backed withal, (besides the charter 1609,) by the Act 1617.[3] The latter is a kind of sheet anchor, and can alone save; if the want of the *subsequent* charter, in implement thereof, rendered eligible by the *intrinsic* nullity of that in 1609, in the circumstances, be not held material. This being too after the Royal order in 1615,[4] when stricter forms were first required in Peerage conveyances, and a specification of the dignity,—which is not in the Act 1617, though otherwise, in the case of that of Spynie in 1592,[5]—together with the direct

Legal presumption of its descent, and necessary extinction, especially in virtue of the Spynie decision, &c.

The Barony of "Culross" (simply) is the only one that can now properly exist, by virtue exclusively of the Act 1617, —if the want of the *new* charter, in terms of the Act, (as in the more favourable Spynie instance), be not held a material exception.

[1] At no time—all the Culross charters are so far original, and detached. I, of course, do not here allude to the futile one in 1616, in respect to the honours at least, as it was not warranted by the crown.

[2] As to the Spynie case, see from p. 654, to p. 707, *incl.*

[3] It may be observed, that there was a great connection implied, and indeed specially enforced *verbatim* in the charters, of such secularized Barony of a religious house, between the fief and the honour, (see pp. 245-6,) the more naturally, as the former had entitled the possessor to sit in Parliament, as a high ecclesiastical dignitary, among the nobility, and even above the Barons.

Implied connection between the temporal Barony of a religious house, and the dignity.

[4] See p. 257, and especially pp. 813-14, under the Ochiltrie claim, evincing the strict and severe notions of *modern* law on this head.

[5] See pp. 659, 703-4.

adhibition of the royal authority,—the vesting, through the charter, of course under the sign manual,—as again in the analogous Spynie instance in 1593,[1] would have been *better*. A claim therefore, as premised, might perhaps still be expedient; for, taken along with the Spynie and Lindores decisions, independent of existing law,—the other Barony of "Colvill of Culross," (erroneously awarded in 1723,) will, in the absence of the patent, be presumed to be only to heirs-male of the body, and hence inevitably to be extinct. I have now, at length, done with my remarks upon the case in question,[2] sufficiently tedious, as they indisputably have been, and shall leave the matter to the better, and impartial judgment of others; only observing, that the repeated futile Culross grants, (which, indeed, as we say in practice, prove *too much*,) moreover, among other similar instances, throw doubt and discredit upon certain erections of church properties, into hereditary Lordships of Parliament, with the dignity,—that is to say, when standing *alone*, and at an earlier period;[3] of which the law must always be somewhat jealous, and that ought to be fully and satisfactorily supported.

A claim, accordingly, by the former, might still be made.

The instance in question tends further to throw distrust upon naked early erections of church properties into temporal Baronies, with the title, after the Reformation.

To shew further the right or interest accruing by the courtesy in 1594, as explanatory of that—nearly about the period—in the person of James Stewart of Down, Earl of Moray,—derived, under such title, from Elizabeth Countess of Moray, in her own right, his spouse, heritable proprietrix, in like manner, of the Moray estates,[4] it was decided by the Session, the 12th of February, in the year in question, in respect to the laird of Dalbatie, that the "courtesie of Scotland fillis landis *als* weill as ane *infeftment* of lyfrent, or *conjunctfie* does;" and hence that there then could be no non-entries affecting the lands of Riddich, which the laird possessed by the courtesy, in right of the heiress, his *deceased* spouse, they being thus

Old Scottish authorities, exemplifying the nature of the law of courtesy with us, in reference to the Moray case, and otherwise.

[1] See pp. 660, 704.

[2] For these previously, see from p. 354 to p. 369, *incl.*, and from p. 701, to p. 707, partly referred to. The Colvil *non-claim*, so *long* before 1723, is also material.

[3] See, on this head, p. 238, *et seq.* pp. 245-6-7-8.

[4] See pp. 795-6-7-8, &c.

necessarily "full," in consequence of the preceding reason.[1]

[1] Original MSS. Reports of Lord Haddington, a cotemporary Judge, and President of the Court of Session, Advocates' Library. In the case of Ogilvy, in 1557, this proposition was also held by a party before the Session, in regard to the courtesy, that "it proceidis of ane speciale prevelege grantit of ye common law of yis realme to him *allanerlie (only,)* quha mereis ane heretrix to his wife, of *quatsumever* landis, ande gettis of ye samyn wiff ane barne, or air herd *cryand* betuix four wallis." (Act and Decree Register of the Session.) The right, thus broader than now, extended *originally* to *all* lands in the person of the heiress, and the *Regiam* (see Lib. II. c. 58, *et seq.)* was hence the rule; only that the latter curiously represents the child as "*bray*-antem," or *braying*, instead of, *rather* more *humanly*, "crying," as above. Contrary to understood present law too, I have found it argued, formerly, that the *second* husband of an heiress, by whom he chanced likewise to have issue, was entitled to the courtesy, upon her death,—even although she had left an heir by a prior spouse;—but this seems never properly to have been received with us, but *e contra;* however, singularly enough, the late Sir Lucas Pepys, the second husband of Jane Countess of Rothes, in her own right,—with issue,—upon such identical ground, at one time, not altogether without legal authority, was disposed legally to try the question. It was found as early as 1478, in the case of Melvil, by the supreme civil Tribunal, that the "speciale privilege of ye curtasy of Scotland—is grantit *bot alanerly (only)* to ye personis yat maryis a *maydin*, and feis ye land, quhilk privilege suld *not* be *extendit* to *nane uyeris* personis."

Case of Ogilvy in 1557.

The right of courtesy formerly, broader than now.

Could the *second* husband of an heiress ever be entitled to it?

Case of Melvil, in 1478.

CHAPTER VIII.

CLOSING REMARKS AND INDUCTIONS.

THE general facts and considerations, such as I conceive bear upon our law and practice in Peerages, having now been submitted, so far as may be expedient, I shall, upon the whole, leave to the judgment and discretion of my readers,—to whom much more will doubtless occur,—only further touching upon the more prominent and material points, to which I must necessarily restrict myself owing to want of room.

Important conclusion believed to be instructed, that the Scottish law must still naturally govern—at least in the main—in the matter of Scottish Peerages.

In the first place, it strikes me, from what has been set forth, that an important and certainly natural principle, may be fairly conceded,—that our Peerage law, nowise altered by the Articles of Union,—but, on the contrary, thereby, especially reserved,—falls alone strictly to govern in the subject in question. Indeed, so far from being traversed by the motley and anomalous character, in *some* respects, of modern practice,—as has been shewn, even inconsistent with itself,—this only evinces that the former could be met by no proper or relevant conflicting rule. The practice alluded to, is often as little conformable to English, as to Scottish law, which therefore cannot, in the main, at least, be shaken by what, in the emergency, may be merely considered the obvious result but of misconception and inadvertence; while, at the same time, instead of being lost sight of, our peculiar doctrine and system,—when known and justly explained,—as is notorious, has sovereignly and broadly governed,—nay, even in a certain degree, under the weighty department of forfeiture since the Union, though imperatively subjected, by the Act of Queen Anne, to the law of the sister kingdom. But, independently of this, and what

may appear even more convincing and satisfactory, I appeal below, to the concurrent opinion, upon this head, of the most eminent authorities at all times, nearly all *English* legal dignitaries, and members of the House of Peers, who *might* have been expected, if that were practicable, to have stickled at, and been influenced, on the other hand, by their homebred notions and impressions.[1] And assuredly, if the Lords, in their ap-

This even admitted by high English legal authority, and Peers.

[1] The celebrated Hugh, Earl of Marchmont, in the Cassilis case, in 1762, maintained that it, with the extensive Peerage matters involved, "must *certainly* be determined upon the general principles of the law of *the country where* the *case* itself took *its rise*," and argued on Scottish authorities. Lord Mansfield no way impugned, but adopted the same course, appealing, *inter alia*, to two decisions of the Court of Session, in cases of Scottish precedence, and Peerage, in 1706 and 1730, along with the opinions of various Scottish lawyers and writers, while founding, specifically, upon the law of Scotland, as the *ratio decidendi*. Nor is there any thing in Lord Hardwick's speech, on the Cassilis occasion, to the contrary, who also founded upon Scottish practice and precedents. (See Mr. Maidment's Publication of the Cassilis Case, p. 39, from p. 43, to p. 55, and pp. 57-8-9, &c.) The same remarks apply to Lord Mansfield and Camden's speeches in the Sutherland case in 1771, though the former attempted his broad and loose doctrine of expediency, to be afterwards noticed. (See Mr. Maidment's other relative Pub. p. 7, *et seq.* &c.) Lord Mansfield is even still more express on this head, in his opinion before me, upon a claim to the Barony of Ross of Halkhead, as far back as 1755, wherein he says, "I am *clear*, that in the case of a *Scotch* peerage, the *House* of *Lords* OUGHT *and* WILL *judge* by the *rules* of the *Law* of *Scotland*, if they can be discovered;" after which he adds, in practical corroboration, that "*they* (the *Lords*) did so *expressly* in the case of the title of Stair, for they established a new creation upon *resignation* with the old precedence, which could not have been done in England." His Lordship is here perfectly correct, that case in 1748 (for which see under pp. 386, *et seq.* and previously, at pp. 280-1-2, *et seq.*) being the *mere* creature of our law, and *solely* grounded thereon. I might also refer to the Belhaven case in 1799, and to various others of the kind. Chancellor Rosslyn again, was as little liable to be trammelled by system; yet, when alluding to prescription in his speech, in the Moray case, (now before me,) in 1793, he argues upon it as "a doctrine of great weight in the law of Scotland,—*by* which *law*," he moreover adds, "*our decision* SHOULD *be regulated*." He at the same time there founds upon Scottish authorities, and, as will be presently seen in the Errol instance in 1797, would not construe a Scottish sitting in Parliament, with its *subsequent* effect, according to the law of England, but exclusively by that of Scotland.* In the

Proof in support of my proposition.

* See p. 931, n. 4.

The doctrine would follow even from the practice of the Scottish *Appellate* jurisdiction.

pellate jurisdiction, still exclusively follow the Scottish law in all Scottish cases, as they confessedly do, why should they not, *cæteris paribus*, when discussing the twin and parallel subject of Scottish Peerages? They have equally adopted this course, at least, in essential vital Peerage points;—and by what just or correct principle then, or ratiocination, I may ask, are they not, so far, thus *generally* to act? Admitting what I here contend for, an important step will be gained in the discussion, it being the main pivot and groundwork upon which my closing remarks and inferences will turn, besides those, in a great measure, elsewhere. And hence I must be pardoned in the emergency, in disclaiming, upon any sound and intelligible notions,—as has latterly been preposterously maintained by some,—the relevant dominion of an indescribable extraneous law, of a mixed nature, over ours, which, when discoverable, ought alone to be consulted. Such being the case, *our received* mode of conveyance or transference of honours,

Most material, as warranting many of my inductions.

Neither is there room for any *intermediate extraneous* law.

Annandale case in 1826, Chancellor Eldon inculcated, "there is *no doubt* that the *general* law of Scotland would *equally* apply to the case of a *dignity*, which applies to an estate," in reference to the precise interpretation of the Annandale patent in 1661; and with the same view, Lord Redesdale repeatedly, and exclusively founded upon "the Law of Scotland, and *the construction* which is put upon such words, (in the limitation there,) in the *Law* of *Scotland*." (From cotemporary MSS. copies of their speeches.) Cruise, the well known English writer on English dignities, in a Peerage opinion in 1818,* admits, even in the case of a closing *Scottish* remainder, under an *attainder*,—that its legal import "*must* depend on the *rules* by which such ultimate limitations have been construed in the Scotch Law." The above authorities, out of many others, may suffice at present. But it, indeed, is only incumbent to look at any Scottish Peerage cases, in further elucidation. Chancellor Brougham certainly adopted the same obvious principle; for, in his deciding speech in the very recent Polwarth claim, 25th of June 1835, he forcibly impressed this, that "we," the Committee of Privileges, "are sitting in a *Scottish* Court, as a Court of Appeal," (thus in the mere ordinary Scottish routine); and, moreover, in his argument upon the construction of the important Polwarth limitation, he founds directly upon the law of *Scotland*, and rests his conclusion accordingly, as being in unison with, and not repugnant to that law, which necessarily ruled as before. (For a full copy of his speech, see the exhibits or productions in the case of Lockhart *v.* Macdonald, in 1840, formerly adverted to, at p. 857, *n.* 2.)

* In my possession.

—not to dwell upon their peculiar constitutions, somewhat singular though they may appear to some, and certainly adverse to the English practice, must still exclusively govern in the shape of resignations, and regular regrants, frequently comprising lands as well as dignities—as has indeed been strikingly resolved by the Lords themselves,—which is further corroborative of what I have premised, rejecting, above all, the visionary *constructive* effect of belting, according to Lords Mansfield and Rosslyn,—an anomaly, at least now, in England—but an utter heresy and stranger in Scotland. It is maintained in the former country, that a Peerage is *indelible* in a party, and rivets in *his* blood, as exemplified in the noted words of Lord Erskine, that have been referred to,[1] which is hence held the bar there, to its subsequent demission, alienation, or loss, in any alternative, excepting from attainder, by him or his posterity, in whom it was once recognised through a sitting in Parliament. But with us, on the contrary, the right and interest, so far, not being, by any means, so rivetted and indefeasible, could be fully demitted, as is even evinced in the very instance of Peerage resignations, that were so common; nay declined,[2] and could be transferred by *proper* royal conveyances, in the form of entails, from a prior possessor to any one, and made to devolve, and separate among certain heirs, according to arbitrary, fluctuating conditions and events.[3] Nor is it less certain, that sittings in Parliament, although under a Peerage solemnly constituted and recognised, were neither untraversible, or ennobled the blood in the way in England.[4] The Peerage, nevertheless, could

Hence our law, as has indeed been found by the Lords, rules, *inter alia*, in the constitution and conveyance of honours.

A Peerage with us, was not always indelible in the blood, as in England, but could be transferred, under royal authority, in every way.

[1] See p. 106, &c.

[2] See also pp. 120-2-3.

[3] See pp. 69, 212-13-14, &c.

[4] See pp. 7, 8, 9, 104-5-6, 121-2, 215, 808-9, 813. In the Errol case in 1797 it was attempted to be argued, "that the right of a Peer of Scotland, *sitting* in Parliament at the time of the Union, cannot now be called in question," and must, *Anglicè*, enure in favour of his *legal* heirs. But this plea, Chancellor Rosslyn, who moved the Errol resolution, would "*not* assent to *at all*," as he explicitly declared, or admit that such sitting conveyed an indefeasible right. On the same occasion, also, Mr. Grant, a counsel, (afterwards Sir William Grant, and Master of the Rolls,) compared the situation of the Peers of Scotland, to that of the Peers of England, without contradic-

Effect of a Scottish sitting in Parliament before the Union, contrasted with an English.

there had been an admission of the right by the Irish House of Peers (still alone,) before the Union, in favour of a predecessor, in whose shoes the party stood.[1] It is obvious that the distinction and rule may apply, *a fortiori*, to a discussion and resolution simply, of the House of Peers, on the question of right of a Scottish Peer to vote at a Scottish Peerage Election, such as those controverted before them in 1793, inasmuch as there is no special Act or direct law, as in the Irish instance, giving the requisite authority to that tribunal, who, upon the English principle, have, strictly, no inherent jurisdiction in honours, and can still less *so* act by the Scottish.[2] It is not recognised by the Articles of the *Scottish* Union, but indirectly arises, *ex necessitate*, to expedite another, though material object.[3] The several Scottish Peerage resolutions, therefore, by the Lords, in such *exclusive* capacity, in 1793, must sink considerably lower in estimation; and above all, the extraordinary one in the case of Moray, admitting my conclusion, that the heir-*general* had the true right; for, independent of the want of any royal reference, and of *our genuine* procedure, he was not even in the field.[4] There was thus no proper litiscontestation, and he hence, by no law, could be fairly compromised. Indeed, Lord Brougham pointedly backs and supports this doctrine in the Waterford claim, when he essentially characterizes a proper, "actual, judicial decision" of a Peerage, to be, "when the *whole* case is *adversely contested* on the *one* side, *and on* the *other*, at the bar" of the Lords, on a royal reference, and when they "have" thus "come to a judicial decision, that would *have* operated to *prevent* ANY *party* ever afterwards *questioning it.*"[5] It hence proving indefeasible, and only, on full issue being joined,—I submit, owing to the material party, as above, in the Moray case, not being necessarily so convened, or barred, from the striking fact in question, that he cannot, in

A fortiori, such decision by the Lords alone, of still less weight in Scottish honours.

Application of the induction, especially to the singular case of Moray in 1793.

Other material ground, backed by Lord Brougham in the Waterford claim, for impugning the Moray resolution in 1793.

[1] *Ibid.* pp. 137—142, &c. It is to be here observed, that it was also found in this case, that Irish resolutions or adjudications, before the Union, are equally good and binding in Peerages, as English or British. *Ibid.* p. 134. [2] That is accordingly, in the *first* instance.

[3] See pp. 648-9, 851-2, and previously, p. 288.

[4] See p. 807, including *n.* 3, and p. 808.

[5] Clark and Finnelly, *ut sup.* pp. 152-3-4, 149, &c.

such way, be affected by the subaltern inadequate Moray procedure in 1793, however what may have been then relevantly stated and adduced, form a portion of available evidence. The case may then, on these grounds, be possibly opened up, especially with the aid of the *res noviter venientes ad notitiam* I have adduced, substantiating the relative plea and exception, which had such weight in the Borthwick instance,[1] where there intervened a still more formidable obstacle.

Further, by the *res noviter venientes ad notitiam*, as in the Borthwick instance.

Interim possession only, reserving the rights of third parties, and challenge or reduction in the relevant way implied, (as stated,) has, moreover, been explicitly and solemnly admitted in the cases of Buchan, Kincardin, nay in fact, of Salton,[2] &c.; and it strikes me, we have, in this respect, an advantage over English practice, to which such qualified interest or title appears foreign. It seems a provident and salutary principle, obviating and precluding most unjust and untoward consequences, illustrated in the noted English case of Willoughby of Parham,[3] besides other attendant perplexities and difficulties, increased by the fanciful and far-stretched *dictum* of Lord Erskine,[4] that, after all, is not fully borne out in England.[5] The above judicial dispensation secures the ends of *germana justitia*, that must always be contemplated; and besides is the actual rule advantageously adopted in the other House of Parliament, where a member may hold an effective, though temporary seat only, in virtue of an Election, and yet be obliged thereafter to relinquish it to another, on his return being questioned, and found illegal. He then is confounded with the mass of the people, without deriving the least benefit from his sitting, and entirely retrogrades *during* the Parliament, in which he had once sat, to his former unparliamentary status, just as if nothing had intervened. This too may bear with some analogy, owing to the common elective characteristic, upon the lame attempt to bolster up a disputed, and, in fact, untenable claim to a Scottish Peerage in an individual, by the circumstance of a predecessor, in whose shoes he stands, having been illegally elected, (owing to the same defect of right,

Interim possession only in Peerages—peculiar to us,—a wise and provident rule.

Precludes the harsh and untoward English consequences, by the English Peerage law.

In fact, adopted in the House of Commons.

The practice there, may bear, by analogy, upon the consequences of the return of one—not a Peer, as a Scottish representative Peer.

[1] See pp. 580—586, &c.

[2] See pp. 32, 33, 185-6, and also pp. 30, 44-5, &c.

[3] See p. 588, *et seq.* and p. 932, *n.* [4] *Ut sup.* p. 931. [5] See p. 589.

qua Peer, then unknown) a Scottish representative Peer. The latter incident, indeed, may much less be conclusive, upon what is conceived our relative broad *adverse* principle, as has been shewn, without too the aid of *any* proper resolution or judgment, &c. against a future challenge. In the present case, the Peerage right and interest, so based, was merely ephemeral, and had as fully died in the *interim* holder, on the dissolution of Parliament, as in the case of a representative member in the Commons, leaving "not a wreck behind,"—when he himself, even supposing there had been no attaching flaw or invalidity, would wholly relapse into the condition of a Scottish Peer, in the veriest sense, as before. There is here no *hereditary* accident implied, constructively or otherwise, as in an English writ of summons, when issued to one having no right to be summoned, as in the remarkable cases of the Baronies of Strange and Clifford,—to sustain, or eke out Lord Erskine's sweeping principle;[1] while it has been resolved, in the Scottish instance of Lindores in 1793,[2] that the long *undisputed* exercise of voting at Peerage Elections by an undue party, who bore a Peerage, in which he had always been recognised, thus *qua* Peer, to make an elective Peer, in no way strengthened or homologated the putative or untenable claim in his person. The doctrine has been fully admitted;[3] *et majus et minus* here, *non variant speciem*. The antecedent temporary right, therefore, though erroneously, to sit in the House of Lords by election, may be merely tantamount, in future, to an isolated summons, likewise upon faulty grounds, (as has frequently happened), to one not a Peer, to walk and assist, in such character, at a coronation,—the high and equally temporary privilege accordingly, being enjoyed and discharged, which, *per se*,[4] nay even with repetitions of the same thing, in law goes for nothing. Neither, by sitting in the House of Lords, does a Scottish representative Peer become at all an English Peer,—a character that no longer exists,—or proper-

Such return, in such case, cannot bolster up, or homologate the supposed, but *empty* right.

Different from an erroneous writ of summons in England.

Voting at Peerage Elections, *per se*, strengthens no claim to a Scottish Peerage.

Even a temporary sitting of a Scottish representative Peer,

[1] *Ut sup.* p. 106, &c.

[2] See p. 779, and what precedes.

[3] In effect, as evident, in the instances of Moray in 1793, and in that, still later, of Glencairn in 1797, for which, see under the respective claims.

[4] For an instance of the kind, see pp. 62-3, including *n*.

ly, or fully, a British. Though entitled, for the mere time, to especial rights and prerogatives, he sits chiefly in a Scottish capacity,[1] and certainly, without subjecting thereby, in any way, his *Scottish* hereditary rights and interests, to the control and conclusions of the English law. On the contrary, instead of losing caste, not a hair of his head is singed in this respect, by thus passing through the upper chamber of the nation, as is capable of the utmost illustration. The former still continue intact, and within the appropriate pale and rule of the Scottish law, which, as has been established,—and what is here decisive,—rejected the notion of indelible identity of a Peerage with the blood, though even solemnly constituted and recognised in form; and did not hold, as insuperable and indefeasible, an incident, thus, of far superior legal effect to the fleeting and ephemeral one in question,—which, besides, can as little be contrasted with that in the far weightier instance of Borthwick.

In any event, in the House of Lords, can draw with it no innovating results, after the expiry of the Parliament.

It humbly strikes me, coupled with the relevant power of granting *interim* possession only, in doubtful cases, &c. that the Scottish form of discussing a Peerage claim was by no means inadmissible, namely, by the same high Tribunal who had the cognizance in all other civil rights,[2] though now sub-

The unrepealed Scottish form of discussing Peerage claims, conceived to be advantageous.

[1] See, as to the above, pp. 843-4.

[2] Independently of the various concurrent, and, as I conceive, irresistible evidence, I have adduced in proof of this fact, (see Chapters I. II.), I may add the remarkable precedent of the Earldom of Rothes, in the reign of Charles II. which is new, (being only lately discovered by me,) and further illustrates our Peerage notions, in important particulars. That old Earldom, constituted by an unknown grant, immediately after the middle of the 15th century, has been held to have been descendible to heirs-male, before the time of the celebrated John Duke of Rothes, Chancellor of Scotland, (whose subsequent Ducal dignity, with subordinate ones, exclusively limited by patent, dated 29th of May 1680, to heirs-male of his body,* expired with him in their default); but the Duke, wishing to secure his Earldom, and ancient titles, with the estates, to his daughters, had, on the 4th of July 1663, obtained, upon his resignation, a charter of regrant of the same,† to the latter, (the eldest always succeeding without division, &c.) and to other heirs,

Case of the Earldom of Rothes, &c. in 1682, involving the point of the due cognizance in Scottish Peerages.

Regulating regrant and descent of the Rothes honours.

* Great Seal Register.

† *Ibid.* It can be proved to have been *under* the *sign manual*, by the original signature, dated at Whitehall, still extant in the Signet Office, Edinburgh.

To the Lords—necessarily now—in respect to their interests

ject, of course, together with all civil questions, to the appellate jurisdiction and review of the Lords. The latter too would hence be placed in a better situation from such *irre-*

which was ratified by Parliament in that year.* And, in such circumtances, after his death in 1681, the following procedure occurred, before the Duke of York, the King's Commissioner, and Privy Council, on the 26th of January 1682, as is proved by the original Record of Privy Council, from which these are excerpts :—"Anent a petition presented by John Lord Lindores, shewing that where the Petitioner being undoubted air *male* to the deceast Johne Duke of Rothes, (by a descent from the House of Rothes, after the middle of the 16th century,) and by his right of blood, hes interest and the only right to the title and dignity thereof, which law presumes to belong still to the aire male ; and since nothing can be made appear to the prejudice of the petitioners right to the title of Rothes, and that he cannot be barred from injoying the same. And therefore humbly supplicating that his Royal highness, and the Council, who are only Judges competent in matters of honour, *quoad* the possessorie judgment, would declare that the petitioner may be acknowledged as Earle of Rothes, and that he may assume and enjoy the said title, conforme to his right of blood, and the law and pratique of this realme, and that all other persones may be discharged to assume, or use the said title in time comeing ; which petitione being given up to sie and answer, the *Countess* of Rothes, (Lady *Margaret*, eldest daughter and heiress of the previous Duke,) and the *Earle* of Haddington, *(Charles,)* her *husband*, did give in the answers following thereto, viz.—whereas the petition craves that the Lord Lindores may be acknowledged as Earle of Rothes, conforme to his right of blood, and all others may be discharged to assume or use the title in time comeing, it is answered, the desire of the petitione is unreasonable, and contrarie to Law, in respect the deceast *Chancellor* (the *Duke* of *Rothes,)* having resolved to settle and provide his estate and dignitie, failzieing heirsmale of his owne bodie, to his eldest dochter without divisione, she marrying a nobleman, or gentleman of the surname of Lesley, at the least, who should use &c. the said surname, &c.—he did make resignatione of his dignity and estate in favoures of himself, and the aires male of his owne body, *whilk failzeing*, to his *eldest dochter*, &c. whereupon there was a signature obtained from his sacred Majestie (in terms thereof,) and wherein his Majestie promises to cause ratify the same in his first Parliament, and accordingly there is a charter past under the great scall, &c.—in maner foirsaid, and which charter and infeftment thereupon is ratified by Parliament anno 1663, &c.—*by which* it is clear and evident that the *title* and *dignity* and estate of *Rothes does belong* to the present *Countes of Rothes*, eldest daughter to the said lord chancellor, &c.—and that the Lord Lindores hes no colour or pretence

Lord Lindores's claim thereto, then before the Privy Council, in the above year.

But opposed by Margaret, Countess of Rothes, in her own right, who maintained the incompetency of the tribunal, and the exclusive competency of the Court of Session in the matter, in ordinary form.

* See Acts, last Edit. vol. VII. p. 518.

vocable right in them,—than merely accidentally at present, through the mutable breath and pleasure (as it *may* be) of the crown. It has, moreover, the higher advantage of far

and prerogative; and to the parties, in respect to a proper and

of right to the same as aire male, *in respect* of the foresaid *resignation*, charter under the great seal, and ratification in parliament, *which* CANNOT *be drawen in question before* the *Lords* of his *Majesties Privy Counsil*, and are certainely not questionable in law, *but consonant* to the *uncontroverted law* and *custome* of the kingdome, and *if* the Lord Lindores think it worth his trouble to persew *any declaratour* of his *right* to the *title* and *dignitie* of the estate of Rothes, it *is* ONLY *competent before* the JUDGE ORDINARE, (certainly *the* SESSION,) upon citation of all parties having interest, at which time it will be sufficiently made appear the Lord Lindores can have no pretence of right, and it were certainly most absurd, both in this caice, and in *many other* caices of noble families of the kingdome to imagine that parties making resignationes of their titles and estate, and obtaining grants thereof from his Maiestie, with ane *novodamus* in favoures of ther ares of line, or eldest daughter, it is *not* to *invalid* * ane legal settlement and conveyance of the estate and dignity,—that is the *uncontroverted law* and custome of the kingdome, and hes bene observed and practised in the case of *many other* noble families, and is absolutely necessar for the continuance preservative of the splendor of noble families, that the estate and dignitie should *not* be separat, (or) should be *summarily drawen* in question by a *petition* before the Lords of *privy Counsell*, and who, with all possible deference, and respect to them, *will certanely* find themselves NOT *competent* to the validity, or invalidity of heritable rights, which, so long as they stand unreduced, can be the only warrand for parties to use and assume the said title and dignity. And as to that pretence, that the Lords of Privy Councell are competent Judges in matter of honour, and to the possessory part, it is answered, *this pretence is* UNWARRANTABLE, and does not at all meet or concern the cace, because here is no injury or affront offered to any mans honour, which were propper to be redressed by the Lords of Privy Council; but the Countes of Rothes hes right to use and assume her fathers title and dignitie, which is expresslie provided to her by graunts, *under* his *Majesties Royal hand*, duly past the great seall and ratified in Parliament, so as it were ane invasioune both upon her right and possessione to invert or prejudge the samin; in respect whereof, etc." And how, it may be asked, do the Privy Council here act? They forthwith, *de plano*, without any demur for a moment, quite in unison with the Countess's just argument, and what I have all along maintained,—"*doe remit* the said mater in de-

Legal effect of a resignation, and regrant of honours, in that century.

Allusion to distinctive cognizance of the Privy Council, to whom this matter of honours, (as much as to Parliament,) was wholly incompetent.

The Privy Council would not interfere, but *instanter* refer the parties,

* Probably an accidental mistake, instead of, in substance, validly, to operate as a legal settlement, &c.—which, at least, must be *akin* to the sense.

more matured judgment, precluding the natural objections, as shewn, to the later system, modelled upon the English.

more matured preparation, especially through the previous fixing of important Scottish matters of fact, with much greater certainty and precision, by means of Scottish heads, and practical experience, through the immediate and best sources withal,—in this way precluding the likely English misconception and error in these particulars, with consequent crudeness and fluctuation in *judgments*, (of *which our* practice must be the basis,) that, I conceive, has been strikingly illustrated.[1] Such are by no means uncommon in the present system, which may have unduly shut out the older with us, that has not been repealed. At the same time, the undue effects of Scottish partiality and private influence below, the bane and too often disgrace of our procedure before the Union, and *even* after, would still be checked and obviated by the wholesome review and final judgment of the upper Tribunal, who profess to be guided and ruled by our law, and doubtless would fairly be so, if it was *accurately* chalked out, and submitted to them, as by the above method, in the leading facts and essentials.

according to the Countess's argument, to the ordinary and established Jurisdiction, in honours,—namely, the Court of Session.

bate *to the Lords* OF SESSION, to be discust by them, *as* ACCORDES of *the* LAW," *—by THAT obviously in the ordinary course. The technical meaning of "remit," or "refer," besides, as merely handing over a case to the ordinary established judicatory, was formerly exemplified and proved, (see pp. 37-8-9.) There is here again no allusion whatever to King or Parliament in such capacity, who, by *assumption* of a very recent *English* authority, as I have experienced, had alone in Scotland—and *therefore*, we *must* admit—the constant Peerage cognizance! Certain claimants to Peerages, like Lord Lindores, owing to the natural love of original hereditary right in the Duke of York, the Commissioner mentioned, afterwards James II.—were induced, in his time, to make untenable and irregular claims of the kind, in the hope of his arbitrary interposition and countenance, but without success.

The right of Countess Margaret to the Rothes honours, indisputable.

I need hardly add,—the Rothes case being so very clear,—that the noble petitioner, in 1682, wisely took Countess Margaret's hint, and did not "think it worth his trouble" to move further in this question of the honours, (at least so far as I can find), which have ever vested, as they still legally do, in her direct descendants and heirs-general.

[1] This also may be a result from the mutable and fluctuating composition of the Committee of Privileges of the Lords, in the discussion of Peerage claims.

* From the original Register, as stated, of Privy Council, in her Majesty's General Register House.

It may be further argued, that, with a similar view, the English Judges are often consulted by the Lords in material English Peerage points;—why, then, ought not also the Scottish, indeed, *a fortiori*, in those affecting Scottish Peerages, especially when so much in unison, and quadrating in their nature with *our* system, frequently so adverse to the English.

The Scottish Judges would thus be consulted, and with greater reason even than the English, in English Peerage cases.

Our own evidence, far from being actually compromised by the *occasional* loose, anomalous, and contradictory relative procedure since the Union,[1] as has been unfolded, should likewise consistently govern. In respect to general services, the inapplication, as we may, upon the whole, allow, with us, of prescription to *honours*, must yet, so *far*, check their abuse, as evinced by certain instances in our days,[2]—independently of the competency of their future reduction by those having an interest within the statutory term of prescription. I am still well aware of some nicety and difficulty which arises on the subject, from the later distinction, and contrariety, in services, between Peerage rights and those at common law,—thus subjecting the *same* matter of pedigree, *possibly* hereafter so important, and having *every* bearing, to different and discordant tests,—that is even further rivetted, rather incongruently, by a very recent case that has been adverted to.[3] This might again lead me into some detail, and, after all, the best remedy might be by the interposition of legislature, here, as well as in other Peerage points. But I cannot fairly see what is to preclude an old general service at least, in any case of pedigree, even affecting honours, presumptively good on the merits, in form, and in procedure, especially upon a record of due authorities, as we often find, hitherto undisputed withal—though not carrying lands—to be *admissible* in evidence. While it ought to be fully so, according to our law, it

Our own evidence ought to govern, including general services.

Some nicety here, owing to the difference by the law between Peerage, and ordinary succession in services.

An old general service may certainly be very admissible evidence.

[1] See, under the case of Rutherford, pp. 906-7-8, 913-14-15, &c.

[2] I must always however here, state my regret that our *old* form of allowing individuals, without a competing brief, even on an indirect interest, to oppose at a general service, has been exploded;—why, on a similar occasion, on the discussion of a Peerage claim *in limine*, involving a matter of pedigree, the Lords, in unison with the same, do allow "*any person*" to "*oppose*." See Cruise on Dig. p. 259.

Our old practice in services similar, in part, to that in a Peerage claim.

[3] See pp. 916-17, &c.

was, invariably, in a striking manner, viewed in the same light by the Lords, in cases of Scottish Peerage, subsequent to the Union, and for a long period,—indeed even down to our day. Yet, nevertheless, as has been fairly seen, by the instance of Rutherford in 1839, and before, a most strange contradiction has here lately arisen, placing general services in the most anomalous, and irreconcilable situation,—inasmuch as by the House of Peers such service *alone* has been received, on *many* occasions, as perfectly good, and probative of material facts, although, on another, under far stronger and apparently irresistible circumstances, as is conceived, it has been utterly discarded in a *simple*, confessed, recent point,—and viewed *in toto* but as a dead letter.[1] While I am much mistaken, if this proof *may* not be superior to what, by English practice, —which once *highly* prized the former,[2]—is *not* infrequently recognised,[3] at least admitted *de bene esse*, it is extremely to be desired that some uniform and established law should be here laid down and adhered to; for, as things stand, I may defy any one to say, how we are to estimate a general service, of any age, in Peerages—whether again, as *every* thing, according to rule, most justifiably,[4]—or *e converso*, as *nothing*.

Palpable contradiction in the Lords' practice in respect to general services, that are sometimes at once received, but at others not, under the *same* circumstances, with the necessity here of some strict and certain rule.

[1] See pp. 906-7-8, and what precedes. [2] Cruise on Dig. p. 273.

[3] See p. 833, *n.* 5. With respect to evidence, by an insertion in a Family Bible, so greatly relied on in England, it is remarkable, that such being adduced in the recent case of Lawrie *v.* Mercer, May 28, 1840, to prove the birth and age of a female witness upwards of forty, —from whence a material conclusion was attempted to be drawn,— actually turned out to have been written *by herself*, only eight or nine years before; and, according to the interlocutor of the Lord Ordinary, the 14th of May 1839, was further for the purpose of iniquitously bolstering up a fabricated story, or "mere invention," to assist the party, pursuer, which, he pointedly added, only made "the matter worse." (Printed papers in the case.) For Monumental Inscriptions, see after.

Instance of an imposition attempted by an insertion in a Family Bible, evidence much relied on in England.

[4] Further, in palpable contradiction of the doctrine inculcated in the Rutherford case, (see pp. 905, *et seq.*) wholly rejecting general services, I must refer to the recent procedure in the still pending Marchmont claim in 1838, when various general services were received without scruple, in evidence,—including two, in 1725, and 1740—and actually *three* in 1751. (See Minutes of Evidence for that year, pp. 151-2, and pp. 66-7-8.) Nay, subsequently still here, *in* 1839, the *year* of the Rutherford decision, a general service, even *so late* as 1799, was equally

Proof of the reception of general services by our latest law—in direct opposition to that in the Rutherford claim.

General services, however sustained by the Session, in *foro contradictorio*, (a case not contemplated by English authorities,) of which we have several examples, must always greatly weigh, I suspect, under any system; and I may only conclude as to Evidence with remarking, in conformity to enlightened authorities, elsewhere at least, that it must ever at the same time be somewhat flexible and flitting in its import—owing to circumstances,—alternately varying and shifting in its hues and complexion, like those of the dolphin, which it may be far from easy invariably to catch or define. Independently, therefore, of the prudent consideration, that *omnis definitio in lege periculosa est*,[1] the broad uncompromising enunciation recently risked as to general services, by Lord Brougham, may not even, in this latter view, be properly warranted—not alluding to the manifest contradiction it even receives from his Lordship.[2]

General services, in *foro contradictorio*, not contemplated in the Rutherford case, &c. must always weigh.

The same Evidence may vary in different circumstances.

The Scottish law of Forfeiture, since the noted Act of Queen Anne, though thereby identified with the English, as repeatedly observed, has been liberally administered—even with reference to our notions, and proved a boon. By our law of succession in honours, hitherto unrepealed,—to which important topic I next come,—there was, I conceive, as I have demonstrated,—and could still do so, further, a strong bias, and unequivocal presumption in favour of female heirs. This was extremely natural, owing to the parallel established provision in other heritable successions, with which honours have been classed, where they were preferred *vi juris*, especially including the Crown,[3] that could not fail to be a rule; but here, on the other hand, I maintain the "shoe *does* pinch," for *our* law, in this respect, has been most unduly tampered with, and perverted.—Instead of such confessed prin-

The Scottish law of forfeiture has been well administered.

But our law of succession in Peerages, has been tampered

admitted, proving the male descent of the claimant's father *centuries back*, but, especially, *as* in the Rutherford case, to *establish* a *recent* and *more difficult extinction*. (See Min. of Evid. for 1839, pp. 340-1.) By the bye, in corroboration of *my* idea of "*Monumental Inscriptions*" at p. 834, *n.* see Miss Sinclair's "Shetland," pp. 97—135.—"*Sepulchral lies*," according to Pope.

[1] This may also apply to another English authority, repeatedly noticed; see p. 832.

[2] See pp. 906-7.

[3] Originally; and as solemnly and justly found at the competition between Bruce and Baliol.

with, and signally perverted by Lords Mansfield and Rosslyn, who have here enacted a foreign supposititious and irrelevant law of their own.

ciple being still allowed its natural, or *any* weight, Lords Mansfield and Rosslyn, of themselves, have arbitrarily and unchivalrously enacted, that in all cases where there is want of direct, undisputable evidence of the limitations of a dignity, involving the absence of the constitution or patent, (bating the plain, irresistible specialty in the Sutherland instance, and that ought to have ruled equally in that of Moray)—the collateral circumstances being neutral, nay even when palpably inclining in favour of heirs-female—there *is* room *only* for heirs-*male* of the body—who must exclusively take in these emergencies! Of a truth, we may here justly exclaim, in respect to such strange *enactment*:—

"Quis *novus* hic nostris accessit sedibus *hospes*?"

For it is every way a novelty, and the mere offspring of their own legalized creation. And as if withal distrustful, as they might well be, of support or countenance to this futile violent conclusion and conceit, from our apposite law and practice, they lamely seek to prop and colour it by secondary irrelevant considerations. Because—in the first place, it seems, in the gross, through *patents*,[1] withal in later times—*more* Peerages have been granted to heirs-male, than to heirs-female,[2]—from whence therefore it *must* follow that there *is* the exclusive preference in question. This, at the same time, however, that there are, at present,—*rather* a *rebutter*, indeed,—in virtue of our various Peerage grants, a far larger class of heirs-female to dignities, than of heirs-male,[3] independently, as has

[1] Patents, I need hardly observe, arbitrarily fixing the descent of an honour, though in numerous instances likewise in favour of heirs-female, are not a proper criterion. It is *our* succession that must here weigh, when left to common law.

[2] See Lord Mansfield's speech in the Cassilis case, in 1762, *ap.* Mr. Maidment's Pub. pp. 49-40, (he here, however, grossly exaggerates and misrepresents the matter, for which see pp. 565-6, 569, 570 of this work,) and his Lordship's speech in the Suth. case in 1771, Mr. Maidment's Pub. p. 13. I need not add, that Lord Rosslyn espoused and adopted Lord Mansfield's doctrine, and even went beyond it as to the *male* succession, as was strikingly illustrated in the Moray instance.

[3] With respect to our Dukedoms alone, innumerable existing heirs-female take under the Ducal patents of Hamilton, Buccleugh, Queens-

been instructed, of the *constant* devolution of *all* our older to heirs-general, besides the later female descents,—is at best but *rusticum* judicium *numero*, non *pondere*, the prior of which tests has been contemned, nay reprobated by lawyers, and cannot in the *abstract*, that is, as regards the *mere* quantity, be confided in ;[2] while the latter, the proper relevant test, evidently in this alternative, decisively applies in behalf of the heirs-female. This, I maintain, upon the superior intrinsic weight of the authorities and precedents, articulately, in their instance, which in every sense preponderates, and strikes the scale in their favour,—preposterous and absurd, moreover, as it would be to allow such, in the face of ascertained law, to be compromised, or affected, as above, by the subaltern consideration objected, even admitting it as contended.

[1] The two pretexts by which they seek to prop *their* arbitrary presumption of the descent to heirs-*male alone*, of the body, in Peerages, flimsy, untenable, and irrelevant.

And secondly, the preceding legal dignitaries would fain ground their visionary and fallacious doctrine upon motives of *expediency*, because, under the law opposed to them, the Peerage would necessarily be increased, and less likely to be restricted, (which, it seems, is most *desirable*,) in virtue of the broader presumed descent to "heirs-general," that would come into play.[3] They here, like certain modern exclusives, not of the *most* ancient extract, would wish to curtail the privilege of their *coterie*, as much as possible. But this strange illogical and inconclusive argument,—for such consequence again, can still less justly defeat the law impugned, if well founded,—

That grounded upon supposed expediency, to be recurred to.

berry, and *Montrose*, (as was *there* at least intended, see pp. 200-1), *far more* than male ; and the Duke of Roxburgh likewise is an heir-female.

[1] When there were no patents ; see pp. 561-2-3-4, *et seq.*

[2] Of the strain of this argument by *numero*, it might be well said, with Horace, in the parallel case of Lucilius,—"cum flueret *lutulentus*, *erat* quod *tollere velles*,"—the surpassing number of the two hundred vapid, or mongrel verses at most, upon which the poet, in the same way, founded, nay composed "stans *pede* in *uno*,"—in reality, not amounting *pondere*, or in true intrinsic weight, or merit, to *one Johnsonian*, or *Byronian* ;—though Lord Mansfield here, may be said not even to have a leg to stand upon.

[3] See Lord Mansfield's speech in Suth. case, *ut sup.* pp. 13, 14, 18, 37. Lord Hardwicke, who, however, took his cue from the former, the principal speaker, and director in the Cassilis case, there also entertained the same argument. See Mr. Maidment's Cassilis Pub. p. 57.

will be specially recurred to in the sequel, so far as the consideration of expediency is concerned, which may properly suffice on this head.

The above *fictitious* presumption or law, has plunged our Peerage succession into contradiction, confusion, and perplexity.

A natural, though most grievous consequence withal, of "Lords Mansfield's and Rosslyn's law,"—as theirs in question has been (contemptuously) branded,—is, that it has plunged our Peerage descent, in certain instances—which they ought fully to have foreseen and weighed—into contradiction, perplexity, and anarchy. It will not be denied that the heir-male of the body of the Abernethies, the first Lords of Salton, the original limitation of whose ancient dignity is unknown,[1] in virtue of the previous doctrine, has an undoubted right to the same,[2] and that the House of Peers, (there having been no resignation,[3]) owing to their repeated recognition and adoption of the above law in multiplied instances, cannot be warranted to refuse the Peerage to such heir-male, who is positively affirmed to exist, in the event of his claiming. What then may be the consequence? This *actual* Barony having also been effectually recognised in, and duly held, on the other hand, by the Frasers of Philorth, as heirs-*female*,—agreeably to *our* law, nay, even to the English,—at, and *ever* since 1670,[4] there will then, in no unlikely event, be *two* Lord *Saltons*, clearly entitled by the respective, though conflicting laws, to the *identical* Peerage, with the *identical* precedence, and *identical*

This signally instanced in the case of the Barony of Salton, besides that of Moray, in 1793.

[1] It was as little, at least, in the reign of Charles II.; nor did the honour previously diverge to an heir-female, in exclusion of the heir-male—both characters having been transmitted through the same takers.

[2] See pp. 184-5, *et seq.*

[3] See the case of the Marquisate of Queensberry &c. in 1812, before the Lords, pp. 668-9, and p. 875, *n.* 4, than which the present is stronger, it involving but a single abstract title, having no possible connection, or having been enjoyed at the same time, previously,—as in the Queensberry instance,—with another, under the identical designation, though of a higher grade, in the Peerage, and differently descendible.

[4] See p. 185. As shewn, however, the recognition in the circumstances being qualified, and in conformity to the legal rights in the individual, really does not make the case a whit stronger, than it before intrinsically was. There was further, a reservation of the rights of third parties. (*Ibid.* and p. 186.) Common authorities likewise, represent the dignity in the Frasers, "in right of" their *female* descent. See, *inter alia*, Nisbet's Heraldry, Edit. 1722, vol. I. p. 288.

rights and privileges! Such consummation, in no view to be defended, whatever may elsewhere obtain,[1] is at variance with *our* notions, and indeed plain common sense, proceeding upon grounds wholly incompatible and irreconcilable with each other. Nay, it involves not only the most palpable legal, logical absurdity, but an utter impossibility;—while the same inextricable anomaly in fact, from two inveterately hostile and repugnant rules coming equally into play, as has been exposed in the extraordinary case of Moray in 1793,[2] would undoubtedly recur; all in consequence, I repeat, of the temerity, incompetence, and presumption of legal dignitaries, who have hastily resolved, without common examination into our proper law and practice, or been at all aware of this important Salton precedent in 1670, and thereafter, to which they *never* advert.[3] But further still, the same extraordinary law, under

[1] As in England, in the cases of the Baronies of Strange and Clifford, which we, like most, I believe, do not precisely understand.

[2] See pp. 780-1, *et seq.* &c.

[3] In the Maxwell of Pollok charter-chest, a considerable magazine of old writs, and interesting documents, both historical (including the valuable Pollok Chronicle, lately printed,) and private, &c. we find some curious cotemporary information as to the state of the noble and ancient family of the Abernethies, Lords Salton, in 1666, and 1669. There is, especially, a letter, 9th of March 1669, by Lady Salton, mother of Alexander Lord Salton, their last *immediate* heir-male, to Sir George Maxwell of Pollok, wherein she states, that Alexander Fraser of Phillorth, (eventually the heir-female, and Lord Salton in 1670, as in the text,) had then summoned her "dochter,"—who is hardly known, and must have speedily died,—"to enter heir to hir *brother*," the *above* Lord, in order evidently to denude in favour of creditors; and further, that Alexander Abernethy of Auchcloich, now the heir-male, (see pp. 187-8,) had, with Phillorth, taken "an unworthie perte against his *cheife*," *(her son)*; which "treacherous dealing," she adds, "hastened his death, most sad to me his mother," &c. During the embarrassed and shipwrecked state of the family, there were, naturally, secret intriguing, and interference of *friends* to promote certain ends. It transpires too, from an "Information," that this ruined Lord had made "ane dispositioun of his *honours*," to Arthur Forbes, a stranger, (see p. 187, *n.* 1.) which had been *read*,—he taking the name and arms of Salton, &c. *Query*, is the latter extant, or recorded? It perhaps had not been duly executed, or valid; but, at any rate, was hitherto unknown. But there was no such conveyance of the honours in favour

New and original particulars as to the *old* Family, and honours of Salton.

An asserted conveyance of the latter to Arthur Forbes, in the 16th century.

But further, it, independently, has cloaked and perpetrated manifest injustice. This instanced in the case of the Barony of Mordington in 1746, and subsequently.

this head, though instituted and enforced by a Chief Justice, with the concomitant flagrant error, and evil, as above, has cloaked and perpetrated manifest *in*justice. Charles Douglas, heir-male of the body *(alone)* of James, first Lord Mordington, being arraigned, as a commoner, for high treason, before a Commission of Oyer and Terminer at Carlisle, in September 1746, in consequence of his concern in the rebellion in 1745, pleaded, in bar of the indictment, his privilege of Peerage, under a pretended right to the Barony of Mordington; in order thereby, through the consequent misnomer, and incompetency of the tribunal, to stave off, or defeat the prosecution. There existed at the time, however, preferable heirs-general and of line, namely, Mary, and Cambelina, his cousins, the sole issue of George, last Lord Mordington, the undoubted heir and holder of the dignity, being both heir-general, as well as heir-male of the body of the first Lord;[1] so that the constitution of the Barony in 1640, with the limitation, being then unadduced and unknown, there, of course, arose the material question, directly involving the validity of the indictment, yea or nay,—that precisely at issue, which of the former, the heir-male, or the heir-female, was thereto entitled?[2] And the result will be seen

of Fraser of Phillorth, or of Abernethy of Auchincloich, though at one time also meditated as to Abernethy, (see p. 188), so that the material question of the dignity, at least as affects them, remained as before, at common law, to the former as direct heir-female, and to the latter as direct heir-male. The preceding Lady Salton, in her deep domestic distress, applies to the above Sir George Maxwell, her relative, as she states, through the Stewarts of Ardgowan, for his aid and advice, that was duly and benevolently given,—in which distinguished representative of his family, we recognise the same worth and honour that characterize his heirs in modern times.

Gross errors of our Peerage writers.

[1] Our Peerage writers, Douglas and Wood, (whom, however, some English lawyers, not to add solicitors, depend upon as authorities,) have, after their very frequent fashion, grossly mistaken, and misrepresented the Mordington pedigree, (see Douglas, pp. 487-8, and Wood, vol. II. p. 263,) making Charles, the criminal, actually *brother*, and thus *every* way preferable heir to the ladies mentioned. They might even have learned the true state of things, as in the text, from a very ordinary and patent authority, the "Scots *(Peerage) Compendium*" for 1756, (if not also before, and thereafter,) under the article of Mordington, at pp. 414-15, which has given the descent accurately.

[2] Of course, we have no abbeyance here.

by this excerpt from an original opinion of Lord Mansfield, now before me, dated 31st of March 1755, taken with what follows. "The *like* reasoning, (his noticed, in behalf of the descent of an honour in such conceived emergency, only to heirs-male of the body,) was *given way to* by *all* the *Lawyers* of the *crown*, in the case of an heir *male (Charles Douglas)* of the Family of Mordington, *claiming* the *Title*, who was indicted for high treason (as above) at Carlisle, tho' the last Lord had certainly left *daughters*, in favour of whose right opinions had been given." It would thence appear, even by Lord Mansfield's admission, that there *were* then legal deniers of his doctrine; but, in consequence of this opinion, as stated, of the crown lawyers, including Lord Mansfield, who was of the number—indisputably—and as we learn by all cotemporary accounts, the proceedings were necessarily sisted, owing to the "*reasoning*" in question, and Charles Douglas, the criminal, was so lucky as at length to escape with impunity.[1] Upon this notable preference of him, *qua* Peer, through the adoption of his own law, (that under discussion,) his Lordship above all, triumphantly, and *acutely* founds, in the opinion alluded to, in order to repeat and enforce it likewise in a claim to the old Barony of Ross of Halkhead, whose constitution is unknown, and as to which he had been consulted. Now, supposing things had remained in this state, and that, at a future time, another heir-male of the body had claimed the Mordington Peerage, by petition and reference to the Lords, and had been opposed, as might be expected, by the ever luckless heirs-female,[2] can there be a doubt possibly entertained as to what would have been the issue? 'My Lords,'—the same legal dignitary, (as *deeply* informed as ever,) would have said, amid his usual rhetoric,—'this is indeed a clear question, not now open to be disputed, "if there be *any* thing *certain* in the Law of

Lawyers in 1746 adverse to Lord Mansfield's doctrine.

Direct exposure of the doctrine and reasoning of Lords Mansfield and Rosslyn, in respect

[1] See Lord Hailes's Suth. case, Chap. VI. pp. 165, 168, besides the cotemporay public prints, &c. Among these, the Scots Magazine for 1746, (p. 438,) explicitly states that, at the trial, Charles Douglas "pleaded his peerage, as Lord Mordington; which was *allowed*, tho' at first opposed by the King's Council."

[2] The direct female line of Lord George, it is to be observed, did not fail until towards the end of last century.

to their *fixed peremptory* law, under discussion, from the Mordington precedent.

Peerage, it is this presumption in favour of the heir-male" of the body; it "has its foundation in *law* and in *truth*;" and further, I remember, that on the prosecution of Charles Douglas (in whose shoes the respectable just claimant stands,) for high treason, in 1746, when he pleaded his Peerage in bar thereof, the matter, in his instance, was "fully considered." And it was *solidly* and truly determined by the advisers of the crown, I having then the honour of being his Majesty's Solicitor-General,[1] that his plea was just, he being indisputably, *qua* heir-male, Lord Mordington. This then is decisive, "it is not now open to litigate this general matter;" the honour here was constituted by "belting only," after which the party ennobled sat in Parliament, and his son after him, and it *can only* descend to heirs-male of the body. In such opinion I am also confirmed, *because* "all questions concerning peerages should be settled upon the principles of expediency."'—This is substantially the argument, and very words nearly, *in toto*, used in identical circumstances, by Lords Mansfield and Rosslyn, who both went hand in hand in the cases of Sutherland and Glencairn.[2] But how egregiously Lord Mansfield would here have erred—as he, moreover, certainly did—together with his legal coadjutors, on the former Mordington occasion, is now clear as noon-day; for the explicit limitations in the *very* Mordington patent, dated March 10, 1640, having been ascertained from the legal adduction,

[1] In 1746, when he so conspicuously and eloquently, (as stated,) acted for the crown against the rebel Lords, including Lord Balmerinoch and Lovat, and was consulted in all such matters. See Holliday's Life of Lord Mansfield, pp. 65-6, *et seq.*

[2] See Lord Mansfield's speech in the Suth. case, Mr. Maidment's Pub. pp. 9, 11, 13, 18, &c.—and p. 681, *n.* of the present work. It is remarkable, however, that Lord Mansfield was not so very confident and peremptory in his conclusions, in his opinion upon the Ross Peerage claim, referred to, in 1755, as elsewhere. On the contrary, he admits, on that occasion, that "there *is* a difference of opinion as to the descent of Peerages created in Scotland, before letters patent; Mr. Craigie, (President of the Court of Session, he adds,) and other great authorities, think they descend to the heirs *generall*." And though he sides with the heir-male, he yet *admits*, "that there *are* considerable precedents the *other* way," *i. e.* in favour of heirs-*female*. Why then, I ask, did he not, as a fair and candid Judge, give *some* weight, at least *aliunde*,—as, however, he peremptorily altogether refused to do,—to the latter fact?

Lord Mansfield did not always entertain the same notions on this head.

His contradiction here, again.

(though now unknown) of the signature in Scotland, in 1730,[1] fully establish that the Peerage, instead of being restricted in any such way, as was maintained, to heirs-male exclusively, *e converso*, had been extended to "ye *heires*—betwix *hir (Anna Oliphant)*, and ye saide Sir *James Douglas* of Mordington, *(first Lord Mordington*, the respective Patentees,) and *yer heires*," &c. That is, unequivocally to heirs-general, including females,[2]—an interpretation further conclusively fixed by the express tenor of the preamble and context, and the peculiar relative circumstances.[3] Hence, as there existed, both in 1746, and long afterwards, the heirs-female mentioned, in conformity, of the body,[4] having thus the sole and undoubted right to the dignity, in terms of the patent, quite to the exclusion of the heir-male, who, nevertheless, as we have seen, was illegally preferred, not only, I repeat, is manifest injustice in succession, the direct consequence of "Lord Mansfield's law," the ground alone for such rash and unadvised preference,[5] but it indisputably happens, that also, through it, the most important ends of law and justice have been arbitrarily and mischievously defeated in 1746, inasmuch as this visionary, and *wise* conclusion of Charles Douglas being a Peer,—which rank he never held,—was, notwithstanding, the *sole* pretext, owing to the misnomer ingrafted *thereon*, &c. for not insisting in his prosecution;—whereby, there being, I believe, *no* doubt of his guilt, a flagrant criminal

[1] See, upon this head, and as to the patent otherwise, pp. 179-80-1. It is well known that the House of Lords, in all Scottish Peerage claims, call first for the signature of the patent, of which the last is a mere echo, as affording the best proof of what is duly carried, and granted, —a most wise and necessary practice *since* the union of the crowns. Wise and peculiarly necessary practice of the Lords in Peerage grants.

[2] I need hardly here appeal to the Polwarth case in 1835, not nearly so strong as the present.

[3] See pp. 180-1.

[4] Of the *nearest* class, for it so happens that there were then, and are still, many, though more remote, of the body of the patentee.

[5] The Mordington constitution and limitation in 1640, having been founded upon previously in 1730, in the Lovat case, (see p. 179, *n.*) (whose result Lord Mansfield knew and approved of), might hence have been discovered, in 1746, among the warrants, after a very ordinary relative Peerage investigation, in the most obvious quarter. Great negligence and inadvertence here, of Lord Mansfield.

By "Lord Mansfield's law," a high criminal, in the Mordington instance, has escaped condign punishment, to which he, a chief Justice, has been accessory.

has thus escaped a trial and conviction for the most heinous and aggravated offence in the Calendar! And not only so, but what is more striking still, owing to the law, and advice, we may truly conclude, of the Solicitor-General of England, afterwards the Attorney-General, and moreover, Lord Chief Justice, the *ex officio* expounder and champion of the criminal law,[1]—namely, Lord Mansfield! Under his narrow and unfounded doctrine, therefore,—besides so carelessly relied on, and applied in this instance,—it thus happens, that an impostor —not to add traitor—may be wholly preferred, while the just and righteous heir *altogether* excluded. Even too, though a Peerage had been erroneously awarded to an heir-general, upon the female principle, and that, presumptively, by common law, instead of to the heir-male, necessarily in the first instance, still such utter injustice could not have been perpetrated; for even then the *cherished* heir-male would have been included, instead of being wholly excluded, as above.

Unauthorized conclusion it might also induce, in the case of the old Barony of Elphinstone.

Again; the Barony of Elphinstone, another old dignity,—whose original constitution and descent, early in the 16th century, has likewise hitherto been imagined to be uninstructed,—may be held, whatever has been objected, to have vested all along in the heir-general, as it does at present, *qua* such, in John Lord Elphinstone, though he happen, at the same time, to be the lineal heir-male. But supposing his Lordship (as, however, every one would deprecate) to leave only female issue,—there existing, as is notorious, distinct heirs-male of the body of Alexander, the first Lord,—would not the dignity, in its present *conceived* state, in such event, still, by the fictitious law of Lord Mansfield, be awarded to the latter, in exclusion of the former? It infallibly would. But here, as before, most irrelevantly;—for I have discovered, in the Elphinstone charter-chest, legal proof of the real constitution of the Barony, through a relative registration, in a cotemporary Exchequer Roll, by which it is established, *e contra*, as in the preceding case, to be legally descendible to heirs-general. The registration in question bears that "*nunc*—apud Edinburgh, *vicesimo secundo die mensis augusti*, anno

[1] As is well known, Lord Mansfield held all these situations.

domini *quingentesimo decimo* (1510)—Dominus Rex (James IV.) IN *creatione dicti Alexandri* (described in another place as "Alexander *Dominus Elphinstone*") *in Dominum Parliamenti*, TEMPORE *baptismatis* sui filii *Arthuri*,[1] concessit subscriptas terras *dicto Alexandro*, et Elizabet Berlay ejus sponse,[2] et eorum alteri diutius viventi, et *heredibus* inter ipsos legitime procreatis seu procreandis, quibus deficientibus, Regi, et suis successoribus libere revertendas, in feodo, et hereditate imperpetuum, viz. terras dominicales de Kildrummy, le new, Wester Clovay, auld auchindore—Dorsky, &c. &c. in *Comitatu* de Mar," with the keeping of the royal Castle of Kildrummy, its principal messuage, &c. all crown property.[3] Of the female descent here, necessarily of the dignity likewise, there can be no doubt; for even Lord Rosslyn—the antagonist of female succession—as has been seen, under the Glencairn claim, is forced to allow that such limitation of lands,

Original evidence of the creation of this dignity, and necessary descent, in virtue even of Lord Rosslyn's admission and doctrine

[1] He was elder brother of James V. but died in infancy.

[2] An Englishwoman, said to have attended Queen Margaret, the wife of the king, to Scotland.

[3] This material information is transmitted to us in the authentic shape of a certified extract from the original Exchequer Roll, under the hands of the celebrated Sir John Skene, Clerk Register, and keeper of the Public Records, in the reign of James VI. The reason of such especial registration in the Roll, (as at the same time transpires,) was to prove that the lands, having been thus absolutely transferred to a subject, ceased, as before, to be royal property, and to be so accounted for by the Auditors of Exchequer to the king, through a rent that Lord Alexander, the disponee, *had* been previously bound, as a kind of lessee, to pay for them,—but which, in consequence of his new full, and lucrative grant, is now discharged. The extensive lands, feudally bestowed, formed a valuable portion of the Earldom of Marr, then in the crown, of which the old stately Castle of Kildrummie was the principal messuage. They continued for more than a century, afterwards, in the Elphinstones, being their most important possession, and by the loss of which, in 1626, (see p. 134,) they became greatly depressed, and deteriorated, in their circumstances, as can be proved, *scripto*, by their own admission. As was formerly stated, *(ibid.)* they were even styled *Lords* Kildrummie in 1621, and 1624, apparently from its possession by the son and heir even, during the father's lifetime. From what I have premised in the same place, (p. 134,) it might follow that the *full* right to Kildrummie had been in 1507, instead of latterly, as in the text, which supplies the earliest date of the event.

thus heritably and broadly given at the *same time*, with the honour, for its evident and better support, actually as in the Glencairn patent in 1488, which is essentially *in pari casu*,[1] moreover ascertains and instructs the descent of the latter,[2] in this instance indisputably "*heredibus* inter *ipsos*," (the *ennobled parties*), or to heirs-general, certainly after the late Polwarth decision.[3] The form of constitution, therefore, besides, similar to that of the Barony of Hamilton in 1445,[4] obviously evinces, in marked opposition to Lords Rosslyn and Mansfield, the continuance still of the territorial notion. It affords me pleasure to be thus instrumental in legally proving the constitution, on an important and interesting occasion, (such as we have lately had), of the Elphinstone Barony, with a more comprehensive descent, constructively, than would otherwise be held or presumed in the case of this distinguished and well-allied family. And, in the great dearth, as is notorious, of our old Peerage grants and constitutions, any accession, like the present, may be material. Lord Mansfield, and Lord Rosslyn, in effect with him, are further driven, as was stated, to prop their peculiar hallucination, by the plea of *expediency;* but still, holding it, even in the abstract, to aid them, in *any* way,—which it might be difficult to establish,—expediency may not be law, much less under their rule and direction; and they were not entitled, I conceive, after this method and pretext, to tamper with, nay even to annul, as they have done, that which *existed*. Lord Mansfield indeed carried the notion so far, as to maintain that "it is of importance that *all* questions concerning peerages *should* be *settled* upon the principles of *expediency*," besides law,[5] calling thus its sovereign authority into play in every Peerage particular,—a loose, and most dangerous doctrine certainly, as must strike every one, and worthy of the alleged or suspected friend of the Stewarts. Under the general dominion of such *mutable* and always indefinite test, according to the *conflicting* impres-

The pretext of *expediency*, by which Lords Mansfield and Rosslyn prop their law in question, and seek generally to apply in Peerages, loose and most dangerous doctrine.

[1] See pp. 819-20.
[2] See p. 823, *n.* 5.
[3] See pp. 673-4, *et seq.*
[4] See Acts of Parl. last Edit. vol. II. p. 59.
[5] See his speech in the Sutherland case, Mr. Maidment's Pub. p. 18.

sions and wayward caprices of men,[1] however acceptable and convenient to such, as we have *seen*, indisposed *thoroughly* to investigate into fact and precedent, and unable to meet and grapple with serious legal objections,—what law could ever stand, and would not thereby be subjected, in ordinary course, to vacillation, abuse, and perversion,—to suit, in short, any purpose; nay what it actually, in the present instance, has sustained from his Lordship? It might introduce strange despotism, and anarchy into our judicial system, where fixed law and precedent should, above all, rule. At the beginning of last century, there were authorities in France, who, like *Lords* Mansfield and Rosslyn, wished, from whatever motive, probably from Salick influences, quite *foreign* to us, to apply a new restricted construction, in an analogous case, to the general limitation in Peerage grants, "a ses hoirs, et successeurs et ayant cause," or "to heirs and assignees," as it has been rendered, which do in law, abstractly and presumptively, include heirs-female. Here then was a parallel case with ours, though the latter may still more, through the agency, again, of common law, and not by a limitation, as above, involve the female succession. But did the Parliament, the higher legal courts, or legal dignitaries,—and, as is notorious, nowhere has the subject of "*Pairies*," honours, ennobled fiefs, their constitution, nature, and peculiarities of descents, &c. been more studied, or more elaborately treated, through means of the best illustration, than in France,[2]—take it upon themselves,

In France, under the same emergency as to succession in Peerages, a very different course was properly pursued.

[1] *As they* might think better, and preferable, for there is no other check, under *favour* of their own bent, and partial notion; which *ratio*, or motive, is well excepted to by Sir John Nisbet, in his Decisions in 1666, (see p. 12,) as "*not nomen juris*, and law," he adds, "ought to be *uniform*, and not *Lesbia regula plyable*, and variable, upon *pretences* of favourable, or not favourable." In proof too of the marked and apprehended consequence in the text, the same authority shrewdly remarks, "ubi antem Lex *aut* regula deest, sibi *homines Lex* sunt, ut ait Apostolus, *sensu multum diverso*." Doubts, p. 65. In opposition to Lords Mansfield and Rosslyn, as would seem, Burnet, his cotemporary, transmits that Nisbet, besides being of "great integrity,—always *stood firm* to the *Law*," never *indulging* himself with "expediency." See his Hist. vol. I. p. 279.

Such pretext of the legal dignitaries referred to, condemned by Nisbet, who adheres to strict law alone.

[2] Independently of the known French writers, and authorities in these subjects, including the higher dignified fiefs, chivalry, heraldry, &c. the various *Coutumiers*, (especially of *Normandy*,) Chartularies,

though far more capable intelligently, of doing so,—on any ground, or upon the flimsy, or illusory pretext of expediency, to interfere in the matter? No,—knowing it to be beyond their sphere and control, owing to the existing law, in a similar way as in the Scottish case, they deferred, in this respect, to the proper and paramount authority,—to that of the crown, who here specially and relevantly interposed. And accordingly, Lewis the Fourteenth himself effected the alteration in question, by the celebrated edict of Marly, given in May 1711, and registered in Parliament the 21st of that month, in these terms, "Que les termes generaux d'hoirs, successeurs, et ayans causes, qui sont dans les Lettres d'*erection* (*of dignities*), ne seront entendus que des *males descendus* de celui, en faveur duquel l'érection aura été faite."[1] It will not be denied

The crown, the paramount authority there, relevantly settled matters.

Chronicles, &c. in such abundance, the *splendid* "*Preuves*," even to the large Histories of the Houses of Auvergne, Montmorency, Brittainy, Lorrain, and Barr, with many more, not forgetting Flanders and Savoy, so much connected with France, supply a mass of valuable relative evidence, in the shape of authentic records and deeds of all kinds, which I have sometimes even found also, curiously elucidatory in certain Scottish details, public and private. What they thus contribute, sparkle like *unique* gems, amid the dearth and darkness that enshrouds us in these respects, owing chiefly to the havoc and destruction of our *numerous* cathedrals, and religious houses, &c. by the Knoxite fury at the Reformation, the approved and preferable receptacles, as formerly noticed, (see pp. 240-1-2,) of the best and most important records, and muniments of the kind,—nay even exclusively involving civil rights. Registrations of Scottish deeds in the church courts, which sat in these edifices, and had the sole consistorial cognizance, besides various others, now consolidated with the Session, were deemed better and safer than in the laick. *Our* truculent Reformation—amid its advantages—occasioned the above evil, from which Popish countries, singularly enough, are exempt, indeed almost all others, England for instance, to *such* extreme and deplorable extent.

[1] The Edict, containing other ordinances respecting honours, their attendant rights and privileges, &c. will be found, independently of elsewhere, in L'Etat de la France, Edit. 1727, vol. III. pp. 112-13-14. There is also one, *(ibid.)* by which clauses "en faveur des femelles, ne seront entendues que de celle qui descendra, et sera *de la maison*, et du nom de celui, en faveur duquel Les Lettres, (dèrection) auront été accordeés." The last paramount arrangement, would exclude, with us, the descent of the crown, as stated, (see p. 854-5,) to the House of Darn-

that, in England *especially*, the crown is the fountain of honours, and authorizes and rules their descent ;[1] and hence, if Lords Mansfield and Rosslyn did not approve of the previously established Scottish presumption and practice in dignities, in favour of heirs-female, and desired here, (as was the fact) in like manner, the above corresponding alteration, they ought to have been more modest, and less engrossing in their procedure, instead of at once arrogating to themselves the right of making a new law,[2] through mere "favourable" or "unfavourable" considerations. They ought, in such emergency, to have paused ; and, through medium of a regular report, to which they *were* competent, in name of the Peers, have elicited the attention of the Sovereign to the matter, and humbly represented and petitioned that the qualification and change in question should be legalized. This, besides, was the more necessary and relevant, because it was *only* by a reference from him, to them, for their *mere* advice and information, not broadly for their unrestricted decision, through claims to the crown, at the outset, involving the point at issue, that the Lords came to have a breath in the discussion.[3] Cruise pointedly, on

The crown with us, might also have so acted in the question at issue, with the co-operation of Parliaments, but not Lords Mansfield and Rosslyn, or the Lords, who so far were incompetent, upon the English principle, here adopted in form.

ley. *Query*, did Lord Mansfield first get the inkling, or notion of his restricted mode of descent, in question, though most incompetently enforced, from the above edict? If heirs-male, simply, be construed, as they have been, equivalently to heirs-male-general, so must "heirs," or "heirs-female,"—that occur in our patents, as equivalent to heirs-general,—to limit which last, was thus the object too of the edict referred to.

[1] See further, immediately, as to this, under *n.* 3.

[2] It is rather amusing, with reverence be it spoken, to observe the language of these personages, in their speeches on Peerage occasions, such as exclusively taking it upon them to "pen the *decision*," to "*settle it*," and the law, as if all depended upon them, and without alluding to the Peers at large,—not upon the Sovereign, whose confirmation was essential, and who could at once disregard and reject their notions, and order a new discussion elsewhere. See Cruise on Dig. pp. 305-6.

Undue assumption of the above legal dignitaries in the case of Peerages.

[3] "The resolutions of the house of Peers, in claims to dignities, upon a reference from the crown, are merely for the purpose of *information*,—nor can they be considered as Judgments, in *any* sense of the word." Cruise, *ut sup.* p. 298. He specially adds, that the crown "is clearly not bound by them,—the supreme jurisdiction in peerage cases is, and has ever been deemed, part of the prerogative of the crown," *(ibid.)* And again, he says, "But still resolutions of this latter kind, (by the

On the English principle, the Lords can only give information, but not decide, the entire Peerage jurisdiction, as in France, being in the crown.

Their coining the narrow law in the case of Scottish Peerage descent, in fact, disclaimed by English authority and law.

this head, inculcates that their proceeding, in 1694, "respecting the *descent* of Baronies by writ," (deciding, or resolving that the extinction of all the other daughters and co-heiresses under an abbeyance, saving the issue of one, terminated it,) "was irregular." And why? just for the reason, I maintain, that it was *ultra vires* of the noble parties, and that they thus cannot act, or make law.[1] It cannot be disputed, that this case, again involving the descent of honours, where there was no patent, is precisely such a one as we are considering, only that the matter there, had been fixed, as I hold, by our common law, which makes it stronger. Neither, in the previous alternative, and step, submitted and recommended,—if in accordance with the general wish,—can it reasonably be entertained, that the crown,—with the consent, however, of Parliament, which was more especially demanded, owing to the necessary infraction of an Article of Union, by such partial alteration, in the above manner, of our former law,—which is thereby generally reserved and protected,—would have been *much* disposed to refuse the entreaty, especially, *inter alia*, after the striking identical precedent of Athole in 1715, and 1733.[2]

Lords), are not final and conclusive; for the king, in whom the *entire* jurisdiction over dignities is placed, may refer the case again to the house of peers, or *elsewhere;* and may ultimately *act according* to his *own discretion*, (like Lewis the Fourteenth, see p. 956,) in assenting or not to their resolutions," &c. *ibid.* pp. 305-6. The same doctrine of the king being the fountain of honour, is illustrated in Scotland, in the instance of Oliphant, (see pp. 17—178, *n.* 5, and more especially Durie's Report of the case, Decis. pp. 685-6,) though differently from in England, the cognizance of *legally* construing, or generally deciding upon the nature and descent of an honour, already constituted, when contested, was by common law, as has been established, in the Session. By the way, this case of Oliphant, in 1633, though it involved a specialty, further distinctly proves that our old Baronies, as in England, when there existed no *heritable* royal constitution and grant, or *rei interventus*, were legally held to go to heirs-general and *female*, quite in the face of Lords Mansfield and Rosslyn's arbitrary law and enactments.

Difference in one respect, between the English, and our original genuine practice here.

[1] Cruise, *ut sup.* pp. 196, 299, *et seq.* and pp. 202-3-4.

[2] See p. 202. Here, in the same way, in marked deviation to established law, a younger son was enabled, by act of Parliament, to succeed to the ducal honours of Athole, though limited by patent to their father, and the heirs-male of his body, &c. in exclusion of the eldest, who then existed, and indeed for an age after. The inducement was the not-

Independently of this, it is always desirable that every important legal principle, or rule, should not be permitted to remain at all dubious or vacillating, but should be rested upon the surest and most unequivocal foundation. And I, therefore, might further humbly suggest, (if Peerage matters be thought worthy of serious consideration and regard, like most departments of the law, and of a just and methodized system,) that the same remedy might be resorted to and applied, through the crown and legislature, in reference to other relative points that have been noticed, either controverted, or of difficulty, fixing especially, as prudently and judiciously as may be, what, as must be evident, with us, is attended with some nicety and intricacy,[1] the proper or relevant period when the territorial period may be held *essentially* to have ceased in honours, and the latter, in the same view, to have become personal. This subject, so little understood, and so outrageously misrepresented, and tampered with, by Lord Mansfield particularly, if put upon a better basis, even although by some arbitrary and absolute enactment, which can solely be through Parliament, might tend, in no small degree, to simplify, and more satisfactorily regulate their character and descent. The same legal dignitary too, has, as unduly, assigned *extra* force to the immaterial adjunct of "bearing name, and arms,"[2] to "heirs-male," and might equally, *proprio arbitrio*, have tampered with, and perverted the other strange, uncouth, or anomalous concomitants, and flexible terms in our limitations, repeatedly referred to, so peculiarly troublesome, and often so inexplicable, and hence further perhaps requiring the ultimate remedy I have above submitted.

The intervention of an Act of Parliament in the present case, as well as in others, regarding Scottish Peerages, particularly requisite and desirable.

As things stand, in the meantime, however, he yet would be bold indeed, to maintain, that the Lords, in fact now the customary interpreters, enured to, and trammelled, as they have been, by the long *adopted* law,—in so many instances,—as to

But as things stand, after the many concurring decisions in Scottish Peerages, with

ed attainder of the latter, the unfortunate Marquis of Tullibardin, in 1715, further concerned again in the rebellion in 1745.

[1] Scottish honours, I have no hesitation in maintaining, (indeed, as I have shewn,) probably after the French usage, continued far longer territorial with us, than in England, or is generally apprehended.

[2] See pp. 622-3.

"Lord Mansfield's law," it is not to be expected that the Lords will now alter it; and this must be attended to in Peerage opinions.

Peerages, whose constitutions are unknown, and have not, like Sutherland, previously diverged to heirs-female, in exclusion of heirs-male,—but, so far, dubious and undefined, would now be at all disposed to act differently, and to enforce an opposite rule in regard to such. Notwithstanding the obvious considerations, and the existing English practice, allowing old Baronies simply by writ of summons, as little without any words of limitation, and thus, *in pari casu* with the former, not to be so fettered, and restricted in their descent, merely to heirs-male of the body, but *e converso*, to go broadly to heirs-general; still we may hold, that they will never, in Scottish Peerage claims, abjure the *admitted* construction in question;[1] and he might therefore be both an *unpractised* and unwary counsel,—whatever his own peculiar bias and notions, when consulted in a case to which the same is favourable, thus in the face of, as happens, existing law and authority, to deter a client from its prosecution. Nay, it so obtains, that he is professionally bound to tell him, that, in the event of his moving, he has every prospect of success.[2] The present doctrine,

Unavoidable duty of a Scottish counsel, in such emergency.

[1] Cruise, while he admits, as we have seen, (at p. 958,) that the proceedings of the Lords in 1694, respecting the descent of baronies by writ, was "*irregular*," yet lays stress upon their being "assented to, and acted upon, by the crown." (On Dig. p. 299.) This may weigh, applicando *singula singulis;* and I may here relevantly quote Cruise, as discussions upon Peerages by the Lords, upon royal references, were only by the English, and not in conformity to *our law*.

Questionable and undue mode of procedure in Scottish Peerage resignations.

[2] Fully aware, as I am, of the latitude or abuse, so exceptionable, that prevailed with us, in resignations and regrants of honours, after the Union of the crowns, and injustice, after all, of that mode of conveyancing, by which the vested right of old heirs was nullified, I conceive, such procedure should be *strictly* weighed, and interpretated in legal practice, and that the resignation—the lever of the regrant—should be accompanied with all due requisites, be explicit, and absolute, barring any qualifying, or perplexing condition, rendering the state of the honour *ex terminis*, hereafter, fluctuating, or anomalous,—or, as has been attempted, in a certain event, fully abrogating the transaction. This seems both trifling with the sovereign, and the subject, the highest in law,—however valid the resignation, (bating the object, *otherwise*,)—may be held,—the procedure, in effect, possibly resolving into no procedure. Hence I now entertain doubts whether the contract, and procuratory of resignation of the Oliphant dignities and estates, dated, I find, March 28, 1617, (and registered in the books

however grounded, may be assimilated to that followed *ex necessitate*, though, at the same time, honestly deprecated, and reprehended by Chancellor Eldon, owing to a previous faulty English decision, upon appeal, in a Scottish case, that an institute in a Scottish entail was not an heir, and therefore (unless described *nominatim*, or *otherwise*) not included by its terms or conditions; the first of which propositions is capable of such ample refutation by our genuine, and original practice.

of Council and Session,) warranting the subsequent, (otherwise just) conclusion in the Oliphant matter, (see pp. 17, 178,) can be fairly sustained, owing exclusively to a specialty and condition, I have lately discovered there, to the preceding purport. In virtue thereof, Laurence Lord Oliphant, the resigner, at a future period, can recal the disposition of his *honours*, &c. he makes to Patrick Oliphant and the heirs-male of his body, and void and annul all for himself, or the heir-male of his body, by merely paying to Patrick 40,000 merks; in which case, such dubious and anomalous disponee is to denude and restore the honours to their ancient state,—just as if *nothing* had occurred. This circumstance, apparently not founded upon, seems to have escaped the Session, in the relative Oliphant decision, in 1633,—where the Court, besides, found that honours could not be *in commercio*, or bartered about,—hence striking, it may be held, at the above arrangement. (See Durie's Decisions, pp. 685-6.) The strange reversionary form in the grant in question, no doubt, was adopted and acted upon in the case of Lauderdale in 1667, and 1675, (see pp. 215-16,) but the heirs-male, the eventual takers, who were thereby benefited, even excluding the intervening transaction, would still also have maintained their right unimpaired, by the previous conveyances alone, that then necessarily ruled. By challenging the act of reversion, again, the heirs-female *(cast)* were obliged, against legal principle, partly, to repudiate the only conveyance in their favour, which rendered their case perplexing and contradictory. There hence may not here have been the best scope for trial of the question; and whether that single precedent be conclusive, and such light, unceremonious, and capricious mode of dealing with honours, shall be judicially recognised, remains to be seen. If not, the heir-male of the body of the first Lord Oliphant—notwithstanding the decision in 1633, then not necessarily binding by *our* law,—would be entitled to the dignity, according to the existing doctrine of the House of Peers,—in virtue of their constructive descent in such emergency; as well as by the stated confirmation in favour of the heir-male, (see p. 181,) who also is to be found ranked in Parliament, from 1669 downwards, by the original precedence. See Acts, last Edit. vol. VII. p. 551; and vol. VIII. Append. pp. 1, 10, &c.

When the resignation, the lever of the regrant, is qualified and *voidable* in a contingency by the very resigner, or his heirs, as is now discovered to have obtained in the Oliphant instance in 1617, *quid juris?*

In the preceding matter, and others, affecting our Peerage law and practice since the Union, an explanatory, and confirmatory Act of Parliament is desirable.

I have already hinted at the propriety of a confirmatory Parliamentary enactment here also, (as recently, in the partial change of our law of evidence, for the English); but still, what is satisfactorily to be done with the Janus-faced Peerage of Salton, partaking, as has been seen, by high authority, both of a male and female character, like another Cæneus, according to the equally ruling precepts of the two conflicting laws, in its instance, namely of *ours*, and the *British*—thanks, as before, to Lords Mansfield and Rosslyn, it may be indeed difficult to predicate. At any rate it may be conceded, in hoc *statu*, that the law of the Lords in favour of heirs-male—even so much at variance with the English, as exemplified by the *enlarged* descent of baronies by writ, to heirs-general—should not be further extended, but, on the contrary, should be restricted and controlled as much as possible.

The preceding topics are what may be more especially recurred to, though there are others doubtless, deserving attention in the course of this performance, from which I am precluded by my limits, and probably by the patience of the reader. These may be weighed, and, necessarily, far better resolved by him, with additional suggestions, &c. under the appropriate heads.

The topics in question, and whatever falls within the province of law, deserve full discussion and scrutiny, else they should be banished therefrom.

The independent subject of Consistorial Law, into which I have been enticed by the way, may, I believe, be left as it is, without any recurrence, from its more obvious and familiar import. As I stated in the Preface, my sole object in this work is the expiscation of truth—however it may bear—in certain legal departments, that appear, upon the whole, to have been but inadequately inquired into; and most happy shall I be, if my having merely noticed, and touched upon relative important points, shall elicit additional research and investigation, and promote the same desirable end. Whatever falls within the province of law, it may be said, is deserving of rigid, nay severe scrutiny and comment,—the only infallible method of advancement and amelioration,—else it should be at once held a dead letter, and banished from its pale; and I have little doubt—which is no small consolation—that the matters and topics in question will continue to evoke, as they have done, the talents and assiduity of some of my legal brethren. Upon this head, I may allude to the contributions

of James Maidment, Esq. Advocate, to whose publications—as has been sufficiently obvious by my references—of the judicial speeches and opinions that happen to be preserved in certain Scottish Peerage cases, with apposite statements and remarks—besides various others, respecting our history and antiquities, &c. &c. the public are much indebted. One great and most important object, *inter alia*, has been thus attained, of bringing the public into juxtaposition with, and making them fully aware—of the peculiar doctrines and *expedients* of Lords Mansfield and Rosslyn,—only hitherto transpiring in MSS. in private repositories; and hence inducing a fair test,—and by it, inevitable refutation of their numerous errors and heresies. I must further take the liberty of mentioning, with just encomium, William Turnbull, Esq. another learned member of our Faculty, so ardent and persevering in the pursuits in question. What is very remarkable, he has been the first to recover, in the course of his extended and successful researches, and ably, and liberally to reprint the intended petition and case in the English Hussey claim in 1680,[1]—that was unknown, I believe, even to English authorities, who, with far better opportunities than we possess, have so zealously and intricately explored the same field. And independently of his full Report of the recent Trial in the matter of the Stirling Peerage,[2] and other publications, he has lighted upon a curious and unique document,—the original patent of the English Barony of "Cleworth," or Clewer, (near Windsor,[3]) quite un-

Discovery of the original patent by James II. after his abdica-

[1] Edinburgh, 1836. The argument is professionally drawn with pains and learning for the period; but this claim to the Barony of Hussey, (constituted by writ of summons, in the reign of Henry VIII.) on the part of Molyneux Disney, the heir-general, in face of a serious, and outstanding forfeiture, appears not to have been prosecuted,—which, however, only enhances—in consequence of the less likelihood of its transpiring—the value of the contribution.

Petition and argument in the English Hussey Peerage claim, in 1680.

[2] Published, Edinburgh, 1839. It has been referred to at pp. 343-4-6, in allusion to certain remarkable assertions, and conclusions in the relative discussion, thus ably transmitted to us, that called for comment, and refutation.

[3] The parish of Clewer, or Cleworth, is so situated, upon the Thames,—the church being dedicated to St. Andrew, the tutelary saint

tion, of the English Barony of Cleworth, to John Earl of Melfort.

heard of before, conferred by James II. of Great Britain, the 7th of August, and fifth year of his reign, (1689,) as by the date at Dublin,—upon his distinguished, though misguided counsellor and favourite, John Earl, and afterwards titular Duke of Melfort, younger brother of his equally noted, and unfortunate Chancellor, James, also *titular* Duke of Perth. It is ample, and finely written on parchment, with the great seal appended, still entire, being a very different production indeed from the wretched Huntly concoction, formerly noticed.[1] The dignity is limited to Melfort, identically, as his previous Peerage grants, preferring, as usual, though unjustly, it must be allowed, the heirs-male of the body, by Euphême Wallace, his *second* wife, because Papists, to those of his first.[2] But the same patent having passed subsequently to the abdication of the royal granter, however perfectly valid it had proved, in the case of his restoration,—had that happened, must now be unavailing.[3] It is only by such

of Scotland, which may have further suggested the choice of the title from that distinguished locality.

[1] See pp. 884-5-6.

[2] See pp. 761-2.

[3] It was handsomely presented by Mr. Turnbull to the existing male Melfort descendant of the French, or Popish branch, together with a remarkable original pardon, he had also recovered, by James II., dated at Saint Germain en-Lay, the 23d of June, the tenth year of his reign, (1694,) to the above John Earl of Melfort, for high treason, and almost all crimes. This document, further valuable in history, seems akin to that before, in 1680, (see pp. 216, *n.* 1, *et seq.*) in the case of the celebrated John Duke of Lauderdale; and such step may have been necessary to most of our principal statesmen. The grant of the Dukedom of Melfort, &c.—as from the original signature, having the usual formalities, &c. (I believe yet in the possession of the Melfort family,)—is dated "at *our* Court, *(James the Second's)*, at the Castle of Saint Germains, this 17th day of Aprill, new stile, 1692, and of our Reigne the eight," and confers that dignity, with those of "Marquis of Forth, Earle of Isla, and Burntizland, Vicomte of Rikerton, Lord Castlemains and Galston," upon "John Earle of Melfort, his Principall Secretary of State of his Realms of Scotland and England,—and the heirs-male of his own body, procreat betwixt him, and Dame Euphemia Wallace, which failing, to the heirs-male of his own body, procreat betwixt him and Dame Sophia Londin, his *first* wife." The relative patent is, thereby, to pass the great seal of Scotland, *per saltum*, while the proper docquet is subjoined, subscribed by the Earl of Lauderdale,

Curious original pardon by James II., in 1694, to the same Earl of Melfort, and grant to him by that Prince, of the Dukedom of Melfort, &c. in 1692.

laudable researches, and discoveries, that the *lacunæ* in our records and muniments—with the attendant satisfactory illustration, in subjects I have attempted in this performance, can be possibly remedied and compensated for,—such deficiency, of course, attaching the utmost value and importance to *every* thing conceivable of the kind,—in whatever shape it may present itself. It is to be hoped too, that George H. Pattison, Esq. Advocate, will favour the profession with a Report of the Marchmont Peerage claim, in which he has zealously been engaged as counsel, after it is concluded,—which, judging from its singular protraction *hitherto*, it may not be easy to *define*—however the termination, by successful efforts, may be nearly approaching. The relative discussion, *inter alia*, has raised, and will tend to illustrate various questions in evidence,

Treasurer Depute, who had also attached himself to the abdicated monarch. It has therefore been subsequent to this, (in 1694, see above,) that the grantee, though so remarkably exalted and honoured, after such fashion, by his royal master, has been pardoned for high treason, and various offences, &c. towards him. I am not aware of the terms and limitation of the grant of the Dukedom of Perth, Marquisate of Drummond, &c. conferred in like form,—it has been *said*, three years after that of Melfort,—upon the Earl of Perth, the Chancellor, Melfort's elder brother,—though taken likewise, as is notorious, both by his son, and lamented grandson. Father Hay, the antiquary, however, a Papist, and noted cotemporary, transmits, in his MSS. collections in the Advocates' Library, that the Chancellor "*is* become Governor to the Prince of Wales at Saint Germains, *and since* the *decease* of King James the seventh, *(in* 1701,) *Duke* of Perth." By original documents, *ap.* Macpherson's History of Great Britain, this nobleman still figures as Earl of Perth in 1695-6, but as "*Duke*" of Perth in 1704, while his *son (James)* is *then* styled *Marquis* of Drummond. (See vol. I. pp. 537, 540, 669, 678.) The Melfort and Perth ducal creations, although invalid, nevertheless, gave the respective disponees, and their heirs, rank and precedence, as actual Scottish Dukes, at the French Court; and indeed, the corresponding *titular* denominations, generally, excepting, of course, in formal or legal British acts and documents, &c. I may observe by the way, that Father Hay, above, while he praises Chancellor Perth—what is singular enough in him, detracts from Melfort, whom he represents as having "undermined the very constitution of our Government, made religion a step to his ambition," and as having "endeavoured to repaire the decay of his oun privat fortune by the ruine of the publick,"—striking features, I suspect, however, more or less, in *not* a *few* of his public cotemporaries.

Date of the grant of the Dukedom of Perth, &c. by James II. to Chancellor Perth, apparently unknown, and differently represented.

Both of the above, merely titular dignities, gave rank and precedence, at the French court, to their assumers.

Father Hay's opinion of the Earl or Duke of Melfort.

including extinctions; and it is remarkable that, in this instance,—so different from in that of Rutherford,—as has been shewn,[1] general services, even of recent date, *have been* admitted, without scruple, in material probations.—It surely must be a reflection, and calumny upon the House of Lords, though maintained by *some*, that they are not bound by their own precedents and authorities, but are entitled to try every Scottish Peerage case isolatedly, and upon new and opposite grounds, if they think proper. What a Babel of confusion, and complete anarchy, such doctrine, if admitted—that has withal, no real countenance and support, but *e contra*—would infallibly introduce into our system, already rather compromised, and unduly tampered with, I need not, I believe, further trespass upon the reader's patience, in *re*-attempting to prove or illustrate.

[1] See pp. 905, 942, *n.* 4.

APPENDIX.[1]

No. I.

SINGLE EXAMPLE OF AN ATTEMPTED CLAIM, AND PROCESS BEFORE PARLIAMENT EXCLUSIVELY, IN 1685, IN THE SHAPE OF AN ACTION OF REDUCTION AND DECLARATOR, AT THE INSTANCE OF DAVID LINDSAY OF EDZELL, THE DIRECT HEIR-MALE OF THE ORIGINAL EARLS OF CRAWFORD, IN REGARD TO THE HONOURS OF CRAWFORD.

(See pp. 24-5.)

I. "WARRANT, and CHARGE," accordingly, to the above "Laird of Edzell," the pursuer, *upon* his Petition to the Lord Commissioner, and the Lords of the Articles in Parliament, in 1685, for summoning William Lindsay Earl of Lindsay, (in reality also, Earl of Crawford,) as defender, in the projected Action in question.

"Att Edinburgh, the fourteinth day of May, I^m VI^c and eighty fyve yeares, anent the petitione given in to his Grace the Lord High Commissioner,[2] *and* the Lords of the articles,[3] be david Lindsay of Edzell, mentioning, that where david Lindsay, sometyme of Edzell, being once in ffie of the estate, and in possessione of the title of the honor, dignity, and Earldome of Craufurde, whereof he did never denude himself, otherwayes than upon express conditione, that if david Master of Crawfoord, grandchild to his author, in whose favores he denuded himself, and the aires maill of his body, should failzie, that then, the estate, Earldome, and dignity should returne to him, and the aires maille of his body; and accordingly, the same having failled in Lodovick,

[1] It is with much regret I have been unavoidably obliged, owing to the length to which this work has now extended, far beyond my original conception, to curtail greatly, several of the Articles in this Appendix,—nay entirely to withhold others I had reserved for insertion. This I mention, in case some of the former may appear meagre, and rather restricted.

[2] Then William, first Duke of Queensberry.

[3] The well known Committee of Parliament, who transacted *all* business.

Earle of Craufoord,[1] and George Lord Spynie,[2] the Earldome and dignities ought to returne to the representatives of that laird of Edzell, then Earle of Craufoord, transmitter yerof, upon yat conditione especiallie, seeing the said Lodovick Earle of Craufoord being taiken prisoner in his Majesties service and warrs in England, *anno* 164..., was sent to this kingdome, and keept closs prisoner in the Tolbooth of Edinburghe, and unjustly forfault by the pretendit parliament, anno 1644, ffor his said service, loyaltie, and deuty; and if he had not been releeved by the then Marques of Montrose *anno* 1645, the *usurping* power for the tyme wold have unquestionably taiken his lyfe also, as they did of many oyeris his Majesties loyall subjectis. And the deceast Johne Earle of Lindsay being of great power and interest for the tyme, taiking advantage of ye conditione of the said Lodovick Earle of Craufoord, did, upon the said fforfaulter, assume, and taike upon him the title, and dignity of the Earle of Crafoord, and which he and William, now Earle of Lindsay, his sone, hes wrongeously possesst since syne, albeit that your petitioner be nearest aire maill, and of Tailze,[3] to the said david Lindsay of Edzell, thereafter Earle of Craufoord, my Gutshirs Grandfather, whereby I have right to the title of honor and dignity of ye Earle of Craufoord, and that it is just and necessar yat I vindicat my ryt, that I may serve his Majestie in yat capacitie as becomes, therefor humbly desyreing yat your Grace and honourable estates of parliament wold be pleased to grant warrand to Macers or Messingeris at armes to summond the said William, now Earle of Lindsay, to compeir before his Grace, and estates of parliament,[4] upon dayes warneing, to bring with him his pretendit rights to the said title of honor and dignity of Earle of Craufoord, to heare and see the samen, and the pretended decreet of fforfaultur, and oyer grounds whereupon it proceeded, and all yat has followed therupon, *reduced* and *declared voyd* and *null*, and to *heare* and *see found* and *declared* before his Grace, and the honorable *estates* of parliament, that *your Petitioner has the only and*

Date of the creation of the Earldom of Crawford clearly in 1398, tho' the written erection is not preserved.

[1] Though the Earldom of Crawford was certainly created in 1398, (see pp. 163, 262-3,) yet its written constitution is not preserved. Owing to the dignity having, previous to the transaction to be noticed with Edzell, before the middle of the 16th century, passed heirs-female, to go to heirs-male, it hence, especially, must be presumed to be descendible in the male line, and to have, every way, fully vested in Earl Ludovick, the direct male of the body of David first Earl of Crawford. The Earldom in question is the oldest in Scotland, descendible under the conveyance to be noticed, in 1642, to heirs-*male*.

David Lindsay of Edzell, the pursuer, was clearly the heir-male.

[2] The Spynie branch, for a period after the death of Earl Ludovick, (previous to the Restoration,) were the heirs-male, but never claimed the honours. They also failed in the male line, in 1671. (For their female representation, see p. 671.) Subsequent to which, the pursuer in the text became the undoubted Crawford heir-male, and acted accordingly.

[3] Entail.

Nature, and constitution of our Parliament.

[4] Thus, not merely before the nobility, but before the three orders or estates of the community, who, with us, sat merely, in one chamber, under one President or Commissioner. There was no discussion, in such cases, by the Peers alone.

undoubted right to the title of honor and dignitie of Earle of Craufoord, and that he hes now right thereto, ffor the reasones forsaidis and oyeris.[1] *Therefor*, the Lord high Commissioneris Grace, and the Lords of the articles, having heard, and considered the above writtene petitione, the Lord High Commissioner, and the Lords of the articles, grants warrand to Macers, or Messingeris at armes, to *summond*, warne, and *charge* the saide *William Earle of Craufoord* to *compeir* befor his Grace the Lord High Commissioner, and the Lords of ye articles, wytin ten dayes, to *answer*, at the instance of the said Petitioner, *to the grounds above represented*, and to *heare*, and see it *found* and *declared* that the said david Lindsay of Edzell *hes the only right to the title of honor, and dignity* of the *Earle of Craufoord*, and yat he *hes now ryt yerto*, for the reasones forsaid, and uyeris, *with certificatione* if he failzie to compeir, etc. By warrand of the Lord High Commissioner and ye Lords of ye articles, *(sic subscribitur.)* TARBAT, Clerk Register."[2]

[Then follows the Messenger's execution of the summons and citation, during the sitting of Parliament, on the 16th of May thereafter.]

II. "INFORMATION" for the said William Earl of Crawfurd and Lindsay,[3] the defender, against David Lindsay of Edzell, the pursuer, in the same Process.

"David Earl of Crawford having taken up some groundless prejudice against his son, he did, in the year 1541, dispone the lands in Auchterallan, and others of the estate of Craufurd, to David Lindsay of Edzell, who, after the said Earl of Craufurd's decease, during the minority of his Grand-child, did assume and usurp the title of Earl of Crawfurd, without any warrand or right; and being sensible how far Earl David's children had been wronged, he did dispone the estate back again to David Master of Crawfurd, Earl David's grandchild, and the heirs male of his body, which failzying to return to the disponer, and his heirs male; and then the said David, designed Master of Crawfurd, in the disposition made by Edzell to him, did Re-assume the title and dignity of Earl of Crawfurd; And he, and his heirs male, of whom Ludovick Earl of Crawfurd is lineally descended, did alwise en-

[1] The form is thus adopted, as in an Action of Reduction and Declarator against a party in respect of lands, before the Session, with certification, &c. but warranted by no petition to the king, with a reference, as in an English Peerage claim.

Form of procedure here, the same as in a common Action of Reduction and Declarator before the Session.

[2] From a cotemporary MS. copy in the Crawford Charter-chest, at the Priory, Fifeshire, for the perusal of which, together with the following printed cotemporary Information likewise, *in causa*, I am indebted to the Earl of Glasgow, the heir of entail, and also eldest coheir at common law, of George last Earl of Crawford and Lindsay,—a nobleman whose general merits and attainments are too well known to require any enlarging, especially by me, on this occasion.

[3] The title of Earl of *Lindsay exclusively* in the *defender's line*, was undisputed.

joy the title; and this Edzell's predecessors, who are alledged to be descended of the said David Lindsay of Edzell, to whom these lands of the Estate of Crawfurd were disponed, for many generations continued Lairds of Edzell, without having the least pretence to the title and dignity of Earl of Crawfurd.

The said David Lindsay, now of Edzell, pretends right to the Title and Dignity, upon these grounds. *First*, that he is heir male to the said David Lindsay of Edzell, to whom Earl David disponed the lands in the year 1541, as being nearest heir male unforefault, and who was once in possession of the title and dignity, which appears by several writts produced. And particularly, by a writt from Queen Mary, wherein he is designed Earl of Crawfurd, and called to a Parliament; who albeit he disponed the lands to David Master of Crawfurd, and the heirs male of his body, which failzying, it was provided the same should return to the disponer's Heirs male, of whom it is alledged this Edzell is lineally descended; so that David Master of Crawfurd's Heirs male having failzied by the decease of Lodovick Earl of Crawfurd, and the Lord Spyne, Edzell hath right to the Title and Dignity, as Heir male, and of line, to David Lindsay of Edzell, to whom Earl David disponed the lands in the year 154....

Secondly, The Title and Dignity being provided to the Earl of Crawfurd's Heirs male, Edzell has right to the same, as nearest Heir male to Lodovick Earl of Crawfurd, and so must be preferred to this Earl of Crawfurd, who hath no relation to Earl Ludovick.

It is answered to the first, that Edzell has not the least shadow or pretence of right to the said Title and Dignity, as Heir male to David Lindsay of Edzell, to whom the Earl of Crawfurd did dispone the lands in the year 1541; *First*, because Earl David, in the year 1541, did not dispone the Dignity to Edzell, but only the lands of Auchterallan, and others mentioned in the disposition, which were a part of the estate of Crawford, but neither Dispones the Title and Dignity, nor the Earldom, *per universitatem*;[1] so that the said David Lindsay, to whom the Disposition was granted, had never right to the dignity, but did only assume, and usurp the title during the time of Earl David's children's minority; and it is most false to alledge that the Lands were Disponed to Edzell, as nearest heir male unforefault, seeing the Disposition, in the year 1541, bears no such thing, nor does it mention that Edzell had any relation to Earl David at all; and any writ by Queen Mary, calling the Earl of Crawford to Parliament, must be understood either of David Earl of Crawford, who made the disposition, or of David Master of

Misrepresentations by the defender.

[1] All this is futile, and unfounded; there *was* a conveyance of the *Comitatus* of Crawford to David Lindsay of Edzell in 1541, which, as has been shewn, did then carry the dignity; and the *same* was, in 1546, reconveyed by the latter to David the Master of Crawford, under reservation of his liferent, *he (Edzell)* being designed Earl of Crawford until his death in 1558,—as can be established.

Crawford, to whom Edzell did again dispone back the Lands ;[1] he after his minority ; and that he had gotten back his estate, having reassumed the Title and Dignity : And albeit that writ could be understood of David Lindsay of Edzell, who had usurped the title, yet that could not make him Earl of Crawford, unless he had otherways right to the dignity ;[2] and the writ by Queen Mary, designing the said David Lindsay of Edzell Earl of Crawford, is a Dispensation granted to the Earl of Crawford, not to attend the Host, wars, arms, weaponshows, etc. during all the days of his lifetime ; in respect David Master of Crawford had undertaken all these services and appearances for him ; which, albeit that could be understood of David Lindsay of Edzell, as thereby designed Earl of Crawford, yet it is evident that he had no right to the Title and Dignity ; but is dispensed with as to his appearance in all publick meetings, upon the account the Master of Crauford did appear for him, which is a clear evidence, that as he was righteous heir to the estate, being David Earl of Crawford's Grandchild, so he had the only right to the Title and Dignity, and in all publick Meetings did appear and discharge the duties incumbent to him, and did take place as Earl of Crawford ; and that the said David Lindsay of Edzell, designed Earl of Crawford, had no right, is evident, seeing the Master of Crawford, to whom he did dispone the lands, did immediately reassume the Title ; and that a person being called, and sitting, as a Lord of Parliament, does not give a right to the Title, is evident from that recent instance in the case of the late Lord Forrester, who albeit he did sit in several Parliaments, yet he had no right to the Title and Dignity. 2. Albeit the Title of Honor had been conveyed by the Disposition made by Earl David in the year 1541, as it was not, yet he having disponed back the Estate to David Master of Crawford, in the same manner that it was disponed to him, if the Title of Honor was conveyed by the Disposition made to him by Earl David, he was again denuded thereof, by the Disposition made by him in favoures of the Master of Crawford ; so that either he had right to the Dignity by the Disposition made to him by Earl David, or not ; and if he had not right, then the Pursuer can pretend no right, as heir to him ; and if he had right, then he was denuded thereof, in favoures of the Master of Crawford, from whom this Earl of Crawford derives right by progress.

It is answered to the *second*, that Edzell cannot pretend Right to the Dignity, as Heir male to Earl Ludovick : *First*, because it cannot be instructed that he has any relation at all to Earl Ludovick, but only is of the name; and if he could instruct he had any relation, or that his

[1] There is the usual misconception or misrepresentation in this Information, (to be found, in a certain degree, in cotemporary litigations,) both here, and elsewhere.

[2] This is corroborative of the doctrine with us, that a mere summons, and sitting in Parliament, did not ennoble, as in England, as will be even still more obvious in the sequel.

predecessors came of the House of Crawford, as he cannot, yet there are many others that are nearer Heirs male, and particularly Evilik, Kilspindie, and several others that can be condescended upon, who came of the House of Crawford long after Edzell, if he could instruct he came of the House at all.[1] 2. Albeit he could instruct that he were nearest Heir male to Earl Lodovik, yet he cannot have right to the Dignity, because Earl Ludovik, and John Earl of Lindsay, this Earl's Father, having made a mutual Tailzie[2] in the year 1641, there is a *Resignation made* in the *King's hands, of the Title and Dignity, in favours of Earl Lodovik's Heirs male of his own body, which failzying in favours of the Earl of Lindsay, this Earl's Father, and the heirs male of his body*, upon which, there was *a Patent expede under the Great Seal, by which* Earl Lodoviks other Heirs male are absolutely excluded,[3] which charter was confirmed by a charter, under the Great Seal, in *anno* 1648, Bearing a *Novodamus*, and ratified in Parliament in the year 1661. And the King, being the Fountain of Honor, it were to controvert his Majestie's Prerogative to pretend, that the King could not, upon the Parties Resignation, transfer the Title of Honor to *any* person he thought fit, albeit it were to a stranger.[4] *Thirdly*, there being Resignation made of the Title in favours of Earl Lodovik, and the heirs male of his own body, which failying to the Earl of Lindsay, and the heirs male of his body, upon which there being a Patent expede under the Great Seal in the year 1641,[5] this Earl of Crawford, and his Predecessors, hath been above fourty years in possession of the Title and Dignity by vertue of the said Patent, and so hath prescribed a right.[6]

It was replyed for Edzell, I. that the Dignity being provided to the heirs male who hath right to the same by their blood, Earl Ludovik could not make any disposition thereof to any other person in prejudice of the said Heirs male, seeing Titles of Honour are not *in commer-*

[1] This is a remarkable misrepresentation, like some others, *aliunde*,—David Lindsay of Edzell, the pursuer, being undoubtedly descended, in the male line, from an Earl of Crawford before the middle of the 15th century, and the *then* nearest heir-male and representative of the Crawford family.

[2] Entail.

Important and conclusive fact in the Information.

[3] This important and conclusive fact against the pursuer at the time, is correct, with the exception, as will be afterwards seen, of Earl Ludovick's collateral heirs-male *not* being *absolutely* excluded. *No* notice, it will be observed, is made of *such* conveyance, in the *citation*, or *summons*. The regrant in question was unexceptionable, being even before the forfeiture in 1644, (see pp. 25, 968,) of Earl Ludovick, by the rebellious powers, however it might be viewed, and was fully acted upon.

[4] This conclusion with us was admissible, and relevant, and the whole jet of the case *is here*, within such small compass,—excluding other motley facts and circumstances, in part rather weakly urged.

[5] The date should be 1642, as will be shewn in the sequel.

[6] This questionable argument from prescription, is but a kind of *make weight*; and indeed there is more objectionable in the matter, towards the conclusion.

cio. And, however a Title of Honour might be disponed and resigned in favours of some near relation, passing by the nearest,[1] yet it cannot be disponed to an absolute stranger, such as the Earl of Lindsay,[2] in prejudice of the Heirs male; and *(he,* Edzell) instanced the case of the Earl of Caithness, which albeit the late Earl of Caithness disponed the estate and dignity, failing Heirs male of his own body, to Glenurquhie, now Earl of Breadalbion, yet he was forced to pass from that Title; and this Earl of Caithness, as Heir male to the late Earl, does assume the dignity. 2. Titles of Honour do not prescribe, as other rights, and albeit they could Prescribe, yet Prescription did not run against Edzell in this case, because Earl Ludovik having lived to the year 1650, or thereby, during Earl Ludovik's lifetime, Edzell was not *valens agere,* and could not claim the title.

To which it was Duplyed, *Primo,* that it is an uncontroverted Principle in Law, that Titles of Honours may be conveyed by disposition, and Resignation, as well as Lands, and other rights, providing the King consent: For albeit the next heir have right to the Title and Dignity by the Blood; yet, if the person that is presently in the title shall dispone and resign the title in favours of a third person, and the King confirm the same by a Patent, as the disponer and resigner is validly denuded of the Dignity, so likewise the nearest of blood.[3] And which is the opinion of all Lawyers that has written upon that subject, and particularly *Tiraquellus de Nobilitat. cap.* 7. *Num.* 14. who is express, *Quod si feudum Regale sit alicui concessum, ex eo nobilitatur, si princeps, qui jus habet, confirmaverit.* That Nobility may be Transmitted from one person to another, if the King, who is the Fountain of Honour, confirm the same; and it does not alter the case, whether the disposition of the dignity be made in favours of a relative, or a stranger; for if it be lawful to pass by a near relation, and to dispone the same to a person of further degree, by that same reason it may be disponed to a stranger; seeing it is not the Relation that makes the disposition to subsist. But it is the power of disponing; for if it were the Relation, that made the right subsist, then a person could not Dispone a Dignity to a further Relation in prejudice of a nearer, whereas it is acknowledged, and there are many instances in Scotland where a Title and Dignity has been disponed to a very remote relation, in prejudice of a nearer, and even in prejudice of a daughter, who was to succeed by the ancient Patent; and so by the same reason may be disponed to a stranger; and this Earls father was not a stranger to Earl Ludovick, but his *nearest*[4] relation, he being a brother of the House,

[1] This was, however, exactly John Earl of Lindsay's case, independently of the argument attempted here in other respects, not being properly borne out.

[2] It is amusing to see both parties calling each other strangers to the Crawford family, with *equal* foundation. The Earl of Lindsay was the *oldest* Crawford cadet. The parties mutually misrepresent each other's descent.

[3] This, with us, is quite true, and can be established in practice.

[4] This is incorrect; he was certainly not his *nearest* heir.

and thereafter married with the House, and there is several writs produced which clears that the Earl of Crawfurd was alwise in use to design the Earl of Lindsay his cousin; and particularly a *Tailzie*[1] of the estate in favours of the Earl of Lindsay in the year 1608; and this was expressly decided the eleventh July 1633.—The Lord *Mordington, contra Patrick Oliphant*, in which case the Lords sustained a Disposition and resignation, made by the Lord Oliphant, of the Title and Dignity in favours of a third person, in prejudice of his own daughter, and found that albeit Titles of Honour be not properly *in commercio*, so as the disponer may transmit the right and dignity to a third person, without the Kings consent, yet having disponed, and resigned the same, the Granter of the right and his heirs was fully denuded, and the dignity became to be established in the person in whose favours the disposition and resignation was made, *when ever* the King gave his approbation, and confirmed the same. And as to the case of the Earl of Caithness, it does not at all meet this case, for the Disposition made by the late Earl of Caithness, in favours of Glenurchy, was granted upon deathbed, and never compleated by a resignation in the King's hands, which was absolutely necessar for conveyeing the Title,[2] and upon these and several other grounds, Glenurchy did voluntarily, without any process, pass from the Title, upon the King's granting him a new title of Earl of Bread-albion. 2. Prescription does run as to Titles of Honour, as well as to other rights, as is clear from *Tiraquellus de nobilitat. cap.* 14. who is express, that nobility may be prescribed, as well as other incorporeal rights. And it is clear by the Act of Parliament concerning Prescriptions, that *all* rights *whatsomever* prescribe, not being pursued within fourty years;[3] which must likewise comprehend Titles of Honours, seeing *non est distinguendum, ubi Lex non distinguit*, and it is frivolous to pretend that Edzell was not *valens* agere during the Earl Lodovick's Lifetime, seeing if he had conceived that the resignation made in favours of the Earl of Lindsay had prejudged his right to the Title, he might have raised a reduction and Declarator of the same, that the said resignation should not prejudge him after Earl Ludovick's decease. But the resignation being made, and a Patent under the Great Seal having followed thereupon, *in anno* 1641, and Earl Ludovick and the defender, and his father, as having right from him, having possessed the Title and Dignity by vertue of that Patent, the years of Earl Ludovicks possession must be conjoyned with the years of the Earl of Crawford and his Father's possession, to make up the prescription, and as an infeftment of Lands to Earl Ludovick and his Heirs male, which failzying to the Earl of Lindsay, being cled with fourty years possession, would prescrive a right to the

Statement of the Oliphant case in 1633, formerly referred to.

[1] Entail.

[2] This evidently, with us, was not so.

[3] But it only strictly alludes to lands; and the next conclusion drawn cannot be well supported.

Lands, and Earl Ludovick's possession would be conjoyned with the Earl of Crawfords, and his Father's possession, to make up the Prescription as to the Lands, so likewise their possession must be conjoyned to make up the Prescription as to the Title of Honor, there being no difference in Law betwixt Lands and Titles of Honour as to the point of Prescription.

> In respect of all which, the Earl of Crawford ought to be assoilzed from this groundless Pursuit, and it ought to be declared that he has undoubted right to the said Title of Honour." [1] ——

The preceding Charge or Summons, with the printed "Information," for William Earl of Crawford and Lindsay, I have thus inserted *verbatim*, because they are new, and I am not aware of a vestige of them elsewhere. On the other hand, a full transcript of the opposite "Information" for David Lindsay of Edzell, the pursuer in the process,—disclosing his statement, and argument, with rejoinders to those of the Earl, has been long preserved in MS. among the Macfarlane Collections in the Advocates' Library,—owing to which reason, and its *length*, I have been necessitated to abandon my intention, as before intimated, of also printing it. The latter, like the former, curious in certain respects, and not without interest, will be found, by persons desirous of a perusal, in vol. II. (a folio) of MSS. Genealogical Collections, in 1715, (from p. 321 to p. 332, *incl.*) in the compilation above referred to. In a material view, the omission may be unimportant. The case, in my estimation, from what has been premised, and will follow, lies within a small and easy compass, amidst rather protracted and unnecessary details, interspersed occasionally with loose and mistaken inferences and argument.

A copy of the opposite Information for the pursuer, too long to be given, is in the Advocates' Library.

The omission is the less important, as the case fell to be decided upon a very narrow, and simple point.

I conceive the chief reason, though others also have been assigned, for the striking circumstance of there being no authentic notices of further steps in the above *inchoate* process *only*,—isolated as it stands, and which certainly proved abortive,—not a trace of it even, in any shape, being discoverable in the Records of Parliament,[2] was its obvious incompetency in point of form. It was irrelevantly and unduly brought before Parliament, instead of the competent tribunal of the Session. For this we have, *inter alia*, the express authority of Sir John Nisbet, Lord Advocate to Charles II. the best cotemporary lawyer, (see pp. 26-7). It was equally incompetent, with the attempt of the Lord Lindores,—the heir-male of the Earls of Rothes, and in the precise situation, in effect, at the period, with David Lindsay of Edzell, *quoad* the Crawford succession—to claim the Rothes honours in 1682, and to exclude the *new* legal Rothes heir, upon a resignation, and regrant

The chief reason for the non-prosecution of the Action was its incompetency in form;—it should, as found in the Rothes case in 1682, &c. have been brought before the Session.

[1] The Earl thus did not depend alone upon a sitting, *so important* in England.

[2] Though they abound too, with many ordinary and inferior occurrences at the time. For a relative cabal too, against the defender at the time, see p. 28.

further again, in the shoes of the Crawford defender, by a process before the Privy Council, which proved equally unsuccessful, and only elicited from them a further recognition of the just cognizance of the Court of Session, by the striking reference of the parties to that Judicatory.[1] It is remarkable too, that in neither of these instances, and as little, in other such cases, was the crown ever thought of, or applied to, —so differently from in England; where the power of the crown, *vice versa*, so far, was exclusive, and therefore a more arbitrary method adopted; while the course of trial, with us, being simply by the ordinary civil Court, at once fully and impartially opened to all, as in the instance of *any* civil right.

No application to the crown in the above cases, which form with us, was foreign and unresorted to.

The new and effectual constitution and descent of the Crawford honours, with the ancient precedence, was by virtue of the original patent in 1642, recently recovered.

The Earl of Balcarras, as the Edzell heir-male, is now the heir, in terms thereof.

The new and effectual regrant, or patent of the Earldom of Crawford, also recently found in the Crawford Charter-chest, dated January 15, 1642, duly proceeded upon a resignation of his honours, by Lodovick, the then Earl of Crawford, into the king's hands,[2] whereby these, with the ancient precedence, "*Comitum* de Craufurd—*a data* eorum *primæ creationis* in *Comites*," (in 1398,[3]) came to be transferred, after Earl Ludovick, &c. to singular successors, namely, to John Earl of Lindsay, and to the heirs-male of his body, who have at length failed,—*but with* a remainder *thereupon*, or clause of return, "hæredibus *masculis* dicti *Ludovici* Comitis de Crawford (the *resigner*) *quibuscunque*, cognomen et insignia Familiæ de Crawford gerentibus."[4] Under the latter, the present James Earl of Balcarras now clearly takes, as the direct heir-male and representative of the Lindsays of Edzell,

[1] See p. 937, n. 2, and pp. 938-9, 940, *ibid.*

[2] "In manibus *nostris*," (the *King's*); and the patent, dated at Windsor, the royal residence, bears, by a docquet, to be under the sign manual. Hence, in form, it was especially valid and unexceptionable.

[3] See p. 968, n. 1.

The old precedence, carried *ex terminis* by the patent in 1642, refutes a glaring error in the Stirling criminal trial.

"Aliaque privilegia—debita *secundum alia Diplomata*, et autentica scripta continentia tempora, et datas dicti tituli, et dignitatis Comitatus," &c. Such insertion regarding the precedency, though not nearly so broad, *(sufficiently common* on these occasions, and certainly effectual, as can be legally established in this particular instance,) was, strangely, peremptorily sworn to, and held on the Bench, in the recent criminal Stirling Trial in 1839, to impugn, and evince the invalidity of the asserted *Novo-damus* of the Stirling honours, on an asserted resignation, in 1839. Such reservation, or grant of the precedence, from the original date, was inculcated there, to "be too much a matter of course" to need specification, and "*not* to be found in *genuine* charters!" (See pp. 345-6.) Had things only been so, in the Stirling case, without the *further* fatal objections, it is indisputable that the circumstance in question, instead of disproving the validity of the conveyance, as was thus so *summarily* assumed, would, on the other hand, have relevantly sustained it. For Peerage regrants *having* this clause as to the old precedence, see pp. 346-7, and its validity could be further established.

[4] This too is obviously the patent founded upon by the noble defender in 1685, (see pp. 972-4); but, as has been seen, not fairly, at least fully given, the final important remainder being withheld, while the date is 1641, instead of 1642.

and necessarily chief, and heir-male of the once numerous House of Lindsay,[1] who, independently of their nobility, and distinguished illustration, can prove a higher antiquity than any in *our* Peerage, by means of *authentic* evidence. The Crawford regrant in 1642, therefore, (naturally so much founded upon by the noble defender in 1685,) being perfectly valid, and unobjectionable, the Edzell family were *then*, at once, excluded by the preference in terms of it, of John Earl of Lindsay,—undoubtedly, in consequence, Earl of Crawford,[2]—as well as by the former, his son and successor, and his *direct* heirs-male,—that is, in the first instance. This new conveyance—significantly omitted in the summons before Parliament in 1685, by received law, in like manner, as in the case of Rothes, quite superseded, and nullified the pleas and arguments of the pursuer, David Lindsay of Edzell, at the *time*,—attempted probably from the same consideration, and expectation, that had, with similar fortune, instigated the Rothes party in 1682, only shortly before;[3] while both precedents, in fact, merely go further to evince the incompetency alike, of the Parliament and Privy Council in the matter of honours, in exclusion of the Session, the ordinary and true jurisdiction.

Upon the whole, the Crawford claim in 1685, like that of Rothes in 1682, only materially evinces the true cognizance of the Session in honours.

[1] Upon this head, and for a delightful concentration of all that is most attractive and interesting in them, by talents, virtue, and approved excellence, see the late printed work (in 1840,) comprising four volumes, entitled "Lives of the Lindsays," by Lord Lindsay, the son and heir-apparent of the nobleman mentioned, who, with a just and pious feeling, has, appropriately, paid this tribute to the memory of his family, and ancestors; and of whom it may be truly said,—

——— "non deficit *alter*
Aureus; et simili frondescit virga metallo."

[2] Though this Earl certainly was the most powerful and affluent scion of the House of Crawford, and head of a branch long ennobled, under the noted title of Lord Lindsay of the Byres, yet nevertheless, that branch happened to be the most distant by the male propinquity,—not only Edzell, clearly the nearest, but others taking preferably, in such character. By the extinction of Ludovick Earl of Crawford, as set forth in the summons in 1685, the limitation in the patent in 1642, naturally to him, and the heirs-male of his body, in the first instance, became spent, and the male representation obviously vested in Edzell, upon the male failure of the next collateral branch of Spynie, as also intimated there. Upon the death of the late George Earl of Crawford and *Lindsay*, the more direct male line of the Lindsays of the Byres failed; but the titles of Earl of Lindsay, Viscount of Garnock, Lord Lindsay of the Byres, &c. being all *exclusively* in this stock, and descendible to his heirs-male collateral, must next vest in the nearest of *its individual* male members, now comparatively but few. *Byres*, the appanage of the branch in question, with Garmilton, &c. "*in feodo de Haddington*," (as proved by an old charter I have read), was acquired by the Crawford line, before the middle of the 13th century, from Gilbert Marshal, Earl of Pembroke, who married Princess Margaret of Scotland, and is stated to have got with her "a noble dowrie," including, I conceive, the *feodum* of *Haddington*.

Present descent of the Earldom of Lindsay, and titles in the noble family of Lindsay of the Byres—the oldest branch of Crawford.

[3] See p. 940, *n*.

No. II.

Remarks in reference to the Baronies of Sempill, and Mordington, &c.

(See pp. 52-3, 190.)

Singularity, and apparent contradiction of the Sempill patent in 1685.

The patent of the Barony of Sempill,[1] dated 25th of July 1685, may be viewed as rather singular. Notwithstanding the avowed predilection to the female descent in the preamble, from the old and modern usage founded upon, of recognising and continuing the honours of noble and ancient families in the heir-female and "her heirs," the confirmation of the conveyance of his honours and estates, by the deceased Robert Lord Sempill, to Dame Anne Sempill, his daughter,—as well as of that, or resignation into the king's hands, of all claim to the same, by Robert Sempill, the heir-male, to her *heirs*, in her favour, still the dignity is limited subsequently, but to the heirs-male of the lady in question, by Francis Abercromby of Fetternier, her husband,—who have lately failed,—or of any other marriage, that however did not obtain. There is here some apparent incongruity and anomaly, that would require, in due explanation, a further search for, and full examination of these respective transferences, that are only very summarily alluded to.

Subsequent conveyance of the estates and honours in 1688.

The descent of the Sempill estates and honours were, thereafter, extended, upon the resignation of the preceding Ann Baroness Sempill, and of Francis Lord Glassford, her husband,[2] failing heirs-male of their bodies,—of whom already,—to heirs-female, and to other heirs, by a charter of regrant, the 16th of May 1688, dated at Edinburgh,[3]—as to which, repeatedly. Lord Mahon, in his History of England, from the peace of Utrecht, has notices, through the medium of portions of the Stewart correspondence, lately brought to this country, and otherwise, in 1744, and 1745, of a "Lord Sempill," as an intriguing adherent, and partizan of the Pretender.[4] Who this may be,—for he certainly was not the *true* Lord Sempill,—Lord *Hugh* being then so, the male descendant, and heir-general of the patentee in 1685, who happened to be in the opposite interest, and had a principal command, under the Duke of Cumberland, at Culloden, in 1746, soon after which he died,—I have not been able to discover. If the then Sempill heir-male, as might seem, his right had been fully barred, according to our notions,

Who was the *Jacobite* Lord Sempil in 1745.

[1] The constitution of this dignity, originally as old as the reign of James IV. is not preserved.

[2] The preceding Francis Abercromby, who had, moreover, that title for his lifetime, conferred upon him by the patent in 1685.

[3] Great Seal Register.

[4] See vol. III. App. pp. x. xii. xix. and body of the work, pp. 278—445, n. &c.

by the resignation of the heir-male, confirmed in 1685.[1] The title of the Jacobite individual *may* have been in virtue of a creation by the Pretender, of which, including those by his father, since his abdication, there were *many*. It might be curious to collect them, as they principally transpire from the Stewart documents, now in the royal possession, though perhaps, in some cases, not altogether agreeable to *certain* families, honoured accordingly, who have been supposed, and have plumed themselves with being, stanch and steadfast Hanoverians. The list might comprise, in itself, a distinct Peerage, the more interesting, as in an opposite crisis, that might not impossibly have happened, duly and effectually constituted. Mr. Edgar also figures in Lord Mahon's interesting History, in 1744 and 1745, as a confidential friend and agent of the Stewarts.[2] By an authentic authority, in the Gask Charter-chest,[3] he still figures as the Secretary of the father of Prince Charles Edward, in 1751; but further, in an original letter from him in 1760, to Laurence Oliphant, Esquire of Gask, (where he alludes to his master's illness,) he starts forward as the "Earl of Alfoord,"—at the same time amusingly subjoining, at the close, "Your *old Comerade, Mr. Edgar*, makes you his Compliments."[4]

He could only have derived his right from the Pretender.

The creations by the latter, of themselves may constitute a new Peerage.

Titular Earldom of Alfoord.

As far as I am hitherto aware, the heir of line of the noble family of Sempill, owing to an intermarriage, and descent from that of Mordington, may be now the actual heir to the Barony of Mordington, in terms of the patent in 1640,[5] to heirs-general,—unless there be, after all, a nearer Mordington descendant, in the same character.

The Barony of Mordington is probably now in the Sempill heir-female.

No. III.

Writs of Summons to attend Scottish, and English Parliaments.

(See p. 102, and preceding.)

Precepts or summons to attend a Scottish Parliament, on the eve of one appointed, were of old issued from Chancery by the King, with consent of the Privy Council, under the testimonial of the Great Seal, and directed to the Sheriff or Bailie of the particular district, "quatenus summoneatis, seu publice summoneri faciatis, omnes et singulos episcopos, abbates, priores, comites, barones et cæteros liberetenentes, totius baliæ vestræ, et de quolibet burgo, tres vel quatuor, de sufficien-

Instance of a general Scottish summons to Parliament.

[1] See above.

[2] See Vol. III. pp. 298—341, *notes*, and Append. pp. xvii. xx.

[3] An abundant and valuable collection of old muniments and papers, belonging to James Blair Oliphant, Esq. of Gask, &c. the undoubted male descendant and representative of the Lords Oliphant, and of that ancient family.

[4] *Ibid.* "Alfoord" likewise signifies, that "*His Majesty* orders me to return *you (Mr. Oliphant)* a kind compliment."

[5] See pp. 179-80.

tioribus burgensibus," &c. to appear accordingly, at a certain day and place, "cum aliis regni nostri prelatis, proceribus, et burgorum commissariis,—ad tractandum, concordandum, subeundum, et determinandum ea, quæ in dicto nostro parliamento, pro utilitate regni nostri, et reipublicæ, tractanda fuerint, concordanda, subeunda, et determinanda,—habentes vobiscum summonitionis vestræ testimonium, et hoc breve. Et hoc, sub pena quæ competit in hac parte, nullatenus, omittatis."

A special one singly, to a Prelate, of the same import.

This was what we termed a general summons, through the crown officer; but there was also a special, after the same form and import, though directed singly to a Prelate, Earl, or Lord of Parliament.[1]

An English writ of summons, though in similar terms, had often constructively, an ennobling effect, denied to the former.

An English writ of summons, though similar in terms, had, constructively, as is notorious, much greater effect. It in fact ennobled a higher laic, individually so summoned, and his heirs in fee,—a consequence quite foreign to us.[2] Want of room precludes the insertion here of a full example; but they are sufficiently familiar, and abound in Dugdale's Summonses to Parliament,[3] as well as elsewhere. The writ is directly by the King, with the advice of his Council, to the special party alone, "firmiter injungentes," &c.—*quod*, (on such a day, &c. you shall attend Parliament,)—"ad tractandum, ordinandum, et faciendum nobiscum, et cum prelatis, et cæteris proceribus, et aliis incolis regni nostri,—et hoc nullatenus omittatis," &c.

Our Prelates sat in Parliament in right of their temporal Baronies.

Our Prelates, of course, sat in Parliament in right of their temporal Baronies, though sometimes disinclined to do so. On the 23d of August 1546, an ordinance was issued by the Regent Chastelherault, and Lords of Privy Council, stating "yat yer is diverse prelatis of yis realme als weil bischoppis as abbottis, yat aw (owe) personale compearance at al generale counsalis, ande courtis of parliament, for yer avises to be had in all materis concerning ye commoune wiell. And albeit yai haif bene oft and diverse tymes requirit be oure soverane ladeis lettres, direct to yaim be avise of my lorde governoure, hir deirest tutor, and lordis of counsall, to haif comperit at hir graces generall counsalis, and parliament, neveryeless yai haif contemptuandlie disobeyit yair requisitiones," &c. On which account, fresh commands are here given to Sheriffs to summon the Bishops as before; but if they still do not appear, then their temporal lands are to be seized and intromitted with. (Acta Dominorum Concilii, of the date in question.)[4]

[1] For full copies of these, see Wight on Elections, first Edit. Append. pp. 443-4.

Different constitution of our Parliament.

[2] Our Parliament too, differently composed of the three estates, always sat and consulted together but in one chamber, and under one common President.

[3] London, 1695.

Curious, and corresponding import of *good-man*, as denoting a class of

[4] There was an order in the community with us, who had the familiar, and *frequent* denomination of "*good-men*,"—not certainly the high, ennobled "*Ricos hombres*," as in Spain, (see Selden's Titles of Honor, Edit. 1672, p. 477,)—literally *rich men*,—however inferior these *may* be,—by no contemptible authority, to

No. IV.

Appeals to Rome, in Scottish cases, before the Reformation, with special allusion to the singular and protracted one, of Margaret Logie, the Queen of David II., and to that remarkable personage, &c. &c.

(See pp. 449-50, n.)

Scottish appeals to Rome, so frequent with us in Papal times, in general consistorial questions, notwithstanding the great distance, and of course grievous expense, aggravated by innumerable obstructions, and dangers,—the intervention "vehementis maris oceani, tempestates, et ventos contrarios," as James V. strikingly complains in an authentic letter, I have seen, to the Pope upon the subject, were yet, in fact, precisely like those in our days, from the Session, to the Appellate jurisdiction of the House of Lords. And in the same way, a peremptory term was statutorily prescribed for the purpose. The Official of Saint Andrews decided, in November 1541, that the Appeal by John Seton of Lathrisk, from a judgment pronounced against him by his Court,—the ultimate Consistorial authority in Scotland, but "lata *Curiæ Romanæ*," was now void and incompetent, "propter *lapsum fatalis temporis*, et negligentiam prefati Johannis appellantis, *infra tempus debitum*, et a *jure statutum*, minime prosequentis.[1] Among the earliest instances of the kind *preserved*, is the process as to the "Kallentir," or Calendar succession, about the middle of the 13th century, by Sir John Kinross, against Sir Alwin de Kallentir, the son of the deceased Malcom Thane of Kalentir, turning "*super natalibus* ipsius Alwini, in

Scottish Appeals to Rome in Papal times, were like those at present to the House of Peers, and were equally circumscribed in time.

They obtained from an early period.

good. Sir George Mackenzie, Lord Advocate to Charles II. says that, in Scotland, the community such as held "their lands of the Prince were called *Lairds*, but such as held their lands of a subject, though they were large, and their superior very noble, were *only* called *Good-men*, from the old French word, *bonne homme*, which was the Title of Master of the Family." (Works, under the art. of Heraldry, vol. II. p. 583.) In the argument, in the English case of the Viscounty of Purbeck, in the reign of Charles II. it was maintained, that "the Titles of Esquire and Gentlemen are drowned in the greater dignity of that of a Peer, and when the *greater* are gone, the *other must go with it*. And then, from being a nobleman to-day, he, and the rest of his Family must be *below all* nobility, and be called *Yeoman*, or *Good-man*." (Shower's Parliamentary Cases, 3d. Edit. 1740, p. 3.) The matter—that in dispute—is here contemplated, of a nobleman denuding himself of his Peerage; and hence, in the sister kingdom, alas! a "good man" *was fully* as little respected as with us,—rather contrary indeed, to the Roman notion,—*boni viri*, notoriously in the acceptation of Cicero, denoting senators.

in both kingdoms.

[1] Register of the Official of Saint Andrews.

cujus bonis paternis, eo excluso," Sir John maintained that he, "tamquam proximior, debet succedere." This was a proper Consistorial question; and accordingly, it came first before the Bishop of Saint Andrews, (the Scottish Judge in the matter, of whom the preceding official was the Vice, or Deputy,) was thereafter repeatedly transferred, by appeal, to Rome, and remitted, like a mere modern case of appeal, for further consideration here; until, at length, after five years' tedious litigation, the process was settled by compromise in 1252, under authority of Papal Delegates or Commissioners.[1]

I could enumerate various other such proceedings downwards, besides that of the Chenes in 1513, and before,[2] involving different questions in the competent law. The action of divorce by David II. against his second wife, the beautiful Margaret Logie, about 1369, a hasty, ill-assorted union, upon what legal pretence, is unknown, was decided in his favour by the Ordinary Ecclesiastical Scottish Tribunal; but she subsequently appealed to the Roman Court at Avignon, when a keen, and protracted litigation ensued, productive of much public agitation and commotion, the issue of which appears to have been a reversal, and actual standing of the marriage, with the high indignation of the Papal See, that exposed Scotland to the horrors of an interdict, and excommunication by his Holiness.[3] With respect to the above remarkable woman, I have found the following original piece of evidence in the Errol Charter-chest, that valuable repository of ancient Scottish muniments and documents.[4]

Remarkable divorce of Margaret Logie, the wife of David II.

Appealed to Rome, and reversed.

Curious original compact between the Queen, her son, and John Kennedy of Dunure.

It is a solemn compact, bond, and obligation, dated at Edinburgh, the penult of November 136..., (the *full* date of the year being unfortunately worn away,) by "Johannes Kennedy, Dominus de Dunure," (ancestor of the noble family of Ailsa and Cassilis), to the former, there styled "Excellentissima Domina mea, domina Margareta dei gratia Regina Scotie," and *to* "*ipsius filius*, nobilis vir et potens *Johannes de Logy, dominus ejusdem*," whereby, for onerous causes, he binds himself, "ad essendum de *eorum retinentia*, pro toto tempore vite sue," to labour with them, and to *warn* them of *all snares*, "cum *tota potentia* hominum meorum, sine fictione qualitercunque—infra regnum Scotie, et precipue, infra Dominium Vallis Annandie," under the usual reservation of the King's authority, "Et si contingat (he concludes) me contra premissa, vel aliquid premissorum, aliquid facere, vel in aliquo contravenire, quod absit," then in such event, "obligo me extunc, et ipso facto, esse reprobatum, et *defectum*,[5] necnon *falsum*, *perju-*

[1] This is established by authentic cotemporary evidence in the Calender Charter-chest.

[2] See p. 449, n. 2.

[3] For these facts, see in the sequel. Fordun, with all others, calls Margaret "*speciosissimam*," vol. II. p. 370.

[4] The way in which it happens to be in the Errol Charter-chest, may appear in the sequel.

[5] "*Quo*, quis non stat promissis." Du Cange, *sub voce* "*Defectus*."

rum, fide mentitum, ET *omni honore armorum, in perpetuum, carentem.*" [1] The clenching penalty here, of loss, or forfeiture of the "honour of arms," as the *climax* of *every* turpitude, and condign infliction,—the severest to a feudal and warlike Baron,—is finely characteristic of that chivalrous period. Other things of importance may be derived from the above original document. 1. That Margaret was not the daughter, as has been stated by old authorities,[2] but the widow of a Logie, the Laird "*of Logie,*" which designation too, is here first intimated to us. 2. That Margaret having thus, at least *before* 1370, as follows from the date of the former, a son, John Logie of Logie, (a fact hitherto also unknown,) then arrived at manhood, to be concluded from his being treated with, above, as a party, and, as may be further obvious from a passport in 1367, to "Johannes de Logy de Scotia, cum XII. equitibus;" [3] she

It proves she was the widow, and *not* the daughter, of a Laird of Logie.

[1] Margaret was clever enough thus to bind down the *Carrick* chief tightly.

[2] See, among others, Fordun, Goodall's Edit. vol. II. p. 370. Even Lord Hailes makes her the "*daughter* of Sir John Logie, Knt." See Annals, Edit. 1797, vol. III. under Append. p. 115. What her *own* descent was, does not transpire, and it would be curious to discover. She may be said to be the only queen of Scotland, whose filiation, that would have illustrated most families, is unknown. From her taking her husband's surname, instead of her maiden, according to the ordinary custom, her origin *may* have been obscure. There is an authentic certified copy existing, of an original grant by "Margaret Logy, Queen of Scotland," in 1367, (once in possession of the Scottish College at Paris,) to William de Kirkintulloch, with a description of her seal appended to it, exhibiting, in the upper part, the Royal Arms of Scotland, supported by two Lions, (the old Scottish supporters, which continued even to the reign of James III. nay I believe after,) and in the lower, the Queen in the royal habit, crowned, holding a sceptre, between two shields of arms "*gentilitia,*" that are not described, possibly her former husband's and her own. Although there are several Logies in Scotland, yet, from sundry indications, I conceive, the *ci-devant* husband of Queen Margaret was ancestor of the Logies of Logie-almond, still even popularly called Logie, (upon the Water of Almond) in Perthshire. That family ended in an heiress before the 4th of October 1493, singularly, another "Margaret Logie," who possibly sprung from the Queen; when there passed a royal charter, upon her resignation of the Barony of Logie-almond in the same county, in favour of Thomas Hay, her husband, younger son of William Earl of Errol, and their heirs. (Great Seal Register.) From this connection came the Hays of Logie-almond, also called "of Logie" simply, eventually Earls of Errol, by failure of the direct line of that noble house, and ancestors of the present Earl of Errol, &c. It may be presumptively, held, in this way, as a family writ, among such others, that the old compact between Margaret Logie, and the chief of the Kennedys, (as above, p. 982,) happens to be now in the Errol Charter-chest, thus going to support my induction. Logie, or Logie-almond, left the Hay, or Errol family, for the Drummonds, a branch of the house of Perth, by whose female representative, Sir William Drummond Stewart, Bart. of Grand-tully, the property is now possessed.

Margaret the only Scottish Queen whose filiation and family are unknown.

Her seal in 1367.

Her husband, and son representatives of the family of Logie, or Logie-almond, of whom the Earl of Errol, owner of the above compact, is descended.

[3] Rot. Scot. vol. I. p. 916. Independently of this, there is a charter by David II. even so far back as 1363, "*Johanni* de Logy *domino ejusdem,*" of the

And not a maiden and virgin, as supposed, when remarried with David II. —an unfortunate union.

must have been of *matured* age, when she married David II. in 1362, or 1363,[1] instead of a tender *damsel*, "virgin," as we might conclude, from what has been represented.[2] On the contrary, she evidently has been a "full blown" widow,—"*lusty*," as Bellenden styles her,[3] of great ripened, matronly attractions, whose experienced wiles and allurements, "*voluptate* formæ *appetitivæ*," as Fordun adds,[4] have enticed the weak monarch, ever susceptible of female charms, into a connection, which, like all such, being chiefly sensual, after a short-lived gratification,[5] has palled, and become nauseating. 3. Margaret, however, independently, unlike her spouse, with ability and talents, which he was unable to appreciate, or to "*direct discretè*,"[6] happened to be active and enterprising. She aimed at political power, and forming a party in the state, identified, not unnaturally, with her own, and her son's aggrandizement, the chief indication of which was the bold, though necessary step, (as always in such cases,) of the imprisonment, *by her* means, of the next heirs to the crown,—the Stewarts,[7]—whom she *prudently* dreaded, and of whom, therefore, it was incumbent to rid herself. In such critical emergency too, she behoved to strengthen her faction, by the aid and co-operation of the leading men in the kingdom; and hence, I conceive, originated the preceding treaty, and compact, (among others,) in 136..., (probably about 1367-8), with John Kennedy of Dunure, a great intriguing chieftain in Galloway and Ayrshire,[8] who, in legal guise, is *there* to premonish the queen, and her son, against all

Able and active, she aimed at political power.

Her compact with John Kennedy of Dunure was to strengthen her party.

Thanedom of Thanadas, Forfarshire, with the reversion of Glammis, royal property, and thus well suiting a royal step-son. Regist. Dav. II. p. 32, No. 76.

[1] See Regist. *ut sup.* p. 25, No. 28, and Winton, Macpherson's Edit. vol. II. p. 293. 1362 would seem the true date, that is, the *very* year of the death of Joanna of England, the king's first wife. See Lord Hailes, *ut sup.* vol. II. p. 274.

[2] From Boece's account, who makes her a "virgin," and 24 at her divorce, about 1369, (see his Hist., Lib. 15, f. 327, a), thus only in her teens when married. Mr. Tytler has as little any notion of Margaret having been previously a widow, and also erroneously represents her as a *Logie* by parentage. See his History of Scotland, vol. II. p. 144.

[3] B. 15, f. 231, a. [4] See Fordun, *ut sup.* vol. II. p. 370.

[5] See latter work, p. 379, and Winton, Macpherson's Edit. vol. II. p. 293. Fordun here states, that David "parvo tempore habitavit" with the Queen; and Winton, that "thai war togidder but schort while."

[6] See Fordun, afterwards, at p. 987.

Margaret confines the Stewarts in *Lochleven* Castle,—so inauspicious to that family.

[7] Fordun, *ut sup.* p. 380, and the Accounts of the Chamberlains of Scotland, for the years 1367-8-9, (vol. II. pp. 498 and 524,) by which it is proved, that the Stewart of Scotland, and his son Alexander, were then respectively confined in Lochleven Castle, which, in consequence, underwent fortification and repairs.

[8] This may be inferred from *his* even having *been* forfeited, as would seem, in the reign of that monarch. See Robertson's Ind. p. 30, No. 6. The important privilege of the *Kenkynol*, (see p. 574,) was in his family, even at the time, as well as of leading the men of Carrick.

snares and counterplots, to which they were peculiarly exposed, and to aid and support them fully, "cum *tota potentia* hominum meorum." 4. But unfortunately, Margaret, at the same time, being comparatively but of secondary family and connections, and especially, like all upstarts, exciting envy and hatred, chiefly in the higher ranks, was unable to effect her object, which has been successfully thwarted by an opposite faction. The result of which—backed also, by the cooling love of the king, degenerating into disgust, and *then* compunction at forming such a humiliating alliance, after his first, with a Plantagenet, in the person of Joan, sister of Edward III.—has been her divorce in 1369,[1] upon some calumnious fiction for the nonce, her consequent downfall, and the liberation of the Stewarts.[2] Still her talents, energy, and spirit,—which we cannot but admire, in defence of her just honour, and interests,—did not even then fail her. She found immediate means of escaping to the Apostolic Court at Avignon,[3] where, by prosecuting an appeal against the divorce, it is forcibly stated "*totum regnum commovit*;"[4] and though but a calumniated female in a foreign country, by her peculiar address, and influence with the Cardinals and the Pope, who was upon the point, in consequence, of excommunicating Scotland,—after keen and incessant processes, at length succeeded in undoing what even *the church* had previously done.[5] She legally vindicated, against every machination, her royal style and status, as an undivorced Queen, which she still retained in 1372, 1374,[6] and 1375,[7] after the decease of her imbecile spouse in 1370.

Her disgrace, and unjust divorce by the Scottish tribunal.

She escapes abroad, appeals to Rome, throws Scotland into the utmost confusion, and at length prevails.

[1] Ford. *ut sup.* p. 379, and in the Chamberlain's Accounts, &c. vol. I. p. 521, under a *Compotum*, from 20th of January 1368, to 19th of January 1369, there is a payment which has escaped notice, "domine Margarete de logy *quondam* Regine Scotie," (she having lost the title in Scotland,) of XL pounds, "in partem solutionis *centum* librarum sibi, assignatarum *per* dominum nostrum *Regem*, percipienti per annum, *post divortium celebratum*," with her receipt accordingly. She was thus allowed to fall gently, with a tolerable pension, which is further in her favour.

Unnoticed allusion to her divorce in the Chamberlain Accounts, and pension thereupon granted to her.

[2] Ford. *ut sup.* p. 380. In the Chamberlain Accounts for 1369, after the Queen's divorce, (*ut sup.* p. 522), there is a payment, through the King's Steward of the *household*, "*ad expensas Agnete de Dunbar—in absentia* Regis;" query, was this a new mistress, who had caught the fickle monarch, and supplanted Margaret?

[3] Ford. *ut sup.* p. 379. "*ascensa clam* navi in aquam de Forth," in 1369, shortly after her divorce.

[4] *Ibid.* p. 379.

[5] *Ibid.* p. 380, and Bellenden, B. 15, f. 231, a. who says that she "gat *finalie* ane *sentence*," upholding her marriage,—which will be confirmed in the sequel.

[6] On the 23d of July 1372, as "*Regina* Scotie, *uxor* condam Domini Davidis, olim Regis Scotiæ illustris, jam defuncti," she borrowed abroad, at Avignon, 1500 merks; and, the 4th of March 1374, as "*uxor* carissimi fratris regis, Davidis de Bruys," &c. she obtained a passport from Edward III. for England, with liberty to remain there two years. This may have been on her contemplated return, not venturing all at once to trust herself in Scotland with her enemies the Stewarts. (Rymer's Fœdera, vol. VI. p. 727, and vol. VII. p. 35.)

Obliged to borrow money abroad in 1372.

[7] Proof of this will appear afterwards. It has been fancied that Margaret

The accounts of her death abroad in 1374-5, vague, mysterious, and contradictory.

How Margaret closed her feverish career, far from satisfactorily transpires. The accounts are somewhat contradictory, not to add mysterious. She is vaguely transmitted, after her *moral* triumph, to have died abroad, conveniently enough, when proceeding to Rome,[1] as we may conclude, again to baffle, (to be presently evident,) the unremitting, though fruitless attempts of her persecutors; according to others, (by what fatality?) *on* "ye *way*" home.[2]

The following facts at least are certain, and can be established by a cotemporary public document, only recovered in modern times, however, strangely, they have not been unfolded, and *detailed* by writers, including Tytler in his late History, who cannot discover the contingencies, progress, or issue of the Queen's litigation.—That the appeal was prosecuted by her during the epochs of Pope Urban, and Pope Gregory, who succeeded in 1371; that she *obtained* "*several sentences*" in her favour, against her adversaries, which subjected the king of Scotland, as well as the Scottish *community*, who figure always as parties, to *danger*,—obviously from the *impending* excommunication, owing to their still continuing restive, and recusant. That to ward the evil, at the *earnest* entreaty of Robert II., Charles V. of France, had written many letters to the Papal authorities, craving a term of delay, and sisting of procedure in the cause; that this availing nothing, and the above proceeding to extremities, and not even respecting *this delay*, that they are *pretended* to have acceded to,—but declaring certain *dis*-*trustful* procurators, and agents of the Scottish king, (as would seem,) contumacious for not appearing—under such pretext,—rather sharp, and upbraiding language passed between the two monarchs, Robert reflecting upon Charles for not fulfilling his promise of effectual intervention, and extrication in the calamity,[3] while Charles defended himself against the charge, and complained of the harsh tone of the other. This curious information we learn from a formal notarial instrument, dated the 31st of January 1374-5, exemplifying these particulars, in the shape of a diplomatic letter, through certain ambassadors, from the Scottish, to the French king, with the answer of that potentate, in the

Straits and difficulties of Robert II. and the nation on her occasion, with imminent danger of an excommunication, that compelled him earnestly to crave the mediation and intercession of Charles V., in the matter, with the Pope; with subsequent reflections and upbraiding between the monarchs.

Absurd notion that she carried her purpose by *Scottish* gold, bribing the Pope, Cardinals, and the foreign authorities, &c.

carried her purpose abroad by *Scottish* gold, (from what mine?) *whereby* the Pope, Cardinals, &c. all bent before her! This is rather a *novel* idea. *Poor* Scotland, then too overwhelmed in debt, was far more likely, (as usual,) to be bought, than thus to buy, or to gain golden opinions, especially for such ejected child. But the first of the above authorities, from the *Fœdera*, proves, on the other hand, that she was needy, and compelled, in her straits, to borrow from strangers.

[1] Ford. *ut sup.* p. 380. [2] Bellenden, B. 15, f. 231, a.

[3] He plainly tells him, that if he is thus disappointed in what had been promised, he, in particular, cannot trust to his word in other matters, that had been both promised, and sworn to by them, "et qui touchent *greigneur* chose,"—thus involving some *weighty* political project. This graphic letter, with the answer, is valuable, in the great dearth of historical information at the period.

valuable quarto vellum MS., transmitted in 1793, to Scotland,[1] from the State Paper Office. And further still, Robert II., in his anxious communication with respect to a matter, that, he admits, tenderly touches him, impresses upon Charles, that both *he*, and *his community*, are likely *still* "estre *plus dommagiez*, et en *dangier*, se ilz ne se peuent par temps, pourueoir de *remede*." He therefore, beseeches him affectionately, "*empetrer* du saint pere, que *les sentences* qui *sunt donneés, (for* the *Queen) soient* RAPELLEES," and modest demand forsooth, that the matter be restored to its original state, just as if these had not passed! In answer, Charles professes himself ready again to assist his royal brother, and to write to the Pope and Cardinals. All this, including the previous altercation, and pretext, pretty plainly evince that Margaret, formidable indeed,—and who is even styled "royne d'Escoce" by the French king,—was in the right, and had a just cause; but her opponents, who were thus driven to every strait, turmoil, and peril,—in the wrong,—being now obliged, in their turn, judgment having repeatedly gone against them, and in favour of the Queen, to figure as appellants. Fordun explicitly says,—and hence with every appearance of probability and truth, that if she had survived, (it being impossible to shake the judgments,) "regnum interdicto supposuisset,"—which was only prevented by her sudden, unexplained demise.[2] We have here again, a verification of the old adages, of the baneful influence of a wronged and enraged woman, "belli *teterrima* causa," aggravated, in this peculiar case, by the previous "*judicium—spretæque injuria* formæ." It is probable too, that England politically aided Margaret in the course of her long process, in order to disturb and perplex the Scottish Government, especially as the money she borrowed in 1372, at Avignon, was advanced to her by London merchants, not unlikely by authority of Government, though paid by their foreign agents; and her bond appears, (as referred to in Rymer,[3]) among the *English Public* Acts, and vouchers. She hence, every way, however innocently, became "Patriæ *Erynnis*;" and with reason, no doubt, Fordun sapiently exclaims, in reference to the Queen, that a wife "est eligenda, *discretè*,—dirigenda *mansuetè*,—diligenda *completè*,"[4]—the choice being made "per *discretam deliberationem, secretam* informationem, *completam* communicationem,"[5]—otherwise, out upon it.

Robert II. again implores such intercession, against the *Sentences* that had been given in favour of Queen Margaret, which now, as an appellant in his turn, he wishes to reduce.

In the circumstances, judgment having gone in her favour, Scotland, owing to her recusancy, and perverse opposition, would have been excommunicated, had it not been for Margaret's convenient demise.

[1] It is printed in Robertson's Parliamentary Records, at pp. 129-30, &c.

[2] See Fordun, *ut sup.* p. 380; and Bellenden, B 15, f. 231, a.

[3] See. p. 985, *n.* 6.

[4] He adds withal, "corrigenda secrete;"—how this might do, I cannot say.

[5] *Ut sup.* p. 370.

No. V.

REMARKS IN RESPECT TO THE OLD EARLS OF MARCH AND DUNBAR, THEIR STYLE, AND DESIGNATION, TURNING ON A MISCONCEPTION OF SIR HARRIS NICOLAS, UPON THIS HEAD, IN HIS "SIEGE OF CARLAVEROCK," &C.; WITH ALLUSION TO ANOTHER, MORE IMPORTANT, AFFECTING EDMUND, OR SIR EDMUND HASTINGS, YOUNGER BROTHER OF JOHN HASTINGS, COMPETITOR FOR THE SCOTTISH CROWN IN 1291-2, AS WELL AS THE REPRESENTATION OF THE OLD EARLS OF "MENETETH," &C.

(See pp. 456, et seq.)

I had intended,—had it not been for a reason repeatedly given,—to have inserted here, *several* particulars regarding the Earldom of March, or "the *Merse*," as we call it, that is, of the March of Scotland, and of its original possessors, the Dunbars,[1]—one of our most illustrious, and historical families, who, by a rash step, came to be so strikingly eclipsed, and degraded, and at length dwindled down, in their representation, to those miserable, ill-fated individuals, Margaret and Janet Dunbars, —their direct coheiresses, in general,[2]—who have only served, in no very creditable manner, to "point a moral," and illustrate a portion of our Consistorial Law. I may observe, however, that Sir Harris Nicolas, in his recent and interesting publication of the curious Roll of Carlaverock, in the time of Edward I., has erroneously supposed that the title of "Earl of *Lennox*" is there given to Earl Patrick, the heir and representative of the former, the then Earl of Dunbar, and March,[3] —though neither he, or any of the family, ever took, or had it.

Error of Sir Harris Nicolas in supposing Patrick Earl of March, to have been styled Earl of Lennox in 1300.

This misconception, natural in an Englishman, is easily explained, when the actual meaning of the style, "Conte de *Laonis*," or "*Laonois*," —the cause of the error, given to this nobleman, in the two copies of the Roll,[4]—or, as it is similarly sometimes written, "*Loenas*" or Lonais,—nay, even corrupted into "*Lownes*,"—obviously turns out to be nothing more than Earl of *Lothian*,—if not, by express verbal usage, "of *Dunbar*,"—or the *Lothian* Earl, such having been formerly the old or-

The same, owing to his designation of "Conte de *Laonis*" in the Carlaverock Roll, the meaning of which, there not improperly us-

[1] Patrick Earl of March, too, as is well known, claimed the Scottish crown in 1291, as heir of Ada, daughter of William the Lyon, who died in 1214.

[2] See pp. 456, *et seq.* and p. 459. The *frail*, adulterous Margaret (who must have had the house on Kilconquhar, but a *particle* indeed of the March inheritance) was the eldest, which accordingly entitled her to such messuage, and hence to the Earldom, &c. by our law, had it not been for its noted forfeiture by Edward I.

[3] See his work, entitled, "Siege of Carlaverock," in 1300, containing the Rolls in question, with various comments, London, 1828, pp. 210-11.

[4] See pp. 34-5, *ibid.*

thography of that *district*;[1] and is little surprising, (titles then not being so stationary and fixed,) owing to the great and fertile fief of Dunbar, with the redoubtable Castle of Dunbar,—the principal fastness and residence of Earl Patrick,[2] and his family, being in (ancient) Lothian. He thus might be as well termed "of Lothian," as the gallant Sir William Stewart of Jedworth, ancestor of the Earl of Galloway, "of Teviotdale," in the next century, from Jedworth, his abode, also in that Sheriffdom. I need hardly add, what is admitted, that the arms, on the Carlaverock occasion, given to the "*Lothian* Earl," are *exclusively* those of the Dunbars, Earls of March;[3] while the *insignia* and bearing of the cotemporary, *Malcom* "de Levenax," *Earl of* Lennox, on the other hand, the *true* and *only* Earl of Lennox, *all along*, (which, of itself, rebuts Sir Harris's[4] notion,) were, as can be established, as perfectly distinct as his noted descent and extraction. Further still, Lennox at that time, (and indeed long afterwards,) was written, "Levenax," and sometimes in authentic deeds, "Levenaux," or "Levenaughes," —comprising the district of the river of *Leven*; but never, as above, "Laonis," or "Laonois."

ed, is misunderstood.

Malcom, all along, the true Earl of Lennox.

Sir Harris Nicolas conceives there was "*great uncertainty* about" Earl Patrick's "proper title"—from thence,—and his being besides called "Earl of March,"—after his *comital* border fief,—as well as "Earl of Dunbar."[4] But he, and his family, unequivocally, used both of these titles, and had such, not unappropriately, given them,—the latter expressly, from their chief Castle of Dunbar,—in a similar manner, as the old Earls of Sussex, and Ormond, in England and Ireland, were desig-

No uncertainty either, as apprehended, by Sir Harris, in his *style*, from his two other titles taken, and given to him, of Earl of March

[1] See Macpherson's Geographical Illustrations of Scottish History, *sub voce* "*Lownes*." He adds, "from undoubted authority," that Dunbar was formerly held to be in Lothian, and talks synonymously of "the Earldom of Lothian or Dunbar," which indeed at once solves the question. See also *ib.* under *Dunbar*.

[2] The Castle of "*Colbrandspath*," (or the path of *Colbrand*, *some* olden hero, now corrupted into Cockburnspath,) was their next feudal strength, and fastness, —the principal messuage of the Earldom of March, judiciously reared in Berwickshire, adjacent to a formidable pass and ravine. That Earldom, after being taken from the Dunbars, (by James I.) was granted to Alexander Duke of Albany, brother of James III.; and in the solemn matrimonial settlements in 1477, (once in the "*Tresor des chartres* in Paris,) between the Prince, who thus also was Earl of March, and Anne de Boulogne, the daughter of Bertrand, Count de Boulogne, Lauragais, &c. he settles upon her, during his life, "*Palatium*—nuncupatum *Colbrandespecht*," (modern Cockburnspath,) with the demesne, and dependencies. According to our striking usage, the old arms of the *Dunbars*, (though so humbled in the sixteenth century), the *original* Earls of March, became,—as in the instance of the Bruces, the *original* Lords of Annandale, the arms of the fief, and were quartered, in right of, and as descriptive of the Earldom, by Duke Alexander; as can be abundantly proved by authentic ancient authorities.

The Castle of *Colbrandspath*, the principal messuage of the Earldom of March, with the dependencies, settled upon Anne Duchess of Albany in 1477.

[3] See the Roll, in the Siege of Carlaverock, p. 34.

[4] *Ibid* p. 211.

and Dunbar; which is countenanced by old practice in the sister kingdoms.

nated Earls of Arundel, and of Gowran,—that is, from their respective Castles of Arundel, and Gowran, &c. The previous assiduous antiquary is unable to determine of what stock of the Grahams, Henry de Graham was, another hero at Carlaverock; for "Sir *William (Robert)* Douglas, (author of one of our very incorrect and faulty Peerages,) takes *no notice* of him,"[1]—certainly a most likely circumstance, and just what was to be expected. The same Henry, evidently from the saltier accompanying the escallops (the principal Graham bearing) in his shield, was of the distinguished line of the Grahams of Eskdale, connected with Annandale, he adding the saltier, the original feudal arms of that district, in token of feudal and clannish dependence upon the Bruces of the royal stem, the first and paramount Lords of Annandale, like other feudatories, and proprietors, as is notorious, in that quarter. Although the fact, inadvertently, has been differently stated by some, the saltier was exclusively the arms of Bruce,[2] (not borne by them, as fabulously held, in right of an Annand heiress,) and thus came, by our general heraldic practice, to be those of Annandale, &c. I observe Sir Harris, and English legal antiquaries, very frequently quote Douglas as an authority; if they knew the true character, and nature of his Peerage, (here referred to by the former,)—so immeasurably inferior even to Dugdale's similar lucubrations in England,—I am sure they would be the last to do so.[3] Nor does Wood's Edition much amend.

Who was Henry de Graham, mentioned at the siege of Carlaverock?

Edmund Hastings, younger brother of John Hastings, the competitor for the Scottish crown, in 1291-2, also figures at the Siege of Carlaverock, and in the Roll.[4] In the famous letter of the English Barons to the Pope in 1301, noticed, and commented upon by Sir Harris Nicolas in his preceding performance, and in the Archæologia, he is described as "Dominus of *Enchuneholmok*," or "*Enchimchelmok*," while the legend on his seal, appended to the same, bears to be "S: Edmundi: Hasting: *Comitatv: Menetei*."[5]—This description and designation, not unnaturally again, has puzzled him, as well as other English authorities,—as much as the uncouth epithet, "Kenkynol," Lord Hardwicke, in the Cassilis claim,[6] without any satisfactory means

Sir Harris Nicolas, and English authorities, puzzled with the style and designation of Edmund Hastings in 1301, brother of the Scottish competitor, another Carlaverock hero.

[1] *Ibid.* p. 331.

[2] The chief, too, was also used both by the Bruces and Grahams.

[3] By the way, Chambers, in his Caledonia, vol. I. p. 547, *n.* c, far from inaccurately states, that Douglas's "account of the Grahams, which begins with legend, is a vast mass of confusion, contradiction, and error."

[4] Siege of Carlaverock, pp. 56-7, 299, 300.

[5] *Ibid.* pp. 299, 300, referring to Palgrave's Parliamentary writs, and "Archæologia," vol. XXI. pp. 192, 217-18. "Enchuneholmok," &c. is there so given, but I rather suspect that the original, on a critical examination, might warrant the reading of "Enchmichelmok," or "Enchmacholmok," owing to the noted flexible character of two of the middle letters,—which would even more closely identify the word with that to be noticed.

Enchmichelmok or *Enchmacholmok* suspected to be the true reading in the English authority.

[6] See p. 574.

of solution, or riddance of their embarrassment. Sir Harris, in the dilemma, seeks amusingly, to interpretate the significant words, "Comitatu Menetei," as of "Saint David's in Wales,"[1] from whence it seems Edmund here takes his designation; which, though not so remote as Jericho, may be yet allowed to be rather far-fetched; but he, and all utterly choak at the barbarous "Enchimcholmok," "Enchunchelmok," &c. which they can by no means digest.[2] Although certainly not a Daniel, I think I can explain these portentous and mysterious writings, that have dazzled and blinded our antiquarian neighbours. It happens to be expressly proved, by a cotemporary English Record, that John Hastings mentioned, the competitor, *brother* of the *Edmund* in question, the 34th of Edward I., had obtained the "*parcel*" or *portion* of the "*Comitatus*" of "*Meneteth*," which had belonged to Alan the *Scottish* Earl of Meneteth;[3] and, as is notorious, was seized by that monarch, on his being captured on the side of Bruce.[4] This, confessedly, as I conceive, is *identically* the very *Comitatus*, latinized, that of "*Menetei*,"[5] in Edmond Hasting's style, and description, and beyond doubt the Scottish Comitatus of "*Meneteth*," (afterwards Menteith or Monteith,) that did partly belong to the above Earl Alan, and infallibly lay in the Sheriffdoms of Stirlingshire and Perthshire, &c. in Scotland, —instead of being "Saint David in Wales." While it, moreover, is as certain, that the principal residence, or fastness, and "*chimmies*" of the Earls of "Menetei," or "Meneteth," in right of *this* fief, comprised two *islands* in the lake of "*Inchemacholmok*,"—written also, chiefly subsequently, "Inchmaquhomok," and (latterly), "Inchmahome,"—*or* of "*Meneteth*," as it was further styled. The former venerated appellation extended to the *general* locality, though, strictly, that of the *larger* island, which likewise contained a Priory, founded by Walter Comyn, Earl of Menteith, after 1238, whose ample picturesque ruins, with those of other buildings, and the Earl's gardens, &c. were in preservation last century;[6] and where the sepulchral monument (the

The words there, "*Comitatus Menetei*," singularly supposed to denote "Saint David's in Wales;" but they can make nothing of Edmond's further style of *Dominus* de Enchimchelmok.

"*Comitatu Menetei*" clearly, on the other hand, denotes the Scottish *Comitatus* de Meneteth; and "*Dominus* de *Enchimchelmok*" properly "*Inchemacholmok*," Lord of the principal portion, and castle of the same Comitatus.

[1] Archæologia, *ut sup.* p. 218.

[2] *Ibid.* and Siege of Carlaverock, p. 299, &c.

[3] *Calend. Rot. chart. et Inquisit. ad quod dam*, p. 138.

[4] Earl Alan, "qi *fu* Conte *Meneteth*," (he having been forfeited in consequence) at the same time, (in 1306,) was delivered in custody to the said John Hastings. Fœd. vol. II. p. 1012.

[5] The word was written in the 13th and 14th centuries, "Meneteth," and "Meneted," as by instances before me, from Rymer's Fœdera, and the *Rotuli Scotiæ*, &c. so it might likewise perhaps be either of these, or Menetet, in the English authority referred to, the "d" or "th," which amount to the same, being obscured, or obliterated by time, and the more likely, as Sir Harris Nicolas informs us, that the legend comprising the description, is "now very *imperfect*." Archæolog. *ut sup.* p. 217. In Blaer's Atlas, in 1662, the lake is that of *Inchemahumo*.

Old orthography of the Comitatus of Meneteth, Menteith, or Monteith.

[6] See Macpherson's Geograph. Illustrat. under "*Inch-mahomo*," and "*Menteth (Lake* of,)" the Priory of "*Inchmahome*," (the *present* designation) by the Rev.

same being naturally the family burial-place) of Walter Stewart, Earl of Menteith, who figured after the middle of the 13th century, is yet to be seen.[1] We hence now again, equally, discover the import of the remainder of Edmond de Hasting's description, consisting in the still more inexplicable designation, as was *thought*, of "Dominus" of "Enchimchelmok," or as, I suspect truly, "Enchmichelmok," or "Enchmacholmok,"[2] as well as the locality of the title,—it being nothing more than the preceding "*Inchmacholmok*," which the very sound, and pronunciation intimate, as shewn; or the *insula Sancti Colmoci*, or Saint Colmok's isle, from its tutelary saint;[3]—the prefixture "*Inche*," or "*Enche*," (an obvious English corruption,) denoting an island with us, and "*ma*," *good*, or *holy*; while *l* formerly, being often mute, has been suppressed in the English orthography, as well as in the other Scottish acceptation of "Inchmaquhomok." Combining therefore, the *entire* description of Edmond Hastings in 1301, thus articulately rendered, which indeed speaks for itself, so consistent, obviously self-explanatory, and corroborative, it resolves simply into this, that he was Lord of "Inchemacholmok," in the Earldom of Meneteth,[4] the *other* parcel or portion of the latter, *distinct* from what was granted by Edward I. to his

Inchmacholmok expresses strictly *Insula Colmoci*, or the principal Island in the lake of Meneteth, or Menteith, which hence, with the general locality, was also called Inchmacholmok or *Inchmaquhomok*.

Macgregor Stirling, pp. 32, *n.* 114-15-16, Macfarlane's Geog. Collect. Ad. Lib. &c. &c. In the Scottish Chamberlain's Accounts (vol I. p. 306.) for the year 1358, there is allusion to a procedure "per *Priorem* de *Inchemacholmok*." See also subsequent note 3, under Priory of "*Sancti Colmoci*." I need not add, that the lake of Menteith, with the ruins, and *old* trees, is still extremely lovely and romantic.

Sepulchral monument of Walter Stewart, Earl of Meneteth, who figured after the middle of the 13th century at Inchmacholmok, now called *Inchmachome*.

[1] It exhibits *his* arms, a fess cheque for Stewart, differenced with a label in chief, as a cadet of the principal stem of Stewart. He is cross-legged, having been a crusader, while a slight coronet, peculiar to his time, and quality, encircles his head. The same arms, as by his seal, which I have seen at the Chapter House of Westminster, were borne by Earl Alexander, his son, in a shield, upon the breast of an eagle displayed. The family afterwards took the mere simple difference exclusively, of placing the cheque on a bend dexter. Edmond de Hastings, in the Carlaverock Roll, has his paternal arms, or those ordinarily of Hastings, with the difference of a label in the former way, which was then much used by our higher Barons, independent of Princes. See Siege of Carlaverock, pp. 56-7. It is the known Orleans difference. [2] See p. 990, *n.* 5.

[3] See what is stated, p. 991, *n.* 6. Spottiswode's Religious Houses, under *Inchmahome*, *ap.* Keith's Bishops, "Priory of Inchmahome," *ut sup.* p. 29, referring to General Hutton, the famous Scottish monastic antiquary, and pp. 114-15, &c. *ibid.* Macpherson, *ut sup.* An original grant by Alan Earl of "Menetheth," forfeited by Edward I. in 1306, (in the Halden of Gleneagle's Charter-chest,) but without date, of the lands of Rusky, in the "Comitatu de Menetheth," is witnessed by "Cristino *Priori* de *Insula Sancti* Colmoci;" and "Adam *Priour* del *Idle* de *Seint Colmoth*, et le *Couent* de mesme le lu," among the other Scottish ecclesiastics, swear fealty to Edward I. in 1296. See Ragman's Roll, p. 117.

[4] In like manner, as Anne de Boulogne would have been described, in right of her Scottish jointure property, namely, of Colbrandespath, in the Earldom of March, of which the former was the chief castle, (see p. 989, *n.* 2.)

brother,—which he thus necessarily held,—and the principal, containing the chief castle and "chemys," almost impregnable from its insular situation, the bulwark and head-quarters of that important fief. This, at least, must be the clear legal conclusion, unless such *precise, co-identical* places by *name*, but still always in connection with "Edmund Hastings," happen to be detected in "Saint David's in Wales," or elsewhere, which I rather conceive would be somewhat miraculous; for, as yet, I am aware of only *one* Earldom of "Meneteth," and "Enchemacholmok," and of *no other* places that approach to them in name and description. And my interpretation besides, naturally quadrates, and is supported by the circumstance of Edmund, independently of his possessing lands in Scotland in 1296,[1] which he lost or forfeited in 1306, at Bruce's accession,[2] having been much engaged in the Scottish wars.[3]

Edmond Hastings's *true* designation, Lord of the former place, in *Comitatu* de Meneteth, and not of "St. David's, in Wales."

Nay, he had even a special command, (as we may presume, owing to his military eminence and talents,) from Edward I., the 11th of September 1302, to remain in his service in that country, instead of attending Parliament, to which he was repeatedly summoned.[4] While, therefore, a parcel of the *Comitatus* of Menteith, forfeited by Earl Alan, and hence to be disposed of by Edward, was given, as a suitable return, to John Hastings, the competitor, who, besides his Scottish royal descent, had likewise distinguished himself on the king's side, against the Scots,[5] another, upon a proportionate scale, from the same motive, was *confirmed* to, and *consolidated* with his brother,[6] who had even more so; namely the principal, and more material, which, from what has been premised, as containing the castle of Inchmacholmok, &c. was best subservient to military purposes, and hence the better intrusted to his maintenance, owing to his superior admitted military qualifications. Obvious policy too, would thus suggest the division of the entire fief between *one* English family, though having Scottish relations, yet the close, and devoted adherents of Edward I., and swayed by a common English interest; which again reconciles and upholds my solution of Edmond's description in 1301, by cogent probability, that is unopposed too, by any objection.

Also supported by circumstances, the Comitatus being held, through the concurrent policy of Edward I., by him, and his brother, &c.

So much, therefore, for things, as they yet stand; but *further* still, I think that my conclusion as to the latter, may be, besides, palpably and curiously evinced, and corroborated, even by a *personal* interest and claim attaching legally in Edmund Hastings, to the preferable or dignified portion of the Meneteth fief in question; in support of which, there would appear to exist, if not strictly the most direct, at least morally strong and irresistible proof.

But further, my conclusion is confirmed by a *personal legal* right attaching to Edmond, in the previous subject.

[1] See Ragman's Roll, p. 157, and Rot. Scot. vol. V. p. 3.
[2] See Robertson's Index, p. 1, No. 16, and p. 26, No. 19.
[3] Siege of Carlaverock, pp. 299-30.
[4] *Ibid.* and Palgrave's Parliamentary Writs, Digest, &c.
[5] Siege of Carlaverock, pp. 296-7.
[6] As to this, and the main nature of his title, see afterwards.

It also centered in him, in virtue of his wife Isabella, a great Scottish heiress.

The wife of Edmund, or Sir Edmund Hastings, as he came to be styled, was certainly a great Scottish heiress,[1] which of course rivetted his connection and interest with Scotland. This is duly established by her solemn act of homage to Edward I. in 1306, with others, of whom she pre-eminently takes the lead, in the character of "Domina *Isabella, uxor* Domini *Edmundi de Hastinges*," for a portion of her estates in Forfarshire and Stirlingshire, that partly comprehended the Comitatus of Meneteth.[2] We thus obtain her Christian name; but what was her surname? That next transpires from a curious mandate or order by Edward I. the 5th of January 1292, directed to the feeble and incapable John Baliol, then king of Scotland, wherein he apprizes him that *at the time* when he *held* the kingdom of Scotland, "*ut* ipsius superior Dominus," he (Edward) *might* have given *(dedissemus*, i. e. duly, by law) the *maritagium* of the said Isabella, which *then fell* to the crown, to the said Edmund de Hastings, "*dilecto* et fideli *nostro*," and insists upon John, who had here different views, recalling, and absolving the lady from the *oath*, it seems, he had "*extorted*" from her, that she would not marry without his consent; which was deemed derogatory to Edward's right, through the *superiority, so previously* vesting in him, and which (of course,) he was determined yet to exercise, and implement in behalf of Edmund.[3] This shews the high importance, and competition necessarily attaching to Isabella, and her alliance, who, in consequence of such singular retrospective interposition,—a grant of *maritagium* for the most part, inducing an actual marriage between such parties,—has been obliged, John being wholly controlled, to obey the dictates *in toto*, of the haughty Lord paramount, to do as he was inclined, and in reality, as we have seen, to marry his cherished subject and favourite.[4] But, in regard directly, to the main point here, and as establishing what I premised, she is, in the mandate, expressly styled "Isabella *Comyn, relicte Willielmi Comyn*," which not only unfolds her surname,—that of *Comyn*—as well as her *husband's*,—our higher ladies, such as Isabella, according to the peculiar Scottish custom, still retaining their maiden appellation, after their marriage and widowhood,[5]—but further, opens a door to her filiation and extraction; for,

Curious interference of Edward I. in 1292.

The former, Lady Isabella *Comyn*, widow of *William Comyn*, dead at least before the date stated, the 5th of January 1292.

[1] This intimation is besides, the more important, as Sir Harris Nicolas says, that "whether *he (Edmund)* was *married*, and left issue, is unknown;—nor is *any thing* stated on the subject in the pedigrees of his family." Siege of Carlaverock, p. 300.

[2] Rymer's Fœd. last Edit. vol. I. part II. p. 995.

[3] Rot. Scot. vol. I. p. 16, a.

[4] There could certainly be no feudal objection to the marriage from "disparagement"—Edmond, as well as his elder brother, the competitor, being descended of the Scottish royal family, and having good Scottish blood in his veins; nay, had the kingdom of Scotland wholly gone, in the course of common law, the latter, as is well known, as the third younger co-parcener, after Baliol and Bruce, would have been entitled to one-third of the kingdom.

[5] This has been fully proved under the Moray claim, see pp. 788-9, 790-1, &c.

laying all the circumstances together, I conceive it is plain, that this defunct, her first spouse,—she hence too being a widow, and entitled to a Comyn jointure,—was no other than "William Comyn" of Badenoch and Kirkintulloch,[1] the undoubted chief of the Comyns. That person, it happens, was alive, the Friday after the festival of Saint Gregory in 1290,[2] but had as indisputably predeceased without issue, the 3d of August 1291, when John Comyn, next of Badenoch, his *younger* brother, gave in his claim, as one of the competitors for the Scottish crown, and in which, as in a modern Peerage case, he explicitly shews, (as was incumbent,) that the family succession and material representation had devolved on him, owing to "William Comyn," his elder brother, a very striking coincidence, *having died "sine* hærede de corpore suo."[3]

Isabella no other than the widow of William Comyn of Badenoch, and Kirkintulloch, elder brother of John Comyn, the competitor.

But this is not all; for the *last* William, as is fixed and ascertained, himself a *Comyn*, had *moreover married a Comyn*, his first cousin,—thus affording in her case, a pointed coincidence again, with that of the above Isabella Comyn,[4]—who was *no other* than the *child* and *heiress* of the *Countess of Meneteth*, in her own right, direct descendant, and representative of the original Earls of Meneteth, by Walter Comyn, the uncle of the said William, who was, of course, Earl of Meneteth by the courtesy. The grant of the *maritagium* of this sole child and heiress of the Countess of Meneteth, must therefore, in the event of her widowhood, and survival, have strictly fallen some time after the Friday since the festival of Saint Gregory in 1290, when her husband, William Comyn, was alive, but before the 3d of August 1291, when he had predeceased; which again signally corresponds, in its necessary date and character, with the *second maritagium* also, of Isabella Comyn mentioned, also the widow of a William Comyn, and the spouse, *secondly*, of Edmund de Hastings,—which, as indubitably, had opened to the crown, not merely about the 5th of January 1292, the date of the preceding mandate of Edward I., who there alludes to it, but specifically, *between* October in 1290, and the 19th November[5] 1292, when, as likewise follows, from his express intimation there, to that effect,—this period comprising the length of such interregnum,[6]—he held, and disposed of Scotland, and its interests, as Lord paramount, and superior. And the argument from this last coincidence, and consequent identity of Isabella Comyn, with the daughter of the Countess, tells the stronger, when it is remembered, that grants of the *maritagium* casualty were ordinarily made by the crown, shortly after they fell, certainly in the case of a widow, such as she, arrived at maturity. Combining therefore, these striking facts,

Which William did marry a Comyn, evidently the above lady, who was the daughter and heiress of the Countess of Meneteth in her own right, by her husband, Walter Comyn.

Further corroborations.

[1] Kirkintulloch was one of the oldest family possessions, transmitted from an early period, and among the principal, next to Badenagh.

[2] See Rymer's Fœd. last Edit. vol. I. part II. p. 730. There being festivals of several Saint Gregories in the year, I cannot, at present, fix the precise month.

[3] Rymer's Fœd. last Edit. vol. I. part II. p. 776.

[4] See above, p. 994.

[5] January then followed November in the Calendar of the year.

[6] See Hailes's Ann. Edin. 1797, vol. I. pp. 214-15-16-17, 243.

From the Countess's name too being actually *Isabella*, and the general concurring circumstances and merits of the case.

with this other, equally so, formerly unknown, but, as I have lately discovered, that the name of the above Countess of Meneteth actually also was *Isabella*,[1] which, in every likelihood,—especially in an age when female Christian names were but few, would descend to her daughter; and further, that *no distinct* "*William* Comyn" at the time, but *he* of Badenoch and Kirkintulloch, can be properly ascribed to "Isabella Comyn," the "*wife*" of a "*William Comyn*,"—thus having besides, the identical Christian name of the former,—as her husband; while, not overlooking either, but taking fully with this, the whole jet *aliunde*, and uniform, and corroboratory complexion of the case, as already, and to be afterwards adverted to, I humbly submit that *she*, Isabella Comyn, could be no other than the Countess's daughter.

Edmund Hastings, therefore, in right of his wife Isabella Comyn, was the elder representative of the Earls of Meneteth, and thereby entitled to the style of *Inchemacolmok*, the principal locality in that Earldom, quite in unison with his description in 1301.

Holding then "Isabella Comyn" to be thus filiated, and possessing such eminent status, she was clearly, in right of her mother, whom she exclusively represented, the direct and preferable heiress of the ancient Earls of Meneteth, their dignity and estates having confessedly devolved to her mother; so that we now discover how *her* second *husband*, *indubitably* Edmund de Hastings, who, by the courtesy, had legally, whatever she had, was more especially, and immediately entitled to be "Dominus" of "Inchemacholmok," (of itself, by the way, corroborative of the identity in question,) that is, as has been proved, actually of the "*Meneteth principal*," as we would say,[2] with which the former was synonymous. In other words, it was the chief portion of the dignified Meneteth fief, what legally attached to the eldest Meneteth heiress,—and in the same way, reflectedly, to him, through his wife, in that capacity; hence irresistibly supporting my interpretation of his description in 1301, that infallibly related to the above, and not to "Saint David in Wales." Why Isabella did not assume the title of Countess of Meneteth may be easily explained, by certain special bars and impediments judicially in her way, that are familiar in history. Countess Isabella, her mother, upon the decease of Walter Comyn, her first husband, (a younger son of the family of Badenagh,) founder of the Priory of Inchemacholmok, had hastily married in 1258, without due permission of the crown, to whom her second *maritagium* (as in her daughter's instance,) thus fell, Sir John Russel, an "*ignoble* English knight;" in consequence of which, and a charge against her of poisoning the former, a powerful and distinguished personage, after being imprisoned with Russel, she was stript of her inheritance, and compelled to fly to England; when the Earldom, and estates of Meneteth, being *wantonly* (*"protervè"*) claimed by Walter Stewart, (the Earl, who lies buried at Inchmacholmok, or Inchmahome,[3]) in right of his wife, *Mary*,[4]—the next, though younger, Meneteth heiress, were allowed him. This is curiously transmitted to have been "fa-

Reasons why Isabella did not take the title, and previous Meneteth history.

[1] See p. 997, n. 1.

[2] John Haldane, husband of Agnes, eldest coheiress of the Earls of Lennox, in the 15th century, was thus styled, "of the *Lennox principal*."

[3] See pp. 991-2.

[4] *Ex parte uxoris suæ, Ford. ut seq.*

vore magnatum," chagrined at the Countess, a woman of great attractions, having frowned at their overtures of marriage; "*unde*," Fordun states "mortem comitis, viri prioris, ei imposuerunt," and imprisoned her, and the knight.[1] A fruitless attempt was made by Countess *Isabella*, judicially, to recover her possessions, in 1260.[2] In 1273, upon her demise, her only child—*Isabella* Comyn, as now turns out—by Walter Comyn, having married, as we, at the sametime, learn, her first cousin, William Comyn, son of John Comyn of Badenagh and Kirkintulloch, a keen litigation, at the instance of John, as their guardian, ensued at York, for the Earldom in question, against Walter Stewart; the result of which does not transpire, only the lady is stated by Fordun to have been "*verè hæres*" thereto.[3] The suit, raised in a foreign kingdom, by foreign interference, probably was hence incompetent, and proved inept. But, at length, it being instituted at *Scone*, by the said William Comyn, in 1285, against the same Walter—in a *manner* the intruder, —things were settled, under royal authority, rather unduly, in one view,—(Isabella, the true heiress, *de facto* at least, being wholly inno-

Isabella, her mother, forfeited her right by *unduly* marrying a second time, after being charged with poisoning her husband.

Adjustment of the Meneteth succession in 1285, where, although the

[1] Fordun, Goodall's Edit. vol. II. p. 92. Lord Hailes, in the Sutherland case, observes, "who was this Lady, the wife of Walter Stewart, and what was the nature of her claim, does not with certainty appear. It is probable, however,—that she was the younger sister of the *widow* of Walter Comyn," (the *Countess* in the text). (Ch. 5. sect. 4, p. 14.) I have been, so far, fortunate here, as to supply her Christian name, previously unknown, which was Mary, upon the authority of an original confirmation, (in the Grant or Seafield Charter-chest,) by Alexander III. in 1267, of a grant by "Walterus Senescallus Comes de Menetethe," with consent "*Marie* sponse sue *Comitisse* de Menetethe," of certain lands, to Sir Gilbert de Glenkerny. Her full figure is also sculptured on her husband's monument, on the right; see pp. 991-2. This other original charter, which I further discovered in the Douglas Charter-chest, does the same service to the *ejected* Countess herself, who was before equally *anonymous*, besides legally proving her marriage with Sir John Russel, and letting out something more. "Omnibus. &c.—Dominus *Johannes Russellus*, et *Isabella sponsa sua*, *Comitissa* de Menethet—noverit, &c.—nos dedisse —Domino Hugoni de Abyrnethin, et heredibus suis—viginti libratas terre—in territorio de Abirfull, &c. His testibus Domino Duncano, Comiti de fiffe, Domino Malisco, Comite de Stratherne, Domino Alexandro Cumine, Comiti de Buchane, Domino Willielmo, Comite de Mar, Domino Johanne Cumine, tunc justiciario galuvidie, Domino Willielmo Monte fixo," &c. all first-rate personages. This conveyance, (which I printed elsewhere,) without date, and where Sir John does not take the title, owing to his marriage being without the consent of the crown, and the enmity of the magnates, has been to purchase his, and his wife's freedom, and to be allowed, with her, to leave the country; which was at length acceded to, after their undergoing some *fleecing*, of which this was a sample. It is remarkable, that the entire figure of the Countess, on her seal appended, erect in flowing robes and habiliments, corresponds in costume, with that of Mary Countess of Meneteth, her successor, on the above monument at Inchemacholmok, that characteristic, and interesting relic of Scottish antiquity.

Proof of the Christian names of the Countess of Meneteth, Isabella's mother, and of the Countess her successor, the wife of Walter Stewart; also of the second marriage of the former, with other particulars.

[2] Fordun, *ut sup.* p. 96.

[3] *Ibid.* vol. II. p. 120. See also, in part, Winton, the next authority referred to.

half of the Earldom was confirmed to Isabella, it was without the chief chemise and title, which were given to a remoter heir.

cent,)—after this fashion; that Walter Stewart should retain half of the *Comitatus* of Meneteth, with the "*themys*," ("CHEMYS,") or "*Chimmeis*,"[1] and necessarily the dignity that was usually attached thereto; while William Comyn, (in right of his wife,) should hold the other half "in fre Barony—*als gud* in *all* profyt—besyd ye Erldwme," (which went to Walter) "all qwytly."[2] Such visitation, her mother's ignoble nuptials, without the consent of the crown, as stated, no doubt a high feudal offence, aggravated likewise, by the alleged poisoning of her first spouse, like that in the decalogue, drew after it, in respect to the offspring. In this way, the Earldom of Meneteth, devolved through Earl Alexander, the son and heir of Walter Stewart, to Earl Alan, already adverted to, forfeited by Edward I. in 1306; but he, being far from a warm adherent of that monarch, but, on the contrary, siding eventually with Bruce,—indeed the cause of his forfeiture, while Edmond Hastings, the second husband of Isabella Comyn, was quite the reverse, Edmund, as we may presume, contemning the adjustment mentioned in 1285, in the very distracted and turbulent juncture, after 1292, has claimed, and seized from Earl Alan what was strictly preferable in her, namely, Inchmacholmok, backed of course, by Edward I., who would doubtless support him in the possession, which did in fact obtain, seeing that he was, besides, his subject and favourite. By some likely compromise, or sufferance, Earl Alan may have been enabled to retain the remaining portion, or parcel, that, however, by his complete English forfeiture, as has been proved, was not inadequately given, and for the reasons assigned, to John Hastings, Edmond's elder brother. In these circumstances, Edmund being only a cadet, the proud and exalted appellation of "Dominus" of "Inchmacholmok," or of "Meneteth," *in fact* exemplifying, and founding his prior right to the Meneteth dignity, was just what he was most likely to have assumed;[3] and which he therefore did in 1301, in full corrobo-

Edmund Hastings, backed by Edward I. may have contemned such adjustment, and taken naturally what was preferably in his spouse.

[1] The principal messuage or castle.

The Meneteth adjustment in 1285, further shews that anciently, recompense was due by the elder coheiress to the younger, for the chemise.

[2] See Winton, Macpherson's Edition, vol. I. pp. 397-8. This supports the notion entertained, that Mary, the wife of Walter, was a younger co-parcener with Isabella, or her mother, though the law, owing to a specialty, has been, in a degree, reversed in her favour. As exemplified here too, and elsewhere,* the principal messuage was not given, as a *præcipuum*,—as at present,—it has been understood, agreeably to English doctrine, that recompense was due for it to the other co-parcener. This is evidently evinced by the condition, that the baronial half is to be possessed freely, "*als gud*, in *all profyt*," as the "*Comital*." I may add, that Macpherson has printed above "*themys*" very erroneously, instead of "*chemys*," as will be seen by examining the original MS. of Winton, his authority, in the British Museum; and singularly, although the meaning here, is so plain, Lord Hailes has also committed the same mistake in the Sutherland case, (see Chap. V. sect. 4, p. 17,) where he assumes "themys" to be the real expression, and holds it to imply the clause, "cum *bondis* et nativis," or, "the serfs on the estate," in favour of Walter!

* See my remarks on the Lennox or Rusky representation, pp. 10, 11, 12.

[3] It being derived from Scotland, forms no objection. Other English families

ration of my main conclusion. But although he, by the courtesy, in right of his wife, the eldest Meneteth heiress of line, thus held her succession, he could not, without the direct sanction of Edward I., especially according to the English notion, take the title of Earl,—as to which that able and sagacious monarch, from political motives, not wishing either to offend the powerful John de Hastings, now the other Meneteth co-parcener, who, being no Earl, might also have aspired after the same pre-eminence,—had not yet signified his intention. Things, therefore, so far, still remained in abbeyance, without either taking the title.

Still Edward I. might not have recognised the title in her, to the prejudice of John Hastings, the other co-parcener, by a singular title.

The fact of Edmund de Hastings likewise being reinstalled, or restored by Edward, (evidently through the courtesy,) in 1296, after the downfal of Baliol, previously the admitted king of Scotland, in lands in Perthshire and Stirlingshire,[1] while Isabel Comyn has been proved to have done homage in 1306, for others in the latter county,[2] additionally points at their possession of the Meneteth inheritance, as the Comitatus of Meneteth lay in these Sheriffdoms. There is another circumstance too, indicative of such Meneteth interest and possession.

Other corroborations of my conclusion.

In 1297, Edmund became surety and cautioner to Edward I. for John "Drumman" or Drummond, a Scottishman taken in arms against him, that he should go abroad and conduct himself in future, *loyally* and faithfully.[3] Now it singularly happens, that the lands of Drummond, belonging to the family of Drummond, of whom the latter has been represented as the head and ancestor, lay exactly in the contiguous parish to Inchemacolmock;[4] from whence, we may, with reason, conclude, that this, implying an intimate connection between the parties, and further attaching Edmund to that locality, was owing to his being Drummond's paramount, or superior, in certain respects,—the neighbouring families and vassals especially, in the case of a great fief, similar to Menteith, having naturally a subordinate and demi-clannish dependence upon such lordly proprietor; while he generally, with us, as above, was answerable to government for their actions and behaviour. The House

Edmund de Hastings surety for John Drummond, a Scottish proprietor, adjacent to Inchemacolmok, in 1297.

representing Scottish, and the heirs by descent to Scottish titles, were even, as is notorious, summoned, under them, to English Parliaments, and sat as Earls, such as the Beaumounts, and Umphravilles, respectively, Earls of Buchan, and Angus, &c. even long after their connection wholly ceased with Scotland.

[1] Rotuli Scotie, vol. I. p. 30, a.

[2] See p. 994.

[3] Rot. Scot. vol. I. pp. 45 b, and 49 b.

[4] At least in 1748, the parish called the Port of Menteith, comprising the Lake of Menteith, &c. is stated, by authentic evidence, in Macfarlane's Collections, Advocates' Library, to be *bounded* on the south by *Drymen* parish,—the same as *Drummond*, and of course by the lands, the cradle, and original patrimony of the Drummonds, and where they resided in 1297, and long after. The fact, I believe, is indisputable.

of Meneteth, by whom grants indeed can be proved to have been made to the Drummonds,[1] must have had many superiorities, and vassals in that quarter; and on any other ground, than "Lord of Inchemacolmok," as he must have been, it is not easy to explain such interference, as this of Edmund, on the occasion, certainly an Englishman, and otherwise quite a stranger there.[2] The great preponderating interest and possessions which Edmund, or Sir Edmund de Hastings happened to acquire in Scotland,—while in excellent keeping with his designation in 1301,—equally accounts for the fact justly noticed by Sir Harris Nicolas, of "very little" being "known" of him,—that is, in *England*.[3] His last mention is strikingly "about 1314,"[4] the memorable year of the Battle of Bannockburn, the grave of so many English heroes,[5] in

Edmund's last notice about 1314, and his,

[1] There is a charter upon record, without date, by Murdoch Earl of Meneteth, the successor of Earl Alan, forfeited in 1306, of the lands of Buchopill, in the *Comitatus* de Meneteth, to Gilbert Drummond; and the Reverend Macregor Stirling shews, in his Priory of Inschemachome, referred to, (see p. 34, &c.) that there was actually a "connexion of the Drummonds with Inschemachome."

[2] Neighbouring families and dependents, in like manner,—such as the Drummonds then were, (however afterwards, high, and ennobled,) in reference to the Meneteths,—as is abundantly proved, in Annandale, the Merse, the Lennox, &c. &c. occasionally took the arms also, of the paramount Lords, and family in the district. And again, it is remarkable, that those of Drummond, barry wavy, were identical with what Edmund Hastings bore upon his seal in 1301, *when figuring as* "Dominus de Inchemacolmok,"—independently of *his* family *insignia* of Hastings, when engaged at the siege of Carlaverock, which were quite different. (See Archæologia, vol. XXI. p. 217, and Siege of Carlaverock, p. 56.) This circumstance, as is not surprising, has appeared inexplicable to Sir Harris Nicolas, which he thought it "impossible to explain." (Archæolog. *ut sup.* p. 218.) Query, might not the former have been the actual arms of Edmund's wife, as the "*verè hæres*," in right of the original Earls of Meneteth, that happen to be unknown, and taken too, by the prevalent custom alluded to, by the Drummonds? The younger intruding line of Menteith, if we may so call them, after Countess Isabella, merely contented themselves with their own differenced arms of *Stewart*. There are unfortunately, no arms on the seal of Isabella, formerly noticed, (see p. 997, n.) but only her figure. But the above, at present, is merely a speculation. It is observable, that the Logies of Logie, (noticed in the article, No. IV.) connected in the same way with Strathern, and other families in Strathern, took two chevrons in their shields, which were the precise arms of the original Earls of Strathern, like those of Meneteth, the Lords paramount of that district. As to the Hungarian or Atheling origin of the arms of Drummond, I need hardly add, it is too absurd and fabulous to claim a moment's attention. The above Logie arms are in an old MS. Heraldic Matriculation of Scottish arms.

Coincidence between the arms of Edmund Hastings in 1301, and the Drummond's, his dependents, in reference to the argument in the text.

The arms Edmund bore in 1301, possibly, in right of his wife.

Peculiar usage as to arms formerly with us, and fabulous origin of those of the Drummonds.

[3] Siege of Carlaverock, p. 299.

[4] *Ibid.* p. 300. In 1312, as Sir Harris also shews there, upon the authority of the Patent Rolls, he had been appointed by Edward II. to the important command of *Custos* of the town of Berwick, the key of Scotland.

[5] It might be interesting to compile a full enumeration of those who fell at that

which he possibly fell too; as we may still more presume, without issue, by the noble, and high-born Isabella Comyn,[1] as to whom record seems silent since 1306, and who proved sterile at least, to her first spouse. Had there been issue in the latter case, they might have been entitled, in virtue of their father's repeated summonses to Parliament, naturally continued in their own persons, to an English Barony by writ, independently of being, according to my conclusion, the preferable heirs of line, together with a dignified Comyn representation, of the original Earls of Meneteth, whose Earldom too, was a female fief.[2] In nearly leaving this subject, I cannot refrain again from remarking, (as I did in a former work,) what a curious and strange fatality has ever attended the Earldom of Meneteth, or Monteith, in every guise and predicament, being from the first[3] to the last,—nay, including this moment, when it still happens to be legally contested,—instead of devolving in a calm, smooth, undisturbed course,—a perpetual cause of *unnatural* strife,[4] distraction, or keen legal competition,—while the

and his wife's ultimate fate, unknown.

Her great rights and claims.

Singular fatality attaching to the Earldom of Meneteth.

"fatal battel,—near *Strivilin*," (Stirling,) as Dugdale, and English authorities, style Bannockburn, contrasted with the dire havock, but *vice versa*, at Flodden; with which, the more I look into any Scottish charter-chest, the more I am sensibly struck, almost every distinguished Scottish family having then been prematurely deprived of an ancestor, or member.

Massacre at Bannockburn and Flodden.

[1] She was clearly, the heiress at least, to one-half of the *Comitatus* of Meneteth, as profitable as the other, (see p. 998), besides, to whatever, independently, centered in her father Walter Comyn, Earl of Meneteth, &c. the most able, wise, and powerful nobleman of his time; not to add, entitled to a corresponding jointure, as widow of the short-lived William Comyn, her first husband, chief of the House of Comyn, then the greatest and most numerous in Scotland. Her mother's ill fate (whether owing to the *poisoning)* seems also to have attached to her husbands.

[2] In the patent Rolls, there are notices of grants, the 5th of Edward II. and 2d of Edward III., (*ibid.* pp. 73, and 103,) of manors and haereditaments, &c. "in *Scotia*," to the value of 300 marks *per annum*, and of the lands of Bathket, and *Rathen*, *(Ratho)* there, "Roberto de Hastinges," and "Hastange," which I take to be the same. Who this is, whether a descendant or relative of Edmund de Hastings, I shall leave to English antiquaries to explore. The Earldom of Meneteth, owing to the final preponderance and success of Bruce, reverted to the family of Alan Earl of Meneteth, in exclusion of John Hastings, Lord of Abergavenny, the competitor, ancestor, as is notorious, of the Lords Hastings, Earls of Pembroke, and whose ancient Barony of Hastings has very recently been called out of abeyance, and confirmed to a coheir, Sir Jacob Astley, Baronet, now Lord Hastings.

Who was Robert de Hastings, who got grants of lands, in Scotland, from Edwards II. and III.? He was apparently of a different stock. See Dugdale's Bar. v. II. pp. 62-3, &c.

[3] The difficult, seemingly, and remarkable competition between two brothers, both singularly, of the name of *Maurice*, for the Earldom, with the curious adjustment in 1213, has been already given, (see p. 172, n. where such should be the date, instead of 1214;) and see *ibid.* as to another, evidently in 1237.

[4] Nearly as unnatural as the former, was the Meneteth contest and struggle, after the middle of the 13th century, of Countess Mary, and Walter her husband, with the unfortunate Countess Isabella, her near elder relative, who may have been harshly, or ill used.

fief and lands, the more substantial possession, after being torn piecemeal, has vanished from the respective lines altogether.

Edmund de Hastings might still be described of Inchmacolmok, even supposing the Meneteth adjustment in 1285 had remained in force.

Inchemacolmok, denoting, and being extended to the general locality and lake of Meneteth, besides strictly the name of, by far, the larger island there, a noted, and venerated place, where, as is stated in Macfarlane's Collections,[1] about the middle of last century, the Earl's gardens were discernible, I have held *it* to contain the *principal* Chemys or Castle of the "*Comitatus*" of Meneteth. There was contiguous, as also mentioned, another inhabited, but very small, unrenowned island, called "Talla" or "Ellantallo," where the Earls of Meneteth, at least latterly, had a seat, or House;[2] the same, with certain lands, having been granted by Malise Graham Earl of Meneteth, who figured in the reigns of James I. and II., to his two younger sons, John and Walter, by whom, however, they were reconveyed to the principal stem.[3] Should it be thought that Talla originally contained the principal Meneteth chemys,—then we might conclude that the elder, though partly disinherited Comyn Meneteth line, so far,—erected as their chemys, of course only the second, one in the other Island of *Inchemacolmok, after which* their half of the Meneteth fief, to be held as a Barony, by the adjustment in 1285, and contiguous to the *Comital* half in the Stewarts,[4] would still naturally—as in fact obtained—be named; and of which the possessor would be "*Dominus*," as Edmund de Hastings, by the courtesy, in 1301. This would obviously make no very material difference upon my argument; nay it might even more directly identify Isabella Comyn, his wife, as the Meneteth Comyn coheiress, in right of whom such portion was awarded to William Comyn, her first spouse, by the adjustment in question, which, it might be contended too, presumptively, thereafter still remained in force; and thus accordingly, operated. In *any* way, Edmund, as above, was *co-parcener* of "Inchemacolmok" or "Meneteth."

That would not detract from the main argument.

No. VI.

REMARKS UPON THE NATURE OF THE OFFICE OF PROCURATOR FISCAL, IN THE CONSISTORIAL AND COMMISSARY COURTS, BEFORE, AND AFTER THE REFORMATION; AND CERTAIN MODERN PROCEEDINGS, IN REGARD TO THAT LEGAL OFFICIARY OF THE COMMISSARIES, AND COURT OF SESSION, IN 1813.

(*See p.* 461.)

The Procurator Fiscal, as is proved by the old Consistorial records, was the advocate or public legal fuctionary of the Primate of Scot-

[1] In the Advocates' Library.

[2] See Macgregor Stirling's Inchmahome, p. 71.

[3] *Ibid.*

[4] See pp. 997-8.

land, in all judicial matters, in whose name all edicts or actions issued, whether in confirmations of testaments or executors, (which afforded the former so great a revenue,) the other Consistorial questions, and in such as affected his own interests, and those of the church, and spirituality generally. He watched over, and acted in whatever might compromise its dignity, decorum, or morality. He was hence, at the same time, the criminal prosecutor. Thus, previous to the 2d of March 1548, the "Procurator Fiscal" concurs with Master Paul Schedo in a prosecution against *Master* John Philip, because he had violently assaulted Paul with a cudgel, and wounded him thereafter with a dagger, to the "*large*" effusion of his blood; of both which crimes Master John being convicted, received sentence of excommunication, in terms of the canon, *si quis suadente diabolo*. But, in an ecclesiastical court, especially in these days, it was not to be expected that the *full* rigour of law would be exercised against a churchman like Mr. John; and accordingly, the Judge,—the official of Saint Andrews,—*remitted* the case "*ad sedem apostolicam*,"—"*pro absolutione* obtinenda,"[1] (which of course followed,) thus freeing the criminal, with the same breath, from the blasting sentence pronounced,—though he is condemned in expenses,[2] which, including the further *Roman* procedure, might be heavy. This again evinces the predominancy of the Papal law and influence. On the other hand, in 1531, sentence of absolvitor from an indictment of murder, at the instance of the Procurator Fiscal, was pronounced by the Official of Saint Andrews, in favour of Walter Gordon, parish clerk[3] of Kerrimure, he being found to be "*immunem* de arte et parte," of that of David Skeppar;[4] with which he had been charged.

Nature of the above office, before the Reformation.

He was the criminal, as well as civil prosecutor.

After the Reformation, the public officer in question, *still legally continued* in the Commissary Court, which came into the shoes of the Papal, or of the Officials alluded to, and insisted, as before, in edicts and confirmations of executors and testaments, in processes, actions, and in other relative matters, &c. But, in particular, he strikingly figures on the canvass, in the acknowledged capacity of *censor, castigatorque morum*, as he did during Papacy, even against the clergy, and *ad vindictam publicam*. He pursued divorces *a vinculo*, in the case of illegal

At the Reformation, the Procurator Fiscal still continued, *quoad civilia*, in the Commissary Court, that succeeded the officials.

[1] The actual words are, "*remittens* (the party) *pro absolutione*, &c. prout *remittimus*." What stronger proof than the above can there be of the term *remitting*, only denoting handing over an individual, and his case, to the ordinary established jurisdiction, which in this instance was *infallibly* that of the Pope, who could only absolve? And this, of course, *a fortiori*, bears upon the identical meaning I apply to the term, in *remits* and *references*, by *other* tribunals, to the Session, in cases of honours, as in that of Rothes, and others, (see pp. 939-40, n. 37-8-9,) which were indisputably, as much competent to the latter.

Striking exemplification of the term remit, as formerly rendered, in respect to honours.

[2] Act and Decree Register of the Official of Saint Andrews.

[3] Parish clerks, though of course subjected, *virtute officii*, to church cognizance, were then laics; for their principal duty, and curious mode of election, see pp. 682-3, n. 2.

[4] *Ibid.* Skeppar seems to have been a laic.

His especial duty consisted in checking illegal marriages and divorces, by collusion, as well as upon other grounds.

marriages, of an aggravated kind,—*inter alia*, on the 23d of July 1575, of that of Thomas Paterson, with Christian Johnstone, which was incestuous, the latter having been the niece of the deceased wife of Thomas,[1]—as well as for the prevention and suppression generally, of unlicensed sexual cohabitation.[2] He acted in this way *ex officio*, and proceeded even upon common rumour, having his eye directed to the conduct of all, especially to *collusive* proceedings of parties; whether—through *colour* of ostensible legal procedure—unduly to solder up,[3] or to jactitate a marriage.[4] This certainly was often the only way to eschew the consequent evil. And he frequently, for the purpose of the general edification, and morality, charged individuals contracted *per verba de futuro*, with *copula*, to *fulfil* and *complete* a marriage by *celebration*, and to abjure a connection he denounced in the interval as "a *great* sklander of ye kirk, and hie contempt of godis word,"[5] &c.—which further shews the importance of celebration. The above can be fully instructed by the Commissary Records.

He also denounced concubinage and sexual immorality.

Collusive processes in the Commissary Court in 1813, and exertion made then by the Procurator Fiscal, by order of the Commissaries, to detect and preclude them.

Every one is aware of the *nature* of *certain* collusive proceedings, in cases of marriage and divorce, that have strikingly occurred, before the Commissary Court, in our days; and the Commissary Judges, at length, compelled by their frequency, and urgent motives of justice and rectitude, as they very properly deemed, to check, and counteract so baneful an evil, by an Act, or order, the 21st of May 1813, appointed the Procurator Fiscal, whose office still existed,[6] to attend the examinations in processes that appeared to be of the preceding kind, "and move for such investigation, as he finds to be legal and competent, to detect collusive agreements in cases of divorce, entered into, not only by the parties themselves directly, but also through the *medium* of their agents, or persons in their confidence." This latter step had been practically shewn to be absolutely incumbent. He accordingly,—not incompetently certainly, it may be held, from what has been premised,—did so; but upon the Commissaries appointing, on his application, in

[1] Act and Decree Register of the Commissary Court. Marriages *a fortiori* then, of a man with the *sister* of his deceased wife, such as have occurred in our days, were so; as to which, and the heinous light in which they were viewed, I could adduce further striking proof since the Reformation.

[2] See again, the remarkable case of the Procurator Fiscal against Ogilvie, Fraser, and Chisholm, in 1573-4, pp. 460-1.

[3] As, for instance, in that still, of the Procurator Fiscal, in 1573-4, last cited, turning likewise upon "collusion."

[4] See also a striking example of this, in the case of the Procurator Fiscal, against Janet Cutlar, and John Hog, husband, and wife, in 1573, p. 444, &c.

[5] Amongst other cases, see that of the Procurator Fiscal, against Patrick Loch, and Agnes Weyland, June 6, 1564, partly referred to, at p. 494, *n.*

[6] His name too, "still appeared as for the public interest, particularly in all cases of divorce," however fully unexercised his powers of late. See Mr. Fergusson's work, to be referred to here, as an authority, Appendix, p. 364.

the case of Homfray against Newte, by their interlocutor, the 18th of June 1813,—a witness to be examined, in consequence of pregnant indications of collusion, in order to detect it,—a bill of advocation was presented by an opposing party, to Lord Reston, the Ordinary in the Court of Session; who, having taken the same to report on the 18th of February 1814, pronounced the following judgment: "Having advised with the Lords of the Second Division, remits to the Commissaries, with instructions to *alter* their interlocutor, and to allow the *process* to proceed, as accords; and that *no* further investigation, with regard to the supposed collusion, *shall take place; also* to *find the Procurator Fiscal liable in* the *whole expences* incurred upon the point in dispute." It has always struck me, with submission, that there was *something* crude, harsh, and not altogether authorized, in this judgment; the Procurator Fiscal, thus so grievously visited, having only acted under a special order of the Commissaries,—who have "always had the power, and been in use to make regulations relative to the duties and practice, in their own judicature, under the title of Acts of Sederunt,"[1] but especially, in conformity to his confessed original and *innate* duties, which have neither been legally suspended or repealed. Nay, not nearly so remarkably,—directly, (as a principal party), or to such extent, in this instance, as in the previous collusive, and relative matters, &c. since the Reformation; while the check in question, so condemned and summarily countermanded by the Session, at the juncture, by every good and just principle, was most salutary, and loudly called for. Under these circumstances too, the Procurator Fiscal was naturally deterred from acting in another strongly presumptive case of collusion, that of St. Aubyn against O'brien, in the same year, since which things were allowed to proceed on the former beaten track. For a full account of these later proceedings, with apposite remarks, see "Reports of some recent Decisions by the *Consistorial*[2] *(Commissary)* Court of Scotland," &c. "by James Fergusson, Esq. Advocate, one of the Judges," Edinburgh, 1817, Appendix, pp. 363-4-5, *et seq.* The learned gentleman adduces there an action before the Commissaries, the 11th of July 1565, at the instance of the Procurator Fiscal, "to set aside the second marriage of Custine Stevenson, with Agnes Pollock, the paramour, for adultery, with whom he had been divorced, from his first wife, who gave her concurrence to this action," when "decree was pronounced accordingly,"[3] and the precedent will be added to my cases and authorities cited.

The Court of Session, however, on an advocation, discharge the former from so acting, and award the entire expenses incurred in a question against him, for such interference.

The decision singular.

[1] See Mr. Fergusson's work, subsequently referred to, p. 365.

[2] This old designation had been revived by the Court.

[3] Work, *ut sup.* p. 364.

No. VII.

Remarks upon a late Pamphlet, by Alexander Sinclair, Esq. entitled, "Dissertation upon Heirs-male," &c. &c.[1]

(*See too p.* 965.)

Neither, though evidently not a lawyer, should I omit Alexander Sinclair, Esq. without his meed of desert, an *amateur* by his own declaration in Peerage matters,[2]—and no doubt a good trait and quality in most persons, however such, abstractly rather, in the absence of those wholesome and indispensable guides and rules, that can be alone supplied by legal study and knowledge, with practical investigation into the proper and recondite sources of relative information,—as will be exemplified in his instance, may, for the most part, mislead and deceive, instead of proving of real and direct benefit. In order to prove "heirs-male," *alone* (abstractly) technically, and legally equiponderant to "heirs-male whatsoever," including collaterals, he especially, in his pamphlet mentioned, triumphantly adduces and founds upon fifteen *redoubtable* precedents and authorities, as he thinks, perfectly relevant and decisive in this view. These, (taking them in their order, to which, as not material, I shall not adhere, in the following remarks,) are the Peerage cases of Colvil of Ochiltrie, Rutherford, Roxburghe, Lothian, Strathallan, Dundee, Garnock, Moray, Sinclair, Breadalbane, Gray, Home, Jedburgh, Aston, and Kellie. Assuredly this is a goodly *list*, though my legal and antiquarian readers, doubtless, will be surprised at such an attempt by the aid of such auxiliaries. The Colvil collateral heir-male, appears to have taken after the death of Robert the first Lord, in the reign of Charles II. but how, it is impossible to shew, owing to the *loss* of the patent, which might have been to "heirs-male *whatsoever*," of whose broad, unbounded meaning, and efficacy, there can be no dispute; or to heirs-male, distinct from those of the body, in the first instance, under a special remainder to such, hence taking this conceived illustration entirely out of the discussion, that exclusively concerns a *sure* simple limitation to "heirs-male." This, however, to Mr. Sinclair, is of no earthly moment; for be betakes himself, in his emergency, to his venerated and never-failing oracles, the "Peerage writers," though, alas! as Chalmers would have truly told him, "in the form" of "*fiction—continually darkening* the *clear*, without clearing the

Fifteen cases adduced by Mr Sinclair to prove that an honour, limited *simply* to "heirs male," went to heirs-male-*general*, inept, and irrelevant.

Case of the Barony of Colvil of Ochiltrie.

[1] "Dedicated, with the greatest respect,—to the Peers of Scotland," as "connected with the history and descent of their ancient Titles," Edinburgh, 1837. I shall, for the sake of brevity, refer to it throughout, under the title "Dissertation."

[2] See Preface to the performance in question, p. vi.

dark;"[1] and who persuade him, good easy man, without a pretence or vestige of authority, as the mere result of their fiat or ruminations, that Robert the first Lord Colvill of Ochiltrie, was so "created, 4th January 1651, by patent, to him and his heirs male."[2] He next grasps at an equal straw. An impostor, as is notorious, attempted to vote at a Peerage Election, as Lord Colvil of Ochiltree, in 1788, in character of collateral heir-male, which *speedily* ended indeed, in his rejection, not after "an elaborate discussion,"[3] as Mr. Sinclair pretends, but a very simple one, but of *one* day, by the adduction of explicit evidence, that at once refuted his asserted pedigree; so much so, that his own counsel were the first to abandon the claim.[4] This evidently weighs nothing. The party being cast upon this ground, that sufficed, rendering it immaterial, how the honour was constituted, and descendible, and excluding the necessity of going into any such question, or exploring and ransacking every place, to recover the *problematical* patent, (in respect to its *terms,)* a most slow and supererogatory task; so that we can never conclude, with Mr. Sinclair, strangely and preposterously here, that the limitation to "heirs-male," *therefore*, was granted and admitted, as he, in the broad manner, has represented and inculcates; while, on the contrary, the challenge, or protest by Lord Cathcart, against this Colvil Peerage aspirant in 1788, is quite general, involving every objection, whether on this head, or otherwise, being unqualifiedly, that he had "*no* right to that title."[5] And then, there independently always remains this objection, as before, that until it can be distinctly shewn, that this honour was indisputably limited to "heirs-male" simply, which has never been done, it is not *hujus loci;* or can prove, however Mr. Sinclair vehemently contend *thereby*, that a Peerage limited to heirs-male simply, devolves to heirs-male collateral. He even goes the length to say, that the precedent "is almost equal to an *adjudged case* in favour of heirs-male, including collaterals."[6] Oh, Mr. Sinclair, you must here be humorous, or attempting a sally against the adjudication of our respected legal tribunals, whose practice and law, I seriously conceive, would be loose and strange indeed, and deserving of every vituperation, if they, even for a moment, listened to what you thus equal, in point of weight, nearly to the most solemn decision! We next come to the *irresistible* instances of Breadalbane, Strathallan, and

Colvil procedure in 1788 quite immaterial.

Strange and preposterous induction here, of Mr. Sinclair.

The cases of Breadalbane, Strathallan, and Dundee.

[1] Caledonia, vol. I. p. 556.

[2] See Wood's Douglas's Peerage, vol. I. p. 361, whom he in fact here quotes, using his very words, though without making any acknowledgment of the authority. (See Dissertation, p. 57.) Indeed, he is so far an original writer, as to disdain, nearly always, to appeal to any. Crawford, a far older Peerage writer, in 1716, after the fashion of Mr. Sinclair, politely, to refer to such oracles, has nothing touching this supposed limitation; see his Peerage, p. 81.

Mr. Sinclair does not refer to authorities.

[3] Dissertation, p. 58.

[4] See Robertson's Peerage Proceedings, from p. 459 to p. 466, incl. also p. 467.

[5] *Ibid.* p. 443.

[6] Dissertation, p. 58.

Dundee, where the *collateral* heirs-male, in terms of the regulating patents in 1681, 1686, and 1688,[1] all take; *but* under *distinct* remainders, to *other* "heirs-male," over and above the first limitation to heirs-male of the body, which are, it seems, *infallibly* to exemplify that "heirs-male" *unqualifiedly*, comprehend heirs-male collateral, or whatsoever! It would be a waste of time to inculcate, that the express *remainders*, in favour of such assumers and inheritors, in the character too *relative*, again, of *direct* heirs-male, make theirs a totally different case; while in that of Dundee, there had never been a proper opening for, or legal recognition of the collateral succession, owing to the forfeiture, not only of the first Viscount, but of the three next collateral heirs-male, by which, as was formerly shewn, the Peerage is utterly extinct and gone.[2] Yet Mr. Sinclair pretends, *inter alia*, that the Breadalbane case, that of the first collateral heir-male, taking *definitely* under a remainder, to collateral heirs-male, "is an indisputable example of heirs-male (simply) having exactly the same meaning as heirs male *whatever!*"[3]

Palpably futile, and erroneous conclusion here again, of Mr. Sinclair.

If these precedents are thus utterly irrelevant, what shall we even think of the next, that of the Earldom of Moray? Amidst much superfluity, Mr. Sinclair founds, in support of his conclusion, upon the charter of the Comitatus of Moray, the 17th of April 1611, to James Earl of Moray, and "the heirs-male *of his body; whom failing*, to Sir Francis Stewart, his brother-german, and the heirs-male of *his body*," "quibus deficientibus, legitimis et propinquioribus hæredibus, et assignatis dicti Jacobi Murravie Comitis quibuscunque."[4] But, supposing the charter carry the honours, as to which formerly, and what the House of Peers will not admit,[5] how can it in the least aid and assist him, when the noble family, all along, down to this moment, are but male *descendants* of the *body* of the disponee, taking solely under the first limitation, as to which there can be no question? Neither can there be to the second, which is again only to heirs-male *of the body* of

Case of the Earldom of Moray, even worse and more inapplicable than the former.

[1] In the Great Seal Register.

[2] See pp. 771-2 of this performance; and for the Strathallan case, see pp. 742-3, *et seq. ibid.* The Strathallan and Dundee remainders are to "*other*" heirs-male.

[3] Dissertation, p. 71. To quote Mr. Sinclair's own words, the destination is "to the heirs male of his own body, *which failing*, to his nearest legitmate *heirs* male, which failing, to his nearest legitimate heirs whatsoever." *Ibid.* p. 69. In terms thereof, John late Earl, (created Marquis of Breadalbane, father of the present), under the middle limitation to heirs-male, succeeded as the first collateral heir-male, which collateral succession is thus *clearly defined* by the *context*, and remainder. For other particulars about the Earldom of Breadalbane, see p. 220 of the present work.

[4] Great Seal Register. I give the precise words, and reference to the Record, which Mr. Sinclair, according to his peculiar and inadvertent manner, does not do. Nay, in this instance, he has committed a great error; for he says, "there is an *ultimate* remainder to the heirs *male* of the said Earl, and to his assignees whatsoever," and argues upon the force of *male*, which, however, *is not there*. (See Dissertation, p. 67.) This is rather loose and exceptionable procedure.

Inaccurate reference and quotation of Mr. Sinclair.

[5] See pp. 784, n. 3, 806.

"Sir Francis Stewart," the brother of the disponee; while the ultimate one, palpably mis-stated by Mr. Sinclair, is, *indifferently*, and irrelevantly, to heirs-general, and assigns. In short, there is not the least designation of "heirs-male," or of *such* whatever, in this notable authority,—forsooth, to prove the *descent* of honours, taken to heirs-male simply, to heirs-male collateral. Nor have the latter succeeded. Yet he most *correctly* and *logically* adds, "It would be superfluous to say more than that *all* these *heirs male* must evidently be collaterals!"[1] Of a truth, it would be altogether superfluous; for no one ever before thus contended—that an "heir-male of the body," the only heirs specified, and with whom we have alone to do, were heirs-male collateral! It is indeed tiresome, and unedifying to pursue Mr. Sinclair in such a course. Under the Gray instance, in the 16th century, the collateral heir-male, and his heirs-male of the body, succeeded by a special remainder *nominatim*, under a charter in 1524, backed by other confirmations;[2] but how this may chance to bear, he, being engrossed by other extraneous matter, does not attempt to shew.

Mr. Sinclair's *most relevant* induction.

Cases of Gray after 1524, and in 1707.

He, moreover, strives, from the limitation in the Gray patent in 1707, failing the issue of the deceased Marjory, only child of Patrick Lord Gray, by John Gray of Crichie, her husband, to Lord Patrick's "heir male," and the "heirs male of his body,"[3] to extort from "heir male," in the first instance, by means of this illustration, as he apprehends, that heirs-male *alone*, here again denote heirs-male whatsoever. That they, however, do *not* do so, and hence making this supposed illustration even more irrelevant and useless than the preceding, is sufficiently plain, when there immediately *follows*, in this entail and settlement of the honours, first, a special remainder to the heir-male of the body, by any other marriage of the above John Gray of Crichie, *who* was Lord Patrick's *cousin*, and *next collateral* heir-male, capable of succeeding, (Charles, that nobleman's only brother, having expressly renounced the succession, and being out of the question;[4]) and secondly, another, to his heirs-male *whatsoever*, in this way pointedly and wholly including Lord Patrick's heirs-male whatsoever. It hence, *e contra*, transpires from the very context of the authority adduced, that "heir-male,"[5] instead of denoting heirs-male whatsoever, denotes only the heir-male of the body of Lord Patrick; for otherwise, the two carefully subjoined remainders, involving and exhausting *his* lawful heirs-male whatsoever, would have been nugatory and superfluous. Mr. Sinclair, who has omitted all mention of this *rather* important fact, of John Gray of

The latter makes against Mr. Sinclair, who omits, and overlooks a material circumstance.

[1] Dissertation, p. 67.

[2] *Ibid.* pp. 72-3.

[3] Heir-male, with us, has been so used to denote a *son* only, thus affording further proof of its limited and not broad acceptation. See p. 195.

[4] This fact, at the *time*, is specially set forth in the patent, (in the Great Seal Register,) which proceeds upon it.

[5] It was not unusual with us, as formerly shewn, to use "heir-male," though in the singular, in a collective sense, as if in the plural; see p. 898, n. 2.

Crichie being such heir-male, is thus *felo de se*, and has cut his own throat by the instrument which he eagerly handles, but thus so treacherously deceives him. It proves the reverse of what he expected, and, *ex necessitate*, rivets the limited meaning of the phrase, he is so anxious to deny. As I may have occasion also to observe elsewhere, the drift or logical relevancy of the worthy gentleman's ratiocination—for we unfortunately cannot call him "learned"—is not always quite apparent. Under this notable instance of the Gray family, doubly unserviceable to him, he asserts that, in the circumstances, the phrase, "*heir-male* of the said Patrick Lord Gray, could never have been used to mean a *son*."[1] Why so?—unless Mr. Sinclair, who, to be sure, is somewhat *original* in discussion, has coined a new language, banishing the approved meaning of terms,—as imagined before, by us humble mortals,—and that of son, in particular, as tending to imply a male heir, from his vocabulary; or Lord Patrick had got into the strange habit of only producing hermaphrodites, or anomalous bipeds. But, not altogether contented with this, he would further despoil the phrase of the innate inheritance of its meaning in this emergency, from his insinuation of Lord Patrick having then "abandoned all expectations" of having an heir-male of the body; which sense, therefore, may not attach to the former, inasmuch as he was "approaching to eighty."[2] This is, however, a harsh and cruel conclusion,—moreover, too, refuted by the contrary nature of the settlements of old men every day, who still do not overlook "heirs-male of their bodies," whom the notion always agreeably flatters, and in which they might be indulged;—nay, opprobrious withal, to the virility of Lord Patrick, which was never before questioned; while, I need hardly add, that many existing noble families are *legally* descended of ancestors of the age of eighty, or even older, nay of "exhausted longevity," to borrow a phrase of Mr. Sinclair's,[3] at the time of procreation; not to add, in more untoward and objectionable predicaments. Can it be disputed in law, which we, though not Mr. Sinclair, are only discussing, that a future son of Patrick Lord Gray—unless proved impotent, and even that might be impracticable, would not have taken under the limitation in question? I conceive it cannot; and if so, then there is an end of the gentleman's pretence. With respect to this instance of Gray, I have only to add, that fathers in those days, as can be fully proved, by our strange, uncouth conveyancing practice, which I have often reprobated, were in use to evince great kindness to their daughters after the above fashion, even to prefer their issue, in certain emergencies, to that of their sons; while not only the direct heir-male, but actually Marjory Gray, having previously thoroughly renounced in favour of John Gray of Crichie, her husband, who, moreover, at the moment, was put *over* the *shoulders* of

"Heir-male" there denotes heir-male of the body, and not heir-male-general.

Rather harsh insinuation against Patrick Lord Gray, and old men.

Gray conveyance in 1707 peculiar.

[1] Dissertation, p. 72.

[2] *Ibid.* He has, however, adduced no evidence of his age.

[3] *Ibid.* (Contents,) p. xii.

Patrick Lord Gray, and so exalted to the dignity,—which is all proved by the patent,—the ordinary legal succession was contemned and inverted in his case. It hence cannot either, well illustrate a point at common law, which was not followed; John thus coming in as a singular successor, and, it is believed, owing to onerous considerations.

The Roxburghe case, which Mr. Sinclair next introduces at length, has nothing to do with the question; the Earldom, though limited by patent in 1616 to "heirs-male," having been fully taken from them, even upon his own theory, to heirs-female of the body, and their heirs-male, by a noted regrant, upon a resignation, of Robert, first Earl of Roxburghe, (whose date Mr. S. negligently does not mention), in 1646, while no claim in opposition to such ruling regrant, that carried likewise the estates, was ever attempted by a collateral heir-male. Sir Walter Ker of Faudonside, the heir-male collaterally, under the older, and original landed Roxburghe settlements, which were conceived to heirs-male whatsoever, ratified, through *form*, the new conveyance, so far, as concerned the lands, having thus a previous independent interest; but this is foreign to the question of the honours, that was based otherwise, and could not be affected by any such act. Why this precedent was brought into the field, may indeed again puzzle us, unless as an agreeable interlude, and variety, as a contrast and palliative to that of Gray,—by way of amusement to the worthy gentleman and his readers; in so far, as much more favourable and benignant,—howsoever *irrelevant* the *topic* in the main,—to William Drummond, second Earl of Roxburghe, than to Patrick Lord Gray, he actually contemplates his *committing matrimony*,—nay even, sad Roué, being "smitten by other charms" than those of his intended, to the disappointment of the "agent of Hymen," [1]—whom, of course, influenced by better motives, it is to be hoped, Mr. S. will be disposed, at length, to obey; with whatever female "charms"—thus remarkably launched into the discussion—he may be smitten. In the meantime, it must afford his friends much sensible satisfaction in hearing him in this manner start, and introduce the question of Hymen.

Case of Roxburghe in 17th century, foreign to the subject.

Mr. Sinclair here indulges in a pleasant vein, in respect to William Earl of Roxburghe, to make amends for his harshness to Patrick Lord Gray, &c.

Spent with the above agreeable exertion, Mr. Sinclair seems to have fallen into a placid state of torpor, and abstraction, which may account for his great inadvertence in the Lothian case. The patent of the Earldom of Lothian, in 1606, is to "heirs-male;" yet no claim was ever made—even upon his own shewing—by a *collateral* heir-male, *of whom* there nevertheless *were many*, on the extinction of the heirs-male of the *body* of the patentee, so early as Charles the Second's reign.

Case of Lothian after 1624, also makes against, instead of at all assisting him.

He thus again goes to refute himself, by his own adduction. He states, that upon the succession of the direct heir-*female* (in 1624), there was a challenge by the "second son to the first, and brother to the second Earl;" [2] but he being thus also an heir-male of the body, had quite a right to move, in terms of the patent 1606, under *whatever* accept-

[1] *Ibid.* p. 61.

[2] *Ibid.* p. 63.

ation of "heirs-male," whose meaning it can never illustrate in the way he intends. There is no feature of the case *here*, worth considering.[1]

The appealing to the case of Rutherford, which besides is not in point, argues the extreme weakness of Mr. Sinclair's exposition.

To such great straits is Mr. Sinclair driven, that he is even compelled to betake himself to the wretched case of Rutherford,[2]—in a matter of this kind,—already sufficiently stated; involving an untechnical and clumsily executed, if not effete settlement, by a rough unexperienced soldier; and which, as I remarked, at the utmost, can but save itself, without attempting to save, or assist elsewhere,—far less to operate as a rule or authority in conveyancing, or in limitations. Indeed, as I also said, to allude to it, is an absolute confession of defeat. Independently too, of this *possible* meaning only transpiring from the general context, and other clauses, this precedent obviously cannot be viewed as an abstract limitation to heirs-male.[3]

Case of Jedburgh, in the 17th century, also unfavourable thereto.

The Barony of Jedburgh was limited in 1622 to heirs-male, "*successoribus* in Familiam de Fernihirst, cognomen et insignia de Ker gerentibus."[4] This, then, is not a simple limitation to heirs-male, all that we discuss; the adjunct "*successoribus*," &c. coupled with the family destinations, having an enlarging effect, independent of that, further so, constructively, and unequivocally given to "bearing name, and arms," by the House of Peers. Nevertheless, upon the death of Sir Andrew Ker, the patentee, without male issue,[5] the honours at once vanished from the face of the earth; for they were taken by none, though there existed *many collateral* heirs-male. Nay, of these, "John, son of Alexander Ker," according to Mr. Sinclair, in 1654, "was served heir-*male* of his grand-uncle, Andrew Lord Jedburgh,"[6] (the patentee); but though thus proud of, and so eager legally to establish the status of his heir-male, he neither ventured to claim, or to assume the dignity. But at length, in order to enable Robert Ker, the next collateral heir-male, to be Lord Jedburgh, at the advanced period of 1670, recourse was had,—to what? to a *new* patent, which *de novo* (on a recital of the old) *creates*, *makes*, and *constitutes* the same Robert, there *repeatedly*, and *invariably* described simply as a *commoner*,—a matter omitted, nay, in fact misrepresented by Mr. Sinclair,[7]—Lord Jedburgh, with limitation to him,

Mr. Sinclair misstates a circumstance.

[1] For a statement of the curious Lothian case, otherwise, see pp. 73-4, *et seq.* The conveyance to the heirs-female not being effectual, I conceive the heir-male collateral may have a claim to the honours, on the *modern* acceptation of heirs-male, agreeably to the late Devon decision.

[2] Dissertation, p. 58.

[3] For the Rutherford case, see p. 893, *et seq.* including pp. 901-2.

[4] Great Seal Register.

[5] He left, as I can prove, several daughters, of whom descendants exist.

[6] Dissertation, p. 75. The service, a general one, upon record, is dated June 24, 1654. Mr. Sinclair does not think it incumbent to specify, or to give his authorities fully.

[7] He states, (Dissertation, *ut sup.*) that upon the failure of the previous collateral heir-male, "Robert," the new patentee in 1670, "*became Lord Jedburgh*,

and the heirs-male of his body, whom failing, to William Master of Newbattle, grandson of William Earl of Lothian, and to the heirs-male of his body, &c. Hence, Robert Ker, though the heir-male, took quite in a new character, however the patent, while it attempts, somewhat, to colour and to gloss over things, (probably at the suggestion of the party,) states, among other inducements, and motives, that it was in *corroboration* of that in 1622. But even this shews that the latter was distrusted, and not held, *per se*, effectual, as a conveyance to heirs-male collateral. If the converse too, there was no necessity for such *peculiar* additional patent. All that then remained, in order to let in the above Master of Newbattle, the grandson of the *Earl* of Lothian, the *next* heir-male, who is a partial deviation from the direct male succession, was simply to have *resigned*, and to have obtained a regrant accordingly. How this instance, upon the whole, including the different structure of the patent in question in 1622, from one simply "to heirs-male," is to illustrate his argument, which it directly goes to refute, Mr. Sinclair strangely, even does not venture to explain. He seemingly, as if so impressed, diverges to an extraneous circumstance regarding the Master of Newbattle, with whom he plays, and amuses himself, cruelly leaving his former portegé to sink, or swim as it can. I may only add, that in the notice of the registration of the patent in the Books of Parliament, "heirs-male" alone, are *twice* expressive of the two limitations respectively, in the new patent, to "heirs-male of *the body*;"[1] thus exemplifying, over and above, their narrow synonymous meaning, and making Mr. Sinclair, lucklessly again, *Felo de se*, through the agency of his own authority.

He does not shew how the instance bears, but abruptly leaves it, to play with the Master of Newbattle.

Whatever there may be in the words, "bearing the name and arms," taken with "heirs-male," agreeably to others, and my unbiassed notion, as formerly explained, we must still keep in view, that the House of Lords, constructively, from Lord Mansfield's adoption of their *modern* acceptation, on the Kirkcudbright occasion in 1772, have held them to operate, accordingly, as equivalent to heirs-male whatsoever, and to carry an honour, by their peculiar effect, to such collaterals. Hence they also would now act in the same way, under the Jedburgh patent in 1622, as it also did in the case of the Earldom of Kelly referred to, limited by patent, the 12th of March 1619, to "heirs-male bearing the name and arms of Erskine,"[2] where the specialty was founded upon, and admitted in 1835; which necessarily takes that precedent out of the category of simple, or abstract limitations to heirs-male, with which we have alone to do. My remarks, as to Lord Mansfield's noted presumption as to heirs-male of the body,[3] here again apply. Upon the

Case of Kelly also not in point, owing to the constructive law of Lord Mansfield, and the House of Peers, which were founded upon.

and was *so recognised* by King Charles II. in 1670, when he got a *new* grant, with the old precedency," &c. This evidently did not obtain, as stated. Neither did the new patent proceed upon a *resignation*.

[1] Acts of Parl. last Edit. vol. IX. pp. 244-5, where the patent is fully given.

[2] Great Seal Register.

[3] See pp. 959-60.

Case of Hume, in the 17th century, still more irrelevant, even upon Mr. Sinclair's own shewing.

authority, as before, of the "Peerage writers," his inseparable, and constant oracles, without whose aid and assistance Mr. Sinclair would be at a fair discount,—though without making any acknowledgment in return, he states that the Earldom of Home, to which an heir-male collateral, as he also mentions, afterwards succeeded, was constituted the 4th of March 1605, with *remainder*, (*limitation* is the select term,) thus most *broadly*, "to heirs-male *whatsoever*."[1]

What then has this again to do with the question, involving "heirs-male" *alone*? If, as above, undoubtedly the heir-male collateral would succeed. But while there is no evidence as yet adduced, or known to exist, of such broad original constitution, whatever flattering unction the Peerages convey,—certainly upon record,—it strangely happens again, that *such* heir-male was obliged to obtain from the crown, a *new* patent, dated 22d of May 1636, of the title of Earl of Home, backed by an Act of Parliament in 1641, carrying the old precedence, in favour of the party and his heirs-male,[2] under which, all the subsequent Earls of Home, down to this moment, have taken, as heirs-male of the body. This, of course, betrays a striking distrust of the efficacy of the original patent, whatever it was; for, if to heirs-male whatsoever, there then was no conceivable occasion for that in 1636, or the special Act of Parliament,—which in this view are inexplicable; while, if, as is probable, it was only to "heirs-male,"—the defect of such lesser limitation being indispensably so salved,—the case again makes Mr. Sinclair *Felo de se*, and cut his own throat,—his own authority, manifestly, murdering and destroying his argument. To such attempt, we regret, of late, the respectable gentleman is rather subject,—in consequence perhaps of the irksomeness of this business, and being "smitten (though not hopelessly, it is to be expected,) by *other* charms." Besides, as we have seen, the right of the collateral heir-male was actually contested by the heir-general in 1633;[3] and hence the new patent in 1636,[4] owing to the inefficacy, as we might thus conclude, of the former.

Nay, may be even unfavourable, and make him again *Felo de se*.

Case of the Barony of Sinclair in 1677, the most futile, and extraneous imaginable.

Of all the irrelevant and inappropriate cases that could ever be most blindly dragged into the discussion, it would beggar fancy to conceive one more so, than that of the Barony of Sinclair, to which the worthy gentleman, however, confidently appeals. It is constituted by patent, dated 1st of June 1677, in favour of Henry Sinclair, and the heirs-male of *his body; whom failing*, to John Sinclair, his brother-german, and the heirs-male of his body; *whom failing*, to Robert Sinclair, brother-german of the late John Sinclair of Herdmeston, and the heirs-male of his body; *whom failing*, to George Sinclair, his other brother-german, and the heirs-male of his body; *whom failing*, to *Mathew* Sinclair, his other brother, and the heirs-male *of his body; whom* failing,

[1] See Wood's Douglas's Peerage, vol. I. p. 736.

[2] Great Seal Register, and Acts of Parl. vol. V. last edit. p. 582.

[3] See pp. 15, 16.

[4] For Mr. Sinclair's remarks on the Home case, see Dissertation, p. 74.

to the nearest lawful heirs-male of Henry Sinclair first mentioned, of course clearly *collateral*, by the context.[1] Upon the failure of the previous heirs-male, the honours were claimed in 1780, as we have seen, by Charles Sinclair, *direct* male descendant of *the body* of the aforesaid Mathew Sinclair, called *nominatim*, as a remainder-man, under an *independent* stock, and thereafter allowed him, in 1782;[2] and his case, it seems, is a *cogent* instance of the descent of an honour to a collateral heir-male, under *one* limitation *simply*, to "heirs-male!!"—all that can be disputed. Mr. Sinclair here perpetrates a glaring error, and misstatement. "In the *Petition*" of the claimant in 1780, he says *his claim* was only *rested* "*upon* the phrase, "*nearest heir-male;*" and upon the strength of this single, abstract *conceit*, which neither, could have compromised the *true* merits of the case,—necessarily to the exclusion of the consideration, and mighty weight of the distinct remainders recited—that even saved against attainder,[3]—he would fain entertain, nay broaches the notion, and ventilates it, as if the decision was only *thus* based and authorized. He at least directly says, that "this, on the *ground* of the petition, (as *above,*) would have been an adjudged case in favour of *collaterals* succeeding, under the head of *heirs male!*"[4] But what must we think, when it turns out, that such neither obtained in the *petition*, or in the claim; and that it, *e converso, did* proceed in virtue of the remainders, regulating the descent in the patent, which are all fully founded upon, and set forth. Nay, further, the petition emphatically rests the right upon the conclusion, that the petitioner or claimant, "*by* the *limitations* in the aforesaid Letters Patent,—is become entitled to the title of dignity," &c. how?—not as "nearest heir male,"—indifferently, as pretended; but *exclusively* "*as* the heir male *of the body* of the said *Mathew* St. Clair!"[5] After this fashion does he proceed in argument! Equally futile too, is his assumption and gratuitous supposition, that it was ever entertained,—by any one,—in the case of such comprehensive, and articulate destination as the Sinclair, that the adjunct "bearing the name and arms" was necessary, under legal understanding, at any time, to impress, and secure the effect of *collateral* descent,[6] so fully marked, and defined quite independently, and by the context,—a distinction which it seems in vain to drive into Mr. Sinclair's *pericranium*, which here, as well as elsewhere, is in no small degree mystified; and is illuded, and argues with the aid of shadows.

Mr. Sinclair here too, perpetrates a glaring error and misstatement.

He also raises up a man of straw, and then knocks him down.

Here, as well as elsewhere, does not see an obvious distinction.

The last of this discomfited squadron of cases, as I think we may now call them, that were to do such mighty things, are the Barony of Aston, and Viscounty of Garnock, which, awkwardly indeed, in a very unserviceable, laggard condition, bring up the rear,—the for-

The two last of this discomfited squadron of cases,—those of Aston, and Garnock.

[1] Great Seal Register.

[2] See *ibid.*

[3] See pp. 712-13.

[4] Dissertation, p. 67.

[5] See Lords' Journals, and Robertson's Peerage Proceedings, pp. 406-7-8, where the "Petition" is fully given.

[6] Dissertation, pp. 67-8.

Aston is as irrelevant, as its predecessors.

mer being limited by patent, the 28th of November 1627, to "heirs-male bearing the name and arms,"[1] and which, independently of the constructive specialty from this adjunct, *by* the *ruling* finding of the House of Peers,[2]—being *only assumed*,—without any proper recognition, as in several untenable Peerage cases, is every way, nothing to the purpose. While Garnock, its companion in distress, even still more like a "wounded snake," draws its "*slow* length along,"—being indeed, without disrespect to the Christian appellation of its captain, a *needless Alexandrine*. Of what possible use it is here, may be at once seen, when the honours are limited by patent, dated 26th of November, 1703, to the patentee, "et hæredibus masculis sui corporis; *quibus deficientibus*, ALIIS propinquioribus Hærodibus suis *masculis*,"[3] and as yet, only heirs-male of the body have taken, without there being even any devolution, *de facto*, to *collaterals*;[4] who besides, as coming under a distinct remainder, could never supply an instance of the descent of an honour to "heirs-male" simply. Such attempts at illustration by such pretended *make-weights*, visionary indeed, only litter a discussion, and exclude the true merits. Yet the worthy gentleman, still under the influence of his usual mystification, contends that the creations "of Strathallan[5] in 1686, Dundee[6] in 1688, and *Garnock* in 1703, independent of the actual succession of collaterals in the two first cases, are *quite decisive* as to the comprehensive meaning of *heirs male*,"[7]—that is, simply, and abstractly! Mr. Sinclair does not see the legal, indeed obvious force of "whom failing," significantly enough coupled, in the above cases, with "*other* heirs male;" thus opposed also to the previous "heirs male of the body" only, in the context, and hence inducing a broader, unrestricted descent; while it is further remarkable, that in the instances of Strathallan and *Dundee*, (*de facto* only)—as well as of Breadalbane,[8]—the actual collateral takers, are *but* heirs-male of the *body*, that is, *quoad* the first remainder-man, or stock, under whom they hold.

Garnock most glaringly so, and can in no way tell.

Mr. Sinclair, from not seeing the distinction in the case of patents with remainders, from those simply to heirs-male, draws the most preposterous and unfounded conclusion.

The preceding, *thus* irresistible new instances of Mr. Sinclair, in his apprehension, which *triumphantly* fix that "*Heirs-male* include collaterals,"[9]—and whose titles even, all severally and respectively, he blazons out, and exultingly prefaces, and parades, in capital letters,[10]—insensibly remind us of the sticks carefully planted by the stripling, in the fond belief they were trees, and about to produce the best and the choicest fruits. In the same way, I fear, we must regard what the worthy gentleman has thus planted in the field of controversy, as

[1] Great Seal Register.

[2] See p. 622.

[3] Great Seal Register.

[4] George Earl of Crawford and Lindsay, Viscount Garnock, the last heir-male of the body, died in 1808; since when, no one has prosecuted his right to the Viscounty, which continues unassumed, and dormant.

[5] See pp. 1007-8.

[6] See *ibid.*

[7] Dissertation, p. 24.

[8] See pp. 1007-8.

[9] Dissertation, p. 57.

[10] *Ibid.* pp. 57-8-9, *et seq.* &c.

an equal failure,—metaphorically, but as barren sticks, as melancholy scarecrows in the desert waste of his exposition,—emblems, alas! of his bootless, though *glorious* attempt—to remain only, till they be blown down by the first zephyr :— All the fifteen instances, as above, empty and unavailing.

"*Gloria*—cum *primo* deperitura *noto*."[1]

Not only so, but as his instances, besides rebelliously, and unnaturally ruining his own cause, choke and preclude healthy vegetation, they are utterly unprofitable, and fall to be forthwith plucked out, and extirpated by the husbandman. They may excel ostensibly, in *numero*, but not certainly in *pondere;* thus exemplifying the futility of the relative argument, reprobated by lawyers, as used by Lord Mansfield, in reference to his crude presumption in favour of heirs-male.[2] In perusing other parts of Mr. Sinclair's performance, we still meet with the same luckless attempts at illustration, and equal miscarriage, owing to undue haste, and inadvertence; and in the absence of thorough, and original investigation into the cases *he* adduces in support of his conclusion. Take, for example, that of the *asserted* "Earldom" of Angus, grounded upon a charter in 1547,[3] which not being in the 17th century, or afterwards, for a reason to be noticed in the sequel, might, even upon this ground, be deemed irrelevant. It is like the Breadalbane, and Strathallan precedents, &c. though even more adverse, the substitution being first to heirs-male of the body; *whom failing*, "hæredibus masculis (of the *disponee)* et *suis* assignatis *quibuscunque;*"[4] and because heirs-male collateral, as he apprehends, were *ex terminis*, entitled to the *dignity* by the remainder, it in like manner *hibernicè*, again, explains the technical meaning of "heirs male" simply![5] It, how- His others equally so.

[1] By the way, these lines are used by Buchanan in reference to a singular mortal, one Critto, who had such an itch for heraldry, and pedigree, as to be constantly importuning his neighbours therewith, and deducing arms, and Peerages upon the frail fabric of their windows; which the unfeeling Notus, though much milder than his brethren, having no such turn, is thus cavalierly to treat. As somewhat connected with the present subject, I shall here subjoin the whole of the Poet's relative epigram :—

"Critto suo cupiens aliquid superesse sepulchro,
Nec simul, in Stygios totus abire lacus,
Omnibus appingit *fastosa insignia vitris*,
Nec *titulis* vacua est *ulla* fenestra *novis*.
O spes *fluxa*—*brevis* famæ fiducia—mendax
Gloria,—cum *primo* deperitura *Noto!*"

[2] See p. 944-5. [3] Dissertation, p. 84.
[4] I quote from the original, in the Douglas charter-chest. [5] Dissert. p. 85.

ever, singularly turns out, that the charter in question [1] does not carry the "Earldom" or "*Comitatus*" of Angus, there being no mention of such there, but only of *lands*, a circumstance, whatever weight may have been given to the same, that, I believe, has been unnoticed. Mr. Sinclair, under this head also, wrongly asserts, as usual, without a vestige of authority, which he seems to repudiate throughout, that "the *second* Marquis of Douglas," Earl of Angus, &c. "obtained power from Queen Anne to restore female succession in his own line." [2] This is quite unfounded. He obtained no such high faculty, (having *besides actually predeceased* the *accession* of her Majesty,) as he would have discovered, had he barely looked into the Douglas litigation, last century. But the above is not all; Mr. Sinclair may argue, there is still the redoubtable case of the "Earldom" or *Comitatus* of Caithness in 1545. By a charter in that year, it is simply limited to "heirs-male." [3] Here then, is a case, he says, precisely in point; for notwithstanding the use of such words merely, in full proof of my doctrine, the branch of Sinclair of May, in virtue thereof, though only collateral heirs-male, took, and had their right adjudged and admitted by the House of Lords in 1793,—"so that this is," clearly and infallibly "a case," to the utter discomfiture, and disgrace of my opponents, as he actually adds—"of heirs male, without any specification, including collaterals." [4] This, no doubt, sounds abundantly well; but pray, Mr. Sinclair, was this charter 1545, the *true* and *regulating* conveyance in the matter? Unfortunately for your brilliant conclusion, I have to state, it was not; on the contrary, it never warranted more than a *direct* male descent, *when* in force; for it came to be wholly superseded, and nullified by a *later* charter of the *Comitatus* of Caithness, with a new erection, dated 3d of April 1592, *which you* have strikingly *omitted*,—not by any means so restricted, but broadly conceived to "heirs *male*,"—"et assignatis,[5] *quibuscunque*," [6] as to the unlimited, *collateral* import of which, there can be no doubt. The latter *amply* comprehends, under the adjunct "*quibuscunque*," the identical branch of May, including *all* the lawful heirs-male of the house of Caithness, who are abundantly known, and are now comprised therein. Mr. Sinclair obviously cannot object to the same grant in 1592, as carrying the honours; for he allows the still recenter one of the Comitatus of Moray in 1611 to do so, even at a time when personal grants of honours exclusively, had come fairly into vogue. I need not add, that the Caithness charter 1592, takes Mr. Sinclair's Caithness instance in 1545 wholly out of his category. Yet nevertheless, he still

Snatches at an apparent short-lived triumph, through the *medium* of the Caithness charter in 1545, which however does not tell, being superseded by a later in 1592, that at once dispels Mr Sinclair's bright imagination.

[1] The original was produced, and printed, at the competition for the Douglas estates, last century.

[2] Dissert. p. 86. His Christian name is James, which should have been stated.

[3] "And assigns" *(assignatis)*, as added; but there having been no assignation, *assigns* may be thrown out of view.

[4] Dissertation, pp. 83, 24.

[5] The same remark applies here, as to *assignatis*, before.

[6] Great Seal Register. It proceeds upon a resignation.

goes on, to the same tune, quoting the equally foreign cases of Buchan and Yhester, &c.[1] whose barricadoes of distinct remainders, as in the instances of Angus, and Strathallan, &c. which he contemns and over-leaps, as much prevent them from being of any benefit to him; *sed tædet harum*, &c. &c.

Cases of Buchan, Yhester, &c. all equally futile, irrelevant.

In short, Mr. Sinclair has brought forward no new case and authority, bearing upon, or tending to illustrate the question;[2] nor could it be well expected, considering—together with his marked legal misapprehensions—the secondary sources of knowledge that he contents himself with, the "Scottish Peerages" generally, &c. though unacknowledged, if even sometimes so much, without broaching the original, or the more recondite, that can only properly illustrate and assist.

Mr. Sinclair's efforts like the mountain in labour, and equally unproductive.

My present remarks have, more especially, been in reference to what he has thus attempted, the previous adductions and expositions in the matter, whether judicially, or otherwise, being more familiar, and hence less deserving a recapitulation.

It cannot be denied, that, in the 17th century, after the broad introduction of patents, or personal grants of honours, over and above charters, as before, greater strictness, as has been seen, prevailed, and was enforced, in regard to their constitution and descent; so that what originally obtained in respect to "heirs-male," (as to which, however, hereafter,) might not then,* as I have already hinted. As illustrated in the Oliphant case in 1633, they were held not to be in *commercio*, and to be less like a subject at common law. By analogy, the same alteration or modification, too, in our practice, partly also, though more naturally, through unavoidable English influence, may have occurred here, as in the matter illustrated, under the cases of Polwarth, and Bargeny, &c. touching the heir of the person last in possession, now, otherwise, it may be held, since last century, than formerly.[3] And thus it may have happened, as is the fact, that both by our first lawyers, and by the crown, the words in question came, at the period, to be strictly used in technical acceptation, in honours, synonymously with "heirs male of the body," particularly by the latter, the highest standard and authority in regard to them, and by whom they could be alone granted. Sufficient proof of this is afforded, *inter alia*, by the Report of Sir John Nisbet, Lord Advocate to Charles II. of the noted Lothian case, where he explicitly uses "heirs-male of the body," as quite commensurate with, and exactly to define the limitation to "*heirs-male*," in the patent of the Earldom of Lothian in 1606—the certain information and knowledge by Charles II. of that limitation, taken with the legal conclusion thereon, which is transmitted to us, through a royal order of James II. the 11th of May 1685, in reference to the question of precedence of the Roxburghe, and Lothian dignities, *vitally identified* with their constitution, and descent, that the *previous* Earldom was, therefore, only "*by his* Patent (the patentee's in 1606,) provided to

Natural distinction in the 17th century, in respect to "heirs-male."

* The fact too, of Craig then using "heirs-male" in the *restricted* sense, according to the old feudal notion, was, *in practice*, not without its weight accordingly; see *De Feud. Lib.* 1. *Dieg.* 9. § 36, and Wallace, in the ensuing p. 1024, *n.* 2.

Indisputable proof of the restricted meaning of the phrase then afforded, through the acceptation of lawyers and the crown, and by the instance of Lothian, &c.

[1] Dissertation, p. 24.

[2] In no part of his work.

[3] See pp. 859, 860-1, &c. and what follows and precedes.

heirs male *of his body;* whereby," it is next, most conclusively, added, "the *honor was* EXTINCT,"[1] owing to their *failure, notwithstanding* there *existed* several *collateral* heirs-male,—besides warrants of patents under the sign manual, with their extensions under the Great Seal, wherein the phrase "heirs male" only, and "heirs male *of the body,*" are indiscriminately used and interchanged in the *same* sense, and necessarily in the restricted. Sir James Stewart, also, Lord Advocate to Queen Anne, evidently construed "heirs-male" in like manner.[2]

Even still more, by the palpably irresistible case of the Viscounties of Melgum and Aboyne, in 1627 and 1632.

But independently still, there is the remarkable and, intrinsically, irresistible case of the two patents of the Viscounties of Melgum, and Aboyne, in 1627, and 1632. By the first of these, dated 20th of October 1627, the Viscounty of Melgum was granted, not merely to the "heirs male" of John Gordon, the patentee, but with the adjunct also of "bearing his name, and arms,"[3] which is further constructively held by the House of Lords to be, *per se,* equivalent to "whatsoever," and to define a collateral descent,—whatever there may be, in reality, in the notion, for which Lord Mansfield is responsible, and not I. If the phrase, "heir male," then, be maintained to imply collaterals, *a fortiori,* it should, with such accompaniment. Yet, in a subsequent patent, dated April 20, 1632, after special allusion to the former, and *explicitly* and *verbatim* reciting *its* limitation, we learn that the said Viscount John, in 1627, had died "*absque* hæredibus masculis *de corpore suo,*"—"*in* QUOS," it is *next* added, "*dictus titulus* Vicecomitis per nostras literas Patentes *conferendus fuit.*" This clearly again denotes, from their here being interchanged and identified, that "heirs male," simply, as in the first instance, were only equivalent to heirs-male of the body. On which account, *therefore,* and that the Viscounty

Mr. Sinclair does not see the true merits of the curious question of the Roxburghe and Lothian precedence, in the 17th century; yet, through means of his *misapprehension,* charges the kings and lawyers then, with error, and ignorance, and supposes himself alone gifted to see through that millstone.

[1] In fact, from what I have shewn, under my statement of the Lothian case, (see pp. 73-4-5-6, *et seq.* &c.) that is curious, admitting the limited import of heirs-male, this would follow, there having been no subsequent valid resignation and regrant of the Lothian dignity to heirs-female, as pretended. The precise situation of the *original* Earldom of Lothian (in 1606), which, I believe, I have been the first to explain, with its relative bearing upon the Earldom, and precedence of Roxburghe, evidently soars immeasurably above Mr. Sinclair's comprehension, who, going upon ordinary accounts, as usual, stumbles in the dark, and lamentably turns to the left, instead of going properly to the right. (See Dissertation, pp. 18, and 19.) He is quite unaware of the flaw attaching to the *supposed* Lothian regrant, upon which indeed much depends; yet recklessly, and with incredible presumption, I must say, makes Charles II., James II., their law-officers, and advisers, &c. &c. all *ignoramuses,* and misled, and himself, alas! what a falling, and how erroneously, the only one who can see through this millstone! I need not advert to his nibblings, in other respects, upon the Lothian question, which, to say the most of them, are as relevant, and of the same stamp.

[2] See more particularly as to these facts, and the authorities, my "Remarks upon Scottish Peerage Law," in 1833, pp. 16, 17, 18, *et seq.*

[3] The limitation in the original is, "suisque hæredibus masculis, cognomen et insignia de Gordon gerentibus."

"*revivat*" in the *collateral* heir male, George Lord Gordon, the elder brother of Viscount John deceased,—hence *again* proving the *restricted* meaning of the limitation, to "heirs-male," owing to the same being thus avowedly spent and gone,—it is accordingly conferred upon Lord George, under the new title of Viscount of Aboyne, during the lifetime of George Marquis of Huntly, his father, with limitation, after his succession, to the higher dignity of Huntly, to James his *son*, just as before, "heredibusque suis masculis nomen, et insignia de Gordon gerentibus;" *who else could not take.*[1] In Secretary Alexander's original Register, for the time, in the Advocates' Library, under date the 20th of April 1632, the *identical* language is used in reference to the creation, with the will of the sovereign to "*revive*" the honour in favour of the heirs-male. It is to be added too, that after the death also of James, the second patentee, in 1632, without male issue, the Viscounty of Aboyne, though limited in the same way as Melgum, appears to have become extinct; for while there were many collateral heirs-male, even now existing, it has never been assumed by, or given to any.[2] The phrase, "heirs-male," is therefore, in a remark-

Further proof of the extinction of the Viscounty of Aboyne in 1632, though granted simply to heirs-male, and there existed numerous heirs-male-collateral.

[1] The originals of both patents are in the Aboyne charter, while the last is recorded in the Great Seal Register.

[2] As to the above instance, which I first adduced in 1833, Mr. Sinclair, with that mode of ratiocination so peculiar to him, roundly, and most gratuitously assumes,—that it is "more adverse than favourable" to my conclusion! (Dissertation, p. 17.) The Earldom of Forfar, granted by patent the 20th of October 1661, simply to "heirs male," (Great Seal Register,) appears to have sunk, on the death of Earl Archibald, son of the patentee, in 1715, without issue. It has never since been assumed, however there be numerous collateral heirs-male. Neither, though the next, Archibald Duke of Douglas, and the Dukes of Hamilton, were sufficiently disposed to take, and insert their titles in their styles, secondary as well as high, are those of Forfar, including also the Baronies of Wandell, and Hartside, ever to be found there. In the Devon case, much stress was laid upon the assumption, in his style, by an Earl of Cork, of an inferior honour, as collateral heir-male, in proof of its continuance, (see Report of Devon case, by Sir Harris Nicolas, p. 118); by the most relevant induction, then, *e contra*, the *non*-assumption of such, as in the previous instance, must tell the other way, and argue its extinction, and, at the same time, the restricted import of "heirs-male." Failing the Hamilton and Selkirk family, the next collateral heir-male, in 1764, was Sir Robert Douglas, Baronet, the Author of the Scottish Peerage, who further states there, (of course, to his own prejudice,) that, on the death of the above Archibald Earl of Forfar, in 1715, "his honours became extinct." (See his Peerage, p. 270.) "Mankind," Lord Rosslyn remarked, in his Speech in the Moray case in 1793, "are, in general at least, as correctly informed in their *own* affairs, as strangers can be, and they are *seldom* induced to *overlook* a valuable right;" so that, although Sir Robert, certainly, be a most indifferent Peerage writer,—and little indeed to be ever trusted in the main, he yet might be listened to, in such a modern matter comparatively, touching *himself* nearly, as the understood state of the Earldom of Forfar; especially as, in a point of this kind,

Mr. Sinclair's mode of ratiocination.

Case of the Earldom of Forfar after 1715, granted to heirs-male, where all the discoverable circumstances tell against him.

Special reason why I alluded here to an intimation of Sir Robert Douglas, a collateral heir-male of the patentee.

able way, irresistibly, and repeatedly proved above, beyond all cavil, to be equivalent but to heirs-male of the body.[1] The late claimant to the Earldom of Devon in England, in 1831, could merely found upon a *solitary* Irish instance, in the reign of Charles I. within the range of his own law, (to be afterwards specially noticed,) in support of his conclusion, that "heirs-male" comprise collaterals, he being entirely, so far, it is most singular, without a vestige of proper English precedent or authority, on his side; so that submitting the matter even to such corresponding test, the precedent of Melgum and Aboyne would indeed be triumphant and victorious; for it, at least, while equally in the reign

Upon the test in the English Devon case, that of Melgum, and Aboyne should *a fortiori* settle the question.

to quote another analogous remark of Lord Rosslyn in the same Speech, "every thing should be thrown into the scale." But while this may obtain, the leaning to him, so far, *in re familiari*, through a specialty, cannot be drawn to any thing like an inference, that I, by having so appealed to him, as I did, on account of *his relationship*,* in the particular in question, ever unqualifiedly relied upon his opinion or authority, in his distinct and general character of a Peerage writer, as Mr. Sinclair might seem to insinuate, (Dissertation, p. 14); far less became answerable for, or homologated the mighty mass of his faults and errors. The distinction here, however impervious to him, is obvious; and I think I may fearlessly appeal, both to the whole of this performance, and the general tenor of my writings, in proof, how fully I am unindebted either to Douglas, or to his confraternity. It was yet natural in the worthy gentleman to feel somewhat sore at my marked reprobation, and rejection of the latter, his venerated oracles, without whom, it is so evident, he, as a writer on Peerages, cannot well walk, or move, or have his being; however far from being much disposed to acknowledge the deep obligation. In leaving this topic, Mr. Sinclair, I may remark, with that inadvertence, and want of proper information so discoverable in him, talks of a "*complete—forfeiture*" as having been incurred by Archibald Earl of Forfar, from his being "at the battle of Sheriffmure, in *support* of the *ancient dynasty (the Stewarts)* in 1715,"—in order to account for the subsequent non-assumption of the honours. (Dissertation, p. 43.) Now, it is notorious this is quite unfounded; it is too bad thus to traduce so gallant, so loyal a nobleman. Had the worthy gentleman looked into any of the ordinary Histories of the Rebellion in 1715,—Patten's, for instance, a cotemporary, who wrote in 1717,—he would have found, from a government report of the battle in question, that the Earl of Forfar was "on *our* side" (*George the First's*), at the head of his regiment,† "*under the Duke of Argyle*," and, like a Douglas, received "wounds—so many, that his life is despaired of;" being "shot in the knee, and cut in the Head with 10 or 12 strokes,"—of which he died, to the deep regret of all, as we learn elsewhere. (See Patten's Hist. *ut sup.* pp. 187-8-9.) Mr. S. also appears to see *triple*. He makes Archibald Duke of Douglas have "*three* Marquisates," (Dissertation, pp. 43, 44); he had but two only, those of *Douglas*, and *Angus*.

(* See Remarks upon Scottish Peerage Law, p. 14.)

Not to be presumed in consequence, as Mr. Sinclair might insinuate, to homologate, or make me, any way, answerable for the mighty mass of Sir Robert Douglas's faults and errors.

Glaring error and mistake of Mr. Sinclair, in the Forfar instance.

† Called "*Lord Forfar's Regiment.*"

Another error.

[1] The extension in Scotland of the grant of the Ochiltrie honours, by a charter the 9th of June 1615, to "heirs-male bearing name and arms," though under a royal warrant, the 27th of May 1615, only in favour of the grantee, and "his *posteritie*,"—that is, descendants of the body,—however liable to a supervening objection, exclusively in the form of passing the charter, (see pp. 808-9, 13, 14,) may also pointedly shew the understanding as to the import of the same limitation.

Ochiltrie case too, evidently supports restricted meaning of heirs-male.

of Charles I. is, in itself, most relevant and conclusive, unequivocally expiscating the opposite meaning; that, on the other hand, does *not* obtain in the above Irish case, which, as may be obvious in the sequel, is foreign, and really irrelevant to the question. We have seen too, through this performance, in 1670, in the case of the official entry then, and statement to that effect, of the patent of Jedburgh in the Books of Parliament, "heirs-male" simply, twice used as synonymous with, and to express two undoubted special limitations to "heirs-male of the body" literally,—at the same time, therefore, confirming, under authority of Parliamentary diction, such acceptation; which is fully illustrated by the previous instances, that, though attempted to be nibbled at, have never yet been refuted,—besides others I formerly adduced.[1] My observations, as may be evident, only bear upon Peerages in the 17th century, and afterwards, owing to the partial change, and peculiar reasons affecting them, and not in respect to mere subjects at common law, where "heirs," or "heirs male" may be differently and broadly rendered, analogous to the rule also that was maintained in England before the Devon decision.[2] The indispensable execution of all the warrants of our Peerage grants in *England*, under the king's hand, after the union of the crowns in 1603, may have, in a degree, naturally tended, by the unavoidable force, however indirectly, of English notions and impressions, that might sway the sovereign, in whom the bestowing and transference of honours alone rests, to such mutual assimilation. But yet, it is very remarkable, that "heirs male," with us, on the lesser, and ordinary occasion of landed grants only, sometimes, in a striking manner, had the same restricted sense I have noticed, as in honours, even in the 16th century. It was represented, the 9th of May 1559, in a case before the Supreme Civil Court, that according to "ye use observit past memor of man, wytin ye lordschip of Strathern, ye haill fewis of oure Soveranis landis, are, and hes bene sett to ye *aris maill*, and failzeing yerof, to ye eldest *female" (heir)*. This destination, therefore, where, in virtue of our conveyancing, the phrase "heirs male" cannot be said to be controlled by the context, but to present itself simply, would have been undoubtedly rendered, by the espousers of the broad meaning of the terms, as has indeed been fully elsewhere exemplified,—first, "to heirs male *general*, or *whatsoever*;" and only *failing all* these, to the eldest female heirs, &c. But here again, quite erroneously; as distinctly follows from this conclusion, or corollary, that is grounded upon the above fact, as the premises, in the legal argument in the case, that *therefore*, certain *royal* lands in question, in Strathern,

My conclusion even supported by Mr. Sinclair's case of Jedburgh, and others, formerly adduced.

It bears upon Peerages, and not upon lands, in the 17th century, upon an analogous English principle, which, from peculiar, unavoidable circumstances, might here, so far, operate.

Curious Scottish instance in 1559, even in the case of lands, proving "heirs-male" simply, to have the restricted meaning of heirs male of the body; being a much more relevant precedent than the Irish patent in 1627, in the Devon claim, *vice versa*, to be afterwards noticed.

[1] In my "Remarks upon Scottish Peerage Law," in 1833.

[2] To give one authority, *inter alia*. "Lands granted to a man, and his heirs, will go to *collateral* heirs, as a brother, or an uncle; *not so*, of honours." Argument in the case of the English Barony of Roas, in 1666, *ap.* Collins on Baronies, p. 266; see also the Fourth English Peerage Report, p. 18, under the passage, to be given immediately; and Sir Harris Nicolas's Devon Report, pp. 143-4-5, &c.

Distinction between succession to lands, and honours, in England.

"*behuifit* to haif bene maid to umquhile Jhone Philpson, gudschire *to* ye said *Margaret (a party)*, and his airis *maill* lauchfully gottin *of his body*; quhilkis *failzeing (whom failing)*, to his eldest female, *but (without)* division."[1] And this plea,—thus in the latter instance so clearly proving "heirs male" to be used only synonymous with heirs-male of the body,—was found to be relevant by the Court, and remitted to probation, for the purpose of clearly establishing such especial usage, and practice. Combining what has been stated, therefore, with various other precedents and authorities,—not forgetting Mr. Sinclair's suicidal instances, which, though they may powerfully sustain me, and amuse my readers, yet, like the sad mischance of the frogs in the fable, prove ruinous and destructive to him, we may infer, as I have shewn.

Restricted meaning of heirs-male discernible in every way.

Indeed, if we turn up any treatise of the Law of Peerage, or connected with the descent of honours, either in the 17th or 18th centuries, in Scotland, or in England, we will find "heirs-male," nay, what is more, "heirs," though, usually, far broader in import, on innumerable occasions, understood, and constantly used to express direct descendants, or of the body, only.[2] Nor can my conclusion, in the main, of such understood and received meaning, by the higher authorities too, in a striking degree, as at least is proved, be fairly rebutted with us, by *one* or *two* instances, where dignities have been assumed, or summarily recognised in collateral heirs-male, under a limitation to "heirs-male," especially as such have, not unfrequently, been taken by those having no right, and even given to them; while a sitting with us,—independently of the peculiarity of *interim* possession—as repeatedly shewn, did not constitute an indefeasible right. There still—whatever may be

It cannot be fairly rebutted by one or two doubtful cases.

[1] Act and Decree Register of the Supreme Civil Court, vol. XIX. p. 404, b. We here trace a similarity between our practice in descent, and that, notoriously in England, from its varying at common law, owing to the different notions, and rules, so far, entertained and enforced in different districts or localities.

Scottish and English authorities as to the restricted meaning of "heirs-male."

[2] Wallace, the Peerage lawyer, who wrote in 1785, and may here answer the purpose in part, says, "A *Peerage* granted to a man, and his heirs-male, seems to be limited to the heirs-male of his body—unless in the patent be inserted either the word whatsoever, or some other equivalent to it, which expressly declares it descendible to collateral males." (Ancient Peerages, p. 383. See also pp. 1019-20, &c.) Crulse repeatedly uses the words, "tenant in *tail mail*," simply, to denote heirs-male of *the body*, (see Dignities, p. 122-3, under the instances of Northumberland, and Gordon *v.* the King's Advocate.) That lawyer also shews, what is incontestable, that the Barony of Vesey was conferred, the 27th of Henry VI. upon Henry Bromflete, and the "heirs-*male*" of "*his body*," (*ibid.* pp. 76-7); yet, in a pedigree, in reference to the discussion, about the Barony of Grey of Ruthven in 1640, printed by Collins in his Baronies, (see p. 251,) the identical limitation is given simply, as "hæredibus masculis." The above are examples, out of innumerable others, merely from works that happen to be beside me at the moment. At p. 18 of the Fourth English Peerage Report, it is laid down, that "the grant of a dignity to a man, and *his heirs*, is a grant to him, and the heirs of *his body* only, and will convey *nothing* to *collaterals*." See Attorney-General's Speech, Devon Report, pp. 143-4-5, and what will further transpire on this head, in the sequel.

said—exists in Scotland, *no strict*, proper *res judicata* in the matter, or in *foro contentioso*. In the Kincardin case in 1706, which approaches the nearest thereto, but *interim* possession, (formerly familiar to us, and hence rendering the undue taking of honours less important,) was allowed to the collateral heir-male, founding on a patent in 1647, to "heirs-male,"[1] though always under reservation of other interests;[2] while, amid reiterated protests against his right,[3] no final or conclusive decision ever followed. The heir-female, who opposed on other grounds, had even a strong interest in avoiding this question of "heir-male," owing to its prejudicially affecting her father. Nor is it to be overlooked, that the heir-male in question was, at any rate, a Peer, being clearly entitled to the Scottish Barony of Kinloss, under a special remainder in the patent, the 8th of July 1604, to heirs-*male* "*quibuscunque*,"[4] *on failure* of heirs-male of the body,—thus so different from that of Kincardin in 1647; and further, as his family succeeded, before the middle of the same century, to the far preferable, and older Earldom of Elgin, whose limitation, by patent in 1633, in favour of "heirs-male," has moreover the adjunct of "bearing the name and arms,"[5]—that *weighs* so *greatly with* the House of Lords,—the other became, comparatively, less important, and likely, on an essential ground, to be questioned in *foro contentioso*, as, in fact, it was not.[6] Neither, what is very singular, in the case of the Earldom of Dunbar, limited by patent, the 3d of July 1605, to "heirs-male,"[7] though there was a summary order, the 30th of August 1703,[8] for inserting it in the Roll of Peers, in favour of a collateral heir-male, does it appear ever to have been complied with. There must necessarily have intervened a serious demur, and obstacle, that stopt the procedure, hasty and questionable, as we may presume, in the first instance. It is indubitable, that no such Peerage is to be detected, at least, in the printed Roll of Parlia-

There is certainly no fair *res judicata* in the matter.

In the case of the Earldom of Dunbar, there was no full recognition, or assumption of the honours, at any time, by the collateral heir-male, but an unfavourable *rei interventus*.

[1] Great Seal Register.

[2] Acts of Parl. last Edit. vol. XI. pp. 305-7.

[3] See Robertson's Peerage Proceedings, pp. 33—48-9.

[4] See pp. 251-2. [5] Great Seal Register.

[6] The remarks of the Attorney-General, in the Devon claim, in reference to an inferior dignity, contended to have devolved to an Earl of Cork, might here latterly be applied. "There was no counter-claim. There was no disputed point, no controversy, which brought the matter in issue before the House of Lords; and therefore it results in the simple fact, that it being immaterial to *his* (the *Earl's*) rank and dignity, whether he sat *with* the superior title, or the inferior, nobody thought it worth while to dispute that claim, and he was permitted to pass as *Lord Broghill*, (the *inferior honour* in question,) as well as Earl of Cork." Report of Devon case by Sir Harris Nicolas, p. 124, which I shall hereafter quote more briefly, as the Devon Report.

[7] Great Seal Register.

[8] Acts of Parl. last Edit. vol. XI. Append. p. 28.

ment in 1706,[1] and certainly in any rolls thereafter[2] of the kind; while it has been, as little, *ever* assumed,—though there existed, and do now, numerous heirs-male collateral. The ostensible exceptions to my main conclusions, might therefore, in fact, in the circumstances, be even forcibly urged, by the common principle, that *exceptio*, (however not here through the *medium* of *res judicata,) firmat regulam*, to strengthen them. And of all the *glaring* misstatements and misconceptions *ever* hazarded, or fallen into *before* a legal tribunal,—most strangely, without the manifest contradiction which *could* have been given, and *that ought*, those proceeding from the crown, in the Annandale case in 1826, may be held the most striking and remarkable, that, from 1660 to 1707, there were seventy-nine Peerages taken "hæredibus masculis," and that of them, "no fewer than twenty-eight are held by collaterals of the patentee." Now, on the other hand, the *fact is*, as will be found by a proper examination of our records, and the competent authorities, that, during the period in question, there happen not to be more than five, if so many, thus limited simply "hæredibus masculis;" while, what may occasion even greater surprise, not a single instance transpires of any of them having gone to collaterals! Of these, Forfar, as has been seen, may be held pointedly to shew the reverse; at any rate, can by no means assist; and as to the few solitary remaining instances, that were condescended upon out of the above range, namely the Peerages of Nithsdale, Seaforth, Kenmure, Kincardine, and Kirkcudbright,* two merely, Kincardin, already discussed, and Seaforth, whose situation has been anticipated, can alone at present tell,—specialties attaching to the others, owing to circumstances, and the existing law; while, as before observed, there has never been a fair *res judicata* in the question, either in reference to them, or *any others*. This opposite statement, it is remarkable, was made by me in a Publication, as far back as 1833, and nearly essentially, legally, elsewhere, without being so attempted to be shaken or refuted.[3]

The alleged exceptions to my inductions may be said to prove the general rule.

Most glaring and unfounded statement made on this head, (perhaps unparalleled,) in the Annandale case in 1826.

Instances adduced there, of the asserted broad meaning of *heirs-male*, that are besides irrelevant, or make the other way.

(* I here, and above, quote from an authentic copy of the Speech of the Lord Advocate on the occasion.)

In the English Devon case in 1831, involving too, a limitation to "heirs-male," its advocates, and the supporters of the judgment, independently of a solitary Irish precedent, to be afterwards stated, (there being none to assist them within the wide compass of English practice,) were obliged, rather amusingly, and by marked revolution in sentiment, to implore and beseech the countenance and protection of our law in this respect —to which, in their straits, they eagerly clung,—nay further, immensely exaggerated and misrepresented, the better, as it were, to suit their purpose. And accordingly, it came to be there maintained; while the Lord Advocate, for the crown, was represented, as above, in the Annandale case, as being "much startled" at the supposed new restricted meaning of heirs-male, and contended it to be "totally contrary to the

In the English case of Devon in 1831, where the aid of our law was *so much implored* and entreated, great stress was laid upon the above misstatement, which was even still more, nay *grossly* exaggerated.

[1] Now before me. It has never been fairly admitted.

[2] See Rob. Peerage Proceed. *passim*.

[3] *Neither* from 1600, to 1660, are there *any other cases*, owing to circumstances, further illustrative of the question, which now may be held as fully *relevantly* stated.

understanding of all Scotchmen, that there should be a doubt as to the meaning,"—that in the cases of Seaforth, Kinnoul, Kenmure, Kincardin, *Forfar*,[1] (!) and Kirkcudbright, the collateral male succession had "*actually been decided* in favour of *claimants* who were heirs-male collateral of grantees of Peerages," from whence it resulted, forsooth, that such confessedly was "the established Law of Scotland, supported by judicial decisions!!"[2] I need not repeat, that this never obtained; and as for the instance of Kinnoul, here objected, as I shewed elsewhere, it is not only entirely foreign to the discussion, but even makes the other way.[3] Upon such erroneous assumptions, nevertheless, the Devon argument *prospered mightily*, deriving *no* small countenance and benefit from the same; and, like a snow ball, prodigiously augmenting as it rolls, even with this outrageous increase of misrepresentation still, that "heirs male" received *(quite visionarily)* a broad collateral import "in the *seventy-nine*" Scottish cases of Peerages, to which allusion has been made![4] In thus glaringly sinning against the truth of our law and practice, the old adage of the canonists has been reversed in favour of the Devon claimant, that "*frustra* legis opem *implorat*, qui contra legem peccat."

Supposititious case of Kinnoul was added to the imaginary proof of the broad meaning in question, which however also made the contrary way.

Nevertheless the Devon claim prospered mightily, and derived great benefit from *such mode* of illustration.

In the actual circumstances, more immediately in reference to the main topic, as was submitted, it is evident, that if the crown, even in one or two instances, including that of the Viscounty of Melgum, &c.—besides the remainder to that effect,—did use, as they most *certainly did*, "heirs male" to define only heirs-male of the body, it might very well have deliberately done so, in various others. Here then, was a serious demur and consideration; and hence, as the strict, and *unequivocal* act and intention of the crown *in honours*, should, I conceive, be especially inquired into, and ascertained; to guard against any undue error, or misconception on this head, it seemed a wise, salutary, and necessary doctrine, that when the words "heirs-male" occurred in patents, *there should* be some *further* ruling test, and criterion exacted, either by a relevant adjunct, the context, or collateral indications,—notwithstanding the noted case of Hay of Limplum in 1789, at common law,—to extend, and rivet to them the broad meaning. This appears the safe and best method to eschew error, and the evil in question; and it was countenanced and supported by lawyers; while the frequent adjunct "whatever" to "heirs-male" opposes their wide import *alone*.[5]

Even although there were but a few cogent authorities for the restricted meaning, or doubt in the matter, that ought, *in honours*, to deserve legal attention, and to require some additional circumstance, to eke out the broad sense in respect to heirs-male.

By the remarkable English decision, however, in the case of the Earldom of Devon, above referred to, the 14th of March 1831, which is quite *unique*,—if not, I would almost say, a solecism in English practice,—and that has elicited much comment and criticism; for the *first* time in England, a dignity, after being dormant, and universally believed extinct for nearly three centuries, was adjudged to the

The remarkable English case of the Earldom of Devon, in 1830-1.

[1] See p. 1021, n.

[2] See Devon Report, p. 58.

[3] See my former "Remarks upon Scottish Peerage Law," pp. 12, 13.

[4] See Devon Report, p. 59; also for what precedes, *ibid.* pp. 49, 53-4-5-6-7-8-9, 61-2, 104-6, 153-4, 158-9, 184.

[5] See, *inter alia*, p. 1024, n. 2.

This Earldom, created in 1553, held for centuries to be extinct, yet, in virtue of the limitation to "heirs-male," *without* a *single* English precedent or actual authority in its support, was adjudged, in 1831, to the collateral heir-male.

collateral heir-male, many in which character all along existed, and on all hands acquiesced in the extinction, under a limitation, in 1553, to "heirs-male."[1] In support of the conclusion, while the constructive meaning of "heirs," or "heirs male," in honours, as already obvious,[2] equivalent only to *direct* descendants, had obtained, indisputably, as would seem,—there was *no single* English precedent of an English honour, during the *wide range of English practice, ever before*, having *gone* to, or been *even assumed*, by a collateral heir-male, under such limitation. Nay, as further unavoidably evincing the strong opposite bias, it is amusing to observe, in the case in question, the claimant actually obliged, on a different point—that of his pedigree, to adduce *suicidal* evidence, in his own instance, of "heirs-male" having, on the other hand, the former *restricted* acceptation. To establish that he was the heir-

[1] In the Devon patent in 1553, the patentee, and his heirs-male, are to have the pre-eminence, state, honour, and places, such as "aliquis antecessorum dicti nunc Comitis, antehac Comes Devonie existens, habuit, tenuit," &c. (Devon Report, Append. p. iv.); but this clause, including, as would seem, the old precedence of former forfeited Earls, cannot be properly held, as was pled, to amplify the limitation, or make it otherwise than it intrinsically is; for in entirely new grants of the same Peerage, at variance with the *previous* ones—to such as were not the next heirs *thereby*, nay even to utter *strangers*—the succession being wholly altered,—the identical *ancient* precedency was yet in use to be carried. This has been partly shewn in the case of the Earldom of Crawford, in 1642; (see p. 976.) The case of the Earldom of Errol is also in point, the present noble family, in virtue of the regrant in 1666, with the subsequent nomination, (see p. 768), having the ancient Errol precedence in the 15th century, though neither the heirs-male, nor the heirs-general of the *original* stock, or taking under *their* limitations; to which we may add, the similar instance of the Earldom of Roxburghe, in 1646, and many others, including especially that of Sinclair, where the Barony, with the old Sinclair precedence, in terms of a patent already referred to, (see pp. 78-9,) in 1677, has now devolved to the heir-male of the Sinclairs of Herdmanston, legally unconnected with, and utter strangers to the antecedent Lords Sinclair. The precedency was thus an isolated royal boon, independent of descent, which it therefore neither illustrates, nor what had preceded.* Neither can stress be laid upon the adjunct "*imperpetuum*" to "heirs-male" in the Devon patent, (see Report, *ut sup.* p. iv.) it being *per se* indifferential, and following, with us, heirs-male of the body, as well as heirs-male. I may here refer, among other cases precisely of such kind, to those of the patents of the Barony of Eythen in 1642, and of the Earldoms of Aboyne, and Dunmore, in 1660, and 1686, where all the limitations are but to heirs-male of *the body*, "*in perpetuum*." (Great Seal Register,) &c. &c. If it be objected, that the above are *Scottish* illustrations, this cannot avail; for the Devon claimant was obliged, in order to support his case, elsewhere, to stand upon, and earnestly to implore the aid and authority of our Peerage conveyances,†—further maintaining, that the law and practice of both countries, so far, formerly, were the same;‡ and it is notorious, we cannot both approbate and reprobate in law. I shall, therefore, throughout, view the Devon limitation but as one simply to "heirs-male."

[2] See pp. 1023, *n.* 2. 1024, *n.* 2. and pp. 1035-6.

The clause carrying the *precedency* of the *ancient* Earls of Devon, in the Devon patent in 1553, and insertion of *imperpetuum* after "heirs-male," cannot properly *extend* the sense of the latter.

* For the striking corroboratory Mordington case also, see p. 1036.

† See Devon Report, under references in *n.* 4 to p. 1027.

‡ Devon Rep. pp. 54-5, 158-9, 184.

male of William, first Viscount Courtenay, his grandfather, he referred to "Extracts from Pedigrees proved before the *Committees of Privileges*, on the 18th February 1771, and 17th March 1794," fixing, *inter alia*, that the latter had been created Viscount Courtenay of Powderham Castle, &c. "by Patent, 6th May 1762," "to him and his *Heirs male*,"[1]—thus standing alone. If so, then, equally—the above being legal evidence, repeatedly admitted and recognised by a solemn tribunal,—upon the identical construction of "*heirs male*," contended for at the time, the *present* Earl of Devon,[2] Viscount William's *collateral* heir-male, ought to be Viscount Courtenay; which honour, nevertheless, in the utter dearth of inferior ones in the family, he has never claimed; but lo, and behold, under another head, by irresistible evidence, published by the Devon counsel, the former words, *e converso*, are ascertained, and fixed to have implied no such meaning, but, in the terms of the *actual* patent, to have denoted only "the heirs male of *his* (the *first Viscount's*) *body*, lawfully begotten."[3] This was, however, quite natural, owing to such limitation being synonymous with the above. In the striking absence, therefore, of English authority, as stated—independently of the aid he so anxiously, though unduly grasped at, from our *supposed* practice,[4] the Devon claimant was compelled merely to stand upon the *naked Irish* precedent,[5] as follows,—on which he triumphantly founded, really *ad victoriam causæ*, as if identically *similar*, and quite adequate for his purpose. On the 28th

Balaamlike, or *suicidal* exposition of the restricted meaning of *heirs-male* even amusingly perpetrated by the Devon claimant in his evidence.

Independently of the Scottish mistaken illustrations, so exaggerated, he could only stand upon a supposed

[1] See the evidence, as fully given in the Devon Report, Append. p. xlix.

[2] The claimant in 1831 died, as is well known, some years ago, without issue, and was succeeded by the present William Earl of Devon, in the capacity subjoined, as next heir-male.

[3] *Ibid.* p. 19. [4] See pp. 1026-7.

[5] As the Attorney-General well remarked in the Devon claim, there was no other that could be referred to, *valeat quantum*. (See Devon Report, p. 123.) One or two old examples of English patents to "heirs male," together with others to "heirs male of the body," were eagerly attempted to be pressed into the service; but this weighs nothing, owing to the former terms, as before understood, being synonymous with the latter. The framer might just have expressed the same thing, as often happened, under such literal discrepancy, for variety's sake. And what is more material still, forfeiture, or other as effectual circumstances, strikingly obtained, quite precluding any illustration, or expiscation of the peculiar meaning of "heirs male" in their case, from subsequent contingencies, or the descent. In the Scrope instance, the patentee, created Earl of Wiltshire, the 29th of September 1397, to him and his "heirs male," and who happened to be forfeited only two years after, was without offspring at the time, while he had two brothers who had male issue; from which mere circumstance, it was lamely endeavoured to be maintained, that the limitation must be inevitably to heirs-male whatever, (*ibid.* pp. 49, 50-1, 112-13-14); but he might very *well* have had subsequently male issue; and, in our days, there are many grants of Peerages even to old persons, having no visible prospect of issue, only to the heirs-male of their body, and otherwise exactly in the same predicament as above.

Irish authority in 1627.

of February 1627, Charles I. created, by patent, Lewis Boyle, second son of Richard, first Earl of Cork, Baron of Bandonbridge, &c. in Ireland, to him, and the heirs-male of his body; *whom failing*, to the *heirs*-male of *the body* of *Earl Richard*, his father; WHOM FAILING,[1] "rectis *heredibus masculis* dicti comitis imperpetuum." And *further* still, the king, in the preamble, emphatically declares, that it was his will that the said honour, "*non solum* dicto Ludovico, et heredibus masculis de corpore; *verum etiam omnibus* heredibus *masculis*, *tam* de corpore, *quam a* LATERE, *dicti Comitis* permansurum,"[2] than which nothing can be more self-evident and explicit. Here, therefore, it will be observed,—heirs-male, as every legal tyro knows, being occasionally flexible in its import,—first, that owing to the certain *explicit* exhaustion of *all* the heirs-*male* of *the body*, in the previous instances, the "heirs-*male*," over, and above, under the ultimate remainder, can only, *ex terminis*, *et ex necessitate*, be heirs-male *whatsoever*, and collateral. That is indisputably proved, intrinsically, by the context, which any one who runs may read. And secondly, such construction is even additionally rivetted by the pointed declaration, at the outset, that the honour *eventually* should go to the Earl's heirs-male *collateral*, "*a latere*," *independent* of his body.[3] A male collateral descent is consequently here enforced, *ex abundanti*, in the plainest and most inevitable language; —but can it ever be fairly said, that this *very peculiar* multiform Irish instance, forming a single remarkable exception, in itself,[4] to the universal Irish practice, *aliunde*, as well as to the English, interpretates, and is at once to *attach* the same broad import, so anxiously and critically guarded, to a naked limitation simply, to "heirs-male," as in the Devon case; which, forsooth, was contended to be *identical* with the above? With every submission, I conceive not. The obvious rule, only, applicandi *singula*, *singulis*, can come here fairly into play; and what may indisputably weigh in the one case, may not in the other. It seems irrelevant to found on the Irish patent in 1627, with its subsequent effect, except in the instance of a patent,—not assuredly meagre, inexplicit at most, and so different, as that of Devon, which falls to be governed by *other* fairly *referrible* tests and rules—but having a corresponding analogous *broad* structure and *contexture*,[5] the context, in

But the latter is irrelevant, not being a case (like Devon) of "heirs-male" simply, but having the broad collateral descent enforced *ex abundanti*, by the context, and through special remainders. In construing each, therefore, the opposite rule, *applicandi singula singulis*, must apply.

[1] "*Per defectum talis exitus*,"—the issue which had preceded.

[2] Devon Report, Append. pp. lvii. lviii. [3] *Ibid.* p. lvii.

[4] There was a patent also of the Irish Barony of Broghill, granted, of the same date with that of Bandonbridge, &c. to Roger Boyle, another younger son of the above Earl of Cork, (see Devon Report, Append. p. lx.) that was alluded to in the discussion, though not so forcibly, or directly; but it is in identical terms, and import evidently, with the preceding, being besides induced by the same motives, and circumstances, which must have governed both, though the words "*a latere*," the single exception, happen not to be in the preamble.

[5] Great stress was laid, in the Devon case, upon the alleged fact of the Barony, in terms of the Irish patent, after Lewis, the patentee, who died without issue,

the converse instance in question, being, so far, quite ineloquent, and mute. If a collateral male succession too, had been decisively intended in the Devon patent, why—the same law and practice holding in both alternatives—was not *something* at least, of similar force, and phraseology with the other, at once adhibited, so naturally, to take the case, according to the Irish fashion, out of the weighty dilemma, resulting from the, at most, ambiguous acceptation, as is indisputable, of "heirs-male;"—words, *(alone,)* that, whatever may be said, have been technically employed, both in England and Scotland, but most especially in the first country, to define heirs-male of the body; yet of this, there is not a vestige; while, *vice versa*, the full and anxious insertions and clauses in the Irish patent bespeak their indispensable necessity for the purpose. The Devon plea, in fact, stands illogically thus, that because, from the *distinctive* terms, and context, backed by the ultimate and decisive remainder, in the peculiar circumstances, in the Irish patent, "heirs-male" therein, do denote heirs-male whatsoever, *therefore* a limitation to "heirs male," *nakedly*, in quite a different predicament, is to be equally entitled to the same broad construction. But admitting such construction of "heirs-male," (simply,) to be thus relevantly fixed, by the *overwhelming* context of a different patent upon *one* occasion, we as clearly, in principle, arrive at a totally conflicting one, nay ruinous to the Devon claim, upon *another*, on parallel grounds, as strong and as irresistible. Why, *inter alia*, we are here met by the remarkable modern Roxburghe case. The descent of the Roxburghe honours, now including the Dukedom, is regulated by the noted limitations in the Roxburghe conveyance in 1648,* to the daughters, *seriatim*, of Harry Lord Ker, only son of Robert first Earl of Roxburghe, and to "their *heirs male;*" but with remainder next, to the Earl's "heirs male *whatsoever;*" and it was just analogously resolved by the Lords in 1812, in the same way, though diametrically opposite to the vital Devon conclusion,—through the *medium* of the *context*,—that "heirs-male" here, on the other hand, under authority of this instance, only denoted "heirs male of *the body;*" because, as must strike every one, if not, and if they are to be taken in the enlarged sense, contended for, what necessity could there possibly especially, be, for the next remainder to "heirs-male whatsoever," or to "heirs-male *collateral*?" In fine, if the phrase "heirs-male," sometimes flexible, may be proved, as it is, by the *context alone*, of the Irish patent in 1627, upon which the Devon claimant so strenuously and mainly re-

Why, if heirs-male-collateral were in view, was not *similar* broad language employed also in the Devon instance, as in the Irish?

But, admitting the phrase "heirs-male" to be explained by the context, in the Irish instance, according to the *broad* sense, which it clearly, and only is; *by the context* also, in other patents, it may, in the same way, be equally construed in the restricted.

* (Under authority of the royal regrant in 1646.)

The above proved by the Roxburgh case in 1812.

Obvious corollary here.

having gone to his collateral heirs-male, *descended of the body* of the *Earl*, his *father*. (See Devon Report, pp. 116-17-18, &c.) But this was, under the *express remainder* there, "to the *heirs male of the body*" of the Earl, (see p. 1030,) which is quite another thing; and how it can bear upon the Devon case, properly, I am at a loss to discover. There is no doubt, that collateral succession obtained in England, after a *certain form*, by remainders; but the question is, how it is to be otherwise eked out, whether by "heirs-male" simply, as in the Devon case, or not?

lied,—though, I conceive, fairly inapplicable to him,—against the strong negative argument too, of complete English taciturnity, and total want of corroborative precedent, so far, in the ordinary case, nay, direct English repudiation of the notion, as we might hold,—to include heirs-male-general; as certainly, by parity of reasoning, may the same phrase be explained and illustrated elsewhere, in the same way, and equally with reference to the Devon claim, to be only capable of the opposite restricted acceptation of "heirs-male of *the body*."

My induction also established by the patent of the Barony of Cramond, in 1628.

To proceed to other parallel examples, besides that of Roxburghe. The Barony of Cramond was conferred, by patent, dated last of February 1628, upon Elizabeth Lady Richardson, the wife of Sir Thomas Richardson, Lord Chief Justice of the Court of Common Pleas, in England, "pro toto tempore vite sue;" with limitation, after her death, "*perque modum successionis*," to Sir Thomas Richardson, knight, "*son* and *heir*" of the Chief Justice, "suisque *heredibus masculis; quibus deficientibus*, hæredibus masculis *de corpore* dicti Domini *Thomæ—Patris*,"[1] *(the Justice.)* It is hence plain as day-light, owing to the ordinary *mode* of male succession, as stated, being here confessedly adopted,—taken with the ultimate remainder to "heirs-male of *the body*" of the common father of the male parties,—which otherwise, upon the large construction of "heirs-male," would have been quite unmeaning and superfluous,—that in this patent, framed, and revised, as we may presume, by a great English lawyer, who had such a parental interest in the matter, these very words, "heirs-male" in the first limitation, do again merely express heirs-male of the body, and were technically used for such identical purpose. By their position, through aid of remainders, in the Irish patent in 1627, they came to express heirs-male-*collateral*; by their position again, above, in the same way, *contextuously*, in 1628, to act quite conversely, as shewn. The Parliamentary Act of restoration of the Marquisate of Huntly, and the family honours, dated 25th of March 1651, formerly alluded to,[2] limits the same to "Lues Gordon,"—son and heir of the deceased George Marquis of Huntly,—in consequence thereof, the third Marquis,—"and his *airis maill*; and faillieing of him, and *them*, be *decis*, to the *next* apparent air maill, of his said umquhile *father*, and *breithern*."[3]

And further, by the Act of Parliament restoring the Huntly honours, in 1651.

It is even here still more obvious from the context, that "heirs-male" only, (of Marquis Lues,) denote "heirs-male of the body,"—thus shewing the frequency of such acceptation; because otherwise, there could, again, have been no earthly use for the subsequent limitation; while this construction perfectly quadrates with the situation of the family at the time, Marquis Lues having then a son George, afterwards, in virtue of the Act, Marquis George, and two brothers, Lords Charles and Henry, who are here all evidently contemplated.

[1] Great Seal Register.

[2] See pp. 873-4.

[3] From the original, produced at the recent Huntly claim.

I need hardly repeat, after what was formerly shewn, that the preceding are all relevant illustrations; the very recent Huntly claim, indeed, in 1838, mainly turning upon the same Act in 1651, (as regulated in the descent,) and being, as well as the previous Roxburghe case in 1812, solemnly discussed and adjudged by the House of Peers. It is indisputable, therefore, from these three unexceptionable Peerage instances of Roxburgh, Cramond, and Huntly, now stated, in the reigns of Charles I. and II.—all before the close of 1651,—that "heirs-male" had, *e converso*, technically acquired the *restricted* meaning; *a fortiori* unquestionably, than may be exemplified, with respect to the *enlarged*, but in the mere solitary Irish instance, of so peculiar and unprecedented a kind, in the reign of Charles I., and that, moreover, being so palpably defined, illustrated, and explained, *ex abundanti*, in its import, in *græmio*, can never properly, I conceive, be assimilated to the Devon, involving a brief abstract limitation, *simply*, to "heirs-male." In explaining each, and arriving at their meaning, we must infallibly adopt the only relevant, though opposite principle, of applicandi *singula singulis;* while it is as obvious, that if we admit the *contextual* argument, as defining or fixing "heirs-male," from the Irish patent, we *must* do so, by means of the Scottish ones, which would lead to a pretty anomaly indeed, nay, as I observed before, ruinous to the Devon claim. That there may be collateral succession in honours, in England, no one can dispute, as, through the notorious agency of express *nominatim* remainders, or otherwise, as in the marked Irish case so often alluded to; but the question is, how is it *differently*, to be fully eked out? and, with submission, it at least has not been so satisfactorily done, as could be *desired*, in the circumstances, in that of Devon. Whatever there may be in the more abstruse and conflicting doctrines, and principles of the English law,[1] its various subtilties and distinctions, &c. into which I of course cannot enter, and that may have, independently, ruled in the Devon claim, still I may contend, that, in a *practical* view, and as deriving support from *direct* precedent, authority, or *res judicata*, it is among the weakest, and narrowest imaginable. And no wonder that its patrons and supporters, in their great straits, —"hard tax on *English* pride,"—to travesty Churchill's noted words,[2] —were thus obliged, first, to beg and solicit, as it seems, the *omnipotent* countenance and protection of *Irish* wisdom, and authority; and secondly, of their "poor" *northern* neighbours,—before the shrine of whose law—which, in England, on other occasions, has been attempted, to be so perverted and even contorted into the English, they devotedly fell down as humble supplicants,—nay, glaringly exaggerated, and now, on the other hand, made, in *fact*, as unlike their own as possible, to suit the Devon object.[3]

The preceding, from what was shewn, all relevant illustrations in the Devon claim, may tell *a fortiori* than the *solitary Irish case.*

The Devon case at least, as regards practical support and countenance, the weakest conceivable.

Its supporters were amusingly obliged to supplicate the aid of the *supposed* Scottish practice in honours, (independently of the Irish,) and, in fact, to make the Scottish, contrary to English bias, as much unlike the English as possible.

[1] English lawyers have been, at the sametime, against the broad construction.

[2] In the "Prophecy of Famine."

[3] To English legal necessity, and destitution, in this manner, analogously here also with Churchill's "Cave" of "Famine," the notable resource and expedi-

Peculiar mode of interpretating the Irish patent in 1627, on the Devon occasion different from ours.

A peculiar method, not very familiar to us, of construing the *Habendum*, or express clause of destination in the Irish patent in 1627,[1]—too much apart seemingly, and distinct from the preamble,—was countenanced, and inculcated in the Devon case, though, as I have viewed the matter, little availing the claimant. Because the words "*a latere*," or previous intimation of the intended *collateral* descent, in the preamble, —upon which, nevertheless, much *stress* was laid, in the relative argument,—are not in the *Habendum*, they were held to operate in an apparent anomalous manner—rather isolatedly,—and notwithstanding the *reflected* advantage, thus, *in fact*, attaching to the *latter clause*, (*if* it could be further enhanced,) and *besides*, distinctive, and irresistible force of the several remainders it contained, &c. this *Habendum* was to resolve simply, into a limitation to "heirs-male," as in the Devon patent;—while, if "*a latere*" had been also therein, then its repetition would have been, at once, injurious and fatal to the claimant, as creating a specialty, that had rendered the Irish instance, in question, foreign and inapplicable;[2] as I conceive it was, at any rate. The above nice-spun subtilty, and ambiguous distinction, as if *forcibly* to carve, and adapt that instance to the Devon purpose, as might strike one, we in Scotland may not precisely comprehend. All the words, scope, and intention, anywhere transpiring in such a grant, I apprehend, on the other hand, we would take into general *practical* consideration, *semel et simul*, as founding and authorizing the relevant conclusion; without *so* exclusively resting upon an individual clause, as professed, which nevertheless was not wholly, or consistently done. The noted *jet* of the fable of the body, and its members, would here apply. Nay, with such view, we might even "look" *beyond* the grant, as, by the way, Lord Redesdale actually did in that of the Annandale Peerage; so differently again, from what was inculcated in the Devon case.[3] In his speech there, in 1826, in order similarly to expiscate the meaning of the identical words "heirs-male," as in the Devon instance, his Lordship, not only generally, and articulately interpretated, and explained the *main* Annandale patent in 1661, which was directly found-

Conflicting modes of interpretating, or construing patents, according to Lords Wynford, and Redesdale.

ent in the text, "shelter at once for man and *beast* supplied,"—to render the *last term*, as the Poet, the noted detractor of the Scots, might naturally have done in reference to *them* at least, if not also to the Irish.

[1] See pp. 1029, 1030.

[2] See Chancellor Brougham's Speech in Devon Report, pp. 169, 170-1-2, especially in reference to that of the Attorney-General's, pp. 141-2, *ibid.* and Sir Harris Nicolas's remark, *ibid.* p. 142, *n.*

Narrow rule of Lord Wynford in construing a patent.

[3] Lord Wyndford laid it down, there, "You cannot, by any rule of law, look *out of a patent.*" Devon Report, p. 119. And the learned Reporter states, that "the Counsel (on an attempt being made to explain or illustrate the import of the main Devon patent, in 1553, by another to the family,) were informed, that 'it appeared to their Lordships, that one instrument could not be used to controul the effect of another instrument.'" *Ibid.* p. 65.

ed upon, and where they occurred *inter alia*, but even further reverted to *those* antecedently conferred upon the family, in a different reign, in 1633, and 1643.[1]

In leaving this subject, I may allude to the case of the Viscounty of Beaumount, as given by Selden. John Lord Beaumount was created Viscount Beaumount, the 18th of Henry VI. (1440) to him, and the "heirs-male of *his body*." But there subsequently, passed, in 1445, a *second* patent, merely to fix the precise precedence, of the said Viscount, and his heirs; the dignity being new in England; and which, therefore, after a "short *recital*" of the *first*, grants it next, after all Earls, and "supra hæredes, et filios omnium Comitum,—eidem Vicecomiti;" *but* simply, "*heredibus suis masculis*;" who were thus to rank. Here then, though the very words of the Devon limitation be latterly employed, they are obviously, I should infer, only used synonymously with heirs-male of the body, the honour, with the precedence, being assuredly granted to the same heirs; while the first patent appears not to have been intended to be innovated upon, or was recalled.[2] Of course I merely quote from *Selden*, learned and experienced though he be in such matters, not having access to the original record, or authority. Upon the previous principle of construction, however, in the Devon claim, bearing upon the *Habendum* in the patent, apparently at variance with Lord Redesdale's, it is observable, that the Beaumount limitation in 1445, falling operatively to rule by itself, the Viscounty should go, like the Earldom of Devon now, to heirs-male whatsoever,—of whom, if I am not mistaken, some still exist.

Case of the English Viscounty of Beaumont, in the reign of Henry VI., whereby the phrase heirs-male would appear to be proved synonymous with heirs-male of the body only.

The *Habendum* in the last Beaumont grant, viewed according to the rule in the Devon case.

In support of the presumption by the English law, of honours being merely descendible to *direct* heirs, and of the distinction between them

[1] "The first question (Lord Redesdale said, on the occasion) will be upon the true construction of that *limitation*, ('*heredibus masculis in perpetuum*,' in the *first* patent of the Barony of Johnstone *in* 1633). In the law of Scotland, it is clearly laid down, that those words are to receive a construction according to the *circumstances* of the grant, that they *do not* clearly import heirs-male *of the body*, (in whose *favour* he *presumes*), but, according to *circumstances*, may receive an interpretation from the *whole* of the instrument, in which they are inserted, and that they may be considered as applying to heirs-male-general, whether of the body, or not." And hence "heirs-male," which, as I remarked, is sometimes flexible, would be construed by every one of the emerging particulars, weighed and balanced fully together. But further still, his Lordship proceeded to the next Johnstone, or Annandale patent in 1643, discussing it in like manner; and finally, to the one strictly before the House, that in 1661, whereupon the claimant *stood*, and under which he could *alone* take,—all the former being, so far, foreign to him,—inasmuch as they were exclusively to "heirs-male," while he was but the heir-female. The above is derived from a cotemporary authentic copy of Lord Redesdale's speech.

Lord Redesdale's mode of interpretating the main Annandale patent in 1661, in the Annandale case, by reference also to the previous ones to the family.

[2] Titles of Honour, Edit. 1672, pp. 631-2.

Further evidence of the presumption by the English law *in honours*, of their descent only to heirs of the body—even in the case of the more enlarged limitation unqualifiedly, to "*heirs*."

and lands, I may further add, this excerpt from the Lords Committees Report into the state of the Peerage, formerly, but barely referred to, and which was pointedly founded upon by the Attorney-General in the Devon case;—that a grant of an Earldom, to one and "his *heirs*," according to the words of Justice Doddridge,[1] "being confined to the grantee and his *posterity*, is, in truth, a grant only, to him and the heirs of *his body*, and therefore does not resemble a grant of lands in fee-simple, which, according to the law of England, as now long settled, would have given the land by descent to *any* heirs of the grantee; an observation which marks a clear distinction between the grant of a mere dignity and the grant of lands." With respect to which, the Attorney-General most naturally remarked, that "unless the addition of *male*, (as in the Devon limitation,) which is plainly intended in a case of this sort, where there is no exclusion, should make the grant *more extensive*, when certainly, *if it means* any *thing*, *it makes* IT LESS so, I cannot conceive why this axiom of law should not be found applicable to *this*," (the Devon *case*.)[2] The Lords Committees, also, in their Report elsewhere, state, that, "according to the law of England, at least as now understood, and perhaps as always understood, a dignity simply cannot be granted in fee-simple; it can be granted only to the person described in the grant, and to the heirs general or *special* of *his body*, he, and those *descended* from *him*."[3] What little real stress too, can be given to the clause in the Devon patent carrying the old precedence, may be further evident from the patent by Charles I., the 10th of March 1640, of the Scottish Barony of Mordington, (that, in effect, of Oliphant, constituted as far back as the reign of James II. in the 15th century, though under another name,) in favour of Anne Oliphant, the heir-female of the Lords Oliphant, who had many collateral heirs, and may be held *then* the true heir, *bating* the *resignation* of Lord Laurence, her father, that went to void her right, and was in *pari casu*, with the Devon forfeiture previous to 1553,—*which* again, (the *Mordington* patent,) also carried the *old* Oliphant *precedence*,—*but* to her, and the *heirs* of *her body only*.[4] Thus the carrying such, as above, may not necessarily, *per se*, amplify the words of limitation in a patent, as was forcibly contended in the Devon argument, to which consideration they are properly foreign. Neither can the above precedent be reject-

Further illustration also, of the little account to be paid to the Devon precedency clause, from the apposite Mordington patent in 1640.

[1] "If a man be created earl to him and his heirs, all men do know, that although he have a fee-simple, yet he cannot alien or give away the inheritance, because it *is* a personal dignity, annexed to the *posterity*," &c. This passage was at the same time quoted.

[2] Devon Report, pp. 143-4-5.

[3] Fourth Report of the Lords Committees, (*ut sup.* in the text,) p. 283.

[4] Namely, between her and Sir James Douglas, her husband, or any other. For proof of these facts, see pp. 179, 180-1, and what had preceded. For other instances of grants of the old precedency, in later patents, to the same purport, see p. 1028, *n.* 1.

ed or discarded from view, in the Devon claim, that, as has been seen, relied so eagerly and greatly, on Scottish grants of honour, in the same century with that of Mordington, seeing we never can consistently both approbate and reprobate in law, which would be the inevitable consequence of such rejection.

Chancellor Brougham's closing remarks in his speech in the Devon claim.

Chancellor Brougham, in the Devon claim, it is observable, curiously, and strikingly closed with impressing, (or hoping?) that it was the "only case of an English dignity," of the kind, ever likely to be discussed, and to enure into practical rule and precedent, by way of affording "some relief," he said, "to the mind" of the Peers, in the resolution they might come too.[1]

A favourable, and rather amiable feeling appears to have been displayed towards the claim in question, owing to the antiquity, chivalrous, historical fame, and distinction, and pristine nobility of the Courtenays—that had unfortunately undergone a marked and undeserved eclipse, however certainly not so super-eminently sprung, as contended, from the French royal family.[2]

The decision there, however, as well as the declared opinions of the Lords in the Annandale claim, must *now* practically be held as attaching the *broad* import to "heirs-male" simply.

But, whatever there may be in my preceding remarks, taken along with this very striking recent Devon judgment, when we find the high legal authorities in the House of Lords giving, as we may gather from their speeches, the same broad construction to "heirs-male," in the Scottish Annandale claim,—the former, in the circumstances, as shewn, even telling *a fortiori*, the general question affecting these words just becomes identical, in a measure, in its character, with the *peculiar* modern presumption adopted and enforced in Scottish Peerages, against *female* succession, so often adverted to. A counsel, whatever his own private opinion or bias may be, is professionally bound to affix weight to such marked prevailing impression, however grounded,—at least certainly to inform a client having a claim, by *collateral* male descent, to a Scottish honour, limited *simply* to "heirs male," that, in the event of its being pushed, he has, now, every chance of success in the House of Lords; with reference to whose notions and dictates, such claim before them, must, accordingly, be shaped

[1] Devon Report, pp. 185-6.

Question of the origin and descent of the *English* Courtenays.

[2] See, upon this head, my "Refutation of the asserted Royal origin of the *English* Courtenays," in a former work, entitled "Remarks upon Scotch Peerage Law," pp. 169—174, *incl.* also p. 867, *n.* of the present performance. There is every reason, however, to believe, that the *former* are sprung, as cadets, from the original French Courtenay stock, so long extinct in the direct male line, whose heiress and representative (like the Bourbon,) married Peter, a younger son of Lewis VI. of France, in the 12th century, and of whom came the Emperors of Constantinople, and the French Princes of Courtenay, (Peter's descendants adopting *that* surname,) who have also failed. The difference of the label, once taken by the English Courtenays, in their arms, the same otherwise, as those of the French Courtenays, after the higher baronial fashion, evinced in the cases of Sir Edmund de Hastings, and Walter Stewart Earl of Menteteth, in the 13th and 14th centuries, (see p. 992, *n.* 1,)—is obviously likewise, technically expressive of such descent.

and modelled. And so, I think, we may fairly dispose of the matter; for my likely tediousness and dilation upon which, I ought perhaps to offer an apology to my readers.

To recur once more to Mr. Sinclair, and not altogether to abandon him in his jeopardy, as he did his Jedburgh protogé.[1] In refutation of the fabulous surmise, that the mother of William first Earl of Douglas, in the reign of David II. was Dornagilla Comyn,—(in order to countenance a supposed preferable right in him to the crown before the Stewarts, through the Baliol family, from whom the Comyns are stated to have descended in the female line,) I adduced, in a recent performance,[2] an original charter from the Torphichen Charter-chest, legally proving her, on the other hand, to have been "*Beatrix Douglas*," as she is there explicitly styled. Mr. Sinclair, however, questions if she was, notwithstanding,[3] in fact, a Douglas, and hence may not have belonged to another family; though I have fully shewn, and could further prove, *ex abundanti*, that in conformity to the far prevalent and *peculiar* custom with us, even still observable in a degree, married women retained their *maiden* appellation both during their marriages, and after the deaths of their husbands;[4] which accordingly Beatrix

Mr. Sinclair's doubt, or notion as to *Beatrix Douglas*, the mother of William first Earl of Douglas, in the reign of David II.

[1] See p. 1013.

[2] "Tracts Legal and Historical," pp. 216—223.

[3] Dissertation, p. 140.

[4] See, among others, striking instances of this in the case of "Dame Agnes Keith," a daughter of the noble family of the Keiths, Earls Marshal, who is so described after the death of the Regent Moray, her first spouse, nay even after she had re-married Colin, Earl of Argyle, in 1574, and that of the several Dowager Countesses of Huntly in 1526, &c. (pp. 788-9, 790-1, &c.) To go further back, in the 14th century, and when Beatrix Douglas lived, the deceased wife of Malisius de Strathern, Earl of Strathern, is referred to by her maiden name, "Majoriæ *de Musco Campo*, Comitissæ de Stratherne," in a charter by Robert Bruce, (Rob. Ind. p. 11.) In the same way, we have "Margarete de *Abernythy* Comitissa de Anegus," and "Margarete de *Sancto Claro* (*Saint Clair*,) Comitissæ de Anegus," (whose husbands were, respectively, John, and Thomas *Stewarts*, Earls of Angus,*) in 1361, and 1362. (Reg. Dav. II. pp. 28-9, Nos. 45, 51.) Previous to this, there is mention, in a charter by David II. in 1357, (in the Marr Charter-chest,) in relation to the lands of Strongartney, "Johannis *de Meneteth* et Elene *de Marr sponse ejusdem*." Elen, as is notorious, was *daughter* of Gratnay *de* Marr, Earl of Marr; in right of which lady, thus as usual adhering to her maiden name, after marriage, the Erskines, as will be seen, came to inherit the Earldom of Marr. Numerous such examples could be added, establishing the rule, with one or two accidental exceptions, as in all such cases. It was deep-rooted—to go further back still, Dame Christian, of the distinguished, subsequently royal house of the Bruces of Annandale, wife of Patrick de Dunbar, Earl of Dunbar, who figured before, and after the middle of the 13th century, is referred to in a writ under the Privy Seal in 1529, as "cristiane *bruce* countes of Dunbar for yat tyme, (who) movit of devotione, biggit and foundit ane house of religione in ye toune of Dunbar, and gaif ye samyn, wyt all ye rentis, ande proffitis yerof to god, and to ye breyer of ye ordoure, and religioune of ye Trinite, submittand ye samyne religiouse house to ye caire,

Additional instances of the peculiar usage with us, of the retention by *married* ladies of their *maiden* appellations *after* marriage.

* See Andrew Stuart's Hist. of the Stewarts, pp. 56-7.

must be likewise presumed to have done.[1] The worthy gentleman would cruelly seek to detach me from this lady of the house of "*Douglas*," whom he yet can supplant by *none*. But I intend to remain *literally* faithful to *her*, however he may wish to fasten upon me *some other*, whom, although too, curiously "smitten," as he thus happens to be, with "*other* charms,"—to use his own words,[2] yet from being, at the same time, quite a stranger to him, he can neither present in person or attractions,—not unlike those which the fervid fancy of the Knight of La Mancha conjured up in the *beau ideal* of *his* mistress,—in fact, equally putative, and non-existent.

Mr. Sinclair is unable to support his inference, so far, by any authority.

In opposition to the rather contrary notion of mine, Mr. Sinclair sports the original theory, that "*widows*, even when married *again*, or *after* becoming widows *again*, *often* kept the *name* of their *first husband*, in *those remote* times,"[3]—such prodigious affection, it seems, did these excellent women, Phenixes of wives, so unparalleled out of Scotland, and so oblivious of every maiden consideration, bear to their much envied deceased first mates; nay, to the prejudice of all others! It was actually the next thing to dying with them, on the funeral pyre. He from thence would seem to infer, though he does not very distinctly bring out his meaning, that such may have been the case also with the preceding Beatrix Douglas—a mere gratuitous supposition, I need hardly add, on his part—whose surname, accordingly, was *alone* indisputably her first husband's, and not, maidenly, her's. But in support of such notable practice, he adduces the case of "Christian de Keth, spouse of Sir Robert de Erskine, (who) was *by birth a Menteith*, and *widow of Sir Edward Keth*."[4] He here gives it rather negligently again, without due explanation of his drift; which we may gather to be, that Christian, in conformity to the usage, still kept the surname of Sir Edward Keith, her *first* husband, after being married to Erskine. But the idea is palpably unfounded. *No* Erskine at the time, and, I believe, I may safely add ever, married a Christian Menteith, the widow of a Keith; who only figures in the fancy of Mr. Sinclair, and the "Peerage writers." The true facts are these. First, Sir Thomas Erskine of Erskine, who figured towards the end of the 14th century, the ancestor of the noble family of Marr, married *Janet* Keith, *daughter* of *Sir Edward* Keith, by *his wife Christian* Menteith, daughter of Sir John Menteith, by Elene de Marr, daughter of Gratney de Marr, Earl of Marr; in virtue of which marriage, the Earldom of Marr came into the Erskine family, as is proved by irrefragable evi-

His singular proposition or fancy, as to *Scottish widows*, in "*remote times*."

His instance of Christian de Keith, to which he appeals in support thereof, unfounded and irrelevant.

and zaill *(zeal)* of ye minister of ye place." (Privy Seal Register.) I have been the longer in my quotation, out of duty to this eminent and virtuous lady, so different from her every way degraded descendants in the 16th century, (see pp. 456—459), whose piety and liberality may not, I believe, be otherwise known.

[1] She has married a husband of her own name and stock, like Isabella Comyn; see pp. 994 5; but there is no proof of her being twice married.

[2] See p. 1011. [3] Dissertation, p. 140. [4] *Ibid.*

dence, I have seen, in the Marr Charter-chest, and through means of the same, especially, by Lord Hailes in the Sutherland case.[1] Secondly, on the 18th of January 1365-6, there past a royal charter, still upon record,[2] of the lands of Kinnoul, in favour of Nicolas de Erskine, the son of "*Roberti* de Erskyne militis, patris predicti Nicolai, et *cristiane de Keth* sponse sue," without the least mention of the parentage of the latter, *who* was *not* a *Menteith*, as Mr. Sinclair states, and had married a separate and earlier Erskine than the former. And rather curiously, and most anomalously certainly, by irrelevantly jumbling the above authorities together, and actually misstating and misrepresenting them individually, has arisen the most extraordinary medley, and error, that can be fancied in a point of pedigree, by which, however, Mr. S. attempts to establish his wonderful induction! But what is best, the real authorities noticed, in their true, unvarnished, and authentic character, instead of supporting, utterly destroy it; for it is moreover proved, by evidence in the Marr Charter-chest, that "*Janet* Keith," though married to an Erskine, still retained (in further illustration, besides, of what I have said) her *maiden* name of "*Keith*;" while the same thing evidently happened to "Christian Keith," even in the case adduced, though partly misrepresented by Mr. Sinclair, who, as fixed by the charter 1365-6, though then the wife of another Erskine, is still also, as formerly, a Keith, which, in the circumstances, and in the total absence, as yet known, of any previous marriage, or opposing fact, must be inevitably presumed to be her maiden surname. The worthy gentleman, as repeatedly, has been here misled by his venerated oracles, the "Peerage writers,"[3]—although (according to his summary practice) without condescending to acknowledge the valuable information he thought he had obtained from them.

The relative circumstances he here asserts and urges, exhibit extraordinary confusion and error, as is conceivable, in a point of pedigree.

Nay, the *true* facts of the case to which he alludes, are *inimical* to him, and *make* the *other* way.

In regard to the Lennox or "Levenax" succession in the 15th century, I alluded, in a former performance, to a service in the year 1507, on the part of Mathew Stewart Earl of Lennox, to Duncan de Levenax Earl of Levenax, (executed in 1425,) his female ancestor.[4] Mr Sinclair, however, thinks it may *not* have been to the latter, but to *John* Earl of Lennox, Mathew's father, who died in 1495.[5] He even here, goes a step further, than before; for he advances this opinion, not as usual, under the Ægis and protection of the "Peerage writers," but merely, alas! upon his own hypothesis, and speculation. In such emergency,

Doubt of Mr. Sinclair, as to the service of Mathew Earl of Lennox, to Duncan Earl of Lennox, in 1507.

[1] See Chap. V. sect. II. pp. 43-4, *et seq.*

[2] Regist. Dav. II. p. 50, No. 150.

[3] This is evident from the following excerpt out of Wood's Douglas's Peerage, under the head of Erskine Earl of Marr, published Edinburgh 1813, vol. II. p. 208. "He" (Sir *Robert* Erskine, who is stated to have died in 1385,) "married—secondly, Christian, *daughter* of Sir *John Menteth*, *relict* of Sir Edward Keith," without reference to any authority for the facts I deny, and that are unfounded.

Mr. Sinclair misled again by his treacherous allies, "the Peerage writers."

[4] See "Additional Remarks upon the Question of the Lennox, or Rusky Representation," p. 48.

[5] Dissertation, p. 108.

the far better, and obvious course, seemingly, would have been to have investigated the record, that I explicitly referred to, in this instance, for my position, namely the *Acta Dominorum Concilii*, vol. xix.[1] in her Majesty's General Register House, Edinburgh, that is patent to all the world; —and where he would have at once found an end and *quietus* to his doctrine, in the express intimation there, that "ye breves" for such service in 1507, were then "*impetrat (obtained)* be matho erle of levenax," not as heir to the above Earl John, his father, as he supposes, but literally, "*be* ye *decesse* of," and necessarily, as heir to, the very "umquhile[2] DUNCANE *erle of levenax*" in question,—just as I contended.

Even still more untenable, and at once refuted by the authority I explicitly refer to.

Indeed, if Mr. Sinclair had been a lawyer, or thought a little, he would have seen the futility, and irrelevancy of a service to Earl John in the emergency, who had not completed his title to the Lennox succession,[3]—the material object in view; for his former, only service, in 1473,[4] to this Earl Duncan, in the principal messuage and superiority of the Earldom of Lennox, together with his portion of the lands, *had been* absolutely *cassed* and *annulled* by letters of James III. in 1475, at the suit of another co-heir.[5] In order, therefore, (after an antecedent compromise, as is notorious, with the latter,) properly to vest such important subjects, identified with the dignity, and higher seignorial rights, in Earl Mathew, it was indispensable, as he did, to connect himself in his service in 1507, with the *last* indisputable feudal possessor of the same, as well as of the entire Lennox Earldom, —*no other* than Earl Duncan,—according to the form that even *now* obtains in parallel cases of ordinary succession.[6]

Futility of his notion to any lawyer.

Fully aware of the necessity, in illustrating and ascertaining all Scottish points of antiquity, of adopting Lord Hailes's rigid tests, and method, —so indispensably adapted to our very *peculiar* situation, and of which, the longer I live, I descry the essential benefits, of pointedly adducing the best, and most satisfactory authorities *attainable*, for every statement and conclusion, and of disregarding and rejecting what is secondary and trivial,—besides proceeding here in a regular and precise manner, I have been thus, in principle, led to notice Mr. Sinclair's lucubrations;[7]

My cogent reasons for thus adverting to Mr. Sinclair's lucubrations.

[1] See my performance, *ut sup.* p. 48. [2] Deceased.

[3] That likewise depended, in part, upon arrangements with the other female co heirs,—there being, as might be expected, strife and contention between them, —that were still transacting at the close of Earl John's life.

[4] In the Montrose Charter-chest.

[5] The original is the Haldane of Gleneagle's Charter-chest, and, together with the previous service mentioned in 1473, is specially alluded to in the late Lennox and Rusky controversy.

[6] Earl Mathew, who was prudently bent, every way, on establishing his right, subsequently, on the 25th of January 1511, obtained an ample royal confirmation of the *Comitatus* of Lennox, and higher feudal prerogatives, &c. &c. (Great Seal Register.)

[7] What the acute Andrew Stuart, of Douglas cause celebrity, remarks, as follows, under the head of proof of pedigree, may equally apply to Mr. Sinclair's

He does not adopt Lord Hailes's method (however he commends it) on such occasions, but proceeds on mere secondary authorities, which induces striking errors.

where, independently of his legal imperception, such advisable conduct is *by no means* discernible.[1] The former is the true "railway" to clear, relevant, and speedy induction; baneful, nay destructive consequences thereto, resulting, if we go off "the line." Nothing certainly, is easier, or less operose, than to write, or discuss, after Mr. Sinclair's summary fashion, nearly always without reference to any authorities, or proper specification of dates and particulars; while he is evidently principally guided, in fact, and in the basis of his Scottish inferences, by "Scottish Peerages," and *id genus omne*. Yet he, nevertheless, predicates, nay decides, rather amusingly, in abstruse points, like a lawyer or even Chancellor, with an *ex cathedra* air. Of this, a curious sample has been afforded in the *vexata questio* of the Roxburgh and Lothian precedency, where, though obviously wrong, and mistaken in a most weighty particular, (as might be expected from his mode of procedure) he yet there makes Charles II., James II., and the great lawyers,[2] and sage advisers of government in the 17th century, signally misled, and *ignoramuses*; but himself, with high complacency, and wondrous good luck, alone *clair voyant* and right.[3] Nay, at the same time, besides falling into very glaring errors, in former plain points, such as the *visionary* high power of conveying his honours to heirs-female, granted, it seems, by Queen Anne to the Marquis of Douglas, who was *dead* at *the moment*,[4] and ruthlessly heaping treason and forfeiture upon the loyal and innocent Earl of Forfar, in 1715,[5] who only, it thus happens, cruelly suffered, and died for his country, to meet such a return—he seems, by no means, accurate, or well-informed in palpable more important Peerage matters in modern times. He represents *alone* the present Marchioness of Hastings, *qua* Baroness Grey of Ruthyn, as having a claim to the *ancient* Barony of Hastings, as direct descendant of the Lords Grey of Ruthyn, to whom he, moreover, *fully* gives that Barony; and which, it seems, may thus be united with her noble spouse's *later* distinct Barony of Hastings, in 1461.[6] This all turns upon an old

Mr. Sinclair's very defective statement of the Hastings Barony, and its descent.

Andrew Stuart's notion as to Evidence in discussions like the present.

Peerage and genealogical proofs, that "no Genealogical Tree is deserving of credit, or can be considered as a proof of facts, without *specifying, and referring to* the *proofs from which* the *Tree* is *made out*." "I, in common with many others, (he adds) accustomed to legal evidence, and correct proofs, have the misfortune of not being completely convinced by *this mode* (the *previous one*) of stating facts." Supp. to the Gen. Hist. of the Stewarts, &c. with Answers to an anonymous attack on that "History," &c. London 1799, pp. 68, n. and 65.

[1] Yet Mr. Sinclair avows himself an admirer of Lord Hailes, and of his accurate mode of procedure, and inductions in rescuing truth from fable, (see Dissertation, p. 140); but practical example, in the case of us poor fallible mortals, is always best, and better than mere eulogium of others, however much authorized, if not acted upon.

[2] Chalmers, the author of Caledonia, has observed, that the reign of Charles II. like that of Queen Elizabeth, in England, was the era of great Scottish lawyers.

[3] See p. 1020, n. 1.

[4] See p. 1018.

[5] See p. 1022, n.

[6] Dissertation, 133.

exploded notion. The Marchioness in question happens to be descended from Elizabeth Hastings, married to Roger Lord Grey of Ruthyn, the full sister of John Lord Hastings, son and heir of John Lord Hastings, competitor for the crown of Scotland in 1291-2, disponee in the half of the Earldom of Meneteth in Scotland in 1306, and elder brother of Sir Edmund de Hastings, co-parcener of the same Earldom, in right of his wife, who have both been sufficiently adverted to.[1] But although the line of John Lord Hastings, the *son*, failed in the reign of Richard II., innumerable heirs exist descended from Hugh de Hastings, his younger half brother, (the competitor having been twice married), in whom,—and not in the Marchioness, as would follow from Mr. Sinclair,—exists the true exclusive right to the dignity. If he had made but ordinary investigation, he would have found that it was decided as far back as the 1st of February 1640, in the very case of this Barony of Hastings, on the claim of Charles Longvile, Esq. (as then heir of line of the said Elizabeth Hastings, through the Lords Grey of Ruthyn, &c.) that *in England* the doctrine of "*possessio fratris*," which makes a *full* sister, like Elizabeth, his ancestrix, and her descendants, the heir in lands, before a *half* brother and his descendants, *does not*, in such circumstances, and inevitably in the Hasting's case, which we are considering, *apply to honours*."[2] Hence it was, accordingly, resolved by the Lords, so recently as last year, on the claim of Sir Jacob Astley, Baronet, and Henry L. S. Styleman Le Strange, Esq. in usual form, that this Barony of Hastings was in abbeyance between them, as direct descendants, with Mrs. Browne of Elsing, the *eldest* co-heir of all ("who had declined to appear as claimant,"[3]) of the said Hugh, younger son of the competitor, and half brother of John Lord Hastings, and Elizabeth, his full sister, who have been mentioned; which her Majesty, therefore, has terminated in favour of Sir Jacob Astley, Baronet, now Lord Hastings. What is singular, although the Baronet happens only to be the *youngest* co-heir,[4] he has yet thus been preferred by a power in the crown,—occasionally in the same manner exercised in England,—that was fairly unrecognised in Scotland in such a case; and, independently of objections that have been urged against it, shewing how much greater the royal prerogative in honours, sometimes is in the sister kingdom, than with us. I need hardly add, that the *eldest* co-heir or co-heiress alone, in every instance, at once succeeds, *vi juris*, to a Scottish

True account of the case that was decided in 1841.

The half-blood in England is not excluded in the descent of *honours*, as in the case of lands.

The youngest coheir of all preferred to the preceding ancient Barony of Hastings, constituted by writ of summons.—and descendible to heirs general.

Difference between our law, and that of England here.

[1] See pp. 990-1, *et seq.*

[2] "The Judges (of the above date, who had been consulted) delivered their opinions" unanimously, "that there cannot be a possessio fratris *in point of honour*;" and this in answer to the question, "whether a possessio fratris can be upon a barony by writ?" Lords' Journals.

[3] Minutes of Evidence in the case.

[4] Younger still, than Henry Le Strange Styleman Le Strange, Esq. who was the elder of *their* common stock, though again, only the next *after* that of Mrs. Browne, the *eldest* of all, as stated.

The *eldest* co-heir is preferred with us, *vi juris* alone, in the case of every honour descendible to heirs-female, the justice of which practice was even maturely, and advisedly recognised by Edward III. in 1333, in the instance of the Earldom of Pembroke.

dignity, simply descendible to heirs female, or general, however numerous the other co-parceners may be,—among whom the lands would divide, but with the exception still, of the chief messuage and superiority, as a *præcipuum*, in favour of the former. Nay, it is curious that Edward III. the 13th of October 1339, in the case of the Earldom of Pembroke, in fact maturely admitted the justice of our rule. In the patent, or royal recognition then, of the dignity, which was a Palatinate, in favour of Laurence de Hastings, the grandson and heir of John Hastings, the competitor, through Isabella de Valence, his wife, eldest sister and co-heiress of the celebrated Aymer de Valence, Earl of Pembroke, the king sets forth this fact, namely, the descent of Laurence "ex ipsius Adomari [1] sorore *seniore*," and *next* pointedly adds, "et *sic, peritorum* assertione, *quos* super hoc *consulimus*, sibi *debetur prerogativa nominis* et *honoris*," of Earl of Pembroke; wherefore, and upon this special ground, as "*causam habens*," he confirms Laurence in the same, and that he "assumat et habeat nomen comitis Penbrochie." This grant, which however contains no mention of heirs, but further confirms the former privilege of a Palatinate over the lands, was adduced in the Hasting's claim.[2] The remaining younger sister, and Valence, or Pembroke co-heiress, with Isabella, was Johanna, who married the celebrated Sir John Comyn of Badenagh, (the younger heir-male and representative of William Comyn, who married Isabella Comyn, the elder representative of the original Earls of Meneteth,[3]) by whom she had again, two daughters, and co-heiresses; first, Johanna[4] the *eldest*, the wife of David de Strabogie, the forfeited Scottish Earl of Athol, (who, in revenge for the desertion of his sister, by the hot-headed Edward Bruce, "King of Ireland," brother of Robert Bruce, became an English partisan;) and in consequence of which alliance, the Earl's family and descendants were the elder heirs of line of the Comyns, besides de Valence co-heirs; and, secondly, Elizabeth,[5] who was married, as is notorious, to Richard

English connections of the great Scottish Family of Comyn, with their direct female representation.

[1] Aymer.

[2] See Minutes of Evidence in that case, in 1840, pp. 53-4, from whence also most of the preceding relative facts and circumstances are taken.

[3] See p. 995-6.

[4] Thus called Johanna again, after her mother, in the same way, as, I conceive, Isabella Comyn, formerly alluded to, after her mother Isabella Countess of Meneteth. (See p. 996.)

[5] These facts can be fully established, in the main, *inter alia*, by an *Inquisitio post mortem* in 1324, (see Min. of Evid. *ut sup.* pp 347-8,) by which these noble female co-parceners are found to be heirs of Aymer de Valence, Earl of Pembroke, to his property of Tregayr in Wales, and where the relationship and descent, as above, are stated. Isabella, the wife of John de Hastings, is here also styled the eldest sister, while it is added, that Johanna, the wife of Athole, (her mother having deceased) had attained the age of 26, and Elizabeth, her younger sister, that of 20. I may observe, by the way, how much more careful the English practice was than ours, in thus specifying the ages of such co-parceners, which almost never obtains upon the same occasion, in our *old* inquisitions or retours, though a

Superior accuracy and exactitude of English retours, (or "*Inquisitiones post mortem*,") as contrasted with ours.

Talbot of Goderich Castle, ancestor of the noble family of Shrewsbury. Though evidently but the younger co-heirs in question, in virtue of this marriage, owing to whatever specialty and intervention, they took the title of "Lords Comyn of Badenagh,"—the Comyns having also *so* figured in the sister kingdom.[1] Combining the marriage of Sir Edmund de Hastings, younger brother of John, the Scottish competitor, with the preceding Isabella Comyn, this distinguished family of Hastings, (Lords of Abergavenny,) were hence much connected with the Comyns, the highest, and most powerful Scottish house at the time. Indeed, as I can besides fully prove, similar mutual alliances obtained, more or less, among several of the great families of England and Scotland, during the reign of Edward I.—who encouraged them, out of a wise policy—as well as before ; but they appear to have been entirely subsequently quashed by the hatred, and *bella internecina*, of which that monarch, at the same time, hurried on by his reckless ambition, was the mainspring, between the two kingdoms.

There was a considerable connection between the great families of England and Scotland in the 13th century, and time of Edward I., which his policy, in part, undesignedly terminated.

The antecedent obvious errors, and crudities, of Mr. Sinclair, however,—including certain others, &c. plainly result, with misapprehensions, chiefly legal, from undue haste in compiling and concocting his

Closing remarks on Mr. Sinclair's "Dissertation."

matter often, of considerable importance. This has been owing, in part, to the principle, in law, of female co-parceners succeeding equally, even without *a præcipuum*, formerly with us, as now, though the eldest was allowed to choose the principal messuage, under the burden, however, of a recompense or recompensation for it, to the others.

[1] The last fullest notice of the principal male Comyn line of Badenagh, the most powerful family in Scotland before the Douglases, and which threw off so many distinguished cadets, including the Comyns, Earls of Meneteth, the Comyns, Earls of Buchan, (afterwards represented by the English Beaumonts, who took the title, and from whom Henry IV. sprung,) the Comyns, Barons of Kilbryde, who had also large estates in England, &c. &c. may be supplied by a mandate or order of Edward II. in 1315, wherein, upon a narrative of the faithful adherence of "bone memorie Johannes Comyn, filius Johannis Comyn dudum defuncti," to himself, and Edward I., and that his Scottish lands had been laid waste and destroyed by the "*rebels*" in Scotland, he in consequence extends the possession of certain English manors, granted to the former, "quamdiu nobis placuerit,—*Margarete que* fuit *uxor* prefati Johannis—in *subidium sustentationis sue*, et *Admori filii* eorundem Johannis, et Margarete." (See "*Rotulorum Originalium in Curia Scaccarii Abbreviatio*," vol. I. pp. 209-10.) Both Margaret and *Admorus*, (evidently Aymer, after Aymer de Valence, his near kinsman,) are new characters ; while, in the latter, who must have died young, also expired the last gleam of the direct, and once redoubtable male Badenagh line, whose alliance was eagerly sought by the first Scottish and English Barons,—(see Winton, Macpherson's Edit. vol. II. pp. 54-5-6-7, 60-1,) and who at length paled before the star of Bruce, that yet rose somewhat inauspiciously, dimmed by their blood. They thus came to be wholly stript of their ample baronial Scottish possessions, and were at length obliged in 1315, the year after the battle of Bannockburn, as refugees in a foreign land, to take a charitable but uncertain bequest, "*in subsidium sustentationis*," &c.

Greatness of the Family of Comyn, their dignified cadets, with new authentic notice of the direct male representatives of the eldest, or Badenagh line, at the time of their downfal.

Dissertation.[1] Of course, omissions, or misrepresentations by him, of material facts and circumstances, while what seem favourable to him are mentioned, either proceed from these causes, and the want of proper and thorough investigation, or zeal and ardour at the moment, in giving vent to his thoughts, which have partly dazzled and blinded him. The latter tendencies, nevertheless, including "amateurship," are good, and most desirable in every pursuit, and ought certainly to be encouraged, instead of being checked, or repressed. Owing to his not being a lawyer, I had hitherto desisted from noticing Mr. Sinclair's performance; and have only done so from the stern unavoidable necessity that impels me in these matters, of being little scrupulous in correcting error, so far as I may be able, and removing the obstacles and impediments in the way of a pursuit, where they, unhappily, *so greatly* abound; and that never can be properly elucidated and advanced, without such indispensable course. I have little doubt, however, that Mr. Sinclair, with a little poring into our legal Institutional writers, if he will condescend to the task, and, especially, occasional visits to the chilling atmosphere of her Majesty's General Register House, by a flagrant antithesis, and apparent anomaly, in the hot-bed of due culture, and antiquarian maturity, may produce better, choicer, and more ripened fruits; that will be still more acceptable to the Peers of Scotland, whom he invokes in his dedication, and justly respects. Nay, they may not even appear to inferior advantage among those he has curiously culled from other fields, including the striking and diversified topics of "exhausted—longevity," "personal security," "massacre at Glencoe," "Hymen,"—"*shoeing* a horse all round,"[2] (*wherein*, I must with shame confess my full deficiency, and willingly yield the palm to him,) —and so forth, &c.; for which interesting topics, I must refer my readers to his performance.

[1] They are, at the same time, interspersed with some better, and juster remarks upon subjects immediately *foreign* to the present, which, this circumstance, as well as the limits of my work, may preclude me from further canvassing; but still labouring under the sad want of proper, articulate support and corroboration by proof, in the way I conceive indispensable. On this account, it would be also both invidious, and an ungrateful task to expatiate more upon what may strike me as objectionable within the nearer scope of the discussion; while what has been premised may chiefly suffice for my purpose.

[2] See Dissertation, *Contents*, pp. ix. xi. xii., and p. 61.

No. VIII.

FURTHER PROOF, THAT, BY THE ENGLISH LAW, THE RESOLUTION OF THE LORDS IN 1793, IN TERMS OF THE BELHAVEN PATENT, IN 1675, WOULD HAVE BEEN DIFFERENT, AND HAD GIVEN THE BELHAVEN HONOURS TO THE ELDER, INSTEAD OF THE YOUNGER HEIR-MALE, WHO WAS HOWEVER JUSTLY PREFERRED, IN CONFORMITY ALONE, WITH THE SCOTTISH LAW.

(*See pp.* 835-7, 845-6.)

This will precisely transpire from the following case, and opinion by eminent English counsel,[1] embodying, *essentially*, the facts in the Belhaven case in 1793.

Case.—"A. is ennobled under a patent to him, and the heirs-male of the body; *whom failing*, to *his heirs-male whatsoever*. He is succeeded by his son, and grandson, in which last his direct male issue failed. But A. had two brothers, B. and C.,—B. the *eldest*, and C. the *youngest*, who both left male issue. *Query*, on the failure of the direct male line of A., the ennobled, whether, *by the law of England*, would the heirs-male of the body of B. or of C. be preferred? Would it not be of B.? But, according to the Scottish, it is the heir-male of the body of C.; and so it has been found."

Opinion.—"*It* (the *final limitation in question*) would *take* effect *in favour of* the *issue* of the *elder* brother."

ADDENDA.

Pp. 589-90, 620, *and* 935.—I have here observed, that Lord Erskine's peculiar doctrine of a Peerage, *once* attaching to the blood of an individual, becoming thereby indefeasible and irrevocable, in favour of a party so ennobled, and his heirs, excepting through forfeiture, was rather too poetical, and far-stretched; besides, not always borne out in England. In further proof of this, I may appeal to the following instances, evidently militating against such an idea, that are adduced in the Devon Report, repeatedly referred to.

[1] I have not an opportunity, at present, to obtain consent to add their names—they being much employed in forensic duties,—but have little doubt, that, if necessary, they would not be disinclined to grant me permission; especially, as I rather apprehend the matter is plain enough to English lawyers.

Authorities proving that a Peerage in England might not wholly rivet in the blood, according to Lord Erskine, and others, but *be* fluctuating and conditional merely, in its descent, like ours occasionally, in terms of our patents.

"Edward, eldest son of Edmund of Langley, Duke of York, was *then* (25th February 1390) made Earl of Rutland, to hold and enjoy that dignity, '*during the lifetime of the duke his father.*'" "In the 15th Edward IV. 1475, Sir Edward Grey was created Lord L'Isle, to him and the *heirs* of his body by Elizabeth his wife, *Lords of the manor of Kingston L'Isle,*" (which last possession also has been held, as illustrated by another similar grant, to be a necessary condition).[1] In the Devon claim, likewise, Sir Harris Nicolas referred to the case of the Earldom of Desmond, which was "*to Sir William Fielding,* to *take effect* on the death of Lord Preston, *if* Lord Preston *died without heirs male of his body;*" and he further noticed the presumed alternative argued upon, *in banco,* by Sergeant Danby, in the reign of Henry VI.—"of a man being created an Earl for the term of the life of another, '*à terme d'auter vie,*'" from whence he inferred, "that such an estate in a dignity was held to be legal."[2] In the above precedents, as with us, occasionally, honours are proved, on the other hand, to be vacillating, and though duly constituted, to be by no means certain, or fixed in their descent, while actual denudation is implied; and it might so happen, contrary to what Lord Erskine inculcated, that the individual who was a Peer to-day, and accordingly recognised as such, would cease to be so, and retrograde into a commoner to-morrow, or indeed, at any moment.

Another original notice of the Family of Logy in Scotland, with a curious action of David II., the husband of Margaret de Logy, in favour possibly, of her prior husband, during their marriage.

Pp. 983-4.—There is an original charter of David II. in the Marr charter-chest, dated 5th of April 1357-8, wherein he states that he had infeoffed "*quondam Johannem de loghi*" in the lands of Strongartnay, in Perthshire; but being subsequently apprized by his council, that his father Robert Bruce had formerly granted the latter, which had then escheated to the crown, "*ex forisfactione* quondam *Johannis* de loghy militis, *patris* ejusdem quondam *Johannis de loghi*,"—"quondam Johanni de Meneteth militi—et Elene *de Marr* sponse ejusdem, nepte sue,[3] conjunctim, et heredibus eorundem," he now, therefore, recals his grant alluded to, and restores the lands in question to Sir John de Meneteth, the son of these parties, "consanguineo nostro;" from whom they had been thus taken, "per suggestionem *quorundem.*"[4] Holding that the *deceased* John de Loghi, son of the attainted John, was of Logie, which also lay in Perthshire, as is not improbable, and hence presumptively, the husband of Margaret Logie, Queen of Scotland, she necessarily must have been at least a widow in 1357-8, the date of the above charter, that is, some years before she married David II., (about 1363); whose prior benefaction, thus obliged to be recalled on legal grounds, in favour of her husband, is curious. From thence it likewise additionally follows, that she could not have been very

[1] See Cruise on Dig. p. 136,—as to the Barony of Lisle in the reign of Hen. VI.

[2] For these instances, &c. see Report referred to, p. 90, and Appendix, pp. lxiii-iv. and *note* to the last.

[3] Here, though married, agreeably to our custom, Elen (through whom the Erskines succeeded to the Earldom of Marr) still retains her maiden appellation.

[4] A convenient *kingly* mode of excuse.

young, as is transmitted by some, at the epoch of her second marriage. The father of her conceived first husband was evidently the Sir John de Logy, who, according to Fordun, in 1320, (in the reign of Robert Bruce,) suffered capitally, as a traitor, for his concern in the Soulis, or Countess of Strathern's conspiracy;[1] whose husband's estates besides were comprised in Perthshire.

Additional English instances further authorizing the style of Earl of Dunbar by the Earls of March.

Pp. 989-90.—The Lords Committees, in their first Report on the Dignity of the Peerage, (p. 407,) observe, that "the old Earls of Pembroke were frequently called Earls of *Striguil*, from the *castle* of *Striguil*, their ordinary *residence;* and the Earls of Derby were sometimes called Earls of *Tutbury*, from *Tutbury Castle*, their ordinary residence." Here then are additional pointed instances of such peculiar custom, besides those of Arundel and Gowran, I have noticed;[2] and accordingly, as I have observed, the Earls of *Dunbar*, and March, naturally took the *first* title from their principal and usual residence, the Castle of Dunbar, in Lothian.

Further proof of the identity of William Comyn of Kirkintulloch and Machan, with William Comyn of Badenagh, the elder brother of John Comyn, the competitor, in 1291-2.

P. 995.—Kirkintulloch was possessed by the principal, or Badenagh line of Comyn, as far back as the time of William the Lyon, who reigned from 1165, to 1214, during whose reign there is an absolute conveyance by "Willielmus Cumin," their ancestor, of the lands of Muchracht, which "*ego (Willielmus)* dicebam esse *de Kerkentulacht*," *(of the latter, his fief,)* to the See of Glasgow.[3] There is further, in the British Museum, an original Discharge by "Willielmus Comyn *Dominus* de *kirkintoloche*," to Sir Hugh de Daliel, Sheriff of Lanarkshire, upon payment of a certain sum, which is dated at his residence of "*Mauchan*," in that county, in 1289. This is the individual mentioned in the above page, referred to. As the lands of *Machan* came to be heritably granted by Robert Bruce, the 3d of March 1315, to Walter Fitz-Gilbert, the ancestor of the noble family of Hamilton, by a charter, still extant, which states that they *had belonged* to "*Sir John Comyn*," evidently of Badenagh,[4] who was then forfeited, these several circumstances additionally identify the preceding William Comyn of Kirkintulloch, with William Comyn of Badenagh, the head of the Comyns at the time, by whose death, without issue, as shewn,[5] before the 3d of August 1291, his succession,—and of course Mauchan,—undoubtedly devolved to the younger Badenagh male line, of whom Sir John Comyn was representative before 1315. In the same way, again, there is a charter upon record, by Robert Bruce, actually of the "Barony of *Kirkintolach*," to Malcom Fleming, which, in like manner, is stated to have belonged to "Sir *John Comyn*."[6] The three garbs, two

[1] Goodall's Edit. vol. II. p. 274. He, and others, were then "equis tracti," and "capite—puniti."

[2] See pp. 989-990.

[3] Original, Chartulary of Glasgow, *vet.* f. 7. formerly *penes* Bishop Cameron.

[4] Original, Hamilton Charter-chest, and Regist. Rob. I. p. 14, No. 72. "Mauchan" and "Machan" are the same.

[5] See p. 995, *ut sup.*

[6] Regist. Rob. I. p. 15, No. 60.

Noted arms of the Comyns, with an early authority for the same.

and one, have long been the noted arms of the Comyns. *One* garb only,[1] is exhibited on the shield of William Comyn Earl of Buchan, who figured in 1211, and for a period afterwards, appended to his original grant, (once extant at the Scottish College at Paris,) of a pound of wax, annually to be burnt at the tomb of Saint Kentigern, in the Cathedral of Glasgow.[2] As is well known, the garbs, his bearing, (the above being among the oldest instances of arms in Scotland,) became the feudal arms of the Earldom of Buchan. At a later juncture, the principal line of Badenoch strewed the field, upon which the garbs are represented, with cross crosslets; as from their arms, which I have seen, both after the middle of the 13th century, and in the 14th, in conformity to a not infrequent fashion in the same circumstances, as we may presume, from their having distinguished themselves at the Crusades: which, I also conceive, were the chief origin of armorial *insignia*; such

[1] Heraldry sometimes increased, and sometimes lessened such charges; a remarkable example of which last practice occurs in the royal arms of France, subsequently composed but of three fleur-delis, instead of the many with which the field was formerly decorated.

Another high alliance of the Comyns.

[2] In leaving the subject of the Comyns, I may further add, upon the authority of the Chronicle of Melrose, that this truly great and numerous family, in the person of John Comyn, before the middle of the 13th century, had nearly also, come to represent, and inherit the possessions, of the original Earls of Angus. It thence transpires, that he married (Matilda*) Countess of Angus in her own right, whereby he was Earl of Angus, and by whom he had an only child, Earl *Bertaldus*.

The Umphravilles, Earls of Angus.

But, first he himself dying, and then the latter (in infancy), the widowed Countess Matilda, not unmindful of her rank, like her contemporary, Isabella Countess of Meneteth, in the same circumstances, (see p. 996) remarried, in 1243, Sir Gilbert Umfraville, that great northern chief, sprung from a kinsman of the Conqueror, and who held Redesdale "*per Regalem potestatem*;"† of whom, by such connection—were the Unfravilles, Earls of Angus. This additionally illustrates the alliances then, between the greater Scottish and English families. In an old roll or inventory of charters by Alexander II. there are the two following: "*Carta Walteri Cumyng* de *Comitatu* de *Menteithe*, Carta Patricii *Cumyng de Comitatu Atholie*." The first, relative to Walter Cumyn, husband of the above Countess Isabella, who figured principally before the middle of the 13th century, is plain enough; but the second is not so; for no Patrick Earl of Athole, in that century, is yet proved to have been a Comyn. I need not add, that both grants or confirmations would have been very curious and instructive to legal antiquaries, had they been preserved.

Two ancient confirmations of the Earldoms of Menteith and Athole, in the 13th century.

* Her Christian name is *aliunde* proved.

† See *Testa de Nevill*, p. 385. Though not ennobled, the Comyns of Kilbryde in Lanarkshire, were a distinguished and most affluent family. David Comyn, their ancestor, is proved by deeds in the original Chartulary of Glasgow, to have acquired Kilbryde, by his wife Isabella de Valoniis, an heiress, before the middle of the 13th century, and to have been succeeded by William Comyn "Dominus de Gillebrid," in 1261. The subsequent male line is to be traced down, till the early part of the 14th century, through representatives, who had acquired by alliances, and otherwise, the Manor of Fakenham in Suffolk, Neuham in Northumberland, the Manor of Sankham &c. in Middlesex, and Suffolk, with large estates besides,

marks and distinctive badges being incumbent, owing to the vast military assemblage and convocation, under different chiefs and leaders, from various countries. Nor would these, on their return, be loath to perpetuate the glorious results of their foreign, though fruitless prowess, in the above fashion, so chivalrously commemorative of it. I cannot omit observing, by the way, what a fine opportunity there was, in the late publication of the Ragman Rolls, (in 1291-6,) certainly but jejune, and meagre too, in other respects,—to have given, through the addition of the seals of the Scottish parties,—which are, or were, at least lately extant, in no indifferent condition, together with a few more, easily procurable, in the early part of next century,—a good and most interesting specimen of pure Scottish heraldry, at a juncture when arms were becoming fixed. Seldom, indeed, have we such a document, (that might have been made so prolific in various details,) to avail ourselves of, in matters of Scottish antiquity; and while there are neither any notices of the distinguished subscribers, their characters, political interests, or families, &c.—so elucidatory and important, moreover, in history,—there are evident mistakes in the names of persons and places, that could, on the other hand, have been detected, and explained by the collation and scrutiny of those versant in such details. Indeed I have the same remark, more or less, to make on some other publications of the kind.

The Ragman Rolls in 1291-6, lately published by the Bannatyne Club.

P. 841, *et seq.*—In respect to the descent of honours by conquest, the ultimate limitation in the charter of the dignity of Lord Monymail, &c. the 10th of August 1627, is "hæredibus masculis" of Lord Robert, the disponee, "gereralibus vel *conquestus*," &c.[1]

Law of conquest with us, applied to honours.

Pp. 84-5, 893, *et seq.*—As has been shewn, the remarkable power of nomination to honours, upon a royal regrant, was exercised with us, from 1604,[2] downwards; and as might be expected, we find the same faculty delegated in France by the monarch, to favoured individuals, in the same century. In January 1638, the *Duché Pairie* of Aiguillon, as is proved by the constitution given *verbatim* by Anselme,[3] was bestowed by Louis XV. upon Mary de Vignerot, the niece of Cardinal Richelieu, "pour enjouir par ladite dame, ses heritiers et successeurs tant masles que femelles, *tels qu'elle voudra choisir* perpetuellement, et à tonjours," &c. And what is further remarkable, as in the parallel instance of the Barony of Rutherford, in 1663,[4] Duchess Mary, the disponee, is

Instance of power of nomination in honours to subjects, exemplified by the case of the Duchy of Aiguillon in France, in 1638.

in the Counties of Hertford, Essex, and Norfolk, &c.—as will be easily seen by perusal of the English records for the time, published by authority of Parliament. The English Hemgraves were female descendants, and in part heirs, on the failure, apparently, of the male-line. The above further exemplifies the mutual connection of the Scottish and English families in the 13th century.

[1] Great Seal Register.

[2] See patent of the Barony of Hume of Berwick in that year, p. 84, *n.* 4.

[3] Among the other authentic "*Pieces*" in regard to the Duchy of Aiguillon, in *Hist. Geneal. et Chron.* de la Maison *Royall de France*, &c. vol. IV. 483 4.

[4] See pp. 893-4.

Nomination here implemented, as in the Scottish Rutherford instance.

stated by the above authority, to have died the 7th of April 1675, "apres avoir *testé* en faveur de Marie Therese de Vignerot sa niece, *qui devint duchesse d'Aiguillon*, et mourut sans avoir été mariée le 18 decembre 1704." [1] We here, as in other instances, trace a mutual resemblance between our practice, and that of France, "our ancient Allies;" while again, as with us, on such occasions, by the preceding constituting Aiguillon grant in 1638, the *lands* and "*Seigneurie* d'Aiguillon, avec les terres y anexées," are *erected* into the Duché Pairie in question,[2] the dignity being carried with the lands, as in many Scottish charters of both subjects, even in the same century, where we find too the term *ereximus*, or erection, thus precisely used.

Our forms besides, in such grants, borrowed from France, further go to refute Lord Mansfield.

This argues, and savours of the far later continuance than imagined, of the territorial principle in honours,—which, as is notorious, still prevails to a great degree in France; and over, and above, exposes and refutes that inconceivable, and ever astounding *dictum* of Lord Mansfield, so often alluded to, that after 1214, Scottish honours ceased to retain their territorial character, and became thenceforward entirely personal, being now granted after the *present* form, by means of a modern patent by themselves, quite distinct from the "*Comitatus*" and "*Baronia*," that forsooth had *nothing to do* with them!! If he had made the smallest research, especially into the relevant French practice, joined with ours, instead of the foreign English,—even here too, but very superficially investigated by him,—he would indeed have been speedily undeceived in such follies. James, it is remarkable, a better historian and novelist than a legal antiquary, in his late interesting performance, entitled "Life and Times" of Louis XIV. calls that in the Aiguillon constitution or charter referred to, "the most extraordinary clause perhaps that ever was inserted in such an instrument." [3] How much more astonished then must he be with our repeated practice to the same effect, not forgetting the notable attempt of Lady Coupar, about 1671, under its shelter and authority.[4]

The regrant of the Roxburghe honours in 1646, *per se* indefeasible.

Pp. 1011.—The Earldom of Roxburghe, &c. though not the Barony of Roxburghe—whose limitation is unknown, and may have been to heirs-male-general, being completely taken from the original heirs by the regrant in 1646, upon a resignation, could not be affected strictly in law by any supervenient transaction. This obviously renders that of the ratification by Sir Walter Ker of Faudonside, the heir-male in 1663, principally in reference to the estates carried with the honours in the charter, immaterial, and as the result of private suggestion merely, at the most, insufficient to counterbalance the main conclusion I have drawn.

Further remarks as to the peculiar nature and limitations of

Pp. 207-8.—I have here alluded to the remarkable circumstance, as might seem, of the royal signature of the patent of the Earldom of March, &c. dated 20th of April 1697,—as is proved by its authentic

[1] *Ibid.* p. 483.
[2] *Ibid.*
[3] Vol. I. p. 5, *n.*
[4] See p. 85, *et seq.*

registration in her Majesty's State Paper Office,—being both in the body, and the docquet by the Secretary of State, intended especially for the eye of the Sovereign, as a prevention of undue surreptitious grants,[1] without the important closing limitation to "other heirs male, and of *tailzie, (entail)*, contained in *his (the patentee's)* infeftments of the lands and lordship of Neidpath,"—*de facto*, at least that which now rules; and under which, the heirs-female, and the Earl of Wemyss, the present noble holder of the honours, can alone take. This certainly obtains, although there be a blank left at each of the respective places, as we may presume, for an additional insertion, prefaced in the last instance by the word "which," initiatory, as we may deem, to a further substitution. The omission appeared the more remarkable, and deserving of notice in a work of this kind, owing to such grants, above all, requiring in both countries, but chiefly in Scotland, the express sanction and approval of the Sovereign,[2] the fact of the House of Lords on such occasions, in Peerage claims, first and paramountly demanding production of the signature of the extended or consecutive patent, to ascertain if it was thus, in the material particular, strictly warranted and authorized,—nay affixing the chief consideration thereto, in the import of the conveyance. The necessity of this salutary

the Earldom of March, &c. in 1697.

Blanks in the registered signature of the patent in London, where the ultimate limitation should be.

[1] See what transpires under the case of Cassilis, in the sequel.

[2] See the remarkable case of the Barony of Ochiltrie in 1793, pp. 813, *et seq.* It was sustained as a relevant objection to a charter of the Earldom of Cassilis in 1671, "with the dignity, and precedency, and priority of place," in favour of the heir-female—upon the Cassilis claim in 1762,—that "the docket subjoined to the original signature, which is intended as a check to prevent grants *by subreption*, contains a special description of the whole lands,—but does *not once* mention the title of honour or dignity." This evinces too, *inter alia*, by the pointed adduction of, and unflinching conclusion from the signature, the strange freedoms that were here sometimes taken, and thus prudently guarded against.

Precedent of Earldom of Cassilis in 1762.

[3] As essentially illustrated in the Cassilis case, *ut sup.* Moreover, in the very recent one comparatively, of the Dukedom of Roxburghe in 1812, the late Earl of Lauderdale, no small authority, as is notorious, in such matters, first and pointedly called for the signature of the charter of the honours and estates of Roxburghe in 1646, upon which, in truth, all turned, although the charter existed, both in the original, and, *ex facie*, implemented state, with the due appension of the Great Seal, and the ordinary forms and observances, in that last stage of the conveyance,—as well as through its registration in the Great Seal Record. Unfortunately, the signature—like various other similar instruments—could not be recovered; but the want, as regarded the charter, was at length held—though not until after keen opposition and argument—to be compensated for by other considerations; there being nothing at the same time to impeach its terms and import. On this occasion it was, as imagined, cleverly replied to Lord Lauderdale, that the signature of his own patent could as little be found. Oh, rejoined his Lordship, that weighs nothing with me, and I heartily wish you could disprove my right to my Peerage, as it has been a mighty encumbrance in my way, and long deprived me of the voice, and seat I otherwise would have had in the national councils.

That of Roxburgh in 1812, with demand, and curious rejoinder of the late Earl of Lauderdale.

Unjustifiable liberties taken with Peerage grants in Scotland after the union of the crowns.

measure, different from what may obtain in respect to ordinary grants, is self-evident and imperative, owing to the removal of the seat of government to England, after the union of the crowns, and the strange and unjustifiable liberties, not however to be wondered at in the emergency, that were then sometimes taken, by gratuitous and unauthorized additions to the extended patent under the Great Seal *in Scotland*, which were foreign and unknown to the previous signature under the sign manual, and royal warrant, *elsewhere*. Independently of the still more flagrant instance of the Viscounty of Oxenford in 1706, that even exceeded in its nature and extent what I here allude to,[1] as well as of Cassilis in 1671. I may again refer to that of the Marquisate of Annandale, &c. The royal warrant or signature of the patent of this Marquisate, the 24th of June 1701, in like manner with the March mentioned, in 1697, is recorded in the appropriate Register in her Majesty's State Paper Office,[2] and contains a limitation simply to "heires male whatsoever,"—the true, and regulating one—of which we have various other valid and effective examples. But lo, and behold, in its extension under the Great Seal, as is established by our Great Seal Register,[3] we first meet with this awkward and untoward appendage, without any authority, to the limitation, namely "*illi (the donee)* in suis prædiis, et statu omni tempore futuro successuris," that have occasioned difficulty and perplexity, and if admitted, which they cannot be, would still do so, in no small degree, under the circumstances. Upon this case, I may also add the following apposite, just remarks of the late Sir William Grant, Master of the Rolls, and Mr Tait, the counsel in the intended Annandale claim, towards the end of last century, by Sir William Pulteney, himself an able lawyer, as they appear in the printed case. "Many other arguments might be stated, to shew that the words, added after the limitation 'to Heirs Male general,' *(as above)* could not prevent the honours from devolving upon the Heirs Male whatsoever; but as the words *added* were *singular*, the Claimant was desirous of inspecting the original Signature under his Majesties Hand. The Signatures of Patents of Honour have *never been entered in any Record in Scotland*, but have remained in the Hands of the Keeper of the Great Seal, as his Warrant for passing the Patent under that Seal; and after the most diligent Enquiry, the Signature could not be found in

Glaring case of Oxenford in 1706, shewing the importance of ascertaining the *strict Royal* warrants in our Peerage conveyance.

Also of the Marquisate of Annandale in 1706, in reference to the *signature* of the patent; no record of such grants being kept in Scotland.

He here alluded to his disability, as a Scottish Peer, to sit, as he had vehemently desired, in the House of Commons, at the exciting and stormy period of the French Revolution, and close of last century,—his own body having withal, rejected him from their representation;—which thus reduced him, like the late Lord Kinnaird,—with *equal satisfaction*,—from the unfortunate peculiarity of their situation, common to Peers of Scotland, to a mere blank in public and political life. We here again discover the destitution in the case of our signatures, of which, as observed, there is no Scottish record, and only latterly, in England.

[1] See pp. 61-2-3.

[2] In London, of course, see p. 1052-3 above.

[3] In her Majesty's General Register House, Edinburgh.

Scotland. As the practice, however, in *England*, had been different, and that Copies of all Signatures have been entered in a Book kept at the Paper Office, the Claimant had recourse to these Books, and there found, that the *Words* in question were *not added*, after the Limitation to Heirs male whatsoever, in the original Signature under his Majesties Hand, and *must therefore have been* inserted in the Patent, *without any Authority from the Crown.* The consequence is, *that they must be held, pro non adjectis*, and the Limitation *must* be taken *agreeable to* the Signature or Warrant;" &c.[1]

The true effective Annandale limitation accordingly, but justly resolves in law into one nakedly to heirs-male whatsoever.

In consequence of the preceding weighty incidents and considerations, I added in my notice of the March case, that some *further* "authentic copy," or proper exemplification of the March signature in 1697 might be incumbent to prop up, supply—or compensate for—the deficiency in the registration, transpiring, as it does, in the highest and most unexceptionable quarter, and to warrant the annexed limitation in question, as it appeared merely in the extension under the Great Seal of Scotland, in the Scottish Great Seal Register.[2] Every other public accessible channel had been ransacked without success in the above view. As is notorious, there has been a great destruction, through the calamity of fires, of signatures with us, while no record of signatures, such as that of March, has been kept.[3] I therefore, as a last resource, to obtain, so far as I was able, every information in this important particular, as well as out of common regard to justice, and for avoiding any hasty misconception or misrepresentation, had applied long ago, to Hugh Tod, Esq. W. S. the agent of the Earl of Wemyss. He happened then, and indeed until the twelfth hour, to be unable here additionally to enlighten me; so that I was obliged to content myself with what I had written:[4] but it gave me much pleasure, on the 6th of May last, to receive from that gentleman a letter, wherein, after, in part, alluding to my former application, he intimated to me that he had just been apprized "by Mr. Fraser,[5] in the office of Mr. Sands, W. S. that when lately making a search in the Marchmont charter-room, for papers connected with that Peerage, he had discovered, among other official documents, the original warrant for the March patent, in which the words in the patent, under which Lord Wemyss takes, are fully inserted, and are not left blank, as *you* (I *myself*) mention they are, in the warrant preserved in the State Office in London." He also added, that

My application, owing to the previous reasons, long ago, to the Wemyss agent for further information in the March instance, and recent favourable discovery in consequence.

[1] See printed Case, referred to, p. 24.

[2] See pp. 207-8.

[3] See also pp. 1054-5, *ut sup.*

[4] At pp. 207-8.

[5] Mr. Fraser is an active and promising young person in the department in question, and his attention having been directed to the subject by my application and communication to Mr. Tod, in whose office he then was, he providently remembered and kept it in view; and thus, after much unavailing research elsewhere, through the auspices of the former, meritoriously made the present discovery.

Mr. Fraser had sent him "a certified copy of the warrant," of which he enclosed me a transcript, together with an offer of an inspection of the original through Mr Fraser, the present custodiar.[1] Of the opportunity, I, of course, availed myself, and found that the warrant agreed with the registration in London, as above, having, like *it*, the subscription of the Marquis of Tullibardin (as Secretary of State); but with the vacant spaces in the *latter*, literally, or truly supplied, or closed by this adjunct to the limitation in favour of heirs-male of the body in the first instance, common to both, "which failzieing, to *his (the patentee's)* other airs male and of tailzie, contained in his Infeftment of the Lands and Lordship of Neidpath," as annexed in the extension under the Great Seal. This material addition is in different ink, and, as it struck me, in a different handwriting; being evidently made subsequent to the warrant after it had arrived in Scotland; and the only question remaining is, can it be legally presumed to have been properly authorized, that is, directly or indirectly, *by* the *Sovereign*,—the great and indispensable *desideratum* in such cases? It may be admitted, that he (William of Orange) could not have seen the ultimate limitation—hardly in embryo, at his inspection of the writ, under which, the prior one to heirs-male of the body being now spent,—the heirs-female, and any other heirs, can alone take; but then he may have verbally, or *in effect*, be held to have authorized it, through the organ of the Scottish government, the Marquis of Tullibardin alluded to, who may have written accordingly to the Chancellor of Scotland,—if even that were incumbent,—the possessor at length of the warrant,[2] when he transmitted it in the partly defective state. For I suspect, upon further reflection, and observation, that in this March instance, and certain others, *more* was intended than may at first meet the eye; and that the blanks, originally left, were constructively understood to act in favour of the grantee, in *reality* as a *carte blanche*, so far as regards completing the conveyance, to be filled up *ad libitum*, as he might incline; which thereafter was accordingly, and regularly done. This is a very important fact,

Relative remarks.

Are we now, legally to presume the proper countenance and sanction of the crown to the ultimate March limitation?

[1] This document, in 1697, with others of the kind, came to be in the Marchmont private repositories, owing to Patrick, the first Lord Polwarth, afterwards Earl of Marchmont, being Chancellor, and Keeper of the Great Seal, at the time, and thereafter. See p. 1054, *ut sup.* I could not, out of common delicacy, have applied to the owner of the Marchmont charter-chest for the relative information, as, owing to the pending claim to the Marchmont honours, and asserted possible results, in consequence, it must be at present prudentially sealed up to all, except legal advisers and agents, through the instrumentality of one of whom, exclusively, (Mr Fraser,) the discovery alluded to, was made. Hence, I conceive,—while I also gave my previous statement qualifiedly,—(see p. 207,) no blame can attach to me for not having elicited the remaining facts from the above quarter,—where there doubtless may be even yet other adminicles of importance.

[2] That in the Marchmont Charter-chest, has the indorsation too, of being "sealed (in Scotland) 30 day of April 1697," of course, by his authority.

and consideration, to be kept in view in practice, as it may at the same time elucidate, and strongly bear upon *other* similar precedents. And, no doubt, taken with the concurring circumstances, the word "which," prefacing the last blank in the docquet of the authentic royal warrant, as it stood *in London*,[1] and that the king may be held to have seen, indicates that a further substitution was intended, quite in unison with my conclusion; which of course, too, although there was occasionally irregularity in the *final* passing of such grants in Scotland,—in an age not so scrupulous or correct as the present,—must, especially at this distance of time, receive support and countenance from the clause in question being inserted in the extension of the warrant under the Great Seal, presumptively again under proper authority, by the Chancellor its keeper, the Earl of Marchmont. So things may relevantly rest, there being only one possibly conflicting, or unfavourable incident, under rather a narrow and rigid interpretation, to be noticed in the sequel,—though again, as may be viewed, not unattended even with a further favourable inference, and considerations.

Important consideration here, including besides, conceived constructive effect of *blanks*, as in the March patent, &c.

I need hardly observe, that any question as to the import of the March patent, can alone date from the death of William fourth Duke of Queensberry, Earl of March in 1810, the last heir-male of the body of the patentee, and thus having an undoubted right, in virtue alike of the warrant as it stood in London, and as filled up in Scotland, the corresponding limitation, as premised, appearing in both exemplifications. There is this striking difference likewise, between the Leven and March cases, that in the latter, the patent actually proceeded upon a signature under the sign manual, while in the other, the charter of regrant in 1664, did not, but, on the death of the previous Earl of Leven, expressly upon one under the cachet, as in a common, nay very secondary succession.[2]

Any question regarding import of the March limitations can only be mooted since 1810.

Independently of what I have stated, other remarkable procedure and occurrences obtained on the occasion of the March patent. Although, as in such instances, when it passed the Great Seal, it bears the date of the signature, namely the 20th of April 1697, yet it was not in fact *sealed*, as is established, even on the 30th of that month;[3] when the Viscount Teviot, (Sir Thomas Livingstone,) who had previously (the 4th of December 1696,) been created Viscount Teviot, "*Lord* Livingstone *of Peebles*,"[4] objected, upon that ground, in Privy Council, to the grant of the dignity of "*Viscount Peebles*," in terms likewise of the March patent, whereby it is also carried, in favour of

Other cotemporary and remarkable procedure on the passing of the March patent, from the opposition of Viscount Teviot, and the Earl of Lauderdale.

[1] See pp. 207-8.

[2] See pp. 56-7, *et seq.* It may perhaps have been intended in the Leven instance, to obtain the royal confirmation and authority, which, owing to some neglect or other, has been omitted; so the question may be, is the conceived want there, compensated for, *aliunde*, or by any thing of which I am unaware?

[3] See, notwithstanding notice, 1056, *n.* 2, what is stated on this head, 1065, *n.* 3.

[4] As proved too by the Great Seal Register.

Lord William Douglas, the March patentee. By express injunction of the Lords, therefore, his patent was *stopped* until the king's orders were here received. But further, the Earl of Lauderdale, at the same diet of Privy Council, "desired to be excused from votting therein, in respect that he himself is heir of lyne of the last Earl of March,[1] who, altho he was forefaulted, yet, when the late Earle of Lauderdale got the title of Duke of Lauderdale, he was restored to the said title of Earle of March; whereupon the Earle did not vote."[2] The same Earl thus, besides, in his turn, demurred to the granting of the title of *March*.

Letter, *inter alia*, of King William, in 1697.

Eventually, however, on the 24th of May 1697, King William wrote, in answer, as follows, to the Privy Council:—"Right trusty, &c.—Whereas we are informed that the patent of honour granted by us in favour of Lord William Douglas is *stopt, by your order*, from passing the sealls untill our pleasure be known, and that this is done upon a representation made to you by the Viscount of Teviot, that the title of Peebles is granted by us to Lord William, whereas the same was formerly granted to him in his patent; we have thought fit to signify to you, that what we have done in this matter was on proper knowledge, we having formerly, by our Secretaries, acquainted the Viscount of Teviot, that he was to change this title. And having declared this unwillingness to do the same, at his desire, we did grant a *second* patent in his favour. It is, therefore, our will and pleasure that *this stop* be *taken off*, and that our patent, in favour of Lord William Douglas, be past *(as happened)* and expede in the usual manner, *without* any *alteration*."[3] The March patent was thus subjected to a kind of ordeal from different quarters, which may render an undue insertion the less likely, and further obviate the objection to that of the ultimate limitation, or remainder. It had certainly, in one particular especially, caught the monarch's attention; and all that can be fancied prejudicial, would be the order that the grant should pass "without *any* alteration," combined with the king having only *seen* the signature *as* in the State Paper Office, to which it *solely* might be argued to relate,—hence exclud-

The conclusion therefrom, tho' there may be an incidental scruple, upon the whole further favourable to the ultimate March limitation, and heir-female.

[1] The noble family of Lauderdale, though female descendants of the ancient Dunbars, Earls of March, (here, and repeatedly, alluded to, in this performance,) through an intermarriage, were not, however, as thus stated, their heirs of line. That *status* and representation assuredly vested elsewhere, as it still does.

[2] There is a good deal of inaccuracy in this statement. The said *(John)* Duke of Lauderdale was not restored, as would follow, to the title of Earl of March. He was merely *created* by patent, May 1st, 1672, Duke of Lauderdale, *Marquis* of March, &c. to him, and the heirs-male of his body, (Great Seal Register); while moreover, the Earl in the text was but his collateral heir-male, and the *former* (the *Duke*) had left female descendants, of whom innumerable descendants and heirs again, still exist. The previous procedure is from the Privy Council Register.

[3] From the authentic registration, both in Her Majesty's State Paper Office, London, and in the Books of Privy Council, in Her Majesty's General Register House, Edinburgh. The letter is dated near "Jemap," the king being abroad.

ing the limitation in question. But, as premised, he may be presumed to have authorized more, and consequently the latter; though, under the existing law, we might take into account the rigour that *is* enforced in similar respects, as evinced by the Ochiltrie case in 1793.[1] No later objection than that noticed, so futilely, on the part of the Earl of Lauderdale, appears to have been made to the title of March, among the others in the patent of 1697, which hence stands as before.

Additional remarks upon the intrinsic import of the ultimate March limitation, contended again to include heirs-female.

With regard to the intrinsic legal import of "other Heirs male and of Entail, contained in *his (the patentee's)* infeftment of the Lands and Lordship of Neidpath," constituting, as stated, the ultimate March remainder, I still adhere to my doctrine, as shewn,[2] of its including heirs-female, and being in reality, equiponderant to "other heirs-male; *as well as heirs (besides,* generally) of Entail." The reference here, to the previous regulating, and *existing* entail of the lands in question,—that dated the 12th of October 1693, in the shape of the marriage contract of the Patentee,[3] upon which a charter of resignation followed in 1694,[4] is upon the whole intelligible, and undeceptive,—even more so than often on such occasions; while further, the same identical words, "heirs male and of *Tailzie*" *(Entail)*—to "the Lordship of Neidpath," are *there also* unquestionably employed as descriptive of *female* heirs who were eventually to take, and of whom there are *many*. Neither do I think that an objection can arise from there *having been* literally *no* anterior "*infeoffments*," repeatedly at least of Neidpath, (to the heirs of entail,) thus rather at *variance*, or *not explicitly* quadrating with the description in the extended patent;[5] for, as already obvious, it was virtually discussed and disregarded in the case of the Peerage of Napier in 1793,—the term "*infeofamento*," employed in like manner, having received in that instance—though there had been no infeoffment at all—a liberal, and not, as would here obtain, on the other hand, but a restricted, or judaical construction.[6]

Objection from the term "infeftments," in the said limitation by the extended patent, viz. "heredes masculos et tallie contentos in ejus *infeofamentis* terrarum et dominii de Neidpath."

The broad meaning of the antecedent material phraseology, as argued, however, it may also literally, and ostensibly strike one, had become fixed and technical—having constructively, after the fashion of other analogous, and certainly rather untoward Scottish diction, been received, and stamped with such peculiar impress and force. Indeed, in proof of this, I need only further appeal to the first authorities, beside me at present, namely Stair, and Erskine, our legal oracles, respectively, in the 17th and 18th centuries, both of whom evidently employ the words "Heirs male and of Tailzie and provision," and "heirs-male and of tailzie," as a general descriptive title in reference to heirs in entails, both male, and whatsoever, when discussing the subject of entail, and heirs of entail.[7]

[1] See pp. 813, *et seq.* [2] See pp. 205-6-7.
[3] Recorded, 11th of August 1781, in the Register of Entails.
[4] Great Seal Reg. [5] "*Infeftments*" being used there, *ib.* [6] See pp. 816-17.
[7] See Stair's Institutes, Ed. 1759, p. 478, § 12, and Erskine's, Ed. 1805, p. 641,

Claim of the Marquis of Queensberry to the March honours strictly as heir-male, and heir of entail, *copulativè*, though far remoter in the last capacity.

It could alone be by a most narrow and *rigid* interpretation indeed, worthy only of Lords Mansfield and Rosslyn, in their insane, reckless hatred of female succession, and arbitrary, unfounded predilection for male heirs, that the female heir, and consequently their present noble holder, could be here excluded from the March honours, and the present Marquis of Queensberry, the heir-male (whatsoever) of the March patentee, and heir *besides*, *ex terminis* of the entail in 1693, though a far remoter one, come to be preferred. I conceive, the more the matter is examined, it will further still turn out that "heirs-male and of entail" are not, *ex necessitate*, to be rendered *copulativè*, as they must in the latter instance, (that can neither properly receive illustration from the Oxenford decision in 1735,[1]) in order thus to favour the Marquis, but *disjunctivè*, in the way I contend; notwithstanding, in a literal clear sense, the superior excellence—with the view of admitting heirs-female—of the ultimate ruling remainder, in the patent of the Dukedom of Roxburghe, &c. the 25th of April 1707, failing "*heirs male* of *his* (the *patentee's*) body," to "the other *heirs (generally)* provided to succeed to the title and dignity of Earl of Roxburghe by the *former* Patents of Honour," &c.[2] And accordingly, the present Duke of Roxburghe, solely by female descent, in virtue of the noted Roxburghe charter in 1646, so often referred to, implemented by a nomination of certain heirs-female, as resolved by the House of Lords in 1812, is duly entitled to the dignities thus carried. It must always be remembered, as I have attempted repeatedly to inculcate, that we formerly often were *not hypercritical* on such occasions, but rather slovenly and careless conveyancers.

Material consideration in reference to ultimate March limitation.

Case of Viscount Teviot, already, in part, referred to.

That I may impartially state every thing connected with this subject, and leave nothing unnoticed within my knowledge and apprehension, I shall add this other striking incident. There can be no doubt, King William had determined by the *second* Teviot patent mentioned, to Viscount Teviot, March 30, 1697, to give him a *new valid* Barony, instead of that of "Lord Livingstone *of Peebles*," as before;[3] yet it so happens, notwithstanding this, that in the warrant of the former, also preserved and registered in the State Paper Office, London, there is *likewise* a *blank* at the place where such title fell to be inserted. It hence, obviously, was to be voluntarily filled up by the party, under the appropriate name and epithet *he* might *choose*,—this second grant again acting, so far, as a *carte blanche*, quite in unison with, and in

§ 21; also President Dundas's opinion in 1737, pp. 206-7, which *a fortiori* bears.

[1] See pp. 376-7, *et seq.*

[2] This is from the Registration of its signature, also in the State Paper Office, London, with which the extended exemplification under the Great Seal in Scotland, in the Great Seal Register, fully corresponds.

[3] See p. 1057, *et seq.*; the date of the *second* patent is proved, under next page.

corroboration of, the conclusion I have already drawn. I will here give the words of the confirmatory, corresponding entry too, in the Record.[1] "This Patent *(dated* 30th March, 1697) was past and recorded upon the 4th day of December last (1697), but was altered, *because* of the title of Lord *Peebles*, and the *new* Patent, of which this is the docquet, *was sent down* BLANK *as* to the *title* of *Lord*,"—which elucidates the constructive form, or right in question.

Blank signature of his second patent in 1697, with the relative explanation, illustrative besides of our understood practice as to *blanks*, and of that in the March instance.

The latter was therefore, as to contents, in *pari casu*, with the March signature, both being evidently sent down to Scotland in a partial blank state, constructively for the purpose of being supplied there, in essential relative particulars, *ad libitum* of the respective patentees. Nay, this in the Teviot instance is besides proved to demonstration by King William's letter, wherein he states he had ordered Viscount Teviot himself, "to *change*" his title,[2]—the act accordingly, involving the choice of style, being thus quite unfettered, and ultroneously to be implemented by him.[3] Nay, further on this head immediately.

The same to be filled up by the Viscount in *Scotland*, in respect to the new "*quiescent*" title, chosen by him, of "Lord Livingstone of *Hyndfoord*," with precedency of the older.

The new title substituted by the Viscount, in consequence, and an ulterior proceeding, are transmitted to us through the following "Act" of Privy Council, "in favours of the Viscount of Teviot," the 19th of July 1698.—"Anent the Petition given in to the Lords of his Majestie's Privy Council, by Thomas Viscount of Teviot, shewing that where his Majesty was pleased by his Letters Patent, dated the fourth, and sealed the twenty-fourth days of December jm. vi^c nynty six years, to confer upon the Petitioner the Honour and dignity of Viscount of Teviot, with the *quiescent*,[4] or secundary Title of Lord Livingstone of *peebles*; but it being thereafter agreed that the Petitioner should *quite*[5] the Title of Lord Livingstone of *peebles* for ane other to be *chosen* by *him*, it pleased his Majesty to grant a *new Patent* upon the thirty of March, jm. nynty seven years, conferring the Honour and Dignity as before, but *leaving* the quiescent *Title* to their Petitioners *choice*. And seeing that their Petitioner hath likeways past the said second Patent creating him a Viscount as before, *but with* the *quiescent*, and *secundary* title of *Lord Livingstone* of HYNDFOORD, and that notwithstanding this alteration so made, it was *always* understood that his right of precedency as a Viscount, was to *stand* conforme to his first Patent, and therefore humbly craving to the effect underwritten, as the said Petition bears; his Majesties High Commissioner, and Lords of Privy Councill having considered the above Petition, they in consideration that the altering of the quiescent title was the only reason for

[1] In 1697, and subsequent to the 4th of December.

[2] See p. 1058.

[3] It is to be kept in view, that in the signature of the Annandale patent, in 1701, (see p. 1054,) the limitation is fully given without any attendant relative blank,—which obviously creates a specialty.

[4] This technical term with us, is not ill adapted to express a second, or subaltern dignity in a family, by which they were not ordinarily designated.

[5] *Quit*.

the second Patent, doe heirby declare that the Petitioner's Precedency as a Viscount, shall stand good and valid with the forsaid alteration, *conform* to his *first* Patent; and ordains this Act to be extracted yerupon for his furder security yeranent."[1] The Earl of Marchmont Commissioner, the President of the Court of Session, Justice Clerk, Advocate, and various noblemen, attended this diet.[2] The better plan might have been for the Viscount to have obtained a Royal grant of the new title, upon *a resignation* of the *former* "quiescent" one, with the old precedency, the Viscounty standing as before. But how the nobleman in question, thus so punctilious, allowed John Lord Carmichael, as thereafter happened, the 25th of June 1701, to be created *Earl* of "*Hyndfoord*," &c.[3]—there being thus an encroachment, or attack again upon his ever ill-treated "quiescent" dignities, is not so conceivable, he still surviving. Nay, what is further remarkable, on the Monument erected to his memory at Westminster Abbey, after his death in January 1710, as thereby intimated, he is not only described as Viscount Teviot, and a Baronet, but also under his original "Lordly" style of "Baron Livingstone *of Peebles*;" while there is no mention of the later.[4] Perhaps owing to the want of a resignation, he might not be thought to be fairly denuded of the former, that was fully constituted; which conclusion, however, would have more strongly applied to the "heirs-male of his body,"—constituting the regulating limitation,—if there had been such,—through default of whom his honours expired with him.

Additional attack upon his new "*quiescent*" title, with retention at the sametime by the Viscount of the former.

The grant of the Viscounty of Seafield, &c. in 1698, may be held among the most correct and unexceptionable instances,—even more so than that of Roxburghe in 1707,[5]—of the constitution and fixing of a Peerage descent by a patent, *through reference* to a *different* and ruling deed or settlement regarding lands,—after the fashion of March in 1697. The Seafield signature under the sign manual, dated 24th of June 1698, limits the honours to the patentee, and the "heirs-male of his body; *which failing*, to his *other* heirs of *Taillie (Entail)*, to *be contained* in the Charter of his lands, Baronies, and others, conform to a Signature under *his* (the *King's)* Royal hand, of *the date* of *these presents;*"—while *simul et semel*, such charter accordingly passed, in virtue of which, heirs-female, as is notorious, accordingly take.[6] Nothing, therefore, can be more methodical, unequivocal, and clear;—and in precise terms of the first signature, the limitations in the extended patent, dated as above, the 24th of June 1698, in our Great Seal Record, are thus latinized,—"in

Viscounty of Seafield, in 1698, the most regular and unexceptionable instance of a Peerage grant, with a referential limitation, like that of March in 1697.

[1] Act Book, or Register of Privy Council, in Her Majesty's General Register House.

[2] *Ibid.*

[3] As by the patent of that date, in the Great Seal Register.

[4] See Dart's Antiquities of Westminster Abbey in 1723, vol. II. Plate 131, where there is an Engraving of the entire Monument and Inscription.

[5] See p. 1060.

[6] From the respective registrations in the State Paper Office, London.

*dictum Dominum Jacobum Ogilvie, (*the *Patentee)* et heredes masculos de ejus corpore, Quibus deficientibus *alios* ejus heredes talliæ continendos in carta terrarum ejus et prædiorum, secundum Signaturam Regia nostra manu munitam, datam cum præsentibus." To our honour, in support of correct conveyancing *sometimes* with us, I have pleasure in giving this instance.

On the other hand, the charter of regrant of the *honours* of Roxburgh, with the lands, dated July 2, 1687,[1] is on this head essentially defective, and labours under the vital objection, as in the cases of Cassilis, and Oxenford in 1671, and 1706.[2] The signature under the sign manual, of the same date, carries *merely* the Earldom or *Comitatum* of Roxburghe, and *lands*, to *which* the former term, at *that* comparatively *modern* period, can *only* relate, in favour of "Robert Earl of Roxburghe, and the heirs-male of his own body, which failing, his *heirs-male and of Tailzie* mentioned in the infeftment of the Earldom of Roxburghe, granted to *umqhile*[3] Robert Earle of Roxburghe, his Great Grandfather, and in the *nomination* and designation of Tailzie made by him, conforme to the said infeftment," &c.[4] But in the extension thereof, under the Great Seal of Scotland, through the charter in question, we first meet with these very *unwarrantable* interpolations over and above the lands,—"*una cum titulo*, et *dignitate Comitis* de *Roxburghe*, cum omnibus *honoribus, dignitatibus* et immunitatibus eidem pertinentibus,"[5] that are there in such guise, *nominally* carried,—in consequence of which, the conveyance, so far, was disregarded and held to be effete in the claim to the Roxburghe honours in 1812, though being the latest, *literally*, quadrating with the material reference in the patent of the Dukedom in 1707,[6] it otherwise might have ruled. We have here, another *notable* and *praiseworthy* example of the practice I have repeatedly adverted to, since the union of the crowns, always to be kept in view, and shewing the great wisdom and justice of the Lords in their demanding, in every Peerage claim, production of the signature of the patent or charter, when it exists. There being no *blanks*, regarding, or in place of, the *absent* Roxburghe honours, in the Roxburghe signature in 1687,—to be afterwards necessarily or presumptively filled up *ad libitum*,—a striking specialty is here again evident, pointedly distinguishing this case, from those of Teviot and March, where, as I have remarked, a different and favourable conclusion falls to be drawn.[7] Nor is it less important upon another vital March point mooted, that in the same Roxburghe conveyance in 1687, "Heirs male and of *Tailzie" (Entail)*, are confessedly used to comprise heirs-*female;* such including the present Duke of Roxburghe, a female heir of entail, taking

On the other hand, regrant of lands and honours of Roxburghe in 1687, bad, and unwarrantable in regard to the latter, further shewing the looseness and impropriety of our occasional practice here, as in the cases of Cassilis, Oxenford, &c.

Specialty that differences the above Roxburgh grant and others, from the instances of Teviot, March, &c.

Further illustration of "Heirs-male, and of entail," in above Roxburghe instance.

[1] Great Seal Register. [2] See pp. 1053-4 [3] The *deceased.*

[4] From the Registration, *ut sup.* State Paper Office, London.

[5] Great Seal Register. [6] See p. 1060.

[7] This also applies to the proper Annandale limitation in 1701, see p. 1054.

under the noted entail and nomination of Robert first Earl of Roxburghe, alluded to, authorized by the Royal charter in 1646. Indeed, his Grace, (a *male Innes*) *by* our *common* law, is only an heir of the latter, and *not at all* of Earl Robert, the disponee in 1687, who, in the male line, was a Drummond, and of a totally different lineage. Upon this ground, the late Sir William Drummond of Logie-almond, his heir-male (collaterally,) conceived that he had a claim to the Roxburghe honours, &c.; but after consulting counsel, who, of course, dissuaded him, it was prudently abandoned.[1] His plea would have been somewhat strengthened by the charter 1687, under a *strict, exclusive* interpretation.

Claim of Sir William Drummond of Logie-almond, to the Roxburghe honours, (in 1806) *ostensibly* supported by the above charter.

I may perhaps here subjoin, that after the recent discovery of the March document in 1697,—in a manner, I may say, elicited, or prompted by me,—in the Marchmont charter-chest, and notwithstanding what I had written upon the subject having long stood without demur or challenge from the same quarter, where it had been fully imparted,—I was confidently required by one, no doubt impressed with a laudable desire for Lord Wemyss's interests at once, *de plano*, to quash and cancel my remarks, and in effect, also to leave the present matter and discussion a *complete blank*, without even the redeeming consequence of its ever being obviated, or compensated for, as in the case of signatures. Of course, I peremptorily refused to adopt such step;—which, if I had done, owing to whatever inducement and consideration, I would have been guilty of the grossest obliquity, undue bias and inconsistency, and have glaringly deviated from the vital principle that has ruled me in this performance—as announced in the Preface—of *expiscating* the *truth* in what I discuss, "however it may bear, by a close, strict analysis;"[2]—without which, our true and genuine Peerage law and practice can never be rightly illustrated and matured. For I need hardly add, that the general March question, in its different features and complexion, is not only subtile in itself, but is also *directly identified*, in a legal view, with *other weighty* Peerage cases, as affects a corresponding descent; but especially the import *aliunde*, of certain constituting signatures of existing Peerage grants still in force, which *are equally, as above, blank*. This apparent defect, that must strike all as remarkable, and demanding explanation, I am now obviously disposed—owing further, to what has been undeveloped in the March instance, taken with that of Teviot, &c.—to regard with a more favourable eye;[3]—so that the latter may serve a vital and benevolent purpose in respect to the former. As my general conclusions, besides,

The general March case, important to, and illustrative of others.

[1] He claimed the honours by reference to the Lords from the crown, July 12, 1806.—Lords' Journals.

[2] See pp. xv. xvi.

[3] As constituting (to be presumed) a kind of *carte blanche* in favour of the party, to be filled up by him, as he inclined,—virtually amounting to a faculty of nomination upon a regrant of honours, as repeatedly shewn.

in respect to the March case, are also favourable,—combining this circumstance with the doubt and distrust that has hitherto environed it, from the terms of the ultimate limitation in 1697, in the minds of some lawyers,—by whom it has not unseldom been mooted,[1] I am not altogether without hopes, if I be well founded in my expositions and doctrine, that their publication, based and grounded as they are, upon full and unbiassed inquiry, may not even be unacceptable to the noble person whom they chiefly concern. And this independently of the beneficial, *supplemental*, or compensating result, as practically evinced, from my original scruple. My former opinion *qualified*, without foreclosing the point,[2] and impartially divulged, was all I could then safely and properly offer; while, even if I had been essentially and unpardonably compromised, and palpably ignorant in my facts, it would have been especially incumbent to have publicly confessed the error, instead of, as required, at once abjuring, or stifling discussion. In such confession of ignorance, I would always glory; it being a main stepping-stone to just views, and due advancement of the legal subjects I profess to discuss.[3]

[1] The March honours, as notorious, have never yet been claimed, so the question is fully open.

[2] See pp. 207-8.

[3] In reference to the *actual* sealing of the March patent, I may more explicitly add this order by the Privy Council, though not until the *8th of June* 1697, after receipt of the King's letter, (the 24th of May 1697,) whereby they do "*take off* the *stop* putt on by them, of the date, 30 April 1697, upon the patent granted by his Majesty in favour of Lord William Douglas, to be Earle of March, etc., and ordaine the said patent to pass the sealls, (truly but *only then*,) and to be given out, *as if* the *seall had been* appended thereto, *when* it was *first* presented, before the stop was laid thereupon." Privy Council Register, *ut sup.* This accounts for the indorsation referred to, of the March signature, with the *latter legal* date, (see p. 1056, *n.* 2.) These particulars and others respectively, are important, as elucidating our understood forms and procedure in passing patents and grants of honours. It is of little real importance to the March question, whether the filling up and completion of the Signature in 1697, which is in a different ink, was, or was not, in a different hand,—this evidently, as in the Teviot instance, having been effected in Scotland. In respect to the Cassilis case, (see p. 1053, *n.*) I may add, that notwithstanding the *interpolation* of the honours in the extended and incompetent charter in 1671, it likewise transpires from the *Registration* of its signature in the State Paper Office, that they are not there included in the regulating conveyancing clauses. I say regulating, or legally effective ones, because, according to *our notable* practice again, and as exemplified in the other inept instance of the charter of the lands of Melvill in 1686, (see p. 897. *n.*) there is elsewhere *incidentally*, a condition that the husband of the heir-female succeeding, whether a Kennedy or not, and their heirs, shall take the "arms and *dignity* of the Family of Cassilis," &c. This empty arrangement as to the dignity, has been copied, *per incuriam*, from the previous draft, into the Cassilis signature.

Further elucidation in respect to passing of the March patent in 1697, and relative practice.

Registered copy of Cassilis signature in 1671, in the State Paper Office, has a similar inept clause, as in the Melvill charter in 1686.

Remarkable procedure of the Lords in 1640, regarding the "*foreign*" Scottish Nobility, &c. and precedence of the latter in *England*, before the Union of the kingdoms.

I observe in the Lords' Journals, under date December 23, 1640, an *order*, "That the consideration of *Foreign* Nobility of Scotland and Ireland, and the Creation of *Baronets* of *Nova Scotia*, be referred to the Committee of Privileges," with a "*Memorandum*" there, subsequently in the same year,[1] "That Mr. Attorney General is to inquire of the Lord Chief Justice of the Common Pleas for the Papers and Directions which he received from the Lords Committees, concerning Foreign Nobility, and Baronets of Nova Scotia, *to debar them of any place in this Kingdom.*" Perhaps some of the legal Antiquaries of the sister kingdom might still recover the relative papers, which may be curious, and favour us with their publication. By the hitherto conceived practice, *e contra*, after the union of the crowns, and before that of the kingdoms, Scottish Peers, in England, ranked *from* those of the same degree; and the English Peers, in Scotland, *eâdem vice*. The Duke of Lennox and Marquis of Hamilton, Scottish Lords, in 1637, are both ranked *at Whitehall*, before the Earl Marshall, Earls of Northumberland, Dorset, &c. (see Rushworth's Historical Collections, Part II. pp. 462, 471.) Vernon, in a letter to the Duke of Shrewsbury, July 18, 1699, alludes to a duel between "*Lord* Wharton, (only then an English *Baron*,) and Lord *Cheyney*," because Lord Wharton had sat "on the *right* hand of the Chairman" at the Buckingham Sessions, "which *he (Lord Cheyney)* pretends belongs to him, *as a Scotch viscount*." (Vernon's Letters, vol. II. p. 324.) The latter, in virtue of a patent, May 17, 1681, *Viscount* Newhaven, and "Lord Cheyn" in Scotland, (Great Seal Register,) had apparently as good a right to such precedence, as the Duke of Lennox, and Marquis of Hamilton to theirs in 1637.—I had intended to add some remarks upon the import of the term "Heirs" in the seventeenth century, but must postpone them, with various remaining matter, &c. to another occasion.

[1] *Feb.* 17, 1640. *February* being *then* subsequent to December in the Calendar of the year. It is singular, that neither by the Articles of Union, or any specific enactment, is the precedence of Baronets of Nova Scotia, properly defined and settled.

INDEX,

(INCLUDING MISCELLANEOUS MATTERS, &c.)

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POSTSCRIPT.

In order to prevent any misconception, I may remark, that there are, as obviously evinced in my present performance, some things in which I differ from what is contained in the "History of the Earldoms of Strathern, Monteith, and Airth," (turning upon the succession to the whole,) and with report of the claim to the last,—so recently published this year by Sir Harris Nicolas. I feel it incumbent to state this, though doubtless beholden to the professional reference, and compliment paid to me in the Preface. I cannot coincide in the extravagant and untenable view, so unqualifiedly taken by a gentleman, (not Sir Harris Nicolas,) of the exclusive landed import only, with us anciently, in legal deeds, of the term "*Earldom*" or "*Comitatus*,"[1] capable of such ample refutation. I have often been amazed at the manner in which Lords Mansfield and Rosslyn sought to meet Lord Hailes's irrefragable instances originally, (in the Sutherland case,) of a grant of *Comitatus*, carrying the honours *with* the lands,—that there *may* have been, *besides*, a *personal* grant of the former,—and to a different series of heirs,—than those to the *Comitatus*;—a *most likely*, and to be presumed arrangement certainly, in feudal times, in such a country as Scotland, where power and landed possession, and feudal dominion, were everything. But the plain answer here is,—before entitling you to the benefit of the argument, you are *bound* to shew *first*, that there *was* such *actual extra grant* in question; which you have not done, even in the faintest manner. And *secondly*, the very notion of its existence then, is a mere fallacy and fantasy, exclusively grounded upon modern conception, the bane to legal antiquarian discussion, which would transfer the era of such abstract concessions, or modern patents, as they might be called, to a period, when, as every Scottish antiquary should be aware, they were unknown. I rather think I could pledge myself, both by what Lord Hailes has adduced, and what I further could, in corroboration,—as partly indeed evinced in this performance, in the event of a discussion, to substantiate what I thus maintain; and such being the fact, and granting it, I submit to the legal profession in both countries, in this more enlightened age,—whether the above *notable* method, by which

Late misconceived import of "*Comitatus*" originally, and irrelevant mode of argument here, by Lords Mansfield and Rosslyn.

[1] See Hist. *ut sup.* Append. No. XIX.

Lords Mansfield and Rosslyn meet my conclusion, can in law be at all palliated, or permitted. It is a most outrageous begging the question, —and at this rate *all* argument would be infinite.

Although counsel in the recent Airth claim, I neither suggested or was consulted on the institution of that to the Earldoms of Strathern and Menteith by the same party, so am not responsible for the step and procedure. And I regret to observe, in the History of these, &c. alluded to, while reference is made to those most secondary, and wretched authorities, (my *old horrors* and *antipathies*,) Douglas's and Wood's Peerages,[1] the due descent from the Stewart stem of Strathern,—upon which all vitally depends at the mere outset, is not legally documented and established; however susceptible it *may* be of adequate and indispensable probation *aliunde*, though unknown in the same quarter. Neither is the question of the legitimacy of the Stewarts, (also introduced in the above work,) fully brought out, the striking and material aggravation, owing to the special bar to the legitimation, *per subsequens matrimonium*, through the incests, escaping notice.[2] This, no doubt, may be ascribed to Sir Harris Nicolas, however eminent, and laudably assiduous as an English Peerage lawyer, being naturally not altogether imbued in our peculiar legal notions, and practice, in Consistorial points, comprising legitimacy.—At the sametime, I admit, the representation by Sir Harris, of our general law of legitimation, *per subsequens matrimonium*, after the era of the 14th century, as "in a state of *transition*" from the English, to what it now is,[3] to be happy and relevant, *under* my later construction of the remarkable case of Tulloch in 1520,

Deficiency of legal proof of pedigree in recent Strathern claim, &c.

Sir Harris Nicolas on the Stewart question.

Scottish Peerage writers a most peculiar class, and far inferior to Dugdale.

[1] See p. 990, and Index, under *Peerage Writers, Scottish*. The instances, however glaring, alluded to there, of the faults and errors of the latter, whom Chalmers, who like myself, had such *multiplied* occasions to test their veracity, not inaptly identifies with "*Fiction*," (see pp. 1006-7,) are in fact, but a mere drop in the bucket,—*raræ* nantes in *gurgite vasto*,—compared with what can be *besides*, elsewhere exposed in their lucubrations. And by the way, the appealing to them by the English learned authority in question, is again an *admirable* illustration of the necessity of "evidence of the *strictest* kinds in matters" of Scottish Peerage, *according* to another, by the existing professional understanding and practice, (see p. 832.) Our English neighbours, good easy people, may perchance benevolently think that *our* Peerage writers—rather a *peculiar* class—are on a *par* with Dugdale! If so, they must be lamentably mistaken, as, I repeat, could be illustrated and proved in a very singular, and possibly surprising manner to the public; and even, as ordinarily admitted in Peerage law, Dugdale, however transcendently superior, cannot, at the most, be relevant or conclusive proof,—certainly, *in* the *existence* of better, or strict, which is always, or should be, *ante omnia*, preferred, as really, in the Strathern emergency, adverted to in the text.

[2] I may mention, I first broached the Stewart question, essentially as stated in the present Work, so far back as 1835, in my "Tracts Legal and Historical;" see *ib.* pp. 162—205.

[3] History of the Earldoms of Strathern, Monteith, &c. *ut sup.* p. 6, *note*.

[4] See Pref. xvi., also pp. 497, *et seq.*

which, however, it is difficult to reconcile with *our* other authorities.[1] In respect to the *Regiam Majestatem*, by which the former appositely bolsters his conclusion, I elsewhere shewed, from its confessed *biform* structure and nature, that it is but a dubious auxiliary, and difficult to be trusted in a critical legal emergency.[2]

Dubious nature of *Regiam Majestatem*, as a legal practical authority.

I need hardly add, that in remaining respects, Sir Harris's Report of the Airth discussion has no inconsiderable attraction, and must be perused with due interest and attention by the profession;—while it is most agreeable to find him in this manner—singularly enough, unknown to me till after the time of publication, thus, in part, compensating for, and supplying the material deficiency, before so pointedly regretted, and adverted to by me in my Preface.[3] In regard to the merits of the Airth claim, owing to the matter being still *sub judice*, or rather not pushed after the argument,—independent of the presumption on my part,—I regret, I cannot well attempt at present further to broach or discuss them.

But I cannot resist, once more, adverting to the modern heresy entertained by some, (including our *old friends* the solicitors,) who have been regarded, nay consulted as authorities in such matters, of resignations of honours, in order to their effectual conveyance, behoving *indispensably* to be into the hands of the crown, and not merely into those of the Barons of Exchequer, the reverse being so directly and palpably refuted by the Roxburghe and Rothes cases, besides various others, &c.—the first as solemnly determined by the Lords in 1812; while the second, as has been seen, was the subject of unavailing cavil and objection, however keen, in 1682.[4] I need hardly observe, that both the existing Duke of Roxburghe, and Earl of Rothes, as well as their predecessors, exclusively come to take their corresponding dignities, through such identical Exchequer resignations, that cut off the previous heirs, under a totally *different* character and right, followed, of course, by unexceptionable regrants from the Sovereign.

Modern error as to Scottish Peerage resignations, with injurious and unjust consequences if admitted.

It is the adhibition of the royal sanction and consent, through the regrant, upon a sign manual, that forms the true cardinal test, and by retrocession, in our Exchequer resignations, as well as *extunc*, renders all good and valid. The mere adhibition, on the other hand, of the

Approved form in conveyancing on such occasion, and what is here null and effete.

[1] Further here, what may we say to the Parliamentary Declaration in 1516, that Alexander Stewart was bastard son of Alexander Duke of Albany, and by the "Lawis—and constitutiouns of yis realme,—*unlegittimate* be *ony* mariage" which involves and presupposes the notion of legitimation by a *subsequent*,—taken with our great leaning to the Romish Canon Law? (See Acts, last Edit. vol. II., p. 283.) Yet *in dubio*, law *leans* to legitimacy.

[2] See my former Remarks on Peerage Law, 52, n. 1, and Tracts Legal and Hist. *ut sup.* pp. 193-5.

[3] See pp. vii, viii, ix.

[4] See p. 937, n. 2, *et seq.* The valid and effectual Rothes regrant in 1663, under the sign manual, was also, as can be proved, upon a resignation in the hands of the Barons of Exchequer.

caschet,—without consequently the knowledge of the crown, (which is *imperative,)* in the emergency, as the warrant of the regrant, —indifferently from the case of any ordinary subaltern conveyance, —would again render things here, indisputably effete.

Necessity of proper specific Peerage resignations (followed by a regrant) to carry old dignity and precedence.

Without specific resignation, the right of former heirs to honours cannot legally be held to be defeated; and whether a *naked* grant *de plano*, or as we might in a *certain manner* say, a regrant of *a dignity*, in that event, identically bestowed, with the *old precedence, ex figura verborum*, upon one not the heir, but an absolute stranger, (as has happened *de facto,*) or having little, or an extremely distant blood connection in his person, with the *former takers*, can legally carry, to the prejudice of, or collision with the still existing *heirs* of the *latter*, or independent parties having conflicting vested interests *aliunde*, the *above*, especially the old precedence, *pariter, et reiteratim*, may receive some elucidation from the pointed case of the Earldom of Findlater, in 1641-3, and 1665, which I may again recommend to notice,[1] and was hitherto unknown,—however, though partly, but in a degree only, the less satisfactory, and forcible instance of the Barony of Sinclair, after 1677, under its *later* aspect, may be *supposed* to weigh otherwise.[2] As I formerly suggested too, in the case of the *two* possible identical Baronies of Salton, under the old, and modern law, the very existence of two such conflicting honours, with the same title and precedence, independent of the injustice of the act, is a rank incongruity, nay, utter natural and moral impossibility, and cannot be countenanced or sus-

New and important case of Findlater in 17th century; and if rebutted by that of Sinclair?

See pp. 946-7.

[1] See pp. 65-6, 80-1, *et seq.* The double, or later concession in 1641, of the original Findlater precedence, with the title, to Sir Patrick Ogilvie and *his* "heirs-male" only, was strikingly declared by Charles I. in 1643, to be contrary to "*equitie* and *reason*," and "to be *void*, *null*, and *ineffectual*," (see p. 81,) which declaration was confirmed in 1665, by Charles II. This Sir Patrick Ogilvie of Inchmartin, the husband of the daughter, and heiress of James Ogilvie first Earl of Findlater, and who was eventually to be benefited by the above void and repudiated grant of the precedence *ex terminis*, happened also to be of the same common and ancient stem of Ogilvie, however not of the special Findlater branch. His situation too, though there was no resignation in the matter, yet proved the most favourable of the kind, the original Findlater patent in 1638 being merely to Earl *James*, and the "heirs male of *his body*" &c., of whom, as there was none, no previous interest, so far, or *jus quæsitum*, ever vested in heirs.

In case of Sinclair, if no resignation, the original Barony is in the Earl of Caithness; and the present Lord Sinclair *may*, by our law, only rank, under his *literally* corresponding title, by the patent in 1677.

[2] See pp. 78-9, 81-3. As far as I yet know, and I believe, as generally held,—though I am, of course, here open to correction,—there was *no* resignation in the case of *this* Sinclair Barony, nor has the question of its precedence been yet fairly, or legally tested. Query, then is not the original and proper Barony of Sinclair, that in the *original* Lords Sinclair, opposed to the later, held by the Sinclairs of Hermistoun, a distinct family, in terms *only* of the patent in 1677, in the present Earl of Caithness, the undoubted heir-male of the former, by reason of his male *descent* from, and representation of their common ancestor William Earl of Orkney and Caithness, "*Lord Sinclair*;" who, by a solemn Act of Parliament in 1488, is explicitly shewn to have possessed the title of *Lord Sinclair*, (see Acts of Parl. last Edit. vol II. p. 213,) and that devolved from him, to the same original Lords

tained by our law.[1] The precedent, moreover, of the Earldom of Lothian, under the jarring patents, in their limitations, of 1606, (the original,) and 1631, and 1678,[2]—as I have also first set forth in this performance,—goes to shew, in its legal history and progress, the conceived inefficacy of *such later* grant of an *original* dignity and *precedence* contemplated, even to the nearest blood-heirs, though *new* takers—*abstracting from* the preliminary or essential warrant of a competent express resignation.[3] What Lord Mansfield or such authorities may chance to predicate upon this head, from what has been so repeatedly shewn in their case, and without proper illustration and proof, according to their usual fashion, we cannot altogether trust to. The preceding

Case of the Earldom of Lothian in 17th century, also here, most material.

Sinclair, as his then preferable heirs-male? In cotemporary and authentic deeds, also now before me, the title of Lord Sinclair is given to the above William Earl of Orkney and Caithness. From the case of Findlater, and what is set forth under the present article, the precedence of the thus comparatively modern and new Barony of Sinclair, in the Hermistoun family, (though stated in the patent in 1677, to be that of the *prior* Lords,) should only be from the latter year. If, again, the *old* precedence literally, is thereby carried, it should clearly be much earlier than the date 1488, that taken by the Hermistouns. See as to this, and partly what is premised, pp. 608-9, including *note*. I conceive, however, that before 1677 the old Barony of Sinclair may have devolved to the Caithness branch, in whom it legally is, as above—always holding there to have been *no* previous resignation.

Earlier date, than supposed, of original Sinclair precedence.

[1] By the way too, as I also remarked at pp. 82-3, this is the case of two Peerages, to use the English phrase, "sitting on the lap of the other," which is viewed, I am informed, in the same light by the House of Lords.

[2] See pp. 73-5. Sir William Ker, who married the Lothian heiress, afterwards Earl of Lothian, was the son of Sir Robert Ker of Ancrum, a great favourite of Charles I., who may have arbitrarily *stretched* things in his favour.

[3] As palpable evidence *inter alia*, that there was no valid resignation of the Lothian *honours* in favour of the heirs-female, &c. by Robert second Earl of Lothian, I may appeal again to the letter of James II. to the Scottish Lord Commissioner in 1685 (in the State Paper Office), in which he affirms that Charles II. had "been *informed*,"—of course, by his legal counsel, and advisers—that the original Earldom of Lothian, (that in Mark, the first Earl, and his son Earl Robert,) whose patent in 1606 has ever been on record, was "provided to heirs of his body," and *therefore* "EXTINCT." Now this could not have been, on the contrary supposition of such actual resignation—of which *neither* is there the *slightest* vestige,—because, by our legal understanding, (combined with a proper regrant, which is as little to be found,) the Earldom had still, on the other hand, thereby existed in the heirs-female,—instead of being thus extinct. Added to this, there is the striking fact of the *after* Lothian line, in the person of Sir William Ker,—who married Ann, eldest daughter and coheiress of Earl Robert, by whom he had heirs, (as likewise proved by the preceding letter), having in 1631, long subsequent to Earl Robert's death in 1624, "ACQUIESCED in the *extinction* of the *former* honours, and *procured* a *new* patent" (in that year), on which they thereafter legally stood. It also follows, that the limitation to "heirs male" (simply), in the original Lothian patent in 1606, could only, as in the instances of the Viscounties of Melgum and Aboyne, in 1627 and 1632, (see pp. 1020,) have been held to denote heirs-male of the body, there having been in the same century many *collateral* heirs-male of the

Proof, *inter alia*, of no valid resignation in Lothian case.

Remarkable Letter here, of James II. (formerly referred to at p. 75.)

Full proof by Lothian case, that "heirs-male" then were held only to denote heirs-male of body.

Question may not in *every* respect be settled.

is a curious and important point, invitingly courting and requiring consideration, it not yet being perhaps so fully or satisfactorily fixed, in practice, in *all* its aspects, as might be; and whatever may other-

patentee, (of whom some still presumptively exist) an interpretation too expressly given to the previous *identical* words by the first lawyers at the time. There could not possibly have been any mistake as to the limitation in 1606, the patent not only being all along upon record, but fully examined, and referred to, as conceived *literally but* to "heirs male," under the correct date, both by Charles II. James II. and their advisers, &c. (See further here, Letter of Charles II. in 1679, in the Lothian and Roxburgh matter, Acts of Sed. Edit. 1790, p. 142.) For remaining conclusive proof of the absence of any resignation of his honours by Robert second Earl of Lothian, the last direct heir-male, and that the new line after his death, in Sir William, husband of his eldest daughter, and their heirs, could only strictly ground their right to *their* dignity of *Lothian* upon the patents 1631, *and* 1678 *(de facto,* though unavailing as to the original precedence); see pp. 73 to 78. Nothing can be truer than the above *acquiescing* in the *extinction* of the first Earldom of Lothian, as intimated in 1685; for, by the Rolls of Parliament from 1633 to 1670, Sir William Ker mentioned, husband of Ann, is proved to rank only according to his abstract creation, as Earl of Lothian in 1631, and is *postponed* not merely to Roxburghe, but to Earls created in 1619, 1623, 1624, and 1628. Then again, as to Earl Robert, their son, the heir-female, down even to the 26th of June 1678, he is alone restricted to the same precedence, and is still after Roxburghe. And it was not until the last Lothian patent, 23d of October 1678, (Great Seal Register,) *de facto* giving the precedence in 1606, and *the bone* of contention, that the case was altered, and he had *ostensibly* a leg to stand upon, *subsequent* even to which, however, he is ranked but as according to 1631. (For the above facts, see Acts of Parl. last Edit. vol. V. pp. 8, 405, 464, 491; vol. VII. 3, 368; vol. VIII. 214, 452, 576, &c.) The same thing is exemplified by the ranking of our nobility in Books of Blazonry I have seen, by the Heralds at the time. If the *older* Lothian Earldom had gone by resignation, &c. to Ann, daughter of Earl Robert, then Sir William, her husband, by the *courtesy*, would have been Earl *instanter; which* title had descended to his son without any necessity for the *after* patents. And here, in contrast, how strikingly the case of Roxburghe tells, where there *was* a proper resignation, followed by a proper regrant, (that in 1646), and hence the Earldom, with the *original* precedence in 1616, at once went to the *new* heirs *(female)*, who by the Rolls of Parliament *(loc citat. &c.)* are proved to have unexceptionably held it, without any new patent, or subsequent repeated jarrings and interventions, as in the Lothian instance, confessedly to cure a vital defect. To descend to lesser evidence,—the cotemporary *Lord Lyon*, Sir James Balfour, (the noted antiquary,) so constituted in 1630,* but a far better authority than Young, the subordinate English herald, the sheet-anchor of Lord Rosslyn in the Glencairn case, (see pp. 822-3, 831—833, *n.* 1, *et seq.*),—he simply states in his Lothian Genealogy, among the other descents of our nobility, (in a MS., Ad Lib.)—that the Anne in question, whom he does not style Countess, daughter of Earl Robert, married the above Sir William Ker, *who* "was," *by Charles I.*, to quote his actual words, "created Earl of *Lothian*, and Lord Newbattle, by letters patent," thus shewing whence the right proceeded, *without* notice of any resignation or regrant, which, if it had obtained, he would have undoubtedly known, and mentioned,—although

Further proof of no Lothian resignation, and that *later* Lothian Family could only claim the old precedency by patent in 1678.

For more here, see p. 1105.

See also further too, *ib.* 1106.

Forcible illustration in point from contrast, afforded by the Roxburghe case, to that of Lothian.

* See p. 1105, *n.* 9.

Concurrent evidence of Sir James Balfour, Lord Lyon in 1630.

wise be thought to bear, in the course of this performance, yet confessedly Sir John Nisbet, Lord Advocate to Charles II., a great authority, whose noted "*Doubts*" in law, an English lawyer observed, were better than most men's *realities*,[1] sided, as has been seen, with English notions, and was clearly against the regrant of the precedence in question. Nay, he even thus generally expresses himself, that the royal prerogative, whose extension he honestly deprecates, should *not* be carried to the excess of affecting the *jus quæsitum* of original heirs to an honour and precedence, "or any thing else," by a regrant thereof, to another, or stranger. He here, too, has in view the Lothian and Roxburgh case.[2] This *may* further relevantly tell against the present noble holder, *de facto* at least, of *the* Earldom of Buchan, in *his* person, however defended, or accounted for,—so peculiar and anomalous, *even admitting* it,—and that is, at any rate, expressly contended to be different from the *proper*, and *original*, in the remarkable pending Buchan Peerage claim; as to which I can becomingly say no more at present, from having first professionally started, and developed it upon the merits.[3] Sir James Stewart, Lord Advocate likewise (to Queen Anne,) a parallel high authority to Nisbet, it is observable, by no means contradicts, but rather sides with him, in his answer to, or comment upon the important question mooted and discussed by the other; for he admits that Nisbet here "thinks *justly* that the *Prerogative* (compassing, in effect, the right of granting a dignity, with the old precedence, inherent in previous heirs, that under view,) should *keep within the boundary of law*, and that it can only be measured by the particular constitution, and the *laws*, and customs of every kingdom and State, and the true Principles and Reasons thereof: But to define it's extent, is too delicate a point to be farther insisted on."[4]

Nisbet decidedly adverse to a conveyance, of an honour or subject, in prejudice of previous and existing heirs.

The doctrine may bear upon the present Buchan claim.

Coincident opinion of Stewart.

he specifically notices Earl Robert's death "at Newbattle, 15 July 1624," and his interment there. As to the present state of the *original* Earldom of Lothian, in consequence of the recent Devon decision, and the law as *now* understood, construing "heirs-male" not as of the body, but as heirs-male *general*, see p. 82.

Present state of *original* Earldom of Lothian by *modern* law.

[1] See in the matter, p. 26, and *n.* 2, *ib.*

[2] See his *Doubts* and *Questions* in our Law, &c. p. 137; also referred to by me, at p. 23, *n.* 1. Nisbet's literal words will be given presently.

[3] I cannot yet refrain *in limine*, from remarking again, that sittings in Parliament, and taking or exercising the dignity, &c. upon an undue and vitious title, or a public *interim* sanction, as in the *modern Buchan* or *Cardross* instance, always here at the same time, without any authority from the only true and competent tribunal, has been repeatedly shewn, as I humbly conceive, in the course of this performance, even further when backed by prescription, not with *us*, to homologate, or obviate a lurking and inherent flaw and defect, that could still be pleaded in bar, in law, and prove fatal. And this, independent of the other arguments on this head in the Buchan claim.

Other material considerations bearing upon the Buchan claim.

[4] His Answers to Nisbet's Doubts and Questions, pp. 222. The literal words of Nisbet, at the place before quoted (in this page), and considered by Stewart, are, "It is thought, that his Majestie's *Concessions*, *whatever* the subject be, should

Value of Nisbet's Doubts and Stewart's Answers.

I must, *par parenthèse*, here bid adieu to these endeared professional heir-looms—Nisbet's Doubts and Questions in Scottish Law, and Stewart's Answers to them,—while thus beneficial, so *unique*, I believe, in their character, and, as would appear, unprecedented, and unambitioned; in which two great lawyers, *discincti*, and withdrawn from the bustle and turmoil of the *Forum*, after the fashion of Scipio, and Laelius,[1] devoted their leisure to exchanging, with the view of wholesome recreation and benefit, not imitated, it is to be deeply lamented, in later times,—and under the influence *mitis sapientiæ*, their private and unbiassed opinions upon the nicer, and most interesting portions of our law.

Sir George Mackenzie also sides with Nisbet, *ut supra*.

Far be it, however, from me, at the sametime, to overlook our other cotemporary Coryphæus, Sir George Mackenzie, founder of the Advocates' Library, whom Chalmers styles an author of "multifarious learning,"[2] and who also combined general literature with law. He was likewise Lord Advocate to Charles II. and although, as notorious, sufficiently arbitrary in his notions, and disposed to *stretch* the royal power and prerogative, yet fully coincided in the matter we have previously discussed with Nisbet. He starts the question, in his treatise on Precedency, which, in fact, essentially may resolve into the cases of Lothian after 1631, or rather 1678, and Sinclair in 1677, that he likely had in view, "Whether can the King create now a *new* Earl, and ordain him to *precede* all the *former* Earls, or any such number of them as he pleases," and preferably answers—while noticing the arguments *e contra*,—"It would seem that the King *cannot*; for there being a Precedency *acquired* (the *jus quæsitum* of Nisbet) to the former Earls by their *first* gift, the King cannot, by any new gift, *prejudge third* parties; and this were, in effect, to *forfeit them* of their Precedency."[3]

be judged *jure communi*; and that *jus quæsitum*, whether as to Honour and precedency, or *any* thing *else*, cannot be taken away upon any such pretence." And this after starting, "If the Question between Roxburgh and Lothian, should be determined with respect to his Majestie's Prerogative being the Fountain of Honour?" It is yet singularly remarkable, that there is *one* error in Nisbet's statement of the Roxburghe and Lothian case, in supposing a resignation by the second Earl of Lothian, which has been evidently obvious to Stewart, and has accordingly induced him properly to demur to, and (partially) question that account. See Nisbet's Doubts, p. 135, and Stewart's Answers, p. 219.

Nisbet's character.

[1] Lord Hailes, himself a scholar, and good judge, to whom I must so often relevantly appeal, represents Nisbet, upon due cotemporary authority, as "a man of great learning, *both* in law, and in many *other* things, *chiefly* in the *Greek* learning." (Notes on Catalogue of the Lords of Session, of whom the latter was one, p. 22.) He thus also combined—abstracting from the vague metaphysical fantasies of certain judicial successors, like sand-hills, only reared that they may vanish in turn, not forgetting the *edifying* Monboddo doctrine of men with tails—the same redeeming classical accomplishment that distinguished the latter,—curiously indeed, as well as Scipio, &c. and some more of our legal authorities.

[2] Caled. vol. I. p. 560, n. x.

[3] Works, vol. II. p. 570.

It is further remarkable, that Sir George entertained much the same impression with the modern,—as illustrated in the Cassilis case in 1762,[1] and as, in like manner, is relevantly contended, in that of Buchan at present, upon the legal ineptness and insignificance of private Parliamentary Ratifications; for "since," he states, such "Ratifications pass *without Observation*, and *oftentimes without reading*, it may be doubted, whether such a Ratification should prejudge *even those*, who were Members of Parliament,[2] but much more such as were *not present*, *or* such as were created *thereafter*, these Ratifications *not* being properly *publick*, and *legislative Statutes*, and so can bind only such as consented."[3] He here also lets us into other important information,—strikingly evincing the extreme laxity and ineffectiveness of the relative procedure. But over and above, the Acts *Salvo Jure cujuslibet*, that besides followed the private Ratifications on the Cassilis and Buchan occasions, keep every thing material open and entire to third parties, having then, or eventually an interest.

Corroboration likewise by Sir George, of ineptness and insignificance with us, of private Parliamentary Ratifications of Peerage conveyances, shewing the careless, undue manner in which they past, independent of the clenching Acts, *Salvo Jure cujuslibet*, &c.

Not only in 1678,[4] but much further down, in 1696-1698, nay in 1700 and 1701, the *later* Lothian line were ranked in Parliament, according merely to the patent in 1631,[5]—that is, until the very date, in 1701, of the grant of the *Marquisate* of Lothian in their favour,[6] to extricate and sublimate them from their *sad* irremediable condition,[7] and to reduce *their* Earldom to a "*quiescent*" title,[8] in return for its inadequate, and unavailing services. And what I have stated in regard to Parliaments, obtained also on the occasion of solemn processions; for instance, at that of Charles I. into Edinburgh in 1633, previous to his Coronation, where Sir William Ker, then Earl of Lothian, (so long *after* the death of Earl Robert in 1624,) figures but as the *youngest* Earl, and is postponed to the Earls of Lauderdale, Annandale, Seaforth, and Roxburgh,[9]

Further as to true right of Lothian line, who were alone extricated from the fatal attaching objection, and enabled to precede Roxburgh, by their elevation to the Marquisate of Lothian, in 1701.

[1] See pp. 558-9.

[2] Here, (obviously) even sitting, and in the House at the moment.

[3] See Sir George's Works, under last quotation.

[4] See p. 1102, n.

[5] See Acts of Parl. last Edit. vol. X. pp. 3, 113, 196, 247.

[6] See p. 204, under n. 2.

[7] See p. 23. Owing to which, to use the words of Sir James Stewart, "that *Contest* (the *Lothian*, &c.) is *ended*." Answ. to Nisbet, p. 219.

[8] See pp. 1061-2.

[9] See Official Statement and Account of the Procession, including all the community who walked, &c. by Sir James Balfour, then Lord Lyon, Works, vol. IV. p. 354. By the way, there is an entry in the Privy Council Register, "anent the Lyon's crowne," under date at Holyroodhouse, 17th of March 1630, where, upon the petition of the said Sir James, to have, *qua* Lyon, a "crown of gold," certain persons are ordained to make the same. I have too, an original cotemporary account by a Herald, of the form and ceremonial of the "crowning," robing, and installation of Sir Alexander Durham, as Lyon, in 1661, (the procession going from the Exchequer, to the Parliament House,) which is curious, and imposing,

Sir James Balfour, Lord Lyon in 1630, and form of Lyon's "*crowning*" in 1661.

who then attended and walked. Now, even supposing,—what is however unfounded,[1] that the resignation and regrant in question,—by the said Robert, second Earl of Lothian *in* 1621,[2] *did* carry the honours, but at the same time, by some strange unusual exception, *not* the *old* precedence; still the third, or *new* Earl in 1633, in consequence,[3] ought to have had the *pas* at least, (as he has not,) of the above Earls of Lauderdale, Annandale,[4] and Seaforth, whose creations, as proved by their patents in the Great Seal Register, were *thereafter*, and *not* respectively, until the years 1623, and 1624. This, of itself, clearly evinces there was no Lothian resignation or regrant, such as has been pretended, and represented, the *new* Earl in 1633, I repeat, and his heirs until 1678, only standing upon *his* patent.[5] In support of the *exact* corresponding ranking, as I before remarked,[6] of the new Lothian line, by the Heralds in their original Books of Blazonry, in the 17th century, I may appeal to that of John Sawers, Herald Painter to Charles I., in the Advocates' Library, containing the arms of our nobility, fully and finely illuminated; as well as to an autograph *Index (penes me)* of the matriculations, with description of the arms both of the latter, and our gentry, begun by Robert Porteous, "Snaddoun Herald" previous to 1661, and continued thereafter by Joseph Stacy, Ross herald,—more curious and valuable than any thing in the Lyon Office, in its modern destitute and jejune state, without any attempted compensation for, or rescuing from its lamentable *lacunæ*, by its recreant, and *unrequiting* noble heads in our days. In both these MSS. William Earl of Lothian is ranked, in right of his Earldom, *after* the following Earldoms, viz. Kelly *created* March 12, 1619; Buccleugh, March 16, 1619; Haddington, March 20, 1619,[6] Galloway, September 19, 1623; Seaforth, December 3, 1623; Annandale, March 13, 1624; Lauderdale, March 14, 1624; and Carrick, created even so far back as 1628.[7] Nay, the former is postponed, in like manner, to Roxburghe, which dated by the original creation, in 1616, and has, further, the precedence accordingly, of *all the above*, even latterly, after the death of Robert first Earl of Roxburghe, in 1650, through the imper-

Important argument that applies to Lothian, even if a resignation and regrant had not, (as yet with us, obtained to the contrary,) carried the *identical* original precedence.

Special concurrent testimony of our Heralds, (before generally alluded to,) in the Lothian matter.

Irresistible contrast here again supplied by the Earldom of Roxburghe—*after* its *new* conveyance, as set forth.

a mock imitation, as it were, of the Royal Coronation,—a sermon being delivered, with psalms, music, "violles," sounding of Trumpets, &c. including too, a *Largesse*, and other peculiar rites and observances.

[1] The *actual* fatal want here, of Earl Robert's resignation of the honours, due regrant, and the effects, &c., may obviously again tell in the Buchan claim.

[2] See pp. 76-7, and what precedes.

[3] Through the Courtesy.

[4] John Murray, also Viscount Annand, &c. This was before the Earldom of Annandale had been granted to the Johnstones.

[5] See p. 1102, *n*.

[6] Retrospectively of that date, by patent in 1627, through reference to the previous patent of the *Melrose* Earldom, a title latterly relinquished by the Family.

[7] Proved by their patents, in the Great Seal Register,—the Privy Council Register, Parliamentary Records, &c. &c.

ative force of his *effectual* resignation, and the regrant to him in 1646, &c. in favour of his subsequent and present heirs—those *entirely new*, and who exclusively took thereby,—namely, the heirs-*female*,—*in pari casu otherwise*, with the *Lothian*.[1] Sawyers' MS. besides, alluded to, (comprising a large *Quarto*,) has a regular authentic list of the whole nobility at the outset, in precise conformity again, with the order, (as given,) in the respective consecutive illuminations, and depicted blazonry of their arms.

The patent of the Earldom of Argyle in 1683, elsewhere referred to, cannot be assimilated to the case of Sinclair in 1677, abstracting from a resignation, under the matter of precedence.

Upon reconsideration, the patent of the Earldom of Argyle in 1663, elsewhere referred to,[2] is not, in its nature and import, to be assimilated to that of the Barony of Sinclair, in 1677, (abstracting from a resignation,) as bearing upon the matter discussed as to precedency;[3] for which reason, owing to its irrelevancy in fact, I have not latterly noticed it in the Postscript. By our law, then, as shewn under the head of Forfeiture,[4] the *sole* act of the *king*, (differently from in England,) without the aid of Parliament, could rehabilitate and restore against treason, the exception in the Argyle instance; so that the Argyle grant in question truly resolves into an *effective* restoration of Archibald Campbell, Lord Lorn, the patentee, (as it declares,) to *all* the honours in the person of the unattainted Earl of Argyle, his grandfather, or any of his predecessors, thus putting him entirely in their shoes, and things in *their original* state. It is to be observed, that there is, at the same time, in this grant in 1663,[5] a *special* rehabilitation of the noble party to "*entire* fame"—*honours*, *dignities*, and the hereditary armorial *insignia*, &c. with, *inter alia*, full power, "gaudere, possidere, et frui," the same; and added to this, there was even, though not indispensable, a subsequent Parliamentary confirmation of the grant, or Diploma, as it is styled, in 1669.[6] The former being undoubtedly the lineal male Argyle representative, and the heir, under their descent, to the honours—thus rehabilitated, and purged of the *tache* attaching to his status, as fully, nay more so, than in the instance of a valid modern Parliamentary restoration, whose effect, so far, has not been questioned in such circumstances,[7]—the Ar-

[1] Proved by the various deeds and authorities upon Record, all duly adduced and admitted in the Roxburghe Peerage claim in 1812.

[2] See pp. 79-80, 751-2.

[3] See pp. 1100-2.

[4] See Index, under *King*, 1080, *b*.

[5] See Registration of same, in the Great Seal Record.

[6] Acts of Parl. last Edit. vol. VII. p. 582.

[7] Nay, it was actually had recourse to, and fully admitted in the restoration of Francis Duke of Buccleugh, in 1743, to the Earldom of Doncaster, *including the old precedency*, forfeited by James Duke of Monmouth, Earl of Doncaster, &c. his grandfather, (see p. 766, *n.* 2.); although various Earls created in the interval, in like manner, were, so far, deteriorated, and postponed in their ranking and precedence. We have besides, many other such undisputed restorations.

gyle case, in its distinctive phases, cannot be identified with, or illustrate —what was in view,—the point of a conveyance *aliunde*, of an old existing honour, including its ancient precedence, in favour of a *stranger*, to the *prejudice* of *true* existing heirs. Both by his Royal and Parliamentary restoration, Archibald Lord Lorn, and Earl of Argyle, was *simul et semel*, divested in law of the *latter character* retrospectively, as far as regarded the Earldom, *in toto*, &c.—now fairly his,—as well as *extunc*.

I may merely now add, that the Lothian Parliamentary Ratification, and relative charter in 1621, long ago alluded to, (see p. 76,) are the latest and only grants of the kind—as far as I am enabled to discover,—so that the original honours unresigned, and thereby unaffected, behoved, of course, to be exclusively regulated by the first Lothian patent in 1606. As things stand, this, I conceive, (at present at least,) must be the legal conclusion.

CORRIGENDA.

Page 82, line 10, *dele* Buchan.
1054, —— 21, *for* have *read* has.
Ibid. —— 22, *for* they *read* it.

JAMES BURNET, PRINTER, EAST THISTLE STREET LANE.