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REMARKS

UPON

SCOTCH PEERAGE LAW,

AS CONNECTED WITH CERTAIN POINTS

IN THE LATE CASE OF

THE EARLDOM OF DEVON;

TO WHICH ARE ADDED,

DESULTORY OBSERVATIONS UPON THE NATURE, AND DESCENT OF SCOTCH PEERAGES,

&c. &c.

BY

JOHN RIDDELL, ESQ.

ADVOCATE.

EDINBURGH:

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MDCCCXXXIII.

PREFACE.

THE following observations are obviously only intended for a certain class of readers. If they have the good fortune to attract attention to the peculiar character of our Peerage Practice, or to illustrate the topics that they attempt to discuss,—and still more, if they be the means of leading to further illustration,—the main design of the Author will be fully accomplished. He is well aware that he may, in some instances, have exceeded those limits to which he should have been confined by the more immediate scope and purport of the work; but to this he has been tempted by the interest and novelty of the subjects that have occasioned the deviation: and considering, besides, the extreme dearth of our ancient materials, it might, perhaps, have been going too far to have omitted their insertion, because they were not directly connected with the principal questions.

It may probably be sufficiently obvious, that the plan, originally meant to be restricted to leading points in the Devon Case, and their determination by our practice, &c. has been insensibly enlarged in the course of the discussion.

EDINBURGH, *July* 1833.

CONTENTS.

APPENDIX.

ERRATA.

Page 2, line 4, mark of quotation after *perpetuum*.
ib. — 17, for *into*, read *on*.
6, — 6, after words " heirs-male bearing the" add " *name and*."
31, — 19, dele " II" prefixed to the title.
35, — 6, dele *of*.
39, — 15, for *Lord*, read *Lords*.
46, — 25, for *of Earl*, read *Earl of*.
56, — 11, for *appresentationem*, read *appresentiam*.
78, — 9, for *Decision*, read *Session*.
102, — 1, dele mark of quotation before *eodem*.
111, — 17, dele mark of quotation before *line*.
150, — 1, of *note* for *Dunglas*, read *Duuglas*.
156, — 12, for *the* (before husband,) read *her*.
157, — 2, for *salutes*, read *salute*.
199, — 22, for *shame*, read *thame*.

REMARKS

UPON

SCOTCH PRACTICE,

&c. &c.

THE late Decision in the Case of the Earldom of Devon, involves topics of considerable interest to legal antiquarians, not only affecting English practice, but familiar, and important to our own. These may be said to turn upon the limitation of the honors,—the clause of precedency,—and the inefficacy of the law of prescription in matters of Peerage. It is the object of the present undertaking to treat of these subjects singly, and in the order they are mentioned; but chiefly in reference to Scotland, with the view of ascertaining how they fall to be regulated by our law; noticing, however, at the same time, some analogous points, such as the meaning of the term "*heirs*," and others, &c., accordingly as they may present themselves in the course of the Discussion.

The Patent of the Earldom of Devon, dated 15th of March 1553, in the first place, grants the dignity to Sir Edward Courtenay, " et *hæredibus suis masculis in perpetuum;* and it was decided by the House of Lords, upon a reference from his Majesty, that, in terms of the limitation, the claimant, although only the remote collateral heir-male, was entitled to the honor. This is the earliest, and only English decision that has recognized, in the case of Honors, the meaning of " heirs-male," as importing a *collateral* male remainder. It was further admitted upon the occasion, that no English Peerage had ever so descended in virtue of such words;—nay, English authorities have maintained, that " heirs," which in Scotland is more comprehensive, were merely equivalent to heirs of the body: such was the opinion of the Lords' Committees into the nature and dignity of a peer of the realm;[1] and nothing can be more common among English Peerage writers, than the acceptation of heirs-male, as simply restricted to heirs-male of the body:[2]—But by calling into aid

March 14, 1831. *See* Report of Devon Case by Sir Harris Nicholas.

[1] " And, in truth, 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."—Fourth Peerage Report, 18.

[2] Thus Cruise, referring to the Barony of Vescy, granted, by a special clause in the summons to " heirs-male of *the body*," uses " *heirs-male*" alone, for the purpose of expressing the limitation.—*Dignities*, 76–7. The House of Lords, in their Journals, style John Lord Frescheville, a claimant in 1677, " *heir-male* of a predecessor, although they only here contemplated his *lineal* male propinquity.—*Ibid.* 79. And in Collins's *Precedents of*

the peculiar circumstances of the case—the spirit, and bearing of the English law, more especially in reference to arms, with other illustrations; and allusion to Scotch, although more particularly Irish practice,[1] —the House of Lords here adopted a different rule, and were induced to pronounce judgment in favour of the claimant.

As several Scotch Peerages, and certainly many Baronetcies, are limited to "heirs-male," and "heirs-male *for ever*," (which adjunct is immaterial, it often occurring in limitations to heirs-male of the body,) it becomes a matter of considerable importance to fix the meaning, and import of these words in reference also to our own country. No doubt, in the Devon case, in the dearth of English precedent, Scottish practice was directly founded upon, and in the most unqualified terms, as decidedly supporting

Baronies by Writ, "*haeredibus masculis*" is exclusively employed as descriptive of the preceding limitation of Vescy, 69, 251; and Index, *voce Bromflete.*

[1] The Irish Peerage of Baron of Bandonbridge in 1627, that was referred to, although proving that there could be a collateral male limitation in honors, and therefore valuable, is not, however, an example of one simply "hæredibus masculis." The limitation is to Lewis Boyle, and the heirs-male of his body; whom failing, to the heirs-male of the body of Richard Earl of Cork, his father; *whom failing*, "rectis hæredibus masculis dicti comitis;" the meaning, therefore, of heirs-male under the last remainder, is peculiarly fixed by the context; and, besides, it is expressly declared in the preamble, that the King wished not only to give the title to Lewis, "*verum etiam* omnibus hæredibus masculis tam de corpore, *quam a latere* dicti comitis." Devon Report, Append. lv. *et seq.*

the plea of the claimant; and strange as would appear, without challenge or contradiction; but be this as it may, it is humbly contended that that practice *is by no means ruled*, and that whatever may have been then speculated, great error prevails upon the subject, as it is believed will be fully evident after what may be adduced in the sequel. It is admitted, that here, as in England, in the case of real property, "heirs-male" have a fixed and technical signification that cannot be shaken;[1] but it is otherwise as to honors, which, from whatever reason, perhaps English influence, are less subject than formerly, to the control of common law, and now fall to be governed by one of a peculiar, and perhaps anomalous character. We may trace this as early at least as 1762, from the admission of Lord Marchmont in the Cassillis' case,[2]

[1] In England, Lord Coke states, "that where lands are given to a man and his *heirs-male*, he hath a fee-simple, because it is not limited by the gifts, of what body the issue male shall be." But this, he adds, "extendeth but to lands, or tenements, and not to the inheritance that noblemen and gentlemen have in their armories or arms." *Vide* Devon Report *ut supra*, 37, *note*. In the reports of the Lords' Committees, the principle is again and again inculcated, that the rules as to the descent of lands, have no application to titles of dignity. In Scotland, a disposition of lands to "heirs-male" will carry them to collaterals; but hitherto it has been held, that since the prevalence of patents, such limitation would not have the same force in honors, which became, more especially latterly, subjects of a privileged nature.

[2] Certified Copy of the Speech of his Lordship, Pen. Fam. de Ailsa.

that in determining it, " some would found their judgment upon the principles of the law of England, and others would be influenced *by a mixed notion of the law of both countries.*"

It may, accordingly, be desirable to probe the subject a little deeply, and therefore no further apology may be incumbent for going into the requisite details.

I. IMPORT OF THE TERM, " HEIRS MALE" IN SCOTLAND IN THE CASE OF HONORS.

THE first authority, or precedent that in this view would attract our notice, is the case of the Peerage of Kirkcudbright, which was discussed by the House of Lords, and adjudged to a collateral heir-male, on the 3d of May 1772. With all submission, however, it cannot be received as a fair illustration of the question at issue; because a specialty was here taken from the limitation being not simply to " heirs-male," but to heirs-male *bearing the name and arms* of the family—which adjunct was held to operate in favour of the claimant, as pointing at *all* male representatives, inasmuch as they might clearly bear the name and arms, and if so, necessarily including them. The Kirkcudbright principle, therefore, was obviously unfavourable to the broad interpretation of " heirs-male," whatever might be thought of the reasoning, which, however, may not

Rob. Peerage Proceed. 373.

be disparaged by other arguments and conclusions in the House of Lords on relative subjects, during the middle part of last century.

It is to Lord Mansfield that we are indebted for this technical distinction between "heirs-male," and "heirs-male bearing the arms," who expressed himself accordingly on the occasion of the above claim: and it can hardly be doubted, that Lord Rosslyn was of the same opinion. Such too has long been the impression and conviction of Scotch lawyers, although no report of the case, or of the *ratio decidendi* has been preserved; but the authority for the conclusion referred to below, will, it is apprehended, amply suffice upon this head.[1] It is further remarkable that Wallace, an Advocate, and Com-

[1] The late venerable and respected James Chalmers, Esq., solicitor, Westminster, who began his legal career in 1764, and was, as is well known, during his time, the principal agent in Scotch Peerage claims, informed the author, by letter in 1812, that in the "case of Kirkcudbright, *Lord Mansfield took a distinction* in respect of the addition *cognomen et arma gerentibus*, which he held to *be something more* than the simple *hæredibus masculis*." Upon such distinction Mr. Chalmers adds, "the title was adjudged to the claimant a collateral heir-male." In another letter from that gentleman in the same year, which, with the above, is still in the author's possession, there is this passage:—"I stated the question (the simple import of heirs-male) to a counsel of considerable eminence, and received an elaborate opinion, which I have every reason to believe, was dictated by the late Lord Rosslyn, who knew more of such matters than any man I ever was acquainted with. I had stated the very cases (of) Kenmure, Nithsdale, &c., and the opinion discusses the

missary Judge, the only writer upon Scotch Peerages, lays it down in his work, that "a Peerage granted to a man and *his heirs-male*, seems to be limited to the heirs-male of *his body*, because others are not to take it, unless in the patent be inserted either the words *whatsoever*, or *some other equivalent* to it, which expressly declares it descendible to collateral heirs-male." This author wrote in the year 1785, and whatever may be thought of his performance, he may be regarded no inapt reporter of the opinions of his day, which, judging from this statement, in the main quadrate with the ascribed import of the Kirkcudbright decision. Hence so far as we have yet gone, legal authorities and practice are adverse to the broad interpretation of "heirs-male."

In the very recent claim to the Earldom of Annandale, it was most material for the claimant to fix the meaning of the words; because the first limitation in the patent was simply to "heirs-male;" and he was only comprehended in subsequent ones to heirs-female.[1] It hence followed, if heirs-male were to be Feb. 13, 1661.

particular circumstances of each, and shews their inapplicability; *and it goes deep into Kirkcudbright.*" He enters, however, no further into detail. The cases of Kenmure and Nithsdale had been suggested by the author.

[1] It is very remarkable, that there passed a Royal charter, 23d of April 1662, under the sign manual, and upon the resignation of the Patentee, of the earldom or "*comitatus* of Annandale—not only carrying the estates, but moreover *the title, and dignity of Earl, according to the dates of the prior patents*, where the first limitation before the opening to the heirs-female, is to heirs-male of *the body*," instead of "heirs-male." Judging from what may Reg. Mag. Sig. Lib. 58, 213.

interpreted heirs-male whatsoever, he would be met *in limine* by extinctions which it might be difficult, nay perhaps impossible, to overcome, upon the rigorous principles enforced by the House of Lords in such cases.[1] On the other hand, if the words were only tantamount to heirs-male of the body, he would at once get into his argument, for the latter have long ago failed. The claimant maintained that heirs-male here meant heirs-male of the body; the Crown, on the other hand, the reverse; and its views will be best understood by means of the following excerpt from the speech of the Lord Advocate, who appeared for the crown upon the occasion.

March 1826.

"I will venture (his Lordship said) to state to

be afterwards stated, this cannot be overlooked in construing the Annandale Patent in 1661, supposing it not to be superseded by the charter; and, indeed, according to old Scotish practice, it is difficult to see how this novodamus can be ineffectual. In the case of the Earldom of Murray, there was nothing but the *mere* grant of a *comitatus* in 1611, together with assumption and recognition,—but no decision until 1793, to establish the right in the present family. The inferences in behalf of any other creation, than by conveyances of the *comitatus*, were insignificant; and yet the dignity, in the year mentioned, was found by the House of Lords to be in the father of the existing Peer. The decision of Murray may be held an innovation upon "Lord Mansfield's law" to be further canvassed in the sequel.

[1] There is a striking difference here, between the laws of England and Scotland,—in the latter country, a degree being proved, is presumed to be the nearest until the contrary is shewn: a further scrutiny in some alternatives might be proper, but whether to the degree exacted by the House of Lords, may be questionable.

your Lordships, and if evidence is required, I am ready to produce it by exhibitions of the records of Scotland *from the year* 1660, *to the year* 1707, that there were forty-two creations which were taken to the heirs-male of the body, *and seventy-nine Peerages* which were taken *hæredibus masculis* in the terms of those grants, and I state to your Lordships, that of these seventy-nine, *no fewer than twenty-eight are held by collaterals of the patentee.* If then your Lordships hold the doctrine which we have heard maintained, and will be again repeated to your Lordships, that under a grant of honor *hæredibus masculis*, the heirs of the patentee are not entitled to take, but only the heirs of the body, *there are twenty-eight Peers of Scotland who have at this moment no right to their titles*:" So far his Lordship generally stated, but he instanced in particular in support of his proposition, seven Peerages, all except Forfar, of an earlier date, namely, those of Nithsdale, Seaforth, Kenmure, Kincardine, Forfar, and Kirkcudbright.

From the speech taken in short hand.

Agreeably to the old adage, that a statement never loses by the circulation, the Devon claimant has even improved upon the matter; for, besides affirming that the Lord Advocate was " much startled" at the supposed new signification of heirs-male, and contended it to be " totally contrary to the understanding of all Scotchmen, *that there should be a doubt as to the meaning*," he represents the above six Peerages, omitting Nithsdale, to have been " *actually*

Report Devon Case, 56.

decided in favour of claimants who were heirs-male collateral." Upon this assumption he proceeds in his argument with impunity; and, as if not satisfied with it, he goes on to state that "heirs-male" *received* the *construction* of heirs-male *collateral* "*in the seventy-nine cases* of Peerage to which the Lord Advocate referred."

Ibid. 59.

Now, with all submission, and every feeling of respect both for the Lord Advocate and the Devon counsel, nothing, it is humbly conceived, can be more unfounded than the assertions in question. After a full examination of the public records, and every requisite source, it may probably surprise most people when it is stated, that during the space alluded to, *there is not one instance of a Peerage destined simply* "*hæredibus masculis*," *having ever descended to collateral heirs*; and as for the alleged *seventy-nine* grants "hæredibus masculis" at the same period, it may be speaking above the mark if we affirm that they even amount to ten! What, then, becomes of the twenty-eight examples to the contrary, so confidently relied upon by the Crown, or of the twenty-eight unfortunate Peers who are thus, upon a visionary speculation, to be deprived of their peerages? It may not be matter of regret to some that the Crown should make such a concession to democracy by thus curtailing the Peerage. All that remains to be said upon this head is, and perhaps to the disappointment of the latter, that after every enquiry, their names and titles cannot be discovered.

There are, no doubt, from 1660, to 1707, patents to " heirs-male *whatsoever*;" to heirs-male of the body," *whom failing*, to " heirs-male," or " *other* heirs-male;" or to " heirs-male *appointed to succeed by such a deed*;" or other analogous instances, where " heirs-male" is directly explained by adjuncts, or the context—under which collaterals may have taken: but it would be a jest to say that this has any thing to do with the present case, which merely treats of " heirs-male" simply; and, indeed, it is to the phrase " hæredibus masculis" *alone*, as is fully manifested by both their speeches, that the Lord Advocate and the Devon counsel confine their assertions.

Devon Reports, 56-7-8-9.

Having, in this manner, disposed of " the twenty-eight" anonymous instances, &c. we next come to the seven that are actually mentioned by the Crown.

Kirkcudbright. Kenmure.

With respect to Kirckudbright, it has been already discussed; and as the Viscounty of Kenmure is not simply to heirs-male, but to heirs-male *bearing the name* and arms, it is exactly in *pari casu* with Kirkcudbright, and, therefore, requires no farther consideration.

Nithsdale.

The regulating patent of their Earldom in the Nithsdale family is not to heirs-male, but " hæredibus masculis, et assignatis *quibuscunque*," as is instructed by the original creation, which is by act of Parliament in 1581. They then held it under the title of Earl of Morton; but, on the 29th of August 1621, the King, wishing that the family should exchange the style of Morton, for Nithsdale, issued a charter

Act. Par. V. III. 263.

Reg. Mag. Sig. Lib. 49, 290.

accordingly, but solely for that purpose; for it, at the same time, expressly "*continues*" and "*confirms*" the old dignity, without prejudice to the grantee (the son of the first Earl) "de antiquitate dignitatis, quondam suo patri concesse; neque putabitur, aut supponetur," adds the charter, "quod *mutatio* dicti tituli *ullam novam creationem efficiat*, sed e contrario, dignitatem prius concessam *corroboravit*." There being no later conveyance, and the original grant being thus clearly in force, we hence see how, as afterwards happened, the collateral heir-male succeeded; which was not in virtue of a patent simply to heirs-male, but under one nearly of as broad a character as can be imagined.

Kinnoul. Reg. Mag. Sig. Lib. 54, 65.

On the 25th of May 1633, George Viscount Dupplin was created Earl of Kinnoul, &c., to him, "et hæredibus ejus masculis in perpetuum." In terms of this limitation, the honors devolved upon his great grandson, William Earl of Kinnoul, who, having no issue, resigned them in favour of Thomas Hay of Balhousie, collateral heir-male both of himself, and the patentee, who was confirmed in the dignities *nominatim* by a *new* patent, dated 29th of February 1704, carrying the old precedency, and containing a limitation to Thomas, and the heirs-male of his body, under which they have descended to the present Earl of Kinnoul.

Ibid. Lib. 21, 110.

How this instance could serve the argument of the Crown, it is certainly impossible to discover; nay, it obviously makes against them, inasmuch as it

shews that Earl William did not trust to the first patent, in favour of heirs-male, to include Thomas the collateral, which, upon their plea, should have been quite enough, but was obliged to resort to another of a much more explicit nature, for the purpose. Indeed, by the resignation, the first patent is at an end, and cannot be founded upon.

Seaforth and Kincardine were granted by patents, 3d of December 1623, and 26th of December 1647, to the respective patentees, and their "heirs-male," and they have been assumed by collateral heirs-male. In the Seaforth case, the heir[1] had right, as heir-male of the body, to a distinct peerage, the Barony of Kintail, which made his claim to the Earldom, nominally forfeited in 1715, less liable to objection, waving the possibility of a later resignation and re-grant. His son, who followed the fortunes of James II., was raised by that monarch to the Marquisate of Seaforth, which thus eclipsed the previous dignity, and rendered it of little importance. In the Kincardine case, the assumption was under protest; but it will be immediately further noticed. Reg. Mag. Sig. Lib. 51, 306, and Records of Chancery.

We now come to the last of the Crown's *specified* authorities, the Earldom of Forfar. On the 20th of October 1661, Archibald Douglas was created Earl of Forfar, to him and "his heirs-male;" he was succeeded by his son Archibald, the second Earl, who, dying in 1715, without issue, the dignity appears to have sunk with him. As far as yet discovered, no Reg. Mag. Sig. Lib. 58, 553.

[1] He succeeded in 1633.

one since has assumed it;[1] and Sir Robert Douglas, an undoubted collateral heir-male, explicitly states that, by his death, "*his honors became extinct.*"

Peerage, published in 1764, 270.

If the Crown have in this manner failed in shewing a single instance upon their side that can be conclusive, it is as indubitable that there is no decision extant to settle the question. They have, indeed, alluded to the case of Kincardine, the most respectable of their *asserted* numerous instances; but it assuredly can never be regarded in that light.

Upon the death of Alexander, Earl of Kincardine, in 1705, the last lineal heir-male of the patentee, a competition for the honors arose between his sister, Lady Mary, and Sir Alexander Bruce, the collateral heir-male; but here the Parliament did not go into the merits of the present case. Wallace informs us that "they did not remount to the question, whether peerages were then limited to males sprung from the person first ennobled?"[2] The point, which was

[1] His next collateral heir-male was Archibald, Duke of Douglas; but although sufficiently lavish of his titles, he did not adopt Forfar. In his disposition and tailzie, 1st October 1754, this is his style:—"Archibald, Duke of Douglas, Marquis of Angus, Earl of Angus, and Abernethie, Viscount of Jedburgh Forest, Lord Douglas of Boncle, Preston, and Roberton," *on record.* In the same way, George James, Duke of Hamilton, collateral heir-male of the Duke, assumed all the Douglas titles (except the Dukedom and Marquisate of Angus, which were extinct,) but not Forfar, as by his retour as heir-male of Duke Archibald, 1st Dec. 1761; *ibid.*

[2] Nature and Descent of Ancient Peerages, 365.

referred to the Court of Session, merely involved the effect of a resignation executed by Earl Alexander, who found it was not voided by his death, but might still be implemented in favour of Lady Mary; against which Sir Alexander appealed. In the meantime (in 1706) during the tumult of the Union, the Parliament allowed Sir Alexander to take his seat as Earl of Kincardine, but "*reserving Lady Mary's right;*" which, Wallace adds, was not "a definitive sentence, but a temporary resolution on the possession only." Nothing further occurred, excepting that Lady Mary continued to protest against Sir Alexander's claim;[1] and eventually the matter became of little, or no moment to either family; as the one succeeded in 1747, to the earldom of Elgin, and the other a few years after, to that of Dundonald, under different patents. Hence it is as clear as sunshine that no definitive judgment has been pronounced in the matter.

March 28, 1707. Wallace, *ut supra.*

The Crown and the Devon claimant, therefore, it need not be repeated, have been equally unsuccessful in their plea of *res judicata;* on the contrary, the question with us is as much open *to discussion* as it was in England anterior to the Devon decision. Neither, whatever may have been their professions, have they produced any thing remarkable, except, perhaps, the cases of Kincardine and Seaforth. With respect to the first, it is now sufficiently plain; and as to the

[1] Vide General Elections, June 17, 1708—Nov. 10, 1710.

last, it may be neutralized by that of Forfar, independently of not being of the most formidable nature, and granting there had been no resignation or regrant;—while most of the very few instances they have ventured to specify, instead of benefiting, have been injurious to their argument.

In the Annandale case, the claimant chiefly insisted upon a strict interpretation, and that " heirs-male" were not sufficient to infer a collateral succession; but although the House, by their order, 26th of May 1826, notified to all interested to attend, nothing has as yet followed, and the claim is still *in pendenti.*

There is a precedent, however, alluded to by neither of the above parties,[1] which may amount to a recognition by the Sovereign of the right of the collateral heir-male under a patent " *hæredibus masculis.*"

Reg. Mag. Sig. Lib. 54, 142.

On the 3d of July 1605, Sir George Hume, Lord Hume of Berwick, was created Earl of Dunbar, the dignity being conferred upon him " et hæredes suos masculos." The Earl died in 1611, leaving two daughters, his co-heirs, and no one assumed the honors. On the 6th of August 1634, however, it appears that Sir Thomas Hope, Lord Advocate, had certified to Charles I., after examining the patent, that the dignity " lawfully descended" to Sir George Home, the collateral heir-male; and failing him, that

[1] A mere outline was given of it in the competition for the honors of Roxburghe, but without any of the circumstances here mentioned.

it would devolve upon Sir Alexander Home, in the service of the Princess of Orange at the Hague. On the 6th of May 1651, Charles II., on a recital of these facts, as well as that Sir Alexander, (now the heir-male), out of respect to his Majesty, and from the length of time that had elapsed, would not assume the title without proper sanction and authority, confirmed it to him accordingly by a warrant under the sign-manual of the above date. What happened in consequence does not transpire; but long afterwards, on the 14th of October 1689, there is another confirmation in similar terms by William III., in favour of Alexander Hume, nephew and heir-male of Sir Alexander, exemplifying also the previous one by Charles II.[1] Whether the latter person ever took his seat in Parliament is uncertain; the family principally resided in Holland, where they failed in the male line during the course of the seventeenth century.

This case, upon the whole, would seem to be strong; but unfortunately it is met by unexceptionable, and weighty authorities of a directly opposite nature; which, further, as rebutting generally the conclusion of the Crown in the Annandale case, will fall next to be stated.

On the 10th of July 1606, James VI. created Mark, Lord Newbottle, Earl of Lothian, the honor being conferred upon him "*et hæredes suos masculos.*" He was succeeded, in terms of the patent, by his son

Reg. Mag. Sig. Lib. 44, 182.

[1] Signature to the above effect, in his Majesty's State Paper Office.

Robert, the second Earl of Lothian, who obtained, upon his resignation, a re-grant of the honors to him, and the heirs-male of his body; whom failing, to his eldest heir-female without division. Dying without male issue, he was succeeded accordingly, by his daughter Lady Anne, who left issue Robert, Earl of Lothian. Earl Robert, in the reigns of Charles II. and James II., had a contest in Parliament with the Earl of Roxburgh for precedency, the point exclusively turning upon this, whether, or not, by the second patent, the precedence of the first was carried? James II., desirous that the matter should be fairly tried by the courts of law, prohibited the Crown officers from objecting the Royal prerogative, in a letter dated 11th May 1685; and where he further observed, in reference to the case of the Earl of Lothian, that according to the information of Charles II., "the title and dignity of the *first* Earl of Lothian was, *by his patent*, provided to *heirs-male of his body*, and that those heirs-male had failed, WHEREBY THE HONOR WAS EXTINCT."[1]

Ibid. Lib. 7. 145.

[1] His Majesty's State Paper Office. While the extinction of the lineal heirs-male was indisputable, it is certain that collateral heirs-male existed. What gives this instance every force, is the undoubted fact, that Charles II., in a previous remit of the case to the Court of Session, 18th June 1679, *(published in Tait's Edition of the Acts of Sederunt,* p. 142,) *and actually referred to in James's letter*, uses the words "heirs-male" *only*, in describing the limitation in the *first* patent. Charles II., therefore, must have been accurately informed; and the Crown, in 1685, have just attached the usual technical meaning to heirs-male.

Here, then, on a remarkable occasion, " heirs-male," for such was the limitation to the first Earl, was unequivocally held to be only expressive of heirs-male of the body; but this was not only the impression of the Sovereign, and his advisers, it was also that of Sir John Nisbet, advocate to Charles II., as from a query upon this very case of the Earl of Lothian, that he has inserted in his Doubts, the commencement of which is as follows:—" If *a nobleman (the first Earl of Lothian)* having a patent to him and *the heirs-male of his body*, should thereafter resign his title, and obtain a new patent to him and his heirs-male of his body, which failzeing, to his eldest heir-female, and *the heirs-male* should fail, may a *nobleman*," *(the Earl of Roxburgh)*, &c. &c.[1] The thing, therefore, is abundantly clear, he rendering, in the same way as the Crown, heirs-male in the first patent by heirs-male of the body; and it further will be perceived, that he uses " *heirs-male* simply, as identical with the very limitation he mentions to " heirs-male of the body," obviously showing that he considered both to be synonymous. Sir John Nisbet, and Sir James Stewart held the office of Advocate respectively, for a long time during the reigns of Charles II. and William II.; and hence, independent of their high talents, and deep knowledge of the law, they must be regarded the best authorities upon the question at issue, as it is indisputable it was the duty of the Lord Advocate to prepare and revise pa-

[1] Doubts and Questions in the Law of Scotland, by Sir John Nisbet of Dirlton, " *Roxburgh contra Lothian*," 135.

tents of honor;[1] and thus if we find that they used heirs-male in the limited sense, it cannot but deeply affect its meaning in patents of the 17th century. The point has been already fixed with respect to Sir John Nisbet; it will next be illustrated in reference to his successor. Sir John, in another part of his well-known work, puts the case, "Patents of honour being granted to a person *and his heirs-male of his body, quæritur*,—whether the appearand Heir may sit in Parliament, and not be lyable as behaving?" To this very query, Sir James, in his equally celebrated replies, answers, "A patent of honour is *ordinarily* granted to a person and *his heirs-male*, yet his apparent heir is allowed to sit in Parliament; and it is not judged a behaviour."[2] Sir James here employs heirs-male to express the limitation of Sir John, that is to say, "to heirs-male of the body;" and the term "*ordinarily*" is important, as pointing to heirs-male of the body, the last being the most ordinary limitation in patents, and thus necessarily rendered by heirs-male.

Doubts, 135.

After lawyers, the next authority would be that of the Lord Lyon, who figured at the creations of Peers, and kept a register of the various patents and inaugurations, now, like every other thing con-

[1] Preparatory to creating his natural son Duke of Lennox, Charles II., on the 18th of August 1675, wrote to the Lord Advocate to "prepare a signature for the Patent, &c.—Letter of his Majesty, State Paper Office.

[2] Dirlton's Doubts, &c. resolved and answered by Sir James Stewart of Goodtrees, late Lord Advocate, &c. 219.

nected with his office, no longer preserved. The great antiquary, Selden, refers to the creation of Sir John Ramsay as Viscount Haddington, in 1606, which, he affirms upon the authority of the letters patent, to have been only "hæredibus masculis *de se*, legitime descendentibus;" and Sir James Balfour, Lord Lyon in 1630, while he states that the Viscounty was extinct, owing to the death of the patentee "without aires begottin of his body," informs us that the dignity had been granted in the above year "to him, and his aires *maile*"—"Sua," adds Sir James, "thaise tytells and honours ceassit, and all returns to the Croune, *according to the patent* of hes creatione."[1] Sir James Balfour, therefore, had the same notion of the limitation; and he never could have made the latter remark, if "heirs-male" had comprehended collaterals; for, as is well known, all the Dalhousie family were the Viscount's collateral heirs-male, and, in that event, would have succeeded to his honors, which could not have become extinct. Titles of Honor, 699.

Such accordingly has obtained in the technical language of the first lawyers and genealogists of the seventeenth century, with the exception, perhaps, of Sir Thomas Hope, who, as has been seen, gave an attestation in favour of the collateral heir-male in the case of Dunbar; but of whose nature and import we are ignorant. Besides the introduction of personal creations by patents in the seventeenth century, and the greater rigour that began to be enforced in

[1] Authorities and Documents in his hand-writing, for fixing the Precedence of the Nobility.—*Ad. Lib.*

transmissions of honors, which put them *extra commercium*, and gave rise to a more limited principle,[1] it may also be remembered that Craig, a favourite writer, though, it must be confessed, little versant in the ancient peculiar practice of Scotland, lays it down, agreeably to early feudal precepts, that heirs-male meant only heirs-male of the body of the first disponee.[2] This, of course, may still have had its

[1] In the year 1612, the Earl of Eglinton alienated his estate and honors to Sir Alexander Seaton, who, assuming the title, was thereupon summoned before the Privy Council, and obliged to lay it down; James VI. observing, "that howsoever he could not stay noblemen to dispose of their lands, he being the fountain of honor within his kingdom, would not permit the same to be sold, or alienated." Much discussion and procedure afterwards ensued; and it was not for a considerable time that James would confirm him in the honours.—See *Spottiswood's History*, 518, and *Privy Council Records, and Proceedings*, for the period. Sir John Kerr of Littledean, was also in 1613, prohibited from taking the title of Lord Jedburgh, upon a charter and infeftment; and on the 21st of March, 1615, to prevent such proceedings in future, James issued a peremptory order to the Officers of State to allow no signatures of resignations, or alienations of honors to pass, unless with his direct concurrence. *Privy Council Register of that date.* All this marks an æra in the constitution of our Peerages, which began to lose their territorial character, and, to be more than ever, privileged subjects. In the case of Oliphant, 11th of July 1633, it was found that an honor was not annailzable by buying and selling, but that it was *inter regalia.* Durie, 686.

[2] Dieg. 10. § 36. "*nisi*, (adds Craig,) *clausula adjiciatur.*"—which tallies with the notion of those formerly quoted, that something more, either by means of a clause, or additional expressions, was required, to denote a collateral substitution.

influence, and led, along with the former circumstance, to the narrow acceptation of heirs-male.

We trace it even as far back as 1586. In that year, an action was formally instituted by the Crown, and Hamilton family, against Captain James Stewart, for reducing "the auld erection and creation of the Earldom of Arran, Lordship of Aven, and Hamilton, wyt the landis and baronies pertening thereto, and *ordaining* ye saide Capitane James, and his *aires maill, to be callit Erlis of Arran,* Lords of Aven and Hamilton, and to have the honours, place, and dignitie of ye said Erldome and Lordship, of ye dait the 27th of October 1581." In a process of so much importance, every thing material would be technically stated; and the advocates of the broad interpretation would maintain that the Peerages, thus created, were descendible to heirs-male general; against which conclusion, however, we have the best evidence, for the patent of creation (of the same date) is entered at full length in the register of the Great Seal, and is only in favour of the Captain, "et ejus hæredes masculos *de corpore suo.*" The fact of there being no legal difference between "heirs-male," and "heirs-male of the body," and their necessary interchange, has induced an apparent, although not real variation. Other instances to the same purport, but of a later date, shall now be stated.

Decreet of Coun. and Sess. Lib. 108, 109.

Reg. Mag. Sig. Lib. 35, 454.

The patent of the Barony of Fairfax of Cameron, dated, 18th of October, 1627, first simply gives the honor to the patentee, "et hæredibus suis masculis *de corpore suo* legitime procreatis, cognomen, et in-

Ibid, Lib. 51, 205.

signia, de Fairfax gerentibus ;" and then adds, " eumque, suosque *hæredes masculos* barones, et dominos parliamenti per presentes creamus." Both limitations stand independent of each other; there is nothing to control either in the patent; the tenendum is only " hæredibus masculis *predictis*," which may apply to either; what then are we to infer? Nothing else surely than that these limitations are synonymous, and convertible; for otherwise, adopting the argument of the Crown in the Annandale case, the honor would, in the same breath, be the subject of two discordant limitations—conveyed by one to lineal heirs-male, but extended by the other to collateral heirs-male, which would be absurd and preposterous. Could any common notary have drawn up a patent at the same time to heirs-male of the body, and heirs-male collateral? Such a thing would be incredible; and yet if heirs-male possessed the broad signification, we must at once admit it.

Reg. Mag. Sig. Lib. 9. In the re-grant of the Barony of Napier, 17th of February 1677, it is stated that, by the first patent, the honor had been limited to the patentee, " suisque hæredibus masculis successive ;" from which the Crown lawyers, in 1826, might have argued, that it was destined to heirs-male collateral; but no such thing, for it is subsequently mentioned, that the cause of the re-grant was the failure of heirs-male

Ib. Lib. 51, 145. of the body, and the first patent is only limited to heirs-male of the body.

An Act of Parliament passed on the 28th of June 1665, fixing the question of precedency be-

tween the Earl of Findlater, and the Earls of Airlie, Leven, and Calender, which recites the titles and interests of the contending parties; and in stating the constitutions of their honors, in the cases of the Earls of Leven, and Calender, it says, that the first Earl of Leven had been raised to that dignity, by patent 11th of October, 1641, to him, and "*his airis-male*," and that the first Earl of Calender had, in October 1641, obtained his Peerage in the very same terms [1]. "Heirs-male," therefore, are here descriptive of the respective limitations, but what were the *literal* words employed in the patents? No others than "heirs-male *of the body*;" which thus again are proved to be nothing more than the mere echo of heirs-male. Vide Acts Par. v. 5, 453. Reg. Mag. Sig. Lib. 38, 6.

If stress be laid on the Irish instance of the Barony of Bandonbridge, adduced in the Devon case; that of the Scotch Barony of Cramond cannot fail to be also appreciated. The patent, dated last of February 1628, limits the honor to Sir Thomas Richardson, son and heir of Sir Thomas Richardson, Chief Justice of the Court of Common Pleas, "suisque *hæredibus masculis*, quibus deficientibus hæredibus masculis *de corpore* dicti Domini Thomæ Richardson patris." It is quite evident that "heirs-male" here, can only denote heirs-male of the body, owing to the restriction imposed by means of the limitation that follows. *Vide supra*, p. 3, *note*. Reg. Mag. Sig. Lib. 52, 264.

[1] Collection of various Scots deeds that past in the 17th century, written in cotemporary hand. British Museum. The Parliamentary Records for the time are defective.

Nothing can be conceived stronger than the patent
Reg. Mag. Sig. Lib. 54, 93. of the Viscounty of Aboyne, dated 20th of April, 1632. It bears, that the King had been graciously pleased by Letters Patent, to confer the title of Viscount Melgum upon the deceased John Viscount Melgum,[1] "et hæredes suos masculos, nomen, et insignia de Gordon gerentes;" and after a further preamble, states, that the said Viscount had died "absque *hæredibus masculis de corpore suo legitime procreatis*"—"*in* QUOS"—be it observed, the patent adds, "dictus titulus conferendus fuit,"—thus clearly proving that the dignity, though granted as above, was only descendible to heirs-male of the body: "Ac volentes (continues the patent)—ut prior titulus REVIVAT, et permaneat in persona Domini Gordon" (the eldest brother of the deceased Viscount,) therefore it creates him, during the lifetime of his father the Marquis of Huntly of whom he was heir, Viscount of Aboyne; with remainder to James his son, "Hæredesque suos masculos, cognomen et insignia de Gordon gerentes"—a limitation that is several times afterwards repeated at full length, but without any addition. James, the son, accordingly succeeded, in terms of the limitation, to the Viscounty of Aboyne, the design obviously being to keep matters, as much as was expedient, in the same channel; but dying without issue, although innumerable collateral heirs-male existed, the title appears to have become

[1] He was lamentably burnt in the Tower of Frendraught.

extinct,—for besides never having been assumed, it was granted under the higher rank of Earl of Aboyne, to another member of the family of Gordon by patent, dated 10th September, 1660. Any further remark on this case would be needless; it would seem to impugn the doctrine in that of Kirkcudbright, which now, however, must be regarded as fixed law. The forcible remarks of Chancellor Eldon on the Duntreath decision may here present themselves.

Ibid. Lib. 58, 4.

On the 27th of May 1615, the King wrote to the Privy Council to prepare a patent of the Barony of Uchiltrie in favour of Sir James Stewart of Killeith, which honor his Majesty added, was to continue with him, and "*his posteritie*"—that is, obviously only in the persons of his *lineal* heirs. In conformity therewith, the Privy Council ordered a patent to be made out "according to the tenour of his Majestie's lettre"—but how was this effected? By a grant of the dignity that passed on the 9th of June, in the same year, with a limitation to Sir James, "et suis hæredibus *masculis* gerentibus et arma de Stewart, et ejusdem arma observantibus." It cannot be a question that the Privy Council, obeying the King's instructions, could only have in view lineal issue; to express which, however, they merely use heirs-male without the qualification. Here also is another instance of the adjunct, "bearing name and arms," in a case only of lineal descent.

Privy Council Register.

Ibid.

Reg. Mag. Sig. Lib. 47, 470.

In the signature or warrant of the re-grant of the Earldom of Dysart, dated 5th of December, 1670, it

His Majesty's State Paper Office.

is stated that the dignity had devolved upon the daughter of the Patentee, " he dying without *heirs-male*;" " the latter certainly, had collateral heirs-male, yet in the patent under the Great Seal, of which this was the warrant, the terms employed are only " heirs-male of *the body*."

Reg. Mag. Sig. Lib. 59, 267.

Ibid. Lib. 21, 38.

The Viscounty of Primrose is limited by Patent, 30th November, 1703, to Sir James Primrose, and the heirs-male of his body, whom failing to " the *heirs-male*" of Sir William his father—the last limitation therefore stands quite alone, and uncontrolled, but in the warrant, or signature, the words are not heirs-male, but heirs-male of the body. This Patent, with the previous one, therefore, additionally prove what was before plain enough, that the limitations in question were interchangeable, and exactly equiponderant in every respect.

His Majesty's State Paper Office.

Upon a general review of the facts, therefore, it is humbly thought that the question is very far indeed from being so clear and indisputable, as was contended by the crown in the Annandale case; and re-echoing its statements,—which were any thing but well founded—by the Counsel in that of Devon. On the contrary, it cannot now be denied that by our Peerage practice, " heirs-male" has been technically employed to mark a limitation to heirs-male of the body; and not only so, but it has been also fully proved that such has been the acceptation according to the first-rate Lawyers, and most unexceptionable authorities. The evidence on this side far outweighs

that on the other, which, from any thing hitherto shown, only rests upon the case of Dunbar, if not of Kincardine. The circumstance, too, of there being limitations " to heirs-male *of the body*" at the same time with heirs-male, is neutralized by the adjunct " *whatsoever*" that is attached to heirs-male, when it was intended to include collaterals. The scale, therefore, turns evidently in favour of the narrow acceptation, which has hitherto been sanctioned and admitted by legal authorities. But even supposing that heirs-male occasionally denoted both heirs-male of the body, and heirs-male collateral, what ought in this, the most unfavorable case that can be imagined, to be the rule? Even in such uncertainty, would it be just, or regular, to go into the broad signification, and gratuitously acknowledge a Peerage in an individual *who assuredly might never have been contemplated?* With submission, it must be remembered that, Peerages are not *now* common subjects descendible like real property; greater forms are required in their transmission; and above all, their descent hitherto has been *strictly* interpreted. In all cases of doubt—and this, obviously, in the alternative, would be of the number, the House of Lords have constantly enforced the principle, that

[1] In the Annandale case too, Mr. Adam contended that " it is not to be presumed that the Crown has made a large grant, where a grant of a more limited construction would explain the circumstances of the case, the rule of construction, (he added,) is that the Grants of the Crown are to be explained *strictly*."

Peerages are alone descendible to heirs-male of the body. When an old grant of a comitatus, or hereditary Parliamentary Barony has been adduced, however strongly collateral circumstances may tell to the contrary—they have invariably so presumed: —and thus, while in England, old Baronies, *even without limitations*, are liberally allowed to *heirs general*,[1] those of Scotland, upon no discoverable law, are denied the same favour, and are subjected to the thraldom of an arbitrary rule. The law has been to restrict Scotch Peerage grants as much as possible, and to withhold force from certain adjuncts, although these have due effect in landed succession[2].

Following the rule, therefore, while we sufficiently appreciate the technical force of the instances and authorities in favour of the limited construction, which, it is apprehended, throw those on the opposite side far into the shade—there seems really but little difficulty in coming to a conclusion in its favour.

[1] This happens even in the case of an *erroneous*, and *faulty* summons to Parliament, to the supposed, but not the real heir of an old Barony, as will afterwards be seen.

[2] Were we to adopt an argument of Lord Mansfield in the Sutherland case, that if, in Peerages, the presumption were not to be for the male succession, but in favour of females, it would be *inconvenient*, owing to the number of new claims that might thereby arise, we might obviously draw the same inference in reference to the broad interpretation of heirs-male. But, with all submission, it is law, and not *convenience* that should rule; and any alteration, or new principle, on the ground of expedience, can be alone enforced by an Act of Parliament.

With respect to Scotch Baronetcies, many of which are granted to " heirs-male," and have been taken up by heirs-male collateral, the point here has as little been decided; but certainly the broad interpretation would apply *a fortiori* to them, as they cannot be viewed in the light of Peerages, and were originally conferred along with land, in the attempt to colonize what however proved to be a mere Utopia, under an evident limitation to heirs-male whatsoever.

Before proceeding to the next topic springing from the Devon Patent, it may not be irrelevant to discuss a little the meaning of the term " heirs"—which, although ordinarily with us, more comprehensive than " heirs-male," is yet of an analogous character, subject often to the same rules, and even under peculiar circumstances, synonymous with heirs-male.

II. IMPORT OF THE TERM " HEIRS," IN CERTAIN CASES.

The preceding observations attach only to " heirs male," standing alone, without being affected by any adjuncts to qualify the meaning. It must still, however, be remembered, that by our law, both " heirs," and " heirs-male," are flexible terms, and under different aspects, fall to be differently construed. The patent of the Barony of Nairn, dated

Reg. Mag. Sig. Lib. 8, 105. 27th of January 1681, limits the honors to the "*heirs*" between Lord George Murray, son of the Marquis of Athol, and Dame Margaret Nairn; whom failing, to any other son of the Marquis, Margaret might happen to marry, and to their "heirs;" but the heirs are expressly stated to be those who are to succeed to the estates; and as, at the same time, the latter were entailed upon the heirs-*male* of the body of Margaret, and her contemplated husband,[1] such, assuredly, must be the import of the word "heirs" in the patent. Many similar illustrations might be added sufficiently familiar to most people. In Scotch writs, much more than in English, flexible terms abound—which indeed are the bane and torment of our law; and when, besides, it is considered how loose, desultory, and undefined our limitations often are, it becomes expedient not always to trust to the *ex facie*, or presumptive meaning, but to attend to, and weigh narrowly the circumstances of the case—following, however, as much as possible the rule in Peerages, of deciding by the contents of the patent, and not looking beyond it.

Vide Wood's Edit. Doug. Peer. v. 1, 41. In the latter view the case of the Earldom of Airth (or Menteith) at present dormant, but said to be in the heir-general through a female, by whom it may be eventually claimed, is curious and striking.

[1] Charter of the estates, 3d February 1681, upon Record.

I. *Case of the Earldom of Airth, or Menteith.*

James I. of Scotland, on the 6th of September, 1427, erected the lands of Craynis and others in Menteith, " in liberum comitatum de Menteith," to be held by Malise Graham, " et hæredibus *suis masculis* de corpore suo legitime, procreatis, seu procreandis; quibus deficientibus nobis, et successoribus nostris libere revertendis."[1] The dignity of Earl of Menteith was indubitably carried by this charter, honors being then territorial,[2] and so consituted at

[1] Sutherland case, chap. 5, sect. 13, 37. The original is in the possession of the Duke of Montrose.

[2] This assuredly is unquestionable, and with all submission, nothing can be more singular than the idea that was entertained last century by some English Lawyers upon the subject. Lord Mansfield, in his speech upon the Sutherland case, makes the astounding proposition that " *after* 1214, *it is clear* that territorial Peerages must have been gone,"—a doctrine at the very sound of which, all the Records of Scotland might rise up and protest, as it was formerly said, the stones of the causeway of Edinburgh would have done, at the very whisper of a union with England. Lord Hailes has proved the reverse *ex abundanti* in the Sutherland case—now since the days of Lord Mansfield sufficiently prized, and not merely as then, wretchedly stigmatized with the name of rubbish:*—and it must be pleasing to every Scotchman to observe the more enlightened view which the present Chancellor has

March 21, 1771, from authentic copy *Pen. Fam. de Sutherland.*

* Such was the term used by Lord Cambden, who also spoke upon the occasion, and who admits that at first, he " was terrified with the appearance of it, *(the case)* and would have withdrawn himself from attending it."— *Græcum est non potest legi.*

Copy of Speech *ut supra.*

the period; and immediately thereafter Malise the grantee, and his male descendants bore the title of Earl of Menteith.

In the year 1633, the lineal male representative was William Earl of Menteith, and Charles I. desiring, in consequence of certain proceedings which are matter of history, as far as he could in propriety do, to sink the title of Menteith, connected with a descent from the Royal Family, (once vested in the Earl by

Report Devon Case, 105.

taken of the subject. In the Devon case, his Lordship observed that, in Scotland, a Peerage was "surrendered to the Crown, and granted out on new enfeoffment"—that "so much was it considered as *connected with tenure*, that a man was a Peer in Scotland, and sat in Parliament *in right of his wife*;" "nay, when the wife died, he sat, and voted as *tenant by the courtesy*,"—which, his Lordship adds, continued even to modern times. Certainly the introduction of Patents, and circumstances already noticed, innovated upon the territorial principle, but still remnants of it are discoverable even in the 17th century—when, however, greater form and solemnity was exacted in Peerage conveyances; they then becoming more of the nature of privileged subjects.

Lord Hailes has proved to demonstration, that all our ancient Peerages were territorial—tracing each singly out, he has shewn that the grant of the comitatus carried the honors, even comparatively until a recent period. And what is the way in which the anti-territorialists meet one, who, as a legal antiquarian, far excelled not only Lord Mansfield, but every other Lawyer of his day? merely *by supposing* that *there may have been patents*, or other creations of the dignities limiting them to heirs-male; and therefore, as this was possible, such was the fact; and therefore, these may be accounted only descendible to heirs-male of the body; when at the sametime it is considered that they do not produce one single instance or precedent in support of the theory, it requires surely very little insight into law to determine that this

a service, which his Majesty had illegally reduced)—granted a patent on the 21st of January in the above year, of which the tenor is remarkable.

It commences with the intimation that James I. had made the preceding grant of the Earldom of Menteith to Earl of Malise, "*et hæredibus suis*"—adding also that Earl William was his lineal "heir;" and after erecting the Barony of Airth, a part of the same Earldom, "in unum liberum comitatum omni tempore a futuro comitatum de Airth nuncupandum," specially *annexes to it* the "comitatum de Menteith;" but *without prejudice* "prefatæ cartæ de comitatu de Menteith, concessæ per prefatum Jacobum I. Regem

Registered in Books of Council and Session.

mode of reasoning is inadmissible.[1] The speech of Lord Mansfield in the Sutherland case proceeds upon mere hypothesis; and after all, is, in a manner, at variance with the judgment pronounced—clinging without proper authority to the male succession, yet obliged, owing to some not exactly defined specialty, to let in the heir female. One of *his Lordship's* findings in the decision, is not a little remarkable, that grants of the *comitatus* of Sutherland, some of them as old as 1347 and 1455, *did not effect the title* or *dignity*, but operated "as conveyances of the estate only"—that is to say, that a person holding the Comitatus in that very territorial age might be but a plain commoner, and landholder—perhaps farmer, or sheepholder—while the Comital honors and privileges were elsewhere—what a singular anachronism in ideas, may it not be exclaimed!

See judgment, March 21, 1771.

[1] Although, with all deference, this is a true state of the matter, yet that it might not be said without some kind of corroboration, an excerpt from an interesting conversation between the late Sir Adam Ferguson, one of the most upright of men, and Lord Chancellor Loughborough, from a copy in Sir Adam's hand-writing, is inserted in the Appendix, No. I.

Scotorum, de data 6 September, 1428,[1] vel alicujus partis, seu puncti ejusdem, *in ipsius pleno vigore, robore, et integritate ut prius remansure, nullo modo prejudicate*," &c. Then follows a more special clause of union of the Earldom of Menteith to the Earldom of Airth, " cum loco, prioritate, et præcedentia tanquam comitibus de Menteith debitis ;" and finally, the Earldom of Airth, with the title, dignity, and old precedence—thus so oddly engrafted upon Menteith—is conferred upon the patentee " *et hæredes suos*." The creation had full effect, and immediately thereupon the Earl relinquished the title of Menteith, and assumed exclusively that of Airth.

See Acts of Par. for the period.

There can indeed be little doubt that the object of the patent was merely to alter the style of the Earl, from Menteith, to Airth, the former having become distasteful to Royalty, without prejudice to the old precedence of Menteith, or otherwise innovating upon the prior creation in 1428. No doubt, the dignity of Airth is made descendible to " *heirs*," but then, it will be perceived, that that very term is employed in the preamble, to designate the actual limitation of Menteith in 1428, which, as has been seen, was only to heirs-male of the body ; and if it be so used in one part of the patent, the likelihood is, that it would have an equal signification in the other. On the supposition too of Airth being limited

[1] There is a clerical mistake in the transcript in the Sutherland case, the date being 6th September, 1427, instead of 1428.

to heirs-general, the union, or annexation of the two Earldoms, here enforced, might be quickly defeated; as in the case of an heir-female, she certainly would be only Countess of Airth, while the dignity of Menteith, which, notwithstanding, in this extraordinary document is still saved and preserved, would instantly fly of, and vest in the heir-male. On the other hand, giving "heirs" the same meaning throughout, as in the first instance, the disseveration would by no means occur, and the union, and main object of the patent be accomplished. With all submission, we cannot simply confine our attention to the *Airth* limitation; but in order to arrive at a just and proper conclusion, we must take every part of the patent into consideration—especially what refers to the charter in 1428—and not only scrutinize it, but, perhaps, also, the collateral circumstances of the case. The precedent being singular, may possibly form an exception to ordinary rules; and it is observable that, in scrutinizing the charter, we do not altogether, in the words of English lawyers, "look beyond the deed;" but merely notice what it actually specifies. In support of this doctrine, there is the admission of Lord Lindhurst, on the part of the Crown, in the Annandale case, in respect to "heirs-male,"—that although the *supposed* technical meaning of these words, as equivalent to heirs-male collateral, must ordinarily be enforced, yet it may fare otherwise, if there be, within the instrument, a "necessary *implication*, or inference," to the con-

trary; or something, that if slighted or contemned, might lead to inconsistency. The argument, of course, bearing equally upon heirs, would, if admitted, be here conclusive; and Lord Eldon has laid it down,[1] that where one deed "refers to another, the other is, as it were, incorporated with it, by the effect of that express reference"—which would, at the same time, enable us to go into the creation in 1428. But this is not all; for Lord Redesdale, in the Annandale case, even argued upon the import of the Family Patents, independent of the one upon which the claimant founded; and, if we are allowed the same range upon the present occasion, we may remount to the patent in favour of the Earl William, in 1631, which, although unjustly reduced, yet limited the honors of Menteith, &c., to "heirs-*male*, and entail." The heirs-male, therefore, all along would seem to have been the proper heirs to the honors, and quite to the exclusion of females.

Reg. Mag. Sig. Lib. 53, 48.

It is sincerely to be regretted, considering the direct descent of this Noble House from the Royal Family,[2] that their grants and investitures should be

1 Roxburgh case, which also involved the question of honors.

2 They are lineally descended, in the female line, from David Earl of Strathern, eldest son of Robert II. by his second wife Euphemia, daughter of the Earl of Ross, and widow of the Earl of Murray. The *asserted* status of the children of the Monarch's first marriage with Elizabeth Mure, gave Earl David, as is well known, a preference, upon which his descendants, were disposed to plume themselves. In commemoration of their royal descent,

only to heirs-male, which may not merely have the effect of excluding the lineal heirs, but may lead to the extinction of the honors, as the chance of a male competitor is rather problematical. This is another misfortune, in addition to the many they have already suffered, in consequence of their connection with royalty; and nothing could be more pleasing, than that the preceding remarks should turn out to be ill-founded. The obvious argument for the heir-general would be, that as there is no inductive clause directly bearing upon the limitation, the term "heirs" there, ought to possess its natural meaning;—at the same time, it is rather difficult to maintain such law, after the notions entertained by the House of Lord. The Family, as heirs of line of David Stewart, Earl of Strathern, through Malise first Earl of Menteith, but originally, Earl of Strathern, (of which title he was deprived by James I.) ought to have possessed that dignity, which was connected with a Palatinate of great extent and antiquity; and an objection that might be urged against their claim to it, upon the territorial principle, might be perhaps met by the recognition of Charles I., which

they covered their entire shield with the chequers, the arms of Stewart, leaving only a small transverse bar, on which they placed the paternal insignia, as, from an old seal of Malise, first Earl of Menteith, which the Author has seen. It had been his intention, had there been room, to have offered some remarks upon the above curious topic of Elizabeth Mure, but they must be postponed to another occasion.

can hardly be nullified by the illegal and iniquitous reduction that afterwards followed; but still, it cannot be denied, that the matter is rather nice and difficult.

The Airth patentee was the famous personage who, according to Scottstarbet,[1] a contemporary, after being allowed to vindicate his right to the Earldom of Strathern, was so imprudent as to boast, in the hey-day of exultation, that he "had the *redest* blood of Scotland," which led to the arbitrary proceedings of the Crown, and their resumption of it upon false pretexts. Many things are hazarded by that author, savouring more of scandal or malignity than of truth; but still there seems to be better foundation for the charge in question. The speech of the Earl was actually reported to the King by Sir James Skene, President of the Court of Session; and his Majesty, in a letter still extant, dated 10th of May 1633, affirms the speech to have been "that he (the Earl) should *have been King of Scotland,*" and that he

[1] Staggering State, &c. 157.

[2] "The blue blood," in Spain, is the fashionable expression. "The pride of ancient descent (Sir Arthur Capel Brooke says) is nowhere carried to so ludicrous an extent as in Spain. If a man can boast of the *sangue azular*, or blue blood, as it is called, although this blue blood may have been reduced ages ago to bodily labour for its own support, on no account would he disgrace it by mixing it with the inferior blood of a family of *whatever rank* and eminence."—Sketches in Spain, &c. v. i. 71. The *russo*, sanguine or red blood, is, however, most classical, and is used per *excellentiam* by the Duchess of Abrantes in her Memoirs.

had " better, or as good right to *the Crown* as *we ourselfis*," a version of the matter much transcending common rumour.

Public opinion, also, seems to have been against the Earl, for, on the 10th of July 1633, an advocate, then in Edinburgh, writes to his friend in the country, that " he" (the Earl) " is to be forfeit and adictit to perpetuale prison, he standis to his defence and denyal both of the *wordis* and of the *equivalency* yerof, and alleadgis nothing proven ; *but the contrare is credibly reportit.*"[1] The Crown, however, did not carry its resentment so far.

By some strange fatality, the Earldom of Menteith, like Pandora's box, or any baneful prototype, has always been the forerunner of mischief and contention ; and its reputation in this respect has not been confined to our own country, but has extended to England, and even remote regions. In its very infancy, before almost any thing can be gleaned about it, it attracts our notice by a remarkable contest in 1213, between two Sosias, or brothers, " Maurice, senior," of Menteith, and " Maurice, junior," of Menteith, the first actual possessor of the Earldom, and the other claiming it " *sicut jus suum*," which required the interference of the King, and Parliament, who, in the above year, confirmed a final treaty betwixt them, by which Maurice, senior, resigns the Earldom to

[1] Original letter from William Maxwell, advocate, ancestor of the family of Springkeld, to his cousin, Sir John Maxwell of Pollok.—Pollok Charter Chest.

Maurice, junior, on condition of obtaining a provision in land for himself and his daughters. What is also extraordinary, this transaction, which is only for the first time brought forward, was thought worthy of being authenticated by an Inspeximus of Henry III. of England; owing to which circumstance it has reached us through the medium of the English records.[1] Subsequent to this, in 1257, Isabella, Countess of Menteith, perhaps the daughter of Maurice, *junior*, after being charged with poisoning her husband, gave her hand to Sir John Russell, an English Knight, which so exasperated the Scotch nobility, that they threw both of them into prison, from which, however, they were at length liberated, and having obtained a sum of money, departed to England. So far Fordun, and there is an original charter extant by "Dominus Johannes Russellus, et Isabella, spousa sua, Comitissa de Menethet," to Sir Hugh de Abernethy, of a twenty-pound land in the territory of Aberfule, witnessed by the Earls of Fife, Strathern, Buchan, and Mar,[2] and other great dignitaries, which, doubtless, has had some connection with these proceedings. In the meantime, Walter Stewart, husband of the younger sister of Isabella,

Lib. 10, c. 11.

[1] Patent Rolls in the Tower, London. Full copies of the relative deeds are inserted in the Appendix, No. II. Probably during the ensuing litigation by Countess Isabel, she has required the King of England to certify her titles to the Earldom, that they might be shewn to the Pope.

[2] See copy Appendix, No. II. It is without date, but must have been about the period.

seized upon the Earldom; and then commenced legal proceedings, and negociations upon a great scale, at Rome, York, and Scotland, and again at Rome, with the aid of the Pope, and his Nuncio, &c. In 1273, the controversy was revived at York, and was not finally settled until after a discussion in a full Parliament, held at Scone by Alexander III. in 1285, who was obliged to divide the Earldom between two competitors. Passing over various singularities in its history, its capricious descent, and attainder in the person of Albany, and a new contention between two brothers, Alexander and John, towards the close of the fifteenth century, owing to unequal settlements, that nearly tore the Earldom in pieces,[1] and suppression of it in the manner shewn, with attendant calamities and mischances, we come to William, Earl of Airth, and *Menteith*, (for the title had been inauspiciously resumed,) grandson and heir of the Airth patentee. This nobleman, in the year 1680, was drawn into some kind of transaction with the Marquis of Montrose, who contrived to acquire for his family the Earl's landed estates; but he even went further, and extended his grasp to the ill-fated dignity of Menteith. In the meantime, there was demurring, and bitter complaints by the Earl to Parliament, who protested against the family of Menteith being sunk in that of Montrose; while Charles II. was induced to recall the grant of the dignity to

Ibid. Lib. 10, c. 14 and 33.

Winton, B. 7, c. 10.

Reg. Mag. Sig. Lib. 8, 470.

Act. Par. V. viii. 257.

[1] The Earldom was ever after much curtailed, and little comparatively remained to the elder branch.

the Marquis, by a letter that does honour to his memory.[1] The poor Earl, chiefly famous owing to a lawsuit with his wife, (not inferior in immorality to the ancient Countess,) which occasioned vast discussion, and fixed the point as to the reception of female witnesses,[2] afterwards died without issue; and for any thing we can see to the contrary, "hoc generis fato, quod nostros errat in annos,"[3] the Earldom may still, even in our days, be again the subject of controversy.

It need hardly be observed, whatever may be the fact in England, that ordinarily, under a grant

[1] "Wee being unwilling to alter the settled course of succession of the titles of honor of the Earl of Menteith, and Airth, and others contained in his patent, it is now our will, and we doe hereby authorize, and require you, at the passing of the said signature, to delete the clauses relating to the disponing of the said Earl's titles of honor, to the end they may remane in the same state which they were in before the late disposition," dated 20th of May 1680; *His Majesty's State Paper Office.* This notice is valuable, because, in the disposition or charter, of which the signature is here alluded to, the honors are inserted.

[2] See Fountainhall repeatedly, "Lady Menteith against the Earl." The celebrated beau Fielding was in the case.

[3] The errant mendicant, William, Earl of Menteith, was well known last century, against whom, in 1762, there went forth an anathema of the House of Lords, discharging him from using the title of Menteith until he had established his right. Whatever he may have been, whether the wandering Jew, or however shadowing out his pretensions, he was the first, on the eve of an election, to leave Edinburgh *with his accoutrements,* lest his presence as a Peer, upon such occasion, might be eyed with jealousy.

Lord Journ. Jan. 27, same year.

" hæredibus suis,"[1] a Scotch Peerage descends to heirs-at-law. A curious qualification, however, of the natural meaning of " heir," which would not seem to have the requisite force, according, at least, to modern impressions, occurs in the case of the Marr succession.

II. *Case of the Marr Succession.*

Isabel Douglas, in her own right Countess of Marr—an Earldom she held as heir of her brother, James Earl of Douglas, and Marr, on the 9th of December, 1404, conveyed the Earldom of Marr, with the Castle of Kildrummie, Jedburgh Forrest, &c., to Alexander Stewart, her husband, and the heirs of their bodies, reserving their liferents; " quibus deficientibus *hæredibus* nostris *ex utraque parte.*"[2] Infeftment followed in terms of the grant, which was confirmed by Robert III. in the manner to be shewn in the sequel.

The Countess and Alexander (who in further corroboration of the territorial usage, was Earl of Marr by the mere courtesy) being both dead without issue, previous to the expiry of 1435, the question that falls next to be discussed is, who then became heir to the Earldom?

[1] Lord Redesdale thought that these words anciently denoted heirs-male; but Sir Harris Nicholas is here at issue with his Lordship.—Lisle Report, 283, 4, &c. and 429.

[2] See a copy of the disposition in the Sutherland case, chap. 5, sect. 11, 46.

According to the understood principles, and nature of the Law of Scotland, there is no room, as in England, for the doctrine *materna maternis*, by which a subject derived from a mother, does not go, as with us, to the children's *paternal* heirs,—supposing the children to have succeeded, and died without issue, but to the heirs of the mother. And recurring to ancient times, it was held in 1567, that the heirs of James VI. to the Crown of Scotland, before his marriage, were not his maternal relations, although from them only he derived his right, but the House of Lennox, who were the nearest relatives on his *father's* side.[1] James being crowned and invested in the Kingdom, it was only necessary, in this view, to determine, who were *his* heirs at law according to common practice, without looking farther back—for we here adopted the legal maxim that " the heir of my heir, is my heir." Agreeably then to this rule, the collateral representative of the House of Douglas, through James Earl of Douglas and Marr, her brother, should also have been heir, at common law, of Countess Isabel in the Earldom of Marr; although it came to them respectively, in right of Margaret heiress of Marr, their mother, and not from their father, William first of Earl of Douglas. Who that individual was, may be gathered from an article in the

[1] Sir Nicholas Throckmorton, the English Ambassador, thus writes to Elizabeth on the 9th of July, 1567. " Some do hold opinion by law—that the Earl of Lennox's son living, shall inherit the crown, if the young Prince die without issue, the *said*

Appendix ;[1] and it is certain that he, on the 6th of May, 1398, renounced, in favor of George Earl of Angus, all right competent to him by succession, after the death of Countess Isabel, to parts of the Douglas and Marr inheritance—together with " the *heritable* succession to the HAILL lands to which the *heirs* of James Earl of Douglas might succeed."[2]

crown being invested in the Prince, and in his real possession, durus est hic sermo to the Hamiltons (the maternal relatives of James); for they cannot suffer this by any means. Touching the tutor to the Prince and governor of the realm in his minority, this is taken to be the opinion of the best learned in the law, that this charge and prerogative doth and justly appertain to the Earl of Lennox, &c., *Ap. Keith's Hist.* 423. He had expressed himself in a previous Letter as follows:—" The Hamiltons would concur in all things, yea in any extremity against the Queen, so as they might be assured the *Prince of Scotland was crowned King*, and should die without issue, that the Earl of Lennox's son living should not inherit the crown of this realm *as next heir to his nephew*," *Ap. Rob. Hist. App.* 341. The person last mentioned was the youngest brother of Darnley, James's father, and certainly James's heir by the father.

[1] No. III.—It appeared several years ago in a periodical publication, but as it has been alluded to in a late historical work, the author both on this account, and as illustrating the present subject, has been induced to re-publish it with some slight corrections and additions. He cannot well see how the conclusion can be avoided, but still he would be happy if the matter could be otherwise explained.

[2] For this account of the contents of the charter, see Douglas's Peerage *first edition*, 465. Lord Hailes, who had examined the Mar charter chest, expressly guarantees the import and authenticity of the deeds there adduced—including the above, which, he adds, formed " the most curious and acurate," part of

It would thence follow that the paternal representative in 1398, when the succession undoubtedly stood to the heir at law, was the heir of Isabel Countess of Marr, and through her of her brother James Earl of Marr and Douglas, to every thing heritable that could be claimed under such a character.

Nevertheless, the family of Erskine had advanced a claim, as heirs *on the English notion*, (which they certainly were) of Countess Isabel, through her mother Margaret of Marr, tracing their descent, exclusively in the female line, from the ancient Earls of Marr. They founded on a promise by Robert III. that he would accept of no resignation by Countess Isabel, in prejudice of the right which the wife of Sir Thomas Erskine (under whom they claimed) might pretend to, as her heir;[1] but then the promise was voided in 1397, by an article in the marriage contract of the daughter of Robert, with George Earl of Angus, where the King retracted it;[2] and subsequently he confirmed the very renunciation al-

the work. He also says that in his time they might be accessible to any inquisitive person. *Suth. case* c. v. sect. 11, 46, *note*, and *Append.* to *Ann.* v. 3, 267. The renunciation in question was further adduced in the competition between the Duke of Hamilton and the late Lord Douglas, last century, for the Douglas estates; and excerpts from it are given in the Appendix to the papers for Lord Douglas. It thence appears that it was confirmed by Rob. III. For more about it see Append. No. III.

[1] Douglasses' Peerage, *ut supra.*

[2] *Ibid.* "retracting also, *if he has given* any letters (of promise) to Thomas Lord Erskine," &c.

ready noticed in 1398. After every enquiry also, there is nothing elsewhere, to countenance the idea of the reception, at the time, of the doctrine materna maternis; and hence, if the Earldom of Marr had still been descendible to heirs-at-law, there might, in 1435, have been an opening for the Douglas representative.[1] But it will be perceived that in the charter, or conveyance of Countess Isabel in 1404, the words "*ex utraque parte*" have been affixed to "heirs," and it would seem, that this has operated as a specialty. For it is certain that, subsequently, in terms of the conveyance, Robert Lord Erskine, the son, and heir of the Lady above alluded to, was accounted the heir to the Earldom;[2] and although his service, as such, in 1435, was reduced by the Crown, on false grounds, the right in him and his descendants, was eventually recognized in the manner that will be afterwards shewn. At the same time, it may be remarked that the Erskines were not content with a confirmation of their rights, by a charter and Act of Parliament of Queen Mary, but applied for another Parliamentary Ratification that passed in their favour in 1587;

See Subject of Prescription *postea.*

[1] That is, also bating his renunciation.

[2] Every where the Erskines are represented as standing upon, and deriving their right from this charter. Nay, it is singular that it was the oldest voucher produced by the Earl of Marr to fix his precedence in the ranking of the nobility in 1606. The Earl of Sutherland then produced older evidence. This is another argument among innumerable others, against Lord Mansfield's law; for here the grant of the comitatus alone in 1404, was regarded as carrying the Peerage.

while every thing was on their side that could be secured either by personal influence, or the favor of the crown.

But the very limitation in question came at length to be legally discussed before the Supreme Civil Court in 1624, in the case of Kildrummy, a portion of the Earldom of Marr. The Elphinstone family had obtained Kildrummy, when the Earldom had been usurped by the Crown; and the Earl of Marr, as heir under the conveyance in 1404, pursued a reduction in the Court of Session against Lord Elphinstone, for recovery of the property. Lord Elphinstone met his opponent by the very plea that has been stated, grounded upon the ancient law. His principal defence was, that the Earl had no interest, because he was not the heir; and that the right was alone competent to the relatives of Countess Isabel, through her father, the Earl being "excludit, *quho was onlie of kin to dame Isabel on ye moyer side.*" The advocates of the parties "disputed contentiouslie upon ye expositione of ye words of ye charteris, concerning ye airis;" but the Lords, upon the consideration that the charter in 1404, contained lands that had descended to her both from the Douglasses, and Marrs, decided, although not till after "*long disputatione*," that the limitation "behoved to be interpreted, *paterna paternis, materna maternis;* and, yerefore, yat ye landis fallin to hir be her moyer, sould perteane to ye nearest ayeris of ye moyer, and yat ye landis yat fell to her on her fayer syde, sould per-

July 23, 1624.

teane to the aires on ye fayer's side."[1] A curious fact also transpired in the litigation, which was founded upon by Lord Elphinston, that in the royal confirmation of the charter in 1404, which was absolutely necessary, according to every feudal notion, the cardinal words *ex utraque parte* were left out, and replaced by the rather significant ones "*hæredibus dicte Isabelle.*" Yet the Court overlooked the objection, because ex utraque parte, was not only in the original conveyance, but in two infeftments that followed in terms of it. It seems, notwithstanding, a very odd omission, and may not altogether be viewed as a clerical error.[2]

Our Court, in this manner, for the first time, as far as can be discovered, admitted in this case, the principle *materna maternis.* It may not be easy to discover such peculiar effect and meaning in the regulating limitation. If there is no opening to the maternal relatives at common law, none of them can be ever properly termed heirs, and hence so much of the phrase as may be thought literally to apply to them, might be held *pro non scripto.* Neither is there any thing intrinsically in the words that rivets the sense thus given—take the analogous case, of

[1] Report of the case by the first Lord Haddington, Lord Clerk Register, a cotemporary, among his MS. decisions, Advocates' Library.

[2] There has been, obviously, much irregularity in Countess Isabel's conveyance, which did not even proceed upon her resignation; nor, probably, had things their due course, owing to the jarring interests, and cabals of the Crown, the Angus, and Erskine families.

which there are examples in our practice, of a Peerage limited "masculis, seu fæmellis," the males or sons certainly would succeed in the first instance, to the exclusion of daughters, from the preference that males have over females; and if succession on the father's side is to be entitled to equal favour, the paternal relatives ought also, in the same way, first to be selected. Even upon the authority of the Regiam Majestatem, we would be justified in this conclusion; for while it takes no notice of materna maternis, it makes the paternal relatives *first*, and then the maternal, the heirs in fiefs[1] —

[1] *Vide* Lib. II. c. 34, and c. 25.—In chapter 34, the words are "*Postremo* marterteræ, (the mother's sisters) vel earum liberi;" they being the ultimate heirs. Nothing, however, is more difficult to be dealt with than the Regiam, as an authority. Previous to the 27th of January, 1502, Katharine Rutherford, holding of the King in ward, had eloped and "trespassed" with James Stewart of Traquair, "comittand her persone to him in fornicatione, like as is at mair lenthe contenit," &c. &c. whereupon the Crown insisted in a declarator, that she had thereby forfeited her right of succession. "The Lordis decreits, &c. in presens of the Kingis hienes—yat ye saide Katryne forfaltit in hir persone, committand ye samyn till ye said James, &c. yai being, in consanguinitie, thrid degrees forbidden of ye law, and *contrair our saide soverane lordis lawis in the secund buke of ye majestie* titulo, viz. quod fornicatio per mulierem commissam ipsam exhæreditat, &c. and as was sufficiently previt be famouse witnesses," &c. This is all clear and satisfactory; but we come now to another, and equally good precedent of a totally different tendency.

Act. Dom. Con. Lib. 12, of that date.

Lib. I. c. 12, § 4. c. 13. § 1. Lib. III. c. 28. § 3.

The Regiam makes the jury or inquest consist, "*duodecim* legalium hominum;" but this was not according to our practice. On the 22d of March, 1538, Humphrey Rollok pursued reduction of a rolment or decreet given by the sheriff-deputes of Aber-

thus introducing the mother's relatives in the last place, although, by subsequent practice, they are excluded altogether—a mode of succession that might be expressed "hæredibus ex utraque parte. It must, however, be admitted, that ex utraque parte is, with us, a very uncommon adjunct—nay, wholly unprecedented; and therefore, more may have been intended by its application, than at first legally meets the eye.

In the conveyance in 1404, besides the Earldom of Marr, the Lordship of Jedburgh Forrest, &c., part of the patrimony of the house of Douglas, is carried, and this mixture of properties, derived from different sources, swayed the Court in 1624; yet the circumstance, viewing it in the abstract, must be held immaterial, if, according to our law, no attention is

deen against him, upon the verdict of a jury, for ejecting John Elphinstone from the castle of Kildrummy, and office of Baillie of the Barony, which he was said to have in tack from Alexander Lord Elphinstone;—"The Lordis of Counsale retretis, rescindis, and adnullis ye said pretendit rolment, and decrete, &c. upon the pretendit deliverance of ye saidis persones of inquest in ye said mater BECAUSE ye said pretendit deputis at ye giving of ye said pretendit deliverance, put ye said mater to ye knowledge of xii. persones of inquest in even noumer, but an odd man to deliver wyt yame, *howbeit be ye law, and consuetude of ye realme, all inquests aught, and suld be chosin in od noumer*, quhare throw ye said pretendit rolment of Court given *but just noumer of inquest*, is null in ye self." Act. Dom. Con. et Ses. Lib. 11. 251. b.

This also throws light upon a more important point; and, it is believed, to be the oldest authority extant for the constitution of our juries.

paid to the quarter from whence the subject is derived, and it be only necessary to enquire who is the heir of the last in possession. Confirmation, too, of the principle may be supplied by the renunciation formerly mentioned in 1398, and the sentiments expressed in 1567 as to the succession of the Crown.

Such would appear to be the state of the question, although it may be difficult to pronounce with certainty upon a point of such great antiquity, when, perhaps too, the law was not completely fixed; and in this impression we might be supported by the notions which the Erskines themselves actually entertained. Whatever, however, may be thought of the nature of the procedure in 1624, it cannot be held to have turned upon common law—proceeding upon an evident specialty under pretext of ex utraque parte, which was the means of bringing for a moment an exotic into our practice. Long before, Sir John Skene, the Clerk Register, and publisher of our laws, (who held that office in 1594,) had thus expressed himself upon the subject:—" Be the law of this realme, the bairnes descendand of the mother sister,[1] has na richt of succession, quhilk, in the awin place and degree, is competent to the bairnes borne of the *father* sister,[2] *quilk is manifest.*" The law of the Regiam, therefore, did not apply, at least in his time; and even Lord Mansfield admits, that when Peerages were territorial, " the heir succeeded to the

Gloss. *voce Martertera.*

Speech in the Sutherland case, *ut supra.*

[1] Mother's Sister.

[2] Father's Sister.

person last seased of the estate, and thereupon took both estate and honours."

The event of the litigation in 1624, finding that the Earl of Marr could enforce rights as heir of Isabel, Countess of Marr,—an epithet improperly applied to him, for such, at least in a general sense, he was not, —occasioned considerable sensation. Many who held portions of the Earldom of Douglas, to the unentailed part of which the Countess was heir, were not satisfied until they had procured from the Earl an absolute renunciation of his right in that capacity. Among these were the Marquis of Hamilton, and the Earls of Angus, Nithsdale, and Annandale. The subject was brought before the Court of Session, through the Chancellor, by means of a letter from the King, dated 24th March 1626, and the Earl of Marr, then present, bound himself to act accordingly. All this has the appearance of indicating that there was some degree of novelty in the decision.

A few more grants of Peerages to "heirs" may yet be noticed—those of the Isle of Man, Torphichen, and Hume of Berwick, all more or less peculiar, and two of them hardly, if at all, known.

III. *Lordship of Man.*

Robert Bruce granted a charter, on the 20th of December, in the 19th year of his reign, of the Isle of Man, hitherto a pertinent of the kingdom of Scotland, with the "Calfes," to his nephew, Thomas

Randolph, Earl of Murray, " et hæredibus suis, in feodo, et hæreditate, et *in liberam regalitatem*, cum advocationibus ecclesiarum, et Monasteriorum, et *cum omnibus, et singulis articulis*, et *querelis ad coronam nostram regiam spectantibus*, &c., *una cum Regali administratione*. Inveniendo inde nobis et heredibus nostris, dictus Thomas, et hæredes sui, sex naves annuatim quælibet viginti sex remorum, cum hominibus, et victualibus sex septimanarum, cum inde fuerint rationabiliter premoniti; *et Faciendo personalem appresentationem ad Parliamenta nostra, et hæredum nostrorum; tenenda per rationabiles quadraginta dierum summonitiones.*"[1]

This is clearly a hereditary Parliamentary honor, from the heritable service of attending Parliament in virtue of the summons. To use the words of English authorities, in reference to a case of the same nature, " the duties of a Peer of the realm were reserved as a service and condition of tenure."[2] No other instance of the kind, as yet known, is discoverable in our Records. That the grant took effect is evident from a charter of the same Monarch, where the disponee is described as Earl of Murray, " *Dominus Mannie*;" and the Lordship, after his death, and that of his two sons without issue, came, in virtue of the limitation to George Dunbar Earl

Reg. Rob. 2, 235.

[1] Copy by the first Earl of Haddington, Lord Clerk Register in the reign of James VI., among his MSS. collections in the Advocates' Library. There is another also, in the same Library, by Sir James Balfour, but without the limitation.

[2] Third Report of the Lords' Committees, 37.

of March, the heir-general, through his daughter, Agnes, the celebrated heroine of Dunbar. This clearly shows, independent of other "authorities, that with us, anciently, although denied to be the case in England, a grant of a Peerage to heirs," must necessarily carry it to heirs-general. Earl George is also designed "Dominus Mannie," in the reign of Robert II.; when granting a hundred pound land in Man—whenever it should be recovered from the English—*in maritagium*, to Agnes his sister, wife of Sir James Douglas of Dalkeith; and he and his descendants assumed the arms of Man, which are still discoverable on the portals of their once redoubtable, although now mouldering fortress of Dunbar.[1] Ibid. Rob. 4, 31.

A Palatinate is at the same time conveyed, the disponee holding Man *per regalem potestatem.*

Although we had, in fact, many Palatinates according to the English notion—that is to say, fiefs invested with royal jurisdiction, yet the term was almost wholly unknown in Scotland. Only one Earldom, that of Strathern, is styled a Palatinate with us, (during the fourteenth, and part of the fifteenth century,) but what was the peculiar nature of the distinction, does not appear. The Earls of Strathern Act of Par. v. 2, 58.

[1] It had been intended to have given some original sketches of this great family, perhaps the most ancient and distinguished in Scotland, and remarkable on account of its various vicissitudes, and the extremely low ebb to which it sunk. If the sons of the House were all valiant, it cannot, alas! be said that the daughters, at the epoch of the final eclipse, were all virtuous.

were anciently "the over Lords" of the Bishop, and chapter of Dumblain—a remarkable supremacy assuredly for a laic to retain in papal times; but this may be accounted for by Gilbert, the munificent Earl of Strathern, having, in the twelfth century, granted one-third of his Earldom to the See of Dumblain,[1] who hence in this manner, might have come to be his vassals. It might be rather inferred that their title properly, was Comes *Palatii;* which denotes a high dignitary about the palace, because about the middle of the fourteenth century, Malise Earl of Strathern is stated to have resigned his Earldom to the English Earl of Warren;[2] and Selden notices a seal of the latter, where, along with his other titles, he uses those of Earl of Strathern, and Comes Palatii,—none of his English fiefs having been palatinates, and the term *Palatii*, according to his authority being unknown in England.[3] How the Earls of Strathern came afterwards to be styled "*Palatine*," may be explained by a remark of Sir George Mackenzie, that elsewhere, even Earls of the palace were occasionally termed Palatine *quasi a palatio.*[4]

[1] Ford. v. 1. 529.

[2] Rob. Ind. 5.

[3] Seld. Tit. of Honor, 533.

[4] Works, v. ii. 542.—The epithet "Earl Palatine," however, was liable to various acceptations. It sometimes denoted a subaltern situation, merely officiary, with the right of conferring degrees, and constituting notaries, such as was bestowed by the Pope or Emperor upon special retainers and functionaries at their courts. These in the case of the Pope, were styled Earls Pala-

IV. *Barony of Torphichen.*

That anomalous dignitary, the "Prior"—"Master"—or "Preceptor," of Torphichen, or "Lord of Saint John," head of the order of Knights Hospitallers of Saint John of Jerusalem of Torphichen, (under all which denominations he figures in our records,) sat in Parliament alternately among the higher clergy, and the dignified barons,[1] in right of his barony of Tor-

tine, "*sacri Palatii*," et aule *Lateranensis*." Their authority anciently extended to Scotland. It appears by an original protocoll of a notary in 1553, that on the 16th of July, in that year, John Grene "vicecomes Palatinus," or deputy "Jacobi Fridelitiis literarum apostolicarum scriptoris, sacri palatii, et aule Lateranensis *comitis*," "creavit, constituit, &c.,—virum bene doctum, et abunde literatum patricium Doddis notarium publicum, seu tabellionem." This took place in the writing chamber "Willielmi Ogill deputati directoris cancellarii." And even after the Reformation, "Magister Patricius Spens Comes Palatinus creavit Magistrum Thomam Murray bachalaureum sacre theologie." Patrick apparently has been made Earl Palatine by the Emperor: and the procedure may be curious, as shewing the way in which a degree was then taken.

[1] The Prior of the Hospitallers of St. John of Jerusalem, and Master of Torphichen, appear to be the oldest appellations; see the *Ragman Roll, and Spottiswood's Religious Houses*, article *Torphichen*. The latter author quotes a charter in 1252, witnessed by a Master. As Preceptor, or Master of Torphichen, the head of the house sits among the Barons of Parliament at an early period. Lord Saint John figures as Premier Baron in 1489, immediately after the Earls; but, in 1526, he is classed among the Abbots and Friars, as a Dignitary of the Church; *Acts of Par.* vol. ii. 216, 300-4. The head of the Knights Hospitallers in

phichen, the original seat, and patrimony of the Knights.

Sir James Sandilands, Lord of Saint John, at the time of the Reformation, to equally good account with Albert of Brandenburgh, abjured the tenets of his order; and obtained, upon his resignation, and on payment of a large sum to Queen Mary, an heritable right to their valuable, and extensive domains. The original title or charter, in his person, dated 24th of January 1563, carries the Baronies of Torphichen, Liston, Ballintrodo, &c., with superiorities, advowsons, annual-rents, temple lands, teinds, privileges, pre-eminences, dignities,[1] offices, regalities, chancery, &c., such as were formerly possessed by the disponee, and his predecessors, "*tanquam Preceptores de Torphichen;*" and erects the whole "in liberam Baroniam de Torphichen," of which the Fortalice of Torphichen was to be the principal messuage; and where infeftment was to be taken

Reg. Mag. Sig. Lib. 32, 182.

England was also styled Prior, or Lord Prior, and ranked as Premier Baron of the Kingdom. "Frater Alanus Prior Hospitalis Ierosolimitani in Anglia, de communi consilio, et assensu capituli," confirms to the Abbey of Holyrood the lands of Irtun, in Galloway, as from an original charter still extant, dated in 1213.

[1] It is almost needless to observe, what must be familiar to those versant in our practice, that "dignities" in such a situation have little meaning of themselves, being occasionally attendant upon grants of offices and subjects of an inferior description. It is the matter to which they serve as an appendage that explains their signification. "Dignities" also, with the other words in the text, are inserted in an alienation of part of the Barony of Liston, in 1685.

Act Par. v. 8, 522.

for the subjects in question,—to be held, upon payment of a feu-duty, by the disponee, "*hæredibus suis et assignatis.*"

There is no mention here of any title of honor, peerage, or hereditary seat, or vote in Parliament; the grant is merely that of a common barony, but with higher rights and privileges, such as had been possessed by the Preceptors; and it will be observed, that although the charter annexes the component parts of the estates of the Knights Hospitallers to the ancient barony of Torphichen, it does nothing more, and only heritably puts Sir James into the shoes of the Preceptors.

Yet it is unquestionable that, by means of this charter, the family of Sandilands became hereditary Peers of Parliament, and were thereafter designed Lords of Torphichen, and even Lords of Saint John, and of Saint John of Torphichen,[1] thus evidently holding the ancient honor, which was never personal, but had been attached by immemorial usage to the fief.

On the 3d of February 1587, Sir James, the first Temporal Peer, was dead, for we then hear of "James Sandilands, broyer oy, and air to, *umquhile* James Sandilands, Lord Torphichen;" that is, grand-nephew of the former. Agreeably to feudal usage, James, Act. Dom. Con. et Sess. v. 14.

[1] "James, Lord Torphichen," in 1565, *Act. Dom. Con. et Sess. Lib.* 35. "James, Lord of Saint John," and "Lord Torphichen," in 1568-9, *Act. Par.* 3, 56-7; but previously there is, in 1564, "James, Lord Saint John of Torphichen," *Act. Dom. Con. et Sess. Lib.* 29.

the grand-nephew, although the heir to Torphichen, being then a pupil, is not recognized as Lord Torphichen until the 12th of May 1597, when he assumes the dignity, on vesting himself in the fief, by retour of that date, as heir to his grand-uncle, in terms of the charter in 1563. The barony, in this manner, passed like a common property, under a limitation applicable to land, carrying the Peerage along with it; and, in the year 1606, when the nobility of Scotland, in obedience to an Act of Privy Council, produced their respective creations, and conveyances of their honors, in order to fix their precedence, this nobleman only produced as his title the charter in 1563, which was admitted as a valid right, and under which he was ranked accordingly.[1]

Spec. Ret. Linlith. &c.

In 1633, John, Lord Torphichen, upon the resumption, by Charles I., of the superiorities of church lands, felt apprehensive that his rights, as successor to a kind of religious order, might thereby be prejudiced; and, after petitioning Parliament, there passed in his favour an Act of Parliament,[2] or, in other words, an award of his Majesty, following a resolution of the Privy Council, which was to have the force of an Act of Parliament,—that the resumption, while it included the temple-lands, &c., should be held in no degree to encroach upon the superiorities of the

Act. Par. v. V. 162, *et seq.*

[1] Productions of the nobility on the occasion, in the handwriting of Sir James Balfour, Lord Lyon in 1630; *Adv. Lib.*

[2] In reality in 1636, but inserted in the Acts of Parliament in 1633, as referring to the petition in that year.

barony of Torphichen, in Linlithgowshire, within "that *mean portione* thereof QUHARIN DOES SUBSIST the *title and dignitie* of LORD OF PARLIAMENT," and "TO QUHILK the title of Lord of Parliament *is* ANNEXIT, perteining to *him* (Lord Torphichen) presentlie in propertie;" but that the same "sall remaine with him and his successors, *according to the tenor of his auld richts and infeftments*, to be haldine of his Majestie in few-ferme, for payment of the soume of ane hundrethe merkes yeirlie." No other right or title being mentioned in the Act, except the previous charter in 1563, it hence continued the regulating one, and, to be in force, as far as respected the remainder of the property that had been still retained by the family.

Now, with all submission, may it not be asked—is not this a territorial Peerage, and bearing a striking resemblance to the Earldom of Arundel, as represented for some centuries backwards, by English authorities? In neither case, *was* there any limitation of the dignity,—indeed in that of Torphichen, a limitation was out of the question, as the Peerage was not hereditary, but only held by the Lords, or Preceptors, during their lives, after their election, but more especially investiture in the fief; and if an English Act of Parliament talks of the title of Arundel *as being* IN *the inheritance of the Castle and Lordship of Arundel*, a Scottish Act, even more explicitly, sets forth that the title of Torphichen "*subsists* in the *mean portion* of the Lordship or Barony of Torphi-

Act Charles I. *ut supra.*

chen[1] and is annexed thereto." "The right, in both cases, to use the words of the Lords' committees, as to Arundel, is "not founded in the general law of the land, but on a *special prescription* alleged in respect of the *particular* property, and *particular* dignity"—the honors following their respective territory, as, in the simile of Lord Redesdale, "the shadow follows the substance;"—the land being a "hereditament to which the dignity was an incident."[2] It is also singular, that in the reign of Charles I. the Earl of Arundel obtained, upon a petition in like manner, a recognition, by Act of Parliament, of the territorial nature of his honor.[3] It cannot be denied both Peerages are unique in the respective kingdoms;[4] and if there has been no *rei interventus* as to Torphichen, the situation of that Peerage may indeed be regarded as extraordinary. Whatever Lord Mansfield might have argued, we may, in such event,

[1] That is probably the middle portion, or central part of the Barony, including the fortalice or castle, and demesne-lands, or perhaps the more ancient part of the patrimony of the knights.

[2] Third General Report of the Lords' Committees. It is also there observed, that the dignity of Arundel "must have been an incident to the castle, and honor, as a right of a way to the castle, over the land of a stranger, might be."

[3] In the 3d of Charles I. see case of the Earldom of Arundel, stated from the Lords' Committee's Account.—Ap. Rep. of L'Isle, Case 377.

[4] Independent of the peculiar constitution and history of Torphichen, there is no such recognition, and of so late a date, of the territorial principle, in the case of any other Peerage.

account it a territorial honor, *inherent* in the mean portion, and principal messuage, of the Barony of Torphichen; and a curious question might, possibly, arise, on the alienation of that transcendant, and highly privileged mean portion. This may not trench upon the principle, that a Scottish Peerage cannot be innovated upon since the Union, because whatever happens, however the land might be conveyed, the title still retains its ancient character, being still an incident, and following, according to its original nature and constitution, the fate of the land—in which it subsists, and without which, like the head and members, it cannot subsist. A check might be thought to lie in the Sovereign, but would it be competent *here*, to refuse to confirm a resignation? It will also be observed, that by the charter in 1563, the Barony is destined "to heirs and assigns," now, under this limitation, in the event of the succession opening to a female, would that female be Baroness of Torphichen? Certainly, in virtue of the ordinary meaning of the words, she ought to be so; but, according to Lord Mansfield's principle, in the Sutherland case, grants of a comitatus, or *Barony*[1] (which is of still less weight) have no effect upon honors, but "operate as convey-

[1] A comitatus is much more determinate in its meaning. Barony, which, in more than one sense, may be styled "nomen universitatis," was applied to innumerable fiefs, held by commoners, as well as peers.

ances of the estate only." Yet even here, there may be a specialty from the remarkable and unprecedented nature of the Peerage of Torphichen, so singularly subsisting from time immemorial in the fief; and a different law might be enforced, without at all compromising the general question as to other inheritances. It would really seem to be going too far to deny meaning to these words, and to apply the favourite, although arbitrary rule of the House of Lords, in all doubtful cases, presuming only in behalf of the heir-male of the first possessor. Neither might it be fair, as has also been resorted to on such occasions, to *suppose* that there might have been some other creation, or conveyance, although *in nubibus;* for the purpose of letting in the presumption.

V. *Barony of Hume of Berwick.*

James I. of England, in the second year of his reign, conferred upon Sir George Hume, (afterwards Earl of Dunbar,) the dignity of Baron of the Kingdom of Scotland, by the stile and title of Lord Hume of Berwick, with a limitation to him, " et *hæredibus* suis in perpetuum;" and, moreover, the patent contains this clause—" quod bene licebit eidem Georgio, per ultimam voluntatem suam inscriptam, seu per aliquem alium actum, seu conveiantiam, in vita sua dictum statum, gradum, dignitatem, &c.

Baronis Howme de Berwick, alicui consanguineo, vel cognato de sanguine ipsius Georgii dare, conveiare et concedere;" to be held by the said cousin, or relative " et *hæredibus suis* in perpetuum post mortem ejusdem Georgii;" with further confirmation of the dignity to Sir George and " his said heirs and assigns;" and that they shall obtain these letters *gratis*, " tam sub magno sigillo nostro Anglie, quam sub magno sigillo Regni nostri Scotie."[1]

There are three things remarkable in this patent; the selecting a place in a different country for a title, although this is not wholly unprecedented; making the grant pass through the Great Seal of England; and, lastly, the privilege delegated to the Patentee to nominate heirs to his honors, within the sphere of his cousins and relatives, by settlement or last will. This singular practice, of which we thus find the first trace, became not unfrequent in Scotland after the middle of the seventeenth century, when it was even allowed to be exercised in reference to strangers. " Heirs and assigns," however, must have had a broader signification at the time, than afterwards; for " assignatis," in the case of Peerages, is now regarded too vague and general, and a more specific reference is required when a nomination is to be effectual.

Sir Harris Nicholas instances another curious Peerage in a celebrated cotemporary of Sir George Hume, Sir James Hay, afterwards Earl of Carlisle, who, in

[1] Patent Rolls of that date.—Rolls Chapel, London.

1606, was created Lord Hay in England, but without voice or seat in Parliament; and with precedence only after the Barons of England.[1] These shades of difference argue a degree of caution and prudence, on the part of James, in the early part of his reign, as if aware of the jealous feeling of the English towards the Scotch, and, therefore, averse at once to make them participators in equal privileges, especially of a political nature.

No settlement or assignation having been made of the Berwick honor in terms of the patent, it may now centre in the Earl of Hume, the heir-general, it is believed, of the Patentee, through Lady Anne, his eldest daughter.

II. THE CLAUSE OF PRECEDENCE WITH RESPECT TO THE HONORS IN THE DEVON PATENT.

We now come to another striking feature in the
March 15, 1553. Devon patent.[2] It grants also to the Patentee, "tam in omnibus et singulis Parliamentis nostris, imposterum tenendis, quam in omnibus et singulis locis quibuscunque, tales et hujusmodi præeminentiam, dignitatem, statum, honorem, et *loca* in omnibus *quibus aliquis antecessorum dicti* comitis, *antehac Comes Devonie*, existens, *habuit*, te-

[1] Report of Devon Case,—*App.* LXV.

[2] See copy of it, Devon Report, *App.* No. I.

nuit, aut gavisus fuit"—from whence it was inferred, that as such precedence regarded a state of things long anterior to the patent, it was the intention of the Crown, in fact to restore the ancient Earldom—and hence, necessarily, to include the claimant, who, although a collateral heir-male of the Patentee, was yet a lineal male-descendant of an Earl of Devon, who figured in the fourteenth century. This, no doubt, may be accounted a specialty in the case; and it was, accordingly, used as an argument in favour of the broad interpretation of heirs-male. But notwithstanding the insertion of such clause in the patent, the Earl of Devon has only hitherto been ranked, in conformity to its date, and not agreeably to the precedence of the ancient Earls of Devon, here evidently pointed out, which is of far higher antiquity.

The clause in question must obviously depend upon the nature and extent of the Royal prerogative; and, with all submission, to deny its efficacy in this respect, would be to trench upon what has been considered, at least anciently, as fixed and acknowledged practice:—Remarks of the Author, upon an English topic, must, doubtless, be offered with much diffidence and hesitation; but still, perhaps, after what has been entertained elsewhere, it may be allowable to hold the opinion.

I. *English Doctrine and Practice, as to Grants of Precedence in the case of Honors.*

The Lords Committees, on the dignity of a Peer of the Realm,[1] in their third Report, observe, "that it has been constantly, and invariably asserted as a rule of law, that the King is the fountain of *all dignity and honour* in the kingdom, and that he may not only give the ancient distinctions of Earl, or Baron, to any one, but may also erect *any name of dignity, which was not used before*, a right which appears to have been exercised by the Crown, in the erection of a mere name of dignity, *to which rights of property had been annexed*, as the title of Baronet, and also in the erection of names of dignity, (those of Duke, Marquis, and Viscount,) which have been annexed to the dignity of Peer of the realm, *with different rights of precedence*. The actual exercise of this power, in various instances, during a course of ages, and the constant assertion of the right in various patents of the Crown, under which many dignities have been, and many still are enjoyed, seem to demonstrate, that the Crown has long been, and probably has *always* been, considered

[1] 29th of July, 1825, 55. These Reports, which have been repeatedly quoted, were, in pursuance of instructions by Parliament, and are very valuable, as containing much original information, with the latest sentiments of English authorities upon the nature and descents of English honors.

as " *the fountain of all dignity and honour* in the kingdom."

There might further be here instanced, a long list of cases, and even down to the present day, where the King has given to the sons and daughters of commoners, the rank of the sons and daughters of Dukes, Marquises, Earls, &c.—and although the motive on such occasions, may have been the succession of their brothers, or relatives to Peerages, they are still, in a legal point of view, proofs of the power of the Crown to raise persons to a pre-eminence to which they were not entitled by birth, and assuredly in defiance of ordinary rules. Nay, the King has even granted precedences to individuals, quite independent of such circumstance; and the noted case may here be remembered of the adulterous daughter of Sir Robert Walpole, first Earl of Orford, upon whom George II. conferred the rank and precedence of a Viscountess.[1]

If then, the Sovereign can, in this manner, create what dignity, or honor he chuses—and, especially one entirely new, to which rights of precedence only are attached—or give precedences simply to strangers, by which the existing rank of parties may be impaired, it really seems no stretch to imagine that it is also within his power to give one Peer precedence over another of the same rank with himself in

[1] " Le pas de Vicomtesse pour une fille bastarde, et qu'il a eue du vivant de sa premiere femme."—Lord Chesterfield's Characters, 53.

the Peerage; and in fact, it is indisputable that, in England, on sundry occasions, this very right has actually been exercised by the Crown. Henry VI., in the twenty-second year of his reign, granted a patent to Henry Beauchamp Earl of Warwick, that he, and his heirs, should be *first* Earls of the realm, and sit in Parliament before all Earls. Dying without issue, this high honor sunk; and the King afterwards granted to Richard Neville and Anne his wife, (aunt by the full blood of a deceased daughter of the preceding Earl Henry,) the dignity of Earl of Warwick, with all the pre-eminences[1] and rank of premier Earl of England. Yet, notwithstanding this last patent to Richard Neville, Edmund, and Jasper Tudor were created—the first Earl of Richmond—and the other Earl of Pembroke, in the 31st of Henry VI. " with precedence immediately after the Dukes of the Kingdom, and before all Earls.[2]

Henry VI. also created Henry Beauchamp Earl of Warwick, Duke of Warwick, by patent, with place, and seat in Parliament and Councils, and elsewhere immediately next to the Duke of Norfolk, and before the Duke of Buckingham, *in prejudice of the patent before granted to the Duke of Buckingham*;[3] and other instances could also be cited from the third Report of the Lords Committees.[4]

[1] Third Report of the Lords Committees, 231.
[2] *Ibid.* [3] *Ibid.* 228-9. [4] *Ibid.*

Some are disposed to undervalue these precedents, from their occurring at an unsettled and turbulent period; but it cannot be denied, that they passed, and had effect; neither were the Lancastrians greater sticklers for prerogative than their successors, by whom, as will be seen, the same thing was done; and after all, the notions and impressions of the present day—too often, however, brought into play in such matters—are but a bad criterion for appreciating facts of antiquity. Upon the whole, therefore, it seems rather difficult to deny the right which is conferred in such explicit terms, upon the patentee, and his heirs, in the Devon patent, by means of the clause under consideration. And it may be further contended, that the preceding are far greater stretches of the King's prerogative, being elevations of Peerages to precedences, that they never, in any shape, held before; while the Devon patent only carries the precedence formerly inherent in the old Peerage of Devon, and in favour of one who was the male representative of the family, as well as possessor of the estates—in reality, but a very equitable measure, and naturally called forth by the circumstances of the case.

Perhaps no bad example, in this respect, of the transcendant power of the Crown, may be the instance of an erroneous summons to Parliament—that is to say, of one summoned to Parliament as heir-apparent to an old Barony, but who in fact was not so; the summons, although proceeding upon

false grounds, yet operating as a new creation of the Peerage *with the old precedence* belonging to it, not only to the individual, but to his heirs-general. The doctrine was recognized in the cases of the ancient Baronies of Strange and Clifford, in the years 1736 and 1737.[1] It therefore may be again argued that, if the Crown have been found capable of acting so efficaciously in such very exceptionable circumstances, its prerogative must be much more indisputable in the Devon case, where the procedure was faultless and accurate, without any misconception as to the right, or person of the grantee.

The British Solomon, after the example of his Royal predecessor, in the noted claim to the Barony of Abergavenny, ordered the subject of dispute to be cut in two pieces, and granted it under different titles, Abergavenny and Despenser, to two competitors respectively, *together with the old precedence* in each case. Unless, as a pure exercise of prerogative, and as akin to what has been shewn, it is impossible to explain this act of his Majesty, which Sir Harris Nicolas, and the Lords' Committees remark, could not be in accordance with common rules and legal principle. This case naturally enough embarrasses the Lords Committees, who maintain that it was not a decision on the question of right, and "that the proceedings terminated in a compromise between the parties."[2] It may not, certainly, have

[1] See Cruise, Dignities, 225-33-4.

[2] Third Report of the Lords Committees, 216.

been a decision of right—and this is just a further illustration of the present argument, which is exclusive of such consideration; but, with all submission, there is no mention in the procedure of any compromise; and indeed it is very obvious that no private agreement between the parties could have influence upon honors.[1] The House of Peers immediately after the Royal determination, were quite acquiescent, and admitted, without scruple, into their ranks, the nominees of the Crown, with the precedence conferred upon them.[2]

James I. followed the same course, in the claim of the Barony of Roos, which he split into two Peerages—the one that of Lord Roos—and the other that of Lord Ross of Hamlake, with the ancient precedences in both cases; and, in the Royal warrant, enforcing his pleasure in the 14th year of his reign, he proceeds on the ground, that all honors "flow from the sovereign power of princes," and that "the admission, and allowance of honors do rest in their grace and favour."[3] The power of the King, in this respect, was again tacitly admitted, as before, without any cavil, or opposition. As it is clear that *one* of the parties, in both of the above cases, could not possibly have any right, they are much to the same purport as the erroneous sum-

[1] See L'Isle Report, 389, and previously, for an account of the case; and first Report of the Lords Committees, 436, *et seq.*

[2] Lords Committees third Report, 438.

[3] It is inserted at full length in Collin's Precedents, 172.

monses to Parliament that have been noticed—for here a stranger, in like manner, must have been allowed to hold on ancient Peerage, and precedence at the mere will and fiat of the Sovereign.

The nobility, however, were disposed to be restive, when Charles I. conferred the dignity of Baron and Baroness Stafford upon Sir William Howard, and his wife, the heiress of Stafford, with the precedence that had belonged to the old Barons of Stafford, whose honors they could not claim. All discussion, however, was avoided by Sir William's elevation to the higher dignity of Viscount Stafford; and, notwithstanding something of the same kind occurred when his Majesty created Viscount Wallingford, Earl of Banbury, with precedence over certain Earls, his seniors; the Earl continued to enjoy that precedence down[1] to the very moment of his death.

That the right in question has, at least, been exercised by the English Kings, and is not foreclosed by any decision, is, therefore, indisputable; and certainly more precedents and authorities can be appealed to in its behalf, than were adduced by the Devon claimant, to support the conceived broad signification of heirs-male. It may, indeed, for the most part, be a harsh and unjustifiable exercise of the Royal prerogative, which is a good motive for change or amendment; but still, in the present situation of things, it might be possibly going too far to deny it

[1] L'Isle Report, 267-8, and Cruise on Dig. 281.

retrospective effect, especially in a case of such antiquity as that of Devon.

II. *Scotch Doctrine and Practice as to Grants of Precedence in the case of Honors.*

The idea was started in the course of the Devon discussion, that the laws of the two countries were originally similar in many respects—which was a principal reason for appealing to Scottish practice, in elucidation, as was supposed, of the meaning of "heirs-male;" and if really here admissible, it will be found with far greater force to confirm the notions, thus stated, that have been entertained in England. There can be no doubt, that the King, in Scotland, was the fountain of honor, in every respect, and availed himself of the privilege more largely, as will be shortly seen, than had been the general custom in the former country. His prerogative, in the case of honors, especially with regard to precedences, while it has hardly ever been questioned, was unlimited; and if, at any time it failed to be exercised, as in the instance of Lothian, by James II., it was not owing to any legal obstacle, but to special relinquishment upon the part of the Sovereign.

The principle of the feudal law was admitted, as laid down by Craig—an eloquent, and able expositor of the general law of fiefs, but what is strange

enough, little to be depended upon as an elucidator of the peculiar practice of Scotland.[1] He expressly styles the King "nobilitatis fons," adding that it is in his power, "nobilitare quem velit;" and says again, "quod princeps nobilitatis *omnis* est fons."[2] We have seen, from the procedure in the case of Eglinton, that James VI. decidedly adopted the notion; and the right in question was freely acknowledged to be in the King by the Court of Decision in 1633, in the case of Oliphant, to be afterwards adverted to. It would be needless to accumulate authorities upon so plain a point. The noted question of precedency between the Earls of Sutherland, Crawford, and others, towards the end of the seventeenth century, was *remitted* by the King and Parliament to the Court of Session; and the only time that any cavil was raised against the King's prerogative in this respect, was subsequent to the creation of Andrew Fraser of Muckwell, and Stainewood, as Lord Fraser, by patent,[3] on the 29th

Reg Mag. Sig. Lib. 54, 138.

[1] For legal proof of the parentage of Craig, which is accidentally misconceived, in the life lately published of that eminent person, see Appendix, No. IV.

[2] *Lib.* I. *Dieg.* 10. § 16.

[3] It is not surprising that the title of Lord Fraser, so indicative of chieftancy over the Frasers, should have given umbrage to the opulent and powerful families of Lovat, and Philorth. What was the particular motive for the creation does not appear. It has been supposed that the family of Muckwell were a branch of Philorth, probably from contiguous property which they held, in Aberdeenshire, and that they could not instruct their pedigree

See Wood's Edit. of Douglas, v. i. 607.

of June 1663. Some then had presumed, " so far to slight and contemne his Maiestie's patent, and royal pleasure therein exprest, as by their discourses and writings to give other names and designations than what are contained in the patent;" but this had merely the effect of calling forth an Act of Parliament on the 24th of June 1662, which after the above recital, " and considering that his Majestie is the *fountain and spring of all honor* within his dominions, and that such doings are hie neglects, and contempt of his Majestie's Royal prerogative," &c. " declares that the Lord Fraser is, according to his patent, to have and enjoy the tytle of Lord Fraser, and discharges all his Majestie's subjects, that none of them presume in discourses, writings, or otherways, to give him any other title,

Acts Parl. v. vii. 379.

farther back than three centuries. But this is a mistake; Aberdeenshire was not their original residence; and the family were of far greater antiquity. Independently of being proprietors of the Barony of Staneywood in 1494, it is proved by an authentic charter, 28th of October 1454, that James II. then exchanged the lands of Staneywood and Muckwells, in Aberdeenshire, with the representative, for the lands of *Corntoun* near Stirling, their previous property. This, therefore, has been the cause of their quitting the fertile fields of Stirling, and removing to the North. In a deed in the Errol charter chest, " Thomas Fraser of *Corntoun*," figures as far back as 1384. The descent of this line of the Frasers, has obviously been overlooked, and may be a fit subject of enquiry to genealogists. Their first appearing in Stirlingshire, is, by no means an unfavourable circumstance, that being a county where the Frasers anciently were very powerful, and indeed held the office of Sheriff.

Act. Dom. Con. 353. Ibid, Lib. 15, 40 b.

or designations, as they will be answerable at their heist perrell."

To allude to instances of the exercise of the prerogative of the Crown parallel with that of Devon, the case of the Dukedom of Buccleugh may be first noticed, which, on account of curious specialties in other respects, it may be proper to discuss at some length.

Reg. Mag. Sig. Lib. 58, 327.

James, Duke of Monmouth, eldest natural son[1] of Charles II., on the 20th of April 1663, was raised to the dignity of Duke of Buccleugh, Earl of Dalkeith, &c., with remainder to himself and the heirs-male of the body between him and Ann, Countess of Buccleugh, his wife, &c.

Ibid. Lib. 61, 172.

On the 16th of January 1666, the Duke and Duchess, upon their resignation, obtained a re-grant of the honors, together with the family estates, (which was not unusual in Scotland at the time,) whereby the titles of Duke, and "*Duchess* of Buccleugh," Earl, and "*Countess* of Dalkeith," &c., "with all

[1] He is here called the King's natural son. In the Appendix to Haniper's life of Dugdale, p. 495, there is a curious paper by Dugdale, intimating that in the Duke's patent as Duke of Monmouth, he was not so designed, which he deemed a deficiency. He adds, that Charles II. afterwards ordered that all his children should be called Fitzroy. In a MS. copy of the productions of the nobility for their ranking in 1606, in the Advocates' Library, there are these words:—"What place or precedence the Duke of Buccleugh has, is not yet determined," apparently added in the reign of Charles II.

pre-eminences, privileges, and liberties whatsoever belonging to the same," are conferred upon each *respectively* during their lives, " et hæredibus masculis inter illos procreandis," &c. In consequence of this novodamus, the Duchess of Buccleugh came to be a Duchess, &c., in her own right, and to have as great an interest in the title of Duchess of Buccleugh, Countess of Dalkeith, &c., as her husband, in the corresponding dignities of Duke, and Earl, along with the precedence under the first patent. It was of no moment that the right, previously in her person, was only through her husband, for he, at the same time, resigned, and the power of the Crown was such as to enable it, in these circumstances, to make it real and more comprehensive. Indeed, the same thing had occurred before, in the case of the Earldom of Buchan. James Erskine, Earl of Buchan, by the courtesy, in right of Mary, Countess of Buchan, his spouse, having along with her resigned that Earldom, they thereupon obtained a re-grant, in virtue of which, both he, and his collateral heirs-male, although no ways related to the Countess, (including the present family,) now hold the dignity. In 1617, & 1625. See afterwards.

Subsequent to this, in 1685, James, Duke of Monmouth and Buccleugh, was convicted of high treason, and beheaded, which not only forfeited *his* Dukedom of Buccleugh, &c., but also, according to the stern and severe principles of our treason law, the right accruing to the male issue, in consequence of the grant of the honors in 1666 to *their mother*. For

this we have the best authority, that of Sir James Stewart, advocate to King William, who lays it down, "If a man, having children by an heiress, come to be forfeited, the children must be *rehabilitate* (restored) before they can succeed *to her*."[1] This is the precise case of the family in question, excepting, what is worse for the children, that they are included in a limitation directly connecting them with their father. The blood of the traitor in the children prejudiced their rights also, and, without legal purification, obstructed every kind of heirship; and if such obtained in the ordinary course of succession, it must obviously apply *a fortiori* in honors. Further still, as our ancient law admitted no saving on the ground of remainder, as in England, all that survived the forfeiture was the personal right of the Duchess in her own titles, who was noways affected by it; and who, while "inflexible," as Dr. Johnson states, "in her demand to be treated as a Princess,[2]" took

[1] Stewart's Answers to Dirleton's Doubts, 123.

[2] See his Life of Gay, whom the Duchess patronized; Works, v. x., 238. It would be absurd, after the well-known solemn declaration of Charles II. to the contrary, and other circumstances, to question the illegitimacy of Monmouth. He himself, however, was deluded into that idea, as asserted by Sir Patrick Hume; and it is stated in Fountainhall's Diary that he not only, during his last attempt, assumed the Royal dignity, but touched for the King's evil. The only adminicles that could give consistency to such a supposition are two letters in 1655, in Thurlow's State Papers, v. i. 665, (alluded to by Mr. Rose), from the Princess of Orange to her brother Charles II., in one of

Rose's Observations on Fox, 191.

Ib. 13, note.

every opportunity, and with success, of vindicating her innocence. Rose's Observations. App. No. 8. &c.

But to remedy a defect, which, however harmless to herself, would have degraded the family, and have sunk the honors of Buccleugh as completely as those of Monmouth at the present moment, she, in 1687, resigned her honors of *Duchess* of Buccleugh, *Countess* of Dalkeith, &c., and thereupon obtained a regrant of the same "cum omnibus precedentiis proprietatibus, pre-eminentis et libertalibus quibuscunqe ad eosdem pertientibus," to herself, and after her death, "Jacobo Comiti de Dalkeith, ejus filio natu maximo," (he thus taking *nominatim*, and in a new character,) and to the heirs-male of his body, &c. This was a wise and effectual step, because the same legal authority who has been quoted, while he denies that, in the ordinary course, the children of a traitor can succeed to their mother, yet admits, however doubtful the point may be, that there is no law, even in the case of the traitor surviving, to prevent the mother, an heiress, from disposing of her inheritance. The objection, in this alternative, must arise from

Reg. Mag. Sig. Lib. 70, 336.

123, *ut supra.*

which, in particular, she says,—"your wife desires me to present her humble duty to you, which is all she can say. I tell you this, because she thinks of another husband," &c. In the introduction to Burton's Diary, v. i. 146, note, there is this notice, referring to Whitelock, that the protector by warrant, to the Governor of the Tower, "had discharged Mrs. Lucy Barlow from imprisonment, she had a young son with her, that she publicly declared to be King Charles' son, and that she was his wife." Lucy Barlow, or Waters, as is well known, was mother of Monmouth.

the survival of the husband, who, if alive, should consent to her deeds, but if a traitor, cannot do so, because *nullus in lege*. But every scruple upon this ground being removed by the decease of the unfortunate Monmouth long before, the Duchess, in 1687, had become perfectly a free agent, and could resign her honors, or do any other act by which she might make herself entitled to the favour of the Crown; and accordingly, the Crown having accepted her resignation,[1] and extended the succession of her honors, with their former precedencies, to the male issue, every obstacle was removed in the way of their succession; for the very re-grant, according to our notions, implied a rehabilitation, not, indeed, retrospectively, but enabling them to take in a new character, which was all that was further wanted.[2] The

[1] It bears in the charter to be "*in manibus nostris, i.e.* of the King.

[2] The warrant of the charter, in 1687, under the sign manual, is still extant in his Majesty's State Paper Office—hence the charter proceeded upon proper powers. It is singular, that neither it, nor the previous one in 1666, are noticed by writers, although the state of the Duchy of Buccleugh has been the subject of discussion among lawyers. The first patent in 1663, is clearly struck at by the forfeiture, and its limitations are evacuated, but then its precedence, *previously* handed over to the patent in 1666, in favour of the Duchess, is legally reconveyed to her, by the last, in 1687, which also introduces the male issue. By the introduction of the English Treason law, at the Union, our old law of forfeiture is necessarily altered, and the children of one in the situation of the Duchess, would now succeed at common law, as in the case of the Earldom of Errol, and other precedents.

children of the Duchess were, besides, subsequently rehabilitated, with various persons, in 1690, by an act which must apply to every thing except forfeited honors; and which, as the Duchess did not die until 1732, would also in the same view be effectual. In these circumstances, the family of Buccleugh have not only held the Buccleugh honors, but also the very precedence, through the medium of the re-grant in 1687, that had been originally conferred by the first patent of the Dukedom in 1663; and, accordingly, have been always ranked without dispute, before the Dukes of Lennox, Gordon, and Queensberry, whose Dukedoms were respectively created in the years 1673, and 1684. This, therefore, shews that the Crown, by a later patent, similar to that of Devon in 1553, could bestow a precedence anterior to its date; nay even the very precedence of a patent that had been superseded by forfeiture, and other causes.

Act. Par. v. 9, 164.

It might at first sight seem strange that the descendants of the Duchess should hold the titles of Duke of Buccleugh, and Earl of Dalkeith, under a charter or patent in 1687, only, of the dignities of *Duchess*, and *Countess;* but this is quite immaterial. Even in our days, it is believed, a patent of the title of Viscountess or Baroness, to a female and her heirs, will carry the corresponding male dignity to her son; and there are in Scotland, patents of the title of Earl "to heirs whatsoever," under which females have succeeded as *Countesses*, which, it must be admit-

ted, is a parallel case; for if in the one the grant of the title of Earl can make a female a Countess, the grant of the title of Duchess in the other, may clearly make a man a Duke: nay, the title of "Duke of Montrose," is also, by a patent, dated 24th April, 1707, through the operation of a previous one of the Marquisate, limited to females, who, there can be no doubt, would be Duchesses of Montrose, in their own right, in the event of the failure of the male heirs.

Reg. Mag. Sig. Lib. 23, 212.

After the forfeiture of the Hamiltons, Earls of Arran, Lords Hamilton, &c. in 1579, these dignities were conferred, as formerly shewn, upon Captain James Stewart, and the heirs-male of his body; and the patent, which is dated 28th of October, 1581, has a clause ordaining "predilectum consanguineum, &c. judicare, et censuram habere in Parliamentis generalibus consiliis, &c. ita ut quilibet alius Comes seu Parliamenti Dominus habet, vel habere potest infra nostrum regnum, et signanter *eundem locum, seriem, ordinem, et gradus, quos Comites de Arrane, et Domini de Hamyltone quovis tempore habuerunt.*" The Patentee was far, indeed, from being the representative of the family of Hamilton, yet, by the force of this clause, which is to the same purport as that in the Devon patent; he, thereafter, was ranked in Parliament, and Privy Council, not according to the above date in 1581, but far above it.

Reg. Mag. Sig. Lib. 35, 454.

Acts of Par. and Books of Privy Council for the time.

Archibald Marquis of Argyle, so celebrated in the time of the Commonwealth, being tried, and con-

victed of high treason in 1661, his honors became forfeited to the Crown; but Charles II., on the 10th of October 1663, granted a patent of the dignity of Earl of Argyle to Archibald his son, (who had been forfeited, but pardoned,) and "his heirs-male, and successors, cum prioritate, et precedentia, *sicuti eadem dignitas possessa et gavisa fuit* per prefatum quondam ejus *avum, aliosque ejus predecessores Comites de Argyle.*" The "*avus*," here mentioned, was Archibald Earl of Argyle, father of the traitor, whom the Crown passed over, on account of his attainder; and immediately thereafter, solely in virtue of this patent, the patentee is ranked in Parliament, according to the precedence of the ancient Earls of Argyle.[1] This instance is every way much akin to Devon; the father of the Devon Patentee having been also a Marquis, but the dignity, forfeited in both cases, was withheld from the issue. Reg. Mag. Sig. Lib. 58, 340.

If, therefore, in the Devon case, it is an objection that previous forfeiture obstructed the descent of the ancient precedence, it may be obviated by the above instances, as far as Scotch authorities can go, for it cannot be denied that they are precisely similar in all essentials.

Neither in the case of resignations, and regrants of honors, carrying the old precedence, did the failure of the family itself, operate as a bar:—This brings the matter nearly on a level with the case of

[1] Act. Par. v. 7. 530-6-9, for the years 1665-7.

Devon, for here, literally speaking, the ancient creation was as completely voided, as it could have been by forfeiture. Mary Douglas, Countess of Buchan in her own right, married James Erskine, son of the Earl of Marr; and they obtained, upon their resignation, (in the very same way with the Duke and Duchess of Buccleugh, as formerly noticed,) a regrant, dated 22d of March 1617, of the Earldom of Buchan, with " all honors, dignities, and precedences—in omnibus nostris parliamentis, statuum conventionibus, &c.—quas Comites Buchanie ex antiquo exercuerunt, seu possiderunt," to each respectively, during their lives, and to the heirs-male of their bodies; whom failing, to the *heirs-male and assigns whatsoever of James the husband.* Another charter passed to the same effect in 1625; and in terms of both, the honors, with the old precedence, are now held by the present family, who are noways connected with the Countess—whose male issue have failed, but are merely Earls of Buchan in virtue of the last limitation.[1]

It is further remarkable, that upon these titles, as Lord Hailes observes, the Countess and her husband obtained a decreet of the Court of Session, on the 25th July, 1628, reducing the decreet of ranking in 1606,—whereby the Earls of Eglintoun, Montrose, Cassilis, Caithness, &c. had precedence before the Countess, and giving her the *pas* before the existing

[1] Sutherland Case, Chap. V. sect. 15, 64-5.

holders of these Earldoms, the youngest of which, in point of date, was not later than the very beginning of the 16th century.[1]

The case of the Barony of Sinclair is to the same effect, and other precedents of an analogous kind might be added. The instance of Angus, to be afterwards stated, will also, upon another ground, tend additionally to illustrate the subject.

We had also, in Scotland, a parallel case with the precedents of Abergavenny, and Roos in England, although not in the reign of James I., but of Charles his son. The ancient Barony, and Peerage of Oliphant, had been created about the middle of the fifteenth century, but, like all our early Baronies, with the exception of Hamilton, its original constitution, is not preserved.[2] Hence, on the death of Laurence Lord Oliphant, previous to 1633, a question arose between the heir-male, and the heir-female, as to the right to the dignity, which was discussed in the Court of Session. Lord Durie, one of the Judges at the time, has given a report of the case, which he informs us, was debated before Charles I. who happened to be then in Edinburgh, on the occasion of his coronation. The Court had no hesitation to

Vide Pp. 74-5.

Dec. 685.

[1] Ibid.

[2] On this account, it is impossible to rank our old Baronial Peerages correctly. It may be observed, that we had no hereditary Lordships of Parliament, until about the reign of James II. The Baronial Peerage of Saint John, as has been shewn, was attached to the fief, and not hereditary.

find, contrary to " Lord Mansfield's law"—that the presumption was in favour of heirs-female; but as there had been a resignation of his honors by the last Lord, they decided, that this was enough to denude him and his heirs, until the King should declare his pleasure. The subsequent determination of the King is stated by Sir James Dalrymple, (there being a chasm in our records at the time) that the heir-male should have the title of Lord Oliphant, and the heir-female that of Mordington, which their respective descendants have accordingly borne, with the precedence of the old Lords Oliphant. This resolution, therefore, was quite in accordance with that in the English cases above-mentioned; and hence, the same conclusion may be drawn as to the right of the Crown freely to dispose, without restraint, of the ancient precedences of dignities.

Coll. 396.

It is not extraordinary, that such procedure should not be to Lord Mansfield's taste; and he, therefore, has keenly attacked it, in his speeches, both in the Cassilis, and Sutherland claims, in his usual strain of assumptive argument. He says, there was no evidence whatever of the original constitution of the dignity, nor does the reason appear why the heir-female was preferred. Undoubtedly, as has been observed, the creation is not extant, and owing to the defect of our records, already noticed, we are debarred from a full detail of the proceedings; but, with all submission, the ground for the decision as to females, *is specially stated,* which turned upon a

Speech in the Cassilis Case, *ut supra.*

natural, and not arbitrary presumption of law. Besides, actually enjoying the dignity himself, the ancestors of this Lord had invariably held it; and, although there was no writ of creation, with limitations, yet the Court found, while they held Peerages, inter *regalia*, that "this use was enough, conform to the laws of this realm, to transmit such titles in the heirs-female"—a fair and admissible principle, especially as by our practice, such Baronies had previously descended to females; and it will be moreover observed, that this is the very law also adopted in England, in the case of old Baronies, which have as little any words of limitation to govern them.[1] Lord Mansfield next exclaims against the propriety of the act of resignation, and the relative finding. But whatever doubts may be here as to the state of the title after the resignation, there was nothing surprising in the notion entertained, it being a palpable remnant of the feudal usage, which, as Lord Brougham observes, prevailed far later in dignities. Nay, even much the same thing was found in 1707, in the case of Kincardine, which Lord Mansfield does not choose to notice, where it was decided that resignations of honors did not become void, and null by the death of the granter, but might be afterwards perfected at the option of

See Durie's Report, Decis. 685.

Ibid.

Devon Case, 105.

Fountainhall, March 28, 1707.

[1] It will be remembered that the present is the case of an old Barony, constituted in territorial times, and not created by Patent, where a different rule, and presumptions apply.

the Sovereign: and further as to the objection in other respects, our records might have undeceived Lord Mansfield, had he taken the pains to examine them, abounding, as they do, with resignations of all kinds at the mere will of the party, without any restriction whatsoever; the check did not lie there, but in the admission, or veto of the Sovereign. Finally, as a last effort, he has recourse to a violent hypothesis, and notwithstanding Lord Durie—no bad authority one would think—being not only an eminent lawyer, but also one of the presiding Judges, informs us that his Majesty *was* present, he yet chooses to be sceptical as to the fact—evidently with the view of disarming the precedent of its force.—He "rather thinks," forsooth, "it was the Lord Advocate on behalf of the King," and not the King who was there; from all which cogent reasonings his Lordship somewhat pettishly exclaims, "I therefore pay no regard to that decision."[1] It is much to be regretted

[1] The very words of his Lordship, together with those that have called forth the preceding observations, shall be here given literally from his speech. "There is no authority to presume otherwise than in favours of the heirs-male, except in the case of Oliphant determined in 1633, but *I pay no regard to that case.* It don't appear there was any evidence whatever of the original constitution of the dignity, nor does the reason appear, why the heir-female was preferred to the succession. Besides, there are two points determined in that case which are manifestly wrong, and against common sense. 1st, A man resigns upon condition that a new grant may be made in favour of particular heirs. The Lords say he has lost his fee, and the King may keep it; and,

Speech in the Cassilis Case, *ut supra.*

that one so eloquent and distinguished has been so greatly warped by prejudice in all that regarded Scotch Peerages, and that instead, like Lord Hailes, of exploring the purer sources of information, he should have indulged in crude notions, and empty, and unfounded assumptions. It would be rather going too far into the Pythagorean system to suppose, that his Lordship had possessed such expanded powers of ubiquity as to be a rival testimony with Lord Durie; and, as might naturally be expected, there cannot exist a doubt that Lord Durie is right, and his Lordship again at fault; as is evident from the following excerpt of a letter from an Advocate in Edinburgh to his friend in the country, the very day before the Oliphant decision.[1] "This day his Majestie cam from Falkland, to Halyrudhous, be the ferrie at Brunteland, quhere, in his awine schip, accompanyit with a great number of bottis, the see

2dly, they say a Peerage might be surrendered without the King's leave. I therefore pay no regard to that decision. It has been said the King was present, but I rather think it was the Lord Advocate on behalf of the King." The expressions in Lord Durie's report, in reference to the effects of the resignation, are, that "it was found enough to denude *himself and his descendants, ay, and while (until)* the Prince should declare his pleasure, and either confer the honour on the pursuer or defender, at which time the act would take perfection." Durie, 686.

[1] It is the same original letter, formerly referred to, in respect to the Airth Patentee. According to Lord Durie, the decision was on the 11th of July 1633, and the letter is dated 10th of July 1663. Vide p. 41, *note.*

beeing sumquhat ruche, his Majestie happilie cam to Leith about twa in the efternone. Bot the silver vessellis with sum of his servandis preponit to the cair yerof, cuming efter in a prettie oppine bott, being mor nor midd firth, be a sudden, and unexpectit storme of wind, wer driven under and perischit. *His Majestie* TO-MORROW *is to heir a dispitt, in the matter of the tytill of the Lord Oliphant,* betwixt Sir James Dowglas and the Lord Oliphantis broyer sone, Mr. Lewis is for him, and Mr. Thomas Nicolsone for Sir James and his ladie,[1] quha is heir of

[1] The Lord Oliphant was rather a curious character; by the resignation of his titles, and estates, in favour of his next heir-male, whose name was Patrick, he unnaturally cut out his only child, the lady here mentioned; and how he treated Patrick on a previous occasion, will be seen by the following autograph letter of the first Lord Haddington, to James I. on his arrival at Berwick in 1617.

" Most sacred Soverane,

Advocates' Library. " Since my last, we are advertised that the Lord Oliphant having consaved ane desperat malice againis Patrik Olifant, his neirest kinsman, and heire apparent, without any discourse, or denunciation of his evill will, enterteaned him in his howse, and at his table, with such familiaritie, and freindlie countenance, as became men so neir in blood, till Wedinesday last; that having souped together in *Dipline, and standing in the hall before the fyre, efter they had sowped, Patrike's doublet and cloathes being lowse, the Lord Oliphant, upon the suddane, without any schew of displeasour in wourdis or countenance, gave to Patrik ane great and dangerous wound in the bellie, which is judged to be

* Duplin, an ancient seat of the Oliphants, acquired by the Kinnoul Family in the same century.

lyne, and my Lord Advocate for the King. *They have taken great paines to prepair thameselfis*, swa yat we think it sall be a creditable dispitt."[1] The intimation is the more important, as we thus find that it was no hasty proceeding, but that the first rate, and most distinguished lawyers, after being fully prepared, had engaged in the discussion. Such, indeed, were Sir Thomas Nicholson, the Lord Advocate (Sir Thomas Hope), and Mr. Lewis, afterwards Sir Lewis Stewart, a great antiquarian, all of whom are panegyrized by Sir George Mackenzie in his eloquent *Characteres*,[2] who further styles them the "*triumvirate*" of the Bar. Yet under such circumstances—and in a century which, as Mr.

most deadlie; as yet, we have not assurance of the gentilman's death, but none that have sene him think he can leive; the malefactor is fugitive, and if the patient die, it is thought it will equallie indanger the offender's lyfe and estate, whairin I will affirme nathing rashlie, bot only entreat your Majestie to forbear to dispose upon his escheat, or estate, till your Majestie's Chancellor cum to you at Berwick," &c. The letter affords a singular picture of the manners of the time; and we may even not uncharitably suppose, that one motive for his Lordship apprising the King so speedily of the event, was the tempting prospect, so near in view, of the escheat and estate, and the fear of being excluded by competitors; but the recovery of the wounded man has disappointed the courtiers.

[1] *Anglice*, dispute.

[2] His words are well known:—"Nicholsonus, summo cum judicio, strenue, et eleganter, causam tuebatur."—"Stewartus argumenta, penetrante doctrina, acuebat;" and as to Hope, he adds —"mira inventione pollebat, totque ille fundebat argumenta, ut amplificationi tempus deesset."

Chalmers remarks, like the reign of Queen Elizabeth in England, was the æra of great lawyers—we are merely at the suggestion of an authority in modern times, and more an English, than a Scotch lawyer, at once to shut our eyes against the facts, and to " pay no regard to the decision !"

However, too, the decision may have had the ill-fortune to have elicited the reprehension of Lord Mansfield, there can be no doubt that it was afterwards respected, and followed as a rule in that very century.

The Barony of Abernethy of Salton, in its constitution, is in all essentials the same with Oliphant, being created about the same time, the limitations unknown, and having descended in the ordinary course of law until the *direct* male line failed in the person of Alexander, Lord Salton, in 1669, but who had left nothing to inherit excepting his honors. It is hence a good test for the descent of ancient Scotch Baronies in the abstract. Now, at this moment, there were both heirs-male, and heirs-female in existence, equally descended from the body of the first Lord; in particular, Sir Alexander Fraser of Philorth was the heir-general through his mother, Margaret Abernethy, the aunt of the last Lord. If Lord Mansfield's law, therefore, had at all been recognised, this Peerage should have devolved upon the heir-male; but no such thing, it descended as a matter of course, by the mere operation of common law, and agreeably to the Oliphant principle, " that use was enough, conform to the laws of this realm, to transmit such titles

in the heirs-female" to Sir Alexander. This is fully instructed by a confirmation of Charles II. in 1670, as was not unusual by our practice in cases attended with no doubt,[1] which directly admits the Peerage to be in him and the heirs of his body, as "*next in blood*" of the said family, "AND CONFORME TO THER RIGHTS THERTO." Accordingly, the Peerage has ever been held without dispute by the family of Philorth; and, with the old precedence, is now in the person of the present Lord Salton, the lineal representative, who clearly, were we to admit Lord Mansfield's law, could have no right. It is not a little remarkable, that Lord Mansfield, while he snatches at any straw that has the semblance of buoying him up in his unsupported notion of the exclusive preference of the male succession in Baronies, never for a moment adverts to the case of Salton; and while

Acts Par. v. viii. 33.

[1] Thus, in the case of the Earldom of Calender, after a nomination to his honors executed by the Earl upon full powers, there is a Royal confirmation; but the former, like sundry other admitted nominations, would have been quite good without such interposition.

Reg. Mag. Sig. Lib. 38, 85.

The Salton confirmation was also ratified by a private Act of Parliament, but every one knows what is the effect attached to such ratifications. They passed without voting at the last hour of Parliament; and, as Erskine observes, "barely confirm that which was formerly granted, without adding any new strength to it by their interposition." Besides, in this very case, there passed an Act *salvo jure cujuslibet*, after the ratification in question, which kept all things open; and, indeed, the Act itself merely confirms the Peerage to the individual *conforme to his rights.*

Inst. B. 1. tit. 1. § 39.

his prejudices seem to shut his eyes against plain and actual fact, in his very speech in the Cassillis case, immediately after depreciating, and disowning that of Oliphant, which was so solemnly, and competently argued,[1] he even goes so far as to eulogize the *very anomalous* precedent of Lovat, because it was in favour of the heir-male; and not only so, but he actually asserts that it "is a good authority," and that "the case was long argued, and maturely considered!" but, with all submission, every one who knows any thing about the matter, and who has looked into the question, which was subsequent to the Union, must agree in the just, and pointed remark of Lord Hailes, that it was tried "by a most incompetent court, and upon pleadings *incredibly loose, and inaccurate.*" To such stretches is his Lordship driven in his attempt to maintain a favourite, although unfounded theory.

Suth. Case, c. vi. 96.

With respect to resignations and re-grants, which, ever since the case of the Viscounty of Purbeck, have

Anno 1678.

[1] The following are the observations of the late Sir Ilay Campbell, President of the Court of Session:—"The case of Oliphant was tried in the Court of Session, 11th July 1633, the *King himself being present*, as we see from Lord Durie's report of the decision, the Parliament at the same time, sitting under the same roof, the Lord High Chancellor at the head of both; and the Court, partly composed of high officers of the Crown, some of whom were members of Parliament *ex officio*, besides extrordinary Lords chosen by the King, who were generally Lords of Parliament. In such circumstances, *is it possible to conceive that such a proceeding would have been held at all, had there been the smallest objection to the competency of it?*"—*Preface to Acts of Sederunt*, xxv.

been disallowed in England, it cannot be denied that the practice with us has been carried too far. By means of them, the heirs under the original patents were excluded from the succession; and nothing can be more objectionable than the custom, the first trace of which we find in the Berwick patent in 1604, of giving parties power to nominate heirs to their titles, which, together with the old precedence, devolved upon the assignees. The Crown occasionally made a stand against it, as in the case of the Earldom of Menteith; but still the absurdity continued, and came even to be allowed *in articulo mortis*, and in reference to strangers. In this way a nobleman, in the decay of his faculties, might even have nominated his sick-nurse, or attendants; and it was said of a nautical Lord, who had the privilege in question, and was liable to great fickleness in its exercise, that he was in the habit of "creating a Peer at every port."

It is, therefore, not going too far to affirm, that Peerage resignations ought at all times to be strictly interpreted; and, in this view, the propriety of the decision of the House of Lords, in the case of the Marquisate of Queensberry, must be obvious, whatever doubts may be entertained upon other grounds. There can be no question that James, Duke of Queensberry, at the time of the Union, intended that his estates and honors should descend in the same way; and he then executed two separate resignations of both, in favour of certain heirs-male, who are now extinct; with remainder to certain heirs-female, of

whom the Duke of Buccleugh is the nearest, and in this character now unquestionably holds them. In the instrument of resignation of his dignities, however, although the Duke specified the Dukedom of Queensberry, and Earldom of Drumlanrig, he yet did not mention the titles of Marquis of Queensberry, and Viscount of Drumlanrig, &c., which, by previous patents, were respectively limited to heirs-male bearing name and arms, and heirs-male whatsoever. The patent or re-grant, therefore, dated 17th of June 1706, which was in terms of the resignation,[1] while it clearly vested the higher dignities in the Duke of Buccleugh, was held not to carry the latter, although it contained a general clause, that the *new* heirs should not be prejudiced in *whatever* precedences, pre-eminences, *titles*, *honors*, degrees, ranks, and *dignities*, that had been formerly granted, in any way, to the Duke, (the resigner), or to his predecessors; and there is none reserving the Marquisate of Queensberry, or Viscounty of Drumlanrig. Accordingly, these titles were adjudged to Sir Charles Douglas, the collateral heir-male to the Marquisate, and the lineal heir-male to the Viscounty—the former having been limited to heirs-male *whatsoever*,[2]

Reg. Mag. Sig. Lib. 82, 86.

July 12, 1812.

[1] Both it and the resignation upon which it proceeds, relate exclusively to the honors; the estates were transmitted by other deeds.

[2] By Patent, 11th of February 1682; Reg. Mag. Sig. Lib. 9. 62.

and the last to heirs-male,[1] bearing the name and arms, &c.

In ancient times, when a Baronial fief had been erected into a Comitatum, or Earldom, we heard no more of it under its former designation, which was regarded as sunk and superseded, in consequence of the new one. This principle appears to have been received into our Peerage-practice, and to have given rise to the notion, that the original dignity was lost, when the title had been again conferred upon the family, with a higher rank in the Peerage, although still retaining the prior denomination;[2] and that it was necessary, in such emergency, when it was intended that the first should still exist—independently of the latter, to throw in a clause of reservation, or protection, to that effect. Thus, in the patent, 29th of May 1680, creating John Earl of Rothes, *Duke* of Rothes, to him and to the heirs-male of his body, there is the following proviso:—" Declarandо omnimodo—quod presens hæc litera nostra *nullomodo prejudicabit* titulum, honorem, et dignitatem *Comitis de Rothes* et diplomata ejusdem dicto Comiti, ejusque predecessoribus competentia, et concessa, ita quod hæredes talliæ et provisionis dicti Johannis Comitis de Rothes, qui jus succedendi in, et ad titulum, honorem, et dignitatem

Reg. Mag. Sig. Lib. 67, 117.

[1] By Patent 1st of April 1628. Ibid. Lib. 52, 104.

[2] It is, of course, a different thing, when both the previous title and a new one of higher rank, but under the same name, are conferred together.

dicti Comitis de Rothes, "*eodem modo, et eque libere, ac si hæc presens litera nostra diplomatis nunquam concessa fuisset.*"[1] In like manner, when John Earl of Athol, on the 17th of February, 1676, had been created Marquis of Athol, there is a reservation of the title of *Earl* of Athol, and the rights, and patents of the same competent, and granted to the said John Earl of Athol, and his predecessors; and other similar instances might be cited. Nay, the same thing actually happened in the case of the Marquisate of Queensberry, when William Marquis of Queensberry was created Duke of Queensberry by patent, dated 3d November, 1684.[2] But no such reservation is to be detected in the last, and regulating patent of the Dukedom in 1706—on the contrary, as has been seen, there is one of a different tendency; from all which it might be inferred, that the previous heirs, being thus in a manner disowned, if not excluded, and without the usual protecting clause in their favour, were rather in a precarious situation. But whatever may have been the intention of the party, or the understanding of practice, they may not

Reg. Mag Sig. Lib. 6, 21.

Reg. Mag. Sig. Lib. 10, 71.

[1] There is something obviously here omitted, but the sense is self-evident.

[2] "Cum hac omnimodo, provisione, &c.—hujus nostri diplomatis concessionem, et acceptationem—*neutiquam derogare, aut prejudicare diplomati perprius ipsi, et hæredibus suis masculis quibuscunque, de titulo, et dignitate Marchionis de Queensberry concesso*, &c. aliisque titulis, et dignitatibus inibi expressis, quos, deficicientibus hæredibus masculis ex suo corpore, nequaquam prædjudicari, et innovari hoc nostro diplomate declaramus."

amount to strict legal demonstration, that an ancient dignity had lapsed, or become extinct, because it was not saved in this manner; and, therefore, it was best to lean to the side of the claimant, and to decide accordingly. The clause in the patent, in 1706, last noticed, however broad it may be, and, although referring only to honors, may be objected to from its general, and perhaps informal character, but while due attention is paid to the exception, it should not be extended too widely in the case of our Peerages, where so much is loose, and undefined, and the niceties, and precision, applicable to real succession, more especially in modern times, are not always studied, and observed.[1] There can be no doubt, however, that the clause carries the old precedency of the honors. One conclusion results from the Queensberry decision, that the descent of honors must be narrowly construed, confirmatory of observations already made.

General Remarks.

Should it ever legally be found that the Devon Patent carries the old precedence, the heir will be, in a manner, the premier Earl of the kingdom:—the dignified fief of Arundel, if it is really an exception, now merging in the Dukedom of Norfolk.

[1] The clauses in the Buccleugh Patents, merely carrying the precedency in 1666, and 1687, as has been seen, are very different, and not nearly so broad and comprehensive.

The Earldom of Devon, or Devonshire, (which is the same thing), not only existed in 1335—which would alone rank it before Shrewsbury, ostensibly the premier Earl at present; but there is reason to think, was of much higher antiquity. Although the family of Courtenay only then assumed the dignity in the person of Hugh de Courtenay, it was, by no means, in virtue of a cotemporary creation, but of a recognition by the Crown of a right derived, as heirs-general of the ancient Redverses, upon whom the Earldom of Devon appears to have been conferred previous to 1135.[1] The conclusion is the stronger, as the instrument of recognition in 1335,[2] in his favour, has no mention of heirs, or of any thing importing a limitation, which is quite consistent with the idea of the original, or Redvers creation being still in force, which, of course, rendered that unnecessary. The Lords Committees seem to admit this,[3] and that the Courtenays were thereby entitled to the precedence in question.[4]

And in fact the Courtenays would appear to have claimed it, when they disputed, in 1446, the priority of ranking in Parliament with the Earl of Arundel. Cleveland, in his history, attempts gratuitously to explain the circumstance, by a supposed descent of the Courtenays from the French Royal

[1] Third Report of Lords Committees, 177, 194. Doug. Bar. v. i. 254.

[2] See a full copy of it in Cleveland's History of the House of Courtenay, 117.

[3] Third Report, *ut supra*, 168-194. [4] Ibid. 237.

Family ;[1] as if that would have been much appreciated at a time when France had been so signally humbled by the English Barons. But, waving this, and the absence of an intermediate rank at any time in England like the "*Princes Etrangers*" in France, between the Royal Family, and the Nobility, there is certainly no necessity, in this view, to resort to such an hypothesis. The right of the Earl of Arundel was as an heir-general (although by no means the nearest) of the Albinis, who did not obtain the dignity until shortly *after* 1150—which antiquity is even questioned by the Lords Committees ;[2] while, on the other hand, as has been seen, the Earldom of Devon had been held by the Redverses (through whom the Courtenays claimed) even previous to 1134. We may hence discover the foundation of the opposition of the Earl of Devon, which rested upon the plea of an earlier creation, however, like most pleas at law, mixed up with certain specialities ; for the Earl insisted, in 1446, that the act of Henry VI., upon which his rival William Fitz-alan, Earl of Arundel, stood, and which carried the Albini Earldom of Arundel, did not comprehend him, but was exclusively in favour of John his elder brother. The period, however, was not one when such a

[1] 213, 17.

[2] For a clear, and succinct account of the Earldom of Arundel, taken from the Third Report of the Lords Committees, who enter into an elaborate statement, see Report of the *l'Isle Barony, by Sir Harris Nicolas*, 362, *et seq.*

point could be fairly and dispassionately argued, and the Judges, to whom the matter had been referred, coming to no opinion, the King, probably from motives of favour, inclined to the Earl of Arundel.[1] Yet the Sovereign's award was by no means definitive, as it contained a saving in behalf of the Earl of Devon of "his lawful suete—for his right touching the sete, and pre-eminence against the said Earl of Arundel, and his heirs—as right, law, and reason requireth."[2]

From the family of Fitz-alan the Earldom of Arundel came by female descent to the Howards, whose male representative, the Duke of Norfolk, is still less the direct heir of the Albinis, the original Earls of Arundel—being not even the heir-general of the stock of the Howards, through whom he derives the dignity; and hence this Earldom, which it has been so fashionable to extol, appears under circumstances little likely to raise it in our estimation, for while it cannot be truly preferred to that of Devon, the latter may have a claim, upon no contemptible foundation, to be considered of greater antiquity.

Were it not for the specialties formerly noticed, the Earldom of Marr, originally in the ancient Marrs —who gave a Queen to Bruce, and a Regent to Scotland—would be the most remarkable in the united

[1] Report of l'Isle Case, 428. Rot. Par. v. 5. 148.

[2] Ibid. For a refutation of the asserted royal ancestry of the Courtenays, through a younger son of a King of France, see Appendix, No. V. The Courtenays are not now the heirs-general of the *old* Earl of Devon.

kingdom. Coeval probably with the commencement of the twelfth century,—and "whose origin," to use the words of Lord Hailes, "is lost in its antiquity;"[1] it descended to Isobel Douglas, through Margaret of Marr, her mother; and in her person undoubtedly, was the lineal and legal representation, along with the ancient dignity. Owing to her decease, without issue, the Erskines—according, at least, to the *English* notion, became in their turn the unquestionable heirs, and representatives; which *status* is also in the same way vested in the present Earl of Marr. If it shall be held that the same principle also then prevailed in Scotland, there can be no doubt—especially after the Sutherland decision, which would directly apply—that they are, in point of creation, the premier Earls of Scotland. The only difficulty arises from what was formerly shewn, and the fact of the Erskines having always stood upon Countess Isabel's conveyance in 1404: every confirmation, and recognition of their right, by the Crown, proceeds upon it as their exclusive title; and it was further the earliest evidence produced by them to instruct their precedence at the decree of ranking in 1606,[2] when their precedence was

[1] Suth. Case, c. v. sect. 8, 35.

[2] "Comperit *Comes de Mar*. Producit ane chartour of Dame Isobel Douglas, Countase of Mar, and Alexander Stewart, sonne to the Earle of Buchan, her spouse, of the Earledome of Mar, with the Castel of Keldrumie and Lordship of Garioch, the 9th of December, 1404. Item ane chartour of confirmation maid

regulated accordingly; still, however, it is proved by the Parliamentary Records subsequently, that they protested for priority of ranking above all the Earls.

Suth. Case, 9. The Earldom of Sutherland may be held to be at least as old as 1245, and the present proprietrix is, in every view, the undoubted heir-general of the ancient Earls. Neither can it be disputed that she has a right to the precedence of 1245, although erroneously ranked in the Union Roll. The Sutherland decision, whatever it may be in other respects, is yet true in this, that the old Earldom devolved upon Elizabeth the heir-general in 1514; and if so, it is necessarily in her representative, who stands in the very same situation with Elizabeth, as was indeed admitted by the decision. The Earls of Sutherland have also protested for precedence above all the Earls; and in 1606, they produced much older vouchers for the antiquity of their title than the Marr family, over whom they were then ranked, as they continue still to be, according to the Union Roll.[1]

be K. Robert the 3, confirmand the chartour above written." From the productions of the nobility on the occasion, in the handwriting of Sir James Balfour, Lord Lyon to Charles I.—*Ad. Lib.*

[1] " Compeirit *Comes Sutherlandiæ.* Producit before the Lords ane charter givene be Kinge David the 2, to Williame, Earl of Sutherland, and Margaret his spous, sister to the King, of the Barony of Cluney, &c. 4th Nov. 1347," &c. Productions *ut supra.* There are, however, as already obvious, documents to instruct the antiquity much further back.

The only competitor—excepting at the same time, the Constable,[1] the two preceding families might have—if not also the whole nobility of Scotland, would be the Earl of Angus, supposing certain high privileges, and prerogatives, formerly in the Douglas family, to be still inherent in the dignity. When these were first granted to them, does not appear; they assuredly are not comprised in the famous "Emerald Charter" of Robert Bruce, to "the good Sir James;" but on the 3d of February 1602, James VI. confirms by charter to William Douglas Earl of Angus, and his heirs—"all honors, immunities, and dignities, ever held by the said Earl, and his predecessors, et presertim *primum locum* in *sedendo*, votumque prestando in omnibus nostris Parliamentis conventionibus, et conciliis; primum locum, et ductionem prime aciei in nostris bellis; et gerendi coronam in omnibus Parliamentis."[2] These honors, however more numerous,

Reg. Mag. Sig. Lib. 44, 22.

[1] The Earl of Argyle, another great hereditary officiary, might have been an additional exception, but the limitation of the Dukedom of Argyle is so expressed, that the Earldom can never subsist independently of it.

[2] The House of Angus could not have held these privileges until the fall of the elder line of the Douglases, about the middle of the 15th century, when the former obtained by special grant the Barony of Douglas. For some remarks connected with the early part of the pedigree of the Douglases, vide Appendix, No. VI.

The pre-eminence of the "*ductio prime aciei*," might be regarded as an office, being, as will be afterwards seen, inherent in the Marshall in other countries. On the great question as to the

and transcendent, yet somewhat similar to what were conferred upon the Earls of Warwick in England, are said, in the same way, to have been a requital to the Douglases for their distinguished military achievements; and they, necessarily, in virtue of the grant of the first vote, and seat in Parliament, claimed priority of ranking over all the nobility. Previous to this, in a Parliament in 1592, Earl William, at the King's desire, ceded his privilege of bearing the crown in favour of the Duke of Lennox; but this condescension on the part of the Earl, was the occasion of a special Act, by which it was declared that "the samen sall nawyis preiuge the saidis Earlis richtis, honoris, and privilegis, whilk he, as erll of Angus, hes *to the first place in sitting, and votting in parliaments, and utheris generall counsaillis*, first place, and leding of the wangard in battaillis, and bearing of the crown in parliamentis in time cuming."—It might be difficult—recurring to older authorities—to show that the Douglases had invariably these extraordinary privileges; and, in the decreet of ranking in 1606, so often alluded to, the Duke of Lennox, as well as the Marquises of Hamilton, and Huntly, are ranked before the Earl of Angus, but still that nobleman is preferred, and seemingly without any question, to all the Earls.

Acts Par. iii. v. 588.

nature of our heritable offices, in the case of Cockburn of Langton, in 1745, it was observed, that however other offices might be readily evicted, a creditor might be somewhat loath to adjudge this one "of the first place in the front of battles."

On the 14th of June, 1633, William Earl of Angus, afterwards Marquis of Douglas, formally resigned his right, as Earl of Angus, to the first seat, and vote in Parliament;[1] but the family have contended that the resignation was ineffectual, because the fee of the *Comitatus*, or Earldom, was not in the Earl—but in his son,[2] and accordingly, the subsequent Marquises of Douglas, including Archibald, (created Duke of Douglas in 1703,) have always protested for the first vote, and precedence in Parliament. Acts Parl. *passim.* At the period of the Union, a charter of these privileges was confirmed by Parliament in favour of Duke Archibald, but under a protest on the part of Ibid. v. xi. 476. the Duke of Hamilton, as the premier Peer by rank and dignity.

As the Earldom of Angus—that in the Douglas " line was only created in the fourteenth century, and hence subsequently to Sutherland, we may see from this, as well as the previous circumstances, what were the Scotch ideas entertained as to precedence, which did not always turn upon priority of creation, or the date of the patent; but were often

[1] Act Par. v. x.

[2] " But anno 1633, the said Earl (of Angus,) being created a Marquis, it is declared by Act of Council, that he did quit the privilege of having the first vote in Parliament, upon his promotion; and yet the Marquis of Douglas still pretends that any such renunciation could not have prejudged the family, since the granter of that renunciation was only a life-renter, his son having been in the fee."—*Sir Geo. Mackenzie Precedency Works*, v. ii. 544.

regulated by adventitious circumstances, and the mere will, and prerogative of the Sovereign.

Sir George Mackenzie is not correct in his remark, that the Constable, and Marshal of Scotland, had only precedence according to their rank as Earls—that is to say, in the ordinary case, and when not walking at coronations.[1] If such had been the fact, they would not have been placed, as they actually were, before the Earls of Sutherland, Marr, Menteith, &c.[2] owing to the comparative recentness

[1] Precedency Works, v. ii. 540.

[2] In a contest that the Earl of Errol had for precedency with the Sutherland Family, subsequent to 1606, he maintained, besides taking up the argument of Sir Robert Gordon against the present Countess, in the Sutherland Case, that "albeit he should not carry the precedency as Earl of Errol, yet *as Constable of Scotland he should carry it*, the precedency being dew to the Constable before all Earls, *as a privilege of the office;* and to verifie this, the Earl of Errol produced a Commission quhich his grandfather had obtained under the Great Seal in January 1630, to diverse of ye nobilitie, joyned to ye officers of state to try the honors and privileges of the office of Constabularie, and also produced the report of this Commission, subscrivit by the Commissioners in anno 1630, *quherin, among other priviledges, this is set down as on*, that the Constable had the precedency. Quich report King Charles *did improve*, by a letter from his Court at Saint Theobald's, 11th May 1633; and upon these groundes the Earl of Errol craved to be preferred to Sutherland." *MS. in the Advocates' Library.*

This, therefore, confirms the remark made in the text, that the precedence of the Earl of Errol has been regulated, not simply according to his rank of Earl, but in consequence of a preference founded upon his high hereditary office.

of their creations as such. In their ranking, as well as in that of the Earl of Argyle, another hereditary dignitary[1]—who, although his Earldom could not have been older than after the middle of the fifteenth century,[2] was yet placed next to the Earl of Angus;—attention must have been paid to the circumstance of the hereditary offices, and these must have weighed more, or less, in the decreet of ranking in 1606. In further confirmation of this, in respect to the Constable, there is a protest, on his behalf, in Parliament in 1585, that he should have priority of vote in Parliament before the hereditary Admiral, also a Peer, in the same way as had been allowed him in the time of Mary of Lorraine, notwithstanding he did not sit among the Earls, on account of his office, which made him the conservator of order within the House, as the Marshal was without; and where they respectively presided in their several capacities, attended by their guards. This notice is important, as further indicating that the hereditary

Act Par. v. 3, 375.

[1] The great, and hereditary office of Justice-General of Scotland was, in 1606, in the Argyle family; and besides the hereditary office of Grand Master of the Household, they held, in the same way, that of Commissary, or Consistorial Judge of the district of Argyle, as far back as the time of Robert II., a most extraordinary post to be occupied by a laic. Dirleton observes, that the heritable Commissariot of Argyle is reserved to the Earl of Argyle by the Act 1609.

Doubts, 34.

[2] The same remark applies also to the Earldoms of Errol, and Marshal, which can be legally instructed by collateral evidence, althqugh none of the constitutions of the dignities are extant.

dignitaries of the kingdom had a precedence, arising from their offices, independently of their Peerages.

The great power of the Douglases, especially while it lasted, had somewhat curtailed the above high military offices, owing to the remarkable prerogatives, already noticed, that had been bestowed upon them. In other countries, the right which the Douglases came to possess of leading the vanguard was in the Marshal; and the Constable was the King's military lieutenant in military affairs.[1]

The original constitution of the hereditary office of Constable in the Hay family by Robert Bruce (of which there are many transcripts) is unfortunately too general, and only specifies the "*hostilagiis* ad dictum officium pertinentibus." This seems to imply the right of levying a tax upon hostellaries, or houses within burgh, where foreign merchandise was exposed.[2] Our Constable had, moreover, right to the King's palace, or residence, on the occasion of tournaments; and David II. declares by a deed, 26th of February, in the third year of his reign, that the grant he had made to Sir John Somerville of his *palatium* at Aberdeen, during a tournament,

[1] Selden, in his Glossary, *voce Marescallus*, says, it fell to him "primam aciem educere," while, at the same time, he quotes these lines in reference to the Marshal:

"*Cujus* erat *primum gestare in prælia pilum*,
Quippe Marescalli claro fulgebat honore."

[2] See *Du Cange sub hac voce*. As *Comes Stabuli*, a tax upon inns is evidently compatible with the nature of his office.

should not be held to prejudice the right of the Constable, or his successors.[1] Being the active and presiding officer of the Crown in all military matters, he had also, as a perquisite, not only the palace, but the very wood, and other materials, of which the barriers, or *barras*, encircling the arena of combat at tournaments, were fabricated. Thus, on the penult of July 1501, an action was compromised at the instance of William Earl of Errol, High Constable of Scotland against the Provost, and Magistrates of Edinburgh for their unjust "detentione ab ipso certorum lignorum, et meremiorum, cum aliis munimentis, quibus efficiebatur ambitus, et circuitus dicti *le barras*, in quo compugnaverunt et certarunt Johannes Coupante Gallicus, et Dominus Patricius Hamilton miles infra dictum burgum."[2] The Magistrates were unable to make any defence, and formally offered a sum of money as an indemnity. This is the famous combat, graphically described by Pitscottie, where Sir Patrick was so conspicuous, and which was fought under the castle wall of Edinburgh. In the transcripts of the works of that author, Sir Patrick's opponent is erroneously styled John Cockbenis, and a Dutchman.

The Constable was certainly a great dignitary,[3]

[1] Copy *British Museum*.

[2] *Ex autog.* Errol charter chest. In some copies of Pitscottie the space where the combatants fought is said to be "in the barrace," in others, within *the lists*.

[3] As in France, the Constable of Scotland bore a sword as the

and had various duties to discharge both in, and out of Parliament, including the punishment of messengers at arms, and other servants of the military court. His criminal jurisdiction in slaughter, murder, riots, and combats, within the compass of four miles during the sitting of Council, or Parliament, or wherever the King happened to be, was undoubted. He for the most part discharged his duties by deputy, and sometimes set his office in tack, so far as concerned the criminal jurisdiction, and authority at tournaments, to the Magistrates of Edinburgh. Thus on the 17th of February, 1507, he makes the latter his deputies for the space of three years, they to have "ye unlawis, and escheit of courtis, and barras,"[1] while at the same time they formally acknowledge his rights, and expressly bind themselves in the ordinary case, that they "sall not, be the halding of ony courtis pertening to *us* (the *Magistrates*) outher burrow court, Scheriff court, nor watter court, derogat, nor minische ye facultie nor privilege of ye said constabill courts bot na maner of way, but fraude and gile; and als yat we sall nocht sit, nor knaw nowther upon the action of blude, nor trublance comitted be onie pertie, or ony maner of personis, *the Kingis hienes beand in the said toune of Edinburgh*, or wytin foure mylis about,

emblem of his office, with which *sheathed*, he walked at coronations. See Sir James Balfour's Works, v. iv. 355-9.

[1] In other deeds, the words "*debates* of barras" are used.

bot the authoritie of the said Constabill Courtis," &c.[1]

The criminal jurisdiction of the Constable, at least at one time, was subject to review in the Court of Session. On the 18th of August, 1565, William Henderson, the Constable-depute, at a Court of Constabulary, held in the tolbooth of Edinburgh, obtained a verdict of a jury against Janet Dick, for "causing lett down aine daill quhare wit grissil henderson was hurt to ye effusion of her blood," but on the case being brought by advocation into the Court of Session, the judgment was reversed.[2]

The High Court of Constabulary sat till the period of the Union, the office being, usually, as before, discharged by deputies. It had its Procurator-fiscal, and exacted fines, and penalties. In the year 1699, there was an arrear of fifty processes;—in fact, during the sitting of Parliament, the duty could have been no sinecure.[3] The Court, however, to its credit be it spoken, did not too pertinaciously adhere to their privileges, on remarkable occasions, when the good of the country, or the interests of the community were at stake, as is evident, from their conduct on the lamentable occurrence, detailed

[1] Act and Decreet Book of the Commissary Court of Edinburgh, 9th of July, 1582, where it is recorded at full length.

[2] Act. Dom. Con. et Sess. v. xxxv. 165 b., and Privy Council Register.

[3] These last circumstances, as well as the next authority, are derived from the natural sources where they might be expected to be found—abounding with many interesting relicks, fully evincing the grandeur, and antiquity of the "Constabular" Family.

below in the note.[1] The office, as is well known, is still preserved by the Articles of the Union.

[1] The following original letter, dated 3d April, 1689, was written by one of the Constable-deputes to the Earl of Errol, Lord High Constable, on the occasion of the noted murder of Sir George Lockhart, President of the Court of Session:—"On Sunday last, the 31st of March, immediatelie after the forenoon's sermon, which was preacht in the high kirk, by the Bishop of Murray, the president of the Court of Session going home, discoursed all the way with his brother Lord Castlehill, and some oyer freindis about the sermon, and yat it was his admiration how he had never heard tell of so excellent a preacher before. At his closs head his broyer took leave of him, and daniel Lockhart was with him, when one Chiesly of Dalry, in whose affair about a difference betwixt him, and his wyffe, he had bin an arbiter, and had determined most justlie, according to the opinion of all knowing men, coming in behind the President before Daniel Lockhart at the entrie of the Closs head foirnent peirson's turnpyk, he with a pocket refald pistoll shott the president in at the back, on the right syd, and the bullet came out before, beneath the stomach, toward the left syd, whereby he was killed dead, and carried home. The murderer was seized on, and taken to the guard, and afterwards to prison on Monday. The Convention, or Meeting of ye Estates was called extraordinary, and gave commission to six of their number, Mr. David Drummond, and me, and the Magistrates of Edinburgh, to torture, judge, and try him. But we thought we could not meddle without prejudging your privileges, and yerfor with all discretione, *least it should have interrupted the trial, and so execrable a murder*, made a protestation in terms of the inclosed paper.

So fell that great man, who was your Lordship's particular friend, and his death is not only a national loss, but extremlie to be regrated for the manner of it. The murderer is sentenced this day to be drawn in a Hurdle from the tolbuith, to the Scaf-

The office of Marshal was even of still higher antiquity in the family of Keith; but the original grant is nowhere extant. The oldest conveyance respecting it, is a charter by Robert Bruce in favour of Sir Robert Keith—proceeding upon his resignation, "in pleno concilio nostro," whereby he confirms to him, *inter alia*, "*terras de Keith cum officio Marescalli*" EIDEM TERRE PERTINENTI."[1] From this it would appear that the office was not personal, but annexed to land, and held by grand serjeanty, as was frequent in England, in the case of high hereditary offices.[2] When the Family had been raised to the dignity of Earl Marshal, the office still continued as before, under its ancient denomination;[3] and, as the greater part of Keith, or Keith

fold at the Cross, yer his hand to be cut off alyve, then to be hanged, and his body hung in chains at the Gallowlee, his hand to be affixt on the West Port."

This was a very extraordinary occasion, when the Convention of States, or Parliament interfered, but still they conjoined the Constable in the proceeding, who, however, did not chuse to delay or impede matters, by asserting his hereditary right as sole judge, and, therefore waved it, although under protest. Vide Acts Par. v. ix. 30.

[1] Copy among Lord Haddington's Collections of Charters, Advocates' Library.

[2] Thus the Duke of Norfolk, *as Lord of the manor of Worksop* in the county of Nottingham, is entitled, by grand serjeanty, to the office of finding the King a right hand glove, and supporting his right hand at coronations, &c.

[3] Retour 10th of October 1637, of George Earl Marshal in various lands, among others in "Keith Mershell *cum officio Mariscallatus Scotie*, et advocatione Ecclesie de Keith Merschell," &c. *Spec. Ret. Hadd.*

Marshal, if not the whole, had been alienated previous to the forfeiture of George Earl Marshal, in 1715, a question might possibly arise as to its present situation. With us, as was determined in the case of Cockburn of Langton, offices are regarded not as Peerages, but as subjects at common law. After existing for several centuries in the male line, not only talented, and distinguished, but retaining even latterly, a considerable portion of their once extensive estates—besides having the exclusive honour of founding a University, this powerful family, like that of Winton,[1] fell at one blow, under circumstances that did not call for so severe a retribution, and must ever awaken our sympathy, and commiseration.

III. EXEMPTION OF PEERAGES FROM PRESCRIPTION.

It will have been seen that the absence of any claim to the Earldom of Devon for nearly three centuries—during which time there is reason to think the dignity was held to be extinct—occasioned

[1] The ancient House of Winton, of whom the Earl of Eglinton, in every appearance, is the chief, on account of its innumerable high connections, and ramifications, may be now held the noblest in North Britain. It is almost enough here to add, that the Ducal Families of Gordon, and Sutherland (in the person of the Duchess) and the Earl of Aboyne, are their cadets in the male line.

little, or no obstacle to the claimant, the law of prescription not applying to honors. In the case of English Peerages this principle appears to be carried to a great extent; Sir Harris Nicolas observes, " no lapse of time is a bar to a claim to a Peerage," in support of which he instances the Baronies of Botetourt, Willoughby de Broke, Berners, &c.:[1] and Cruise here expresses himself equally strongly, and besides appealing to the cases of Fitzwalter, Mowbray, &c., adopts the argument used in that of Botetourt, " that it is an undoubted maxim with regard to honors, that they cannot be extinguished otherwise, than by forfeiture, or by act of Parliament." Neither with us does there appear to be any thing to induce an opposite conclusion. The family of Erskine, the heirs after 1435, in the manner that has been shown, of Isobel Douglas, Countess of Marr, were deprived of the fief and dignity of Marr from that year, until 1565—a period of more than a century, and a quarter—during which time the Earldom was bestowed upon strangers. On the 5th of May, 1553, however, John Lord Erskine vested in himself the character of heir in special to the Countess through an ancestor; and Queen Mary thereafter granted him a charter, dated 13th of June, 1565, of the Earldom of Marr, which proceeds upon the ground that he was entitled to it in terms of the conveyance in 1404,—and while the Queen

Suth. Case, c. 5, § 12.

Reg Mag. Sig. Lib. 32, 501.

See p. 49.

[1] LI'sle Report, 106. Dignities, 167.

fully admits the unwarrantable detention of the Earldom from his predecessors, she expressly states she was instigated to this step by motives of justice, after inquiring into the merits of the case; and with the sole desire "legitimos hæredes ad suas justas hereditates restituere."[1] The right therefore of the

[1] This whole transaction is creditable to Queen Mary, whose liberality, and kindness to her servants, notwithstanding her failings—which, after all, find their best excuse in the ascribed rights of sovereignty, and depraved manners of the age—must ever, independently of her other attractive qualities, throw a degree of radiance over her character. She here appears in striking contrast to her father James V., who tyrannized over, and unjustly treated his nobility, which may have been a chief cause of their desertion at Fala, and his own untimely end. For this the authorities took amends after his death, and may even be said to have insulted his memory.

His treatment of James Douglas, Earl of Morton, and the grounds, so openly avowed by the civil court, for reducing a resignation of his Earldom, may be a striking instance in point. The Lords, on the 29th of March, 1542, peremptorily cass, and annul the resignation,—*First*, Because it was executed by the Earl under terror, he being charged by the King to pass to Inverness, "yer to remane in ward in ye sessioune of winter, to permut and change ye halsoume, ande warme air wyt cauld, ande tempestuous air, ye naturale fudis wyt ye quhilk he was nurit all his liftyme, wyt rude, and unganand metis, and quhair sic thingis as accordit to his estait, ande preservatione of his lif, myt not be had; and alsua to permute ane plesande palice,* castell, yerdis,

Acts and Decreets of Council and Session, of that date.

* Dalkeith. The Earl was representative of the Douglases of Dalkeith, a great branch of the Douglas family, apparently sprung from them at a very early period. The houses of our nobility were occasionally called palaces, thus we have the palaces of Seton, Crookston, &c.

disponee was thus admitted, notwithstanding the length of the contrary possession; and he instantly, thereupon, became Earl of Marr, in terms of the charter, which was ratified by Parliament in 1567. Act. Par. v. 2, 549.

Subsequently, in 1587, John Earl of Marr, son and heir of the preceding, presented a petition to Parliament, where, after stating, "yat be ye lawes and costume of ye realme, the *richt of blood*, nor yit

toune, college, wyt diverse uyeris plesouris, wyt humille, and sober lugeings, wyt diverse incommoditeis, and displesouris quhilkes wer lang to reherse, ye saide erle being ane of ye maist noble baronys of ye realme, and impotent of his leggis, aigit, occupyit, and detenit wyt diverse maladies—quherthrow for dreid ande tinsale of his life," &c. he signed the resignation. *Secondly*, Because it was executed at Brechin when the Earl was proceeding to the north, removed from all his friends, the King being also there, and by repeated orders, and messages forcing him to the act. Nay, it is even positively maintained, that although the King commanded the Earl to make the resignation in favour of Robert Douglas of Lochleven, yet it was in reality for his own behoof, for "our said umquhile soverane labourit allwayis to yat effect, *yat he myt have ye saidis lordschipis, and landis, and desirit ye said ward to compell ye said Erl for dreid of his lyf to mak ye said resignatione.*"

Queen Mary figures upon another occasion, in 1564, in the benign character of an amicable arbitress, when effecting an agreement between Andrew Earl of Rothes, and his "eldest *lawful* brother" *William* Leslie, the "*righteous heir of Rothes,*" in relation to the succession to the Earldom of Rothes. As her decreet arbitral must have been called forth by a singular, and nice question, as well as by the conflicting claims of a party to the Earldom, hitherto unknown, a copy of it is inserted in the Appendix, No. VII.

any heritabile title *fallis under prescription, nor is tane away be quhatsumever lenthe of tyme, or laik of possession,*" he begs his Majesty, and the states, to enquire into the nature of his pretensions to the Earldom of Marr, in order that his right might be confirmed by Parliament.—This accordingly was done, and in the ensuing Act, it is fully ratified, "*notwithstanding ye lenthe and diuturnitie of tyme, quhilk hes intervenit sensyne,* during ye quhilk space, the saide Erle, and his predecessoris, be ye iniquitie of ye time, hes bene wranguslie debarrit from the said landis, and possessione yairof."

Ibid. v. iii. 475.

This is also equally strong, and the reasons founded upon, and recognised, in the course of the procedure, fully demonstrate the inefficiency of prescription, as far as regards the descent of Peerages—whatever may strike us otherwise, as to the question formerly discussed, owing to the renewed application to Parliament, and confirmation a second time, in favour of the family of Erskine.

Descending later down, we will find that the same principle was followed, although the Act 1617, had intervened, introducing prescription into real succession.

In the year 1618, Gilbert Lord Somerville dying without male issue, Hugh Somerville of Drum his brother, and heir-male, did not assume the dignity, which ever afterwards continued dormant, until the 27th of May 1723, when it was adjudged, by the House of Lords, to James Somerville, the lineal

Rob. Peer. Proceed. of that date.

male descendant of Hugh, who, thereupon, became Lord Sommerville. Here more than a century intervened, since the relinquishment of the dignity; and this, and every Scotch case of the kind, is much stronger than that of an English Barony that may have opened to co-heirs, because, as is well known, we have no abeyance in Scotland, during the existence of which the honor is in a manner in the hands of the Crown, and a *non valentia agendi* imposed upon competitors.

In the same way, the title of Lord Colvil of Culross was claimed, and allowed on the 27th of March, 1723, to a party, although the Peerage had been discontinued from the death of James second Lord Colville of Culross, for more than fifty years, previously; and Henry Borthwick, on the 8th of April, 1762, had his claim admitted to the Barony of Borthwick as heir-male of John Lord Borthwick, since whose death, in 1672, the honor had never been assumed. Lords Journals. Ibid.

If a non-claim be, in this manner, ineffectual to void the right to a dignity, notwithstanding the lapse of time long beyond the term of prescription, it is as clear, that an usurped possession or assumption by a stranger, can as little be fortified by it. Upon this subject, Mr Forrester, an eminent authority, thus expressed himself, nearly eighty years ago.[1] Sir Will. Jones' Report, 96, 100-7, 30.

"The bare possession will not give right, as was resolved upon in the Baronys of Bolbeck, Sandford,

[1] From an autograph opinion upon the case of a certain Peerage in the possession of the Author, dated 10th February, 1755.

and Badlesmere, in the Earl of Oxford's case, where it appears, that John Earl of Oxford to himself, and his heirs-male, and seized in fee-simple of the above Baronyes, dyed without issue-male, but leaving three daughters, 18 Henry VIII., anno 1527; the daughters never claimed the Baronys. But the collateral heir-male took both Earldom, and Baronys, which were all enjoyed by him, and his descendants till Car. I. anno 1625, near a century, when that line of heirs-male failing, it was determined by the House of Lords, with the concurrent opinion of the Judges, that these baronys falling into abbeyance, 18 Henry VIII., *notwithstanding the heir-male had enjoyed them for four generations*, were then in the King's hand, to dispose of at his pleasure." The same law would also seem to apply in the case of Scotch Peerages.

Sir Patrick Leslie was created Lord Lindores, by James VI. The precise mode of the constitution of the dignity is not ascertained, but the creation may be legally presumed from collateral circumstances. The Patentee was succeeded in the dignity by Patrick his eldest son, and he by his brother James, in whose grandson David the fifth Lord, the lineal male descent failed before the year 1736.

The Peerage was thereafter assumed, respectively, by Alexander Leslie, and Francis Leslie, both collateral heirs-male, who were, *de facto*, the sixth, and seventh Lords; and, finally, by John Leslie of Lumquhat, who was of the same stock, and who

voted without challenge at elections of the sixteen Peers; but his votes being objected to, at the general election, 24th of July 1790, and subsequently discussed in the House of Lords, they were, after a full hearing, rejected, and found not to be good. June 6, 1793. The decision of the House of Lords equally struck against the previous collateral heirs-male, who had assumed the dignity; and hence its assumption from 1736, to 1793, clearly went for nothing, and was no obstacle to the investigation that ended in the refutation of the right.[1]

The same thing was virtually admitted on the claim to the Earldom of Glencairn in 1797. Alexander Earl of Glencairn died in 1670, leaving an only child Lady Margaret, when the Peerage was assumed by John his brother, the next heir-male, who, and his male descendants, ever afterwards held the dignity unchallenged, until their extinction in 1796. But this unvaried, and undisputed possession, for much more than a century, did not debar Sir Adam Ferguson from claiming the honor, in 1797, as the heir of line of Lady Margaret,—which claim, it is to be observed, if well founded, undoubtedly nullified the right of the intermediate heirs; and he accordingly was admitted as a party, and fully heard, although eventually unsuccessful in his plea.[2]

[1] From the documents and pleadings in the case.

[2] *Ditto.* Judgment was pronounced against him, 13th July, 1797.

But whether a judgment of the House of Peers upon a Peerage claim, in favour of one who afterwards turned out to have no right, can be subsequently opened up, is a point of far greater nicety, and however the leaning appears to be on *his* side, the question may not yet be quite determined. This seems to be the only exception that can be urged to the exemption of Peerage rights from prescription, and the difficulty may partly arise from the principle laid down by Lord Erskine, "that when once the blood of a man is ennobled by sitting—as a Peer (in Parliament,) nothing but delinquency can deprive his posterity of the same honor."

Ap. L'Isle, Report, p. 108, note.

The Barony of Willoughby of Parham in England, granted, 1st of Edward VI., to Sir William Willoughby and the heirs-male of his body, may be here referred to from English practice.

Upon the failure of the direct heirs-male of the body of William, eldest son of Lord Charles, only son of the Patentee, in 1680, Thomas Willoughby the heir-male of Sir Thomas, the *fifth* son of Lord Charles, claimed the honor, and had it allowed him. Thomas *was not the heir-male of the Patentee*, the nearest heir-male being Henry Willoughby, the male descendant of Sir Ambrose Willoughby, *second* son of Lord Charles. The same Henry, thus of the elder branch, had gone to Virginia in the year 1676, and continued there until his death in 1685, owing to which, or some other circumstance, the non-claim

on their part, may be explained. What followed shall be given in the words of Cruise.

" It appears, however, from the Journals, that in 1733, Henry Willoughby, the heir-male of Sir Ambrose, petitioned the House for the title; writ of summons having been at that time issued to Hugh Willoughby, who was the then lineal heir-male of the fifth son of Charles, stating the above facts: but the House does not appear to have paid any attention to this petition, for immediately after it is an entry, that Hugh Willoughby took his seat." Neither was the right of Hugh Lord Willoughby thereafter questioned, and although he was not the heir under the patent, he still enjoyed the dignity until his death, which happened in 1765; at which time all the heirs-male of Sir Thomas, the fifth son of Lord Charles, became extinct. Cruise, Dignities, Pp. 169-70.

Henry Willoughby, the lineal heir-male of Sir Ambrose, and hence the true heir, thereafter came forward, and claimed the dignity in 1767, which was allowed him by the House of Lords, upon this ground—" that the contrary possession ought to be no bar to his claim, *as there was no person in being interested under such succession; without prejudice to the question if there was.*" A writ of summons was accordingly issued to Henry, and he took his seat as Lord Willoughby of Parham. Ibid. 170.

From this precedent, it has been inferred, that a judgment in favour of one having no right, must operate, and cannot be disputed, as long as there

are heirs-male of his body—but that these having failed, things return to their ancient channel, and there is an opening again to the true heir.

This doctrine was founded upon in the late claim to the Scotish dignity of Lord Borthwick.

Henry Lord Borthwick, formerly adverted to, had that barony allowed him by the House of Peers in 1762, as conceived heir-male of the family, in virtue of a descent towards the end of the fifteenth century, from Alexander Borthwick of Nenthorn—alleged lawful son of William third Lord Borthwick.

He, however, died in 1772, without issue, subsequent to which, but not until 1809, the Peerage was claimed by Archibald Borthwick, Esquire, banker in Edinburgh, as the nearest male descendant of the same Alexander Borthwick of Nenthorn, but necessarily as collateral heir-male only of Henry Lord Borthwick. The Peerage was also, not long after, claimed by John Borthwick, Esquire of Crookston, as the true heir-male of the family—although more distantly sprung from the House of Borthwick,—who contended that Alexander Borthwick was illegitimate, and therefore that neither of the claimants in 1762, or 1809—but more especially the last one, had a right to the honor. This gave rise to the question, whether it was now competent, after the judgment in 1762, which equally turned upon the filiation, and *status* of Alexander Borthwick of Nenthorn, the alleged bastard, to listen to Mr Borthwick of

Crookston—the principal point at issue, being thus, in a manner *res judicata.*[1]

On the 9th of May 1812, it was proposed in the Committee, (to whom the respective claims had been referred) " that the committee ought not to receive any such evidence against the present claimant (Archibald Borthwick) as calls in question the right of Henry, late tenth Lord Borthwick, to the title, honor, and dignity of Lord Borthwick; which was reported from the Committee of Privileges, and resolved and adjudged by this House, 8th April 1762." Considerable discussion followed upon the motion, the counsel for both parties being heard; but on the 14th of April 1813, it was resolved " to receive the instructions of the House upon a matter of such importance," and, eventually, on the 23d of June 1814, " the following instructions from the House were read :"—" Resolved, 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*

Minutes of evidence in the case.

Ibid.

[1] Papers and pleadings in the case.

benefit of such judgment, and as Archibald Borthwick, the only claimant who alleges a descent from Alexander Borthwick of Nenthorn, 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*."

Archibald Borthwick, in the earlier part of his pedigree, had introduced an additional link, which made it at variance with the one that had been submitted by Henry Lord Borthwick to the House in 1762, which is the proposed falsification here alluded to, in consequence of which, Archibald was found to be excluded from a plea, that he otherwise might have had. There was this difference between the cases of Willoughby of Parham, (which, however, was followed in the above instructions, as far as it went) and Borthwick, that while in the one, there was no such difficulty, there existed in the other, a singular specialty arising from the claimants in 1762, and 1809, deriving their descent from a common ancestor, whose illegitimacy was only maintained after 1809, and the connecting link to both,

with the Lords Borthwick. The decease of Henry Lord Borthwick, therefore, without issue, did not restore things to their former situation, as the last claimant stood, in a great measure, in his shoes, and had the principal point at issue, decided in his favour by the judgment in 1762.

The fact, however, of the heirs-male of the body of Henry Lord Borthwick having failed, exempts the case from the principle of Lord Erskine, formerly noticed, in respect to the posterity of one, under whatever circumstances, who may have sat as a Peer.

One important inference may obviously follow from this, and every similar precedent, that there is a greater necessity for exacting stricter evidence, as to extinctions, in the case of Peerages, than in matters of mere succession at common law.

From what has been premised, we may be enabled to form a proper estimate of the claim to the Scotch Barony of Ruthven of Freeland.[1]

[1] In alluding to this subject, the author is only discharging a duty, imperative upon every Scotch antiquarian, of correcting flagrant error; and no where does it abound so plenteously as in the works of our Peerage writers—who, to use the words of Chalmers, in "the form" of "fiction," are "continually darkening the clear, without clearing the dark." Certainly without attempting to remove the mist, and delusion that prevails there, it would be in vain to seek to arrive at a proper knowledge of our Peerages, with which our Peerage law is necessarily indentified. In such circumstances there is, unfortunately, no other remedy for the evil, than that impartial, and unflinching spirit of severe in-

Caledonia, v. i. 556.

It is agreed upon all hands that the Barony of Ruthven of Freeland was conferred in 1651, upon Sir Thomas Ruthven of Freeland, after whose death it descended to David his son, who dying without issue, in 1701, or 1704,[1] the male line of the Patentee failed,—that during the reigns of George I. and George II., the honor was assumed by Isabel, only child of Elizabeth, the second daughter of the Patentee, by whom, and her descendants, it was afterwards borne;—but at the same time it transpires—and as indubitably—that no vestige of the patent any where exists; which has been attempted to be accounted for by the conflagration of the house of Freeland "some years previous" to 1764,[2] when it actually has been supposed to have perished in the flames.

vestigation that was first adopted by Lord Hailes, without reference to weaker biasses, or prejudices, either public, or private—which has been the means of fixing many points both connected with our history and laws. All that remains to be added is, that if there be any misconception, or inaccuracy in the above statement, or additional fact of a favourable nature that has escaped him, the author will be at all times most happy, while he frankly acknowledges his error, to make the necessary alteration; and to retract his inferences so far as they may thereby be affected.

[1] Crawfurd says in 1704, *vide* Peerage 435, Douglas in 1701, see his Peerage 602. He certainly was alive in 1700, as is proved by the acts of Parliament, v. x. 207.

[2] Vide Douglas's Peerage, 602. In the last edition (vol. ii. 464,) the 15th of March 1750, is assigned as the date of the event.

The Peerage being thus created long after the introduction of patents, no argument, derived from territorial practice, can evidently here avail, even supposing it could apply; and the want of the patent, under the circumstances, as will be still further evident in the sequel, cannot but be considered as a vital defect, that is not to be atoned for, or compensated by any possible adminicle, or presumption. In all ordinary cases the House of Lords adopt the principle, that where the patent is not extant, the honors alone descend to the heirs-male of the body of the person first ennobled; and this law was enforced even as late as the year 1812, in the case of the barony of Roxburghe.

But Douglas, the Peerage writer, who has been the first to enrol Isabel, and her descendants, among the nobility of Scotland, in his Peerage, published in the year 1764, has pleaded these considerations in their behalf.

First, that the Peerage of Ruthven was continued on the roll of the Scotch Peers at the Union, notwithstanding the previous death of David the second Lord, and extinction of the male line of the Patentee,—which, to use the very words of Douglas, "*by the articles of the Union*—was to be the established and fixed roll *in futuram rei memoriam*." He from this infers, that the Peerage must have been to heirs-general. P. 602.

Secondly, That it was not commented upon by the Lords of Session in their report on the state of Ibid.

the Scotch Peerage in pursuance of an order of the House of Peers, in 1740.

And, lastly, that Isabel (above mentioned) " had letters as a Baroness to the coronation of both King George I. and II."

To the first of these apologies it may be answered, that it is not declared by the articles of the Union, that the Union Roll is to be a fixed and established standard, as above asserted; so far from this, there is not a word upon the subject; and, on the contrary, it has both been altered, and innovated upon on various occasions. Neither is that roll drawn up with exactitude; besides Ruthven, it contains the names of Peerages that did not exist at the time, and after the period of the Union, it was not the custom to withdraw Peerages from the roll when they had become extinct. Nay Douglas himself virtually confesses the uncertainty of the test, for he, at the same time, observes, that the Lords of Session in their report " found the titles of no less than twenty-five Peers of that roll dubious"—so little reliance is there to be placed on it! The circumstance therefore that is thus founded upon—which even at the most would not of itself suffice, is evidently of very little importance.

Ibid.

To the second—that the Lords in their very report[1] confess their inability " to give *any reasonable* satisfaction touching the limitations of the Peerages

[1] Vide Report ap. Acts of Sederunt, 349.

that are still continuing," owing to various deeds affecting them, that are very difficult to be found upon record, and sometimes are not there preserved at all: being thus without due means of coming to a sure conclusion, and knowing that the Peerage of Ruthven had been assumed, while they saw nothing to affect it in those Patents that met their eye, they have prudently enough, in this state of uncertainty, refrained from any remarks upon the subject. It is to be observed, that their report was long previous to the avowal of the burning of the Ruthven patent in Douglas's Peerage.

And to the last—that the servants of the Crown, being far less competent judges, may still more naturally have attended to mere appearances; above all, in discharging an act that was only ministerial, and could not elicit, upon their part, any strict or judicial enquiry. But at any rate that they did palpably err in considering Isabel a Baroness, will be clearly evident from remarkable circumstances that will be stated in the sequel. This is all, so far as yet known, that has been alleged in support of the assumption; and we next come to the opposing evidence on the other side.

I. Crawfurd the Peerage writer, although not the most acute, or accurate of men, yet far honester than Douglas, and who besides was a cotemporary of *David* the second Lord Ruthven, explicitly states

that *he* " died unmarried in the 1704, and *thereby* (as he adds) *the honor became extinct.*"[1]

II. It is admitted by Douglas, and all authorities, and further can be legally established, that the same Lord David had an *elder* sister than Elizabeth, the mother of Isabel, of the name of Anne, who was married first to Sir William Cuningham of Cuninghamhead, and secondly, to Cuningham of Craigends.[2]

Peerage, 435.

Crawfurd states, that she actually had issue by Sir William, but this is put beyond doubt, by a service, dated 21st of March, 1689, of " Sir William Cuningham of Cuninghamhead, as *heir* of Dame *Anna Ruthven,* wife of Sir William Cuningham of Cuninghamhead, *his mother*,"[3] and that Sir William, the son, *lived*

[1] Peerage, article Ruthven, 435. It was published in 1716. His History of Renfrewshire, as by the title page, appeared in 1710.

[2] See Crawfurd, and Douglas, *ut supra.* That Anne was his eldest sister, is proved by the entail of his estates executed by Lord David, on the 26th of October 1674; and by the service on the 9th of December, 1732, of James Ruthven, of Ruthven, as heir in special to him. In the latter, she is explicitly styled, " *sorori sue natu maxime ;*" and in the former, the " *elder* sister," while Elizabeth, (mother of Isabel,) is only designated " our *second* sister." There was independently Mrs. Jean Ruthven, " *my (Lord David's) youngest* lawful sister," as described in the entail, who was unmarried, and will be afterwards noticed. The authorities here, will be found in vol. v. p. 329, of the Record of Taillies, and in the Register of Special Services for the county of Perth, under the corresponding date.

[3] *Inq. Gen.* of that date. Dame Anna's son is here styled

down to 1722, can be proved by unquestionable authorities subjoined below.[1] The striking fact, therefore, transpires from this evidence, that the latter in right of Anne Ruthven, his mother, was the undoubted heir-general, quite to the exclusion of Isabel; and that although the Ruthven succession had opened to him *in this character*, as early as 1701, or 1704, he *never ventured to assume the dignity*. This is the more remarkable, as Sir William was fully aware of the consequences of his descent, and had even assumed the surname of Ruthven,[2] a family which he thus was desirous of representing as far as he could do, in justice and propriety.

Yet Douglas admits that it was only, *as heir-general*, that Isabel, and her descendants, could have right to the Peerage! All this seems of itself conclusive, and while clearly hostile to the notion of the Peerage being limited to heirs-general, it can be viewed no otherwise than as strongly corroborating Peerage *ut supra.*

Sir William, his father having died previous to the 29th of March 1672, when he is served heir in special to him in Cuninghamhead, &c.—*Inq. Spec. Ayr.*

[1] Obligation by "Sir William Cuningham of Cuninghamhead," dated 25th of September, 1721.—Paper Register, or Appendix to, Great Seal Record, Book xvi. 289. He also appears in 1722, among the Commissioners of Supply for Ayrshire.—*Brit. Acts*, 9, *Geo. I.*

[2] Royal Charter, 30th November, 1741, to John Snodgrass of Cuninghamhead, of the dominical lands of Cuninghamhead, formerly belonging to the deceased "Sir William *Ruthven, alias* Cuningham, of Cuninghamhead." *Great Seal Register, Book* xcvii. 222.

Crawfurd's account, that the honors, on the death of Lord David, became extinct.

Vide, p. 602, and Wood's edition, v. ii. 464.

Douglas, in his Peerage, very blameably represents things in such a manner as to lead any one to believe, that upon the death of David in 1701, Isabel had succeeded as heir-general, a *status* now abundantly clear that could not have been in her, until, at least the much later period of 1722, if not subsequently; but this is only one of the many devices resorted to, by this most accommodating, and flattering of genealogists.

Neither in Chamberlain's list of the Scotish nobility in 1726, or in any list before the middle of the 17th century, is there mention of the Peerage of Ruthven. But the most singular circumstance is, that Isabel, the heir of the second daughter of the Patentee, not only assumed the dignity before the extinction of the heir-general—being even summoned as a Baroness, as Douglas informs us, to the coronation of George I. in 1714, but Jean, who, as has been seen, was only "*my youngest* lawful sister," (i. e. *of Lord David,)* fired by the same noble ambition, however hesitatingly, also aspired to the same honor. Nor could it be said that her claim, when contrasted with her sister's, was much less exceptionable; for she was *in a manner* the representative of the family, as her brother Lord David, owing to some whim, or caprice, had made her the first substitute in his entail in 1674; and on the 9th of September 1721, in terms of the entail, under

the description of " Jean *Lady Ruthven*," she is served heir in special to her brother. But as if apprehensive of the scrutiny of the Bench, she, in her petition to the Court of Session, on the 4th of November 1721, for recording the entail, is only modestly styled " *Mrs. Jean Ruthven.*" After her decease, and the succession devolving upon James, the eldest son of her niece Isabel, the other Baroness, in 1732, he is described as James Ruthven of Ruthven; but, in an authentic deed in 1733,[1] following the example of the female part of the family, and being now the undoubted heir-general, he designates himself " James *Lord Ruthven*;" since which time, for any thing yet known, the same style has been constantly used by him, and his descendants.

Inq. Spec. Dec. 9, 1732.

III. Notwithstanding the Patent may have disappeared, it would be rather remarkable, owing to the comparative recentness of the event, that a statement of its contents did not exist in some shape, or other: And it so happens, that in a manuscript of note in the Advocate's Library, containing various patents, and creations of honors, the very date of the Ruthven patent—which was upon the 3d of January 1651—is not only given, but it is further expressly mentioned, that it was only limited to the

1 Translation by " James *Lord Ruthven*," to Thomas Hay, 14th December 1733. *Mackerston Charter Chest.* In his Retour in 1732, as heir of the second Lord, and under the appellation of " James Ruthven, of Ruthven," his mother is styled " Isabel Lady Ruthven."

ut supra.

Patentee "*and his heirs-male.*"[1] This last authority, therefore, if authentic, which there seems no reason to doubt, is again decisive, and obviously still more unequivocally, of the question at issue.

There still rests, however, the assumption of the dignity for a century back, together with voting at the Peers' elections, but the legal insignificance of such circumstances must be now self evident, after what has been premised, as to the exemption of Peerages from prescription. The cases of Lindores and Glencairn are fully in point, and clearly shew that no claim to a Peerage, originally defective, can be in this manner strengthened. The present topic, after all, is too trivial, and flimsy for criticism.—The nature of the claim was known, and sufficiently appreciated by antiquarians last century; Lord Hailes, after stating that Baroness Isabel, in a jesting mood, called her summons to the coronation a patent,—declaring she would keep it, as such, in her charter-chest, sarcastically observes, "that what she said *in jest, is now seriously insisted upon*;"[2] and he

[1] "3d January 1651, Patent to Sir Thomas Ruthven of Freeland, creating him Lord Ruthven, and to his heirs-male." *Advocates Library*, Jac. v. 4, 16, p. 319. It forms the second volume of a collection of charters, pedigrees, and similar subjects. Sir Thomas, the Patentee, was father of David the second, and last Lord.

[2] "In a jesting way she said that this was her patent, and that she would preserve it as such, in her charter chest, what she said in jest is now seriously insisted on." *Notes of Lord Hailes on Douglas' Peerage, Advocates' Library.*

further informs us upon hearsay, that the pension in favour of Lady Anne Stewart, the wife of James, her son and successor—whom he styles "Mr. Ruthven," was granted to her simply, as "Lady Ann Ruthven," and not under the designation of a Baroness.[1] Such then is the true state of matters; and we may now see to what *just* conclusions we would have arrived, had we trusted to the very *veracious*, and *faithful* account of Douglas.

Yet there was vested in the family the undoubted representation as heirs-general, which cannot be impugned, of the only remaining branch of a noble house, who were not only ancient, but of the highest note, and distinction, in Perthshire; and, like the Hepburns, suffered more, or less, in all its branches, from the daring, and probably reckless ambition of their chief. During the abolition of the surname of Ruthven, the remaining members of the family were allowed to take the name of "Rowan," traces of which are still discoverable in Ireland.

As a striking corroboration of the remarks already made as to the carelessness, and inaccuracy of the Union Roll, may be mentioned the case of the Peerage of Aston of Forfar, which, although undoubtedly existing at the time of the Union, whatever may be its present situation, is not inserted there.

[1] Ibid.

APPENDIX.

APPENDIX.

No. I.

EXCERPT FROM A CONVERSATION BETWEEN THE LATE CHANCELLOR LOUGHBOROUGH (AFTERWARDS EARL OF ROSSLYN,) AND SIR ADAM FERGUSON, ON THE 13TH OF JULY 1797, REPORTED BY THE LATTER.

"HE (the Chancellor) 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 supposing a presumption in favour of males, in the succession of land, and to hint at a distinction between lands, and honors. He avoided saying that the decree in the case of Cassilis was wrong: though Mr. Chalmers[1] 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 had spoken of it in the same terms to him. He then went to Lord Mansfield's speech in the case of Sutherland, and repeated what he had hinted at in his speech in my case, that Lord Mansfield had then stated that all, or most of the instances of female succession in Peerages, were to be accounted for by special circumstances, and were not inconsistent with the general rule of male succession. I told him I remembered myself Lord Mansfield's saying so: *But that he had not supported such a*

[1] This is the respectable authority formerly referred to, *vide* p. 6. *note*.

position BY ANY INSTANCES. *Indeed* IT IS NOT TO BE SUPPORTED. *He made no answer to that.* That the Chancellor's own opinion is, that the presumption in favour of heirs-male is contrary to the ancient law of Scotland, it is impossible for me to doubt. His admiration of Lord Hailes' case for the Countess of Sutherland, which he expressed on a former occasion so strongly to myself as to say, that it was the most fortunate thing on earth that such a mass of falsehood had been given in for Sir Robert Gordon, as to prompt Lord Hailes to produce *the most valuable work on the subject of Peerages*, a work, however, which can have no other effect but to lead into error, if Lord Mansfield's doctrine has any foundation. The same language held to others, all prove it; nay, in speaking in the House of Lords, he had gone out of his way to speak of the case of Cassilis as having come before the House at a time when the law had not been explained, as it had since been by a learned antiquarian, and judge, Sir David Dalrymple,[1] who had shewn that the female succession had prevailed in Scotland, in *the earliest times, both in land and in honors.*

" How then is his supporting that very doctrine in any case to be accounted for? was it for want of resolution *to combat a prevailing error?* I know not. He has, however, in so doing, disappointed me, and I think has lost a fair opportunity of acquiring fame to himself."—

It need hardly be observed, that Lord Hailes in the Sutherland case, strenuously advocates the territorial principle, and necessarily the succession of females to honors. The prevailing, although erroneous impression to the contrary, Lord Rosslyn, it seems, from whatever motive, was unwilling to refute; hence Lord Brougham has been the first to vindicate the cause of truth by admitting a fact which, with all submission, cannot but be apparent to every antiquarian. There assuredly was much loose and unauthorized reasoning in the Cassilis case; it was even contended that a resignation of honors into the hands of the Barons

Vide supra, p. 33-4. *note.*

[1] Lord Hailes.

of Exchequer was null;—a proposition which, if true, would prove fatal to many existing Peerages, and quite contrary to the later decisions in the cases of Errol, and Roxburgh. In fact, so much uncertainty and even contradiction have been introduced into our Peerage law, that it may be a question, whether the descent of our Peerages in future, should not be regulated by Act of Parliament.

No. II.

ORIGINAL DOCUMENTS CONNECTED WITH THE ANCIENT HISTORY OF THE EARLDOM OF MENTEITH.

Pro Mauricio juniore.

Rex omnibus, Noveritis nos anno ab incarnatione domini Mº CCº sexagesimo primo, vicesimo die septembris, inspexisse cartam Alexandri filii regis Scocie, Comitis Gilberti de Stradhern, comitis Malcolmi de Fif, et Willielmi de Bosco Cancellarii, sigillis suis signatam, non abolitam, non cancellatam, nec in aliqua sui parte vacatam, sub hac forma. Hec est amicabilis conventio facta apud Edinburche, anno ab incarnatione dominica Mº CCº XIIIº die Sancti Nicholai, inter Mauricium Comitem de Manenthe,[1] et Mauricium juniorem fratrem ejus, de loquela que fuit inter eos de Comitatu de Manenthe, quem Mauricius junior petebat sicut jus, et hereditatem suam; scilicet predictus Mauricius Comes per fustum et baculum resignavit in manu do-

[1] "Maneth" is the old orthography. Thus a charter by William the Lyon of the privilege of a free market to the Church of Glasgow, is witnessed "*Comite Gillecristo de Meneth.*" This is the first Earl of Menteith, who can be traced upon record. Maneth, probably, was a contraction for *Meneteth*, or Menteth, denoting in the same way with Strath-*earn*, the country through which the Teith ran. In a charter by King Malcom to Scone in 1164, Gilchrist is designed Earl of "*Menteth.*" Original Chartulary of Glasgow v. ii. 5. Original Chartulary of Scone. 21.

mini Regis Willielmi, comitatum de Manenthe, et dominus Rex eundem comitatum reddidit Mauricio juniori, sicut jus suum, Mauricius autem senior tenebit in vita sua per balliam dominini Regis duas villas, scilicet Muyline, et Radenoche, et Tum, et Cattlyne, et Brathuli, et Cambuswelhe, quas terras Mauricius junior accommodavit domino Regi ad opus Mauricii senioris in vita sua, ita quod Mauricio seniore decedente, terre ille sine contradictione redeant ad Mauricium juniorem. Idem vero Mauricius junior eadem die tradidit fratri suo Mauricio seniori, ad maritandas filias suas Savelime, sicut iidem duo fratres eam tenuerunt predicto die, et Mestryn, et Kenelton, et Stradlochlem. Ita quod ille filie, et earum heredes qui de illis venient, tenebunt illas quatuor terras de Mauricio juniori. Et ut hec amicabilis conventio facta firmius futuris temporibus teneatur, probi homines domini Regis utrique parti hujus cyrographi sigilla sua apposuerunt. Hii autem tunc presentes fuerunt Dominus Alexander filius Domini Regis, Comes Gilbertus de Stradherne, Comes Malcolmus de Fife, Willielmus de Boscho Cancellarius Phillipus de Mubray, Ingelramus de Balliolo, Walterus de Lindeseia, Rogerus de Mortemer, Alexander Vicecomes de Strivelin, Hervius de Kinross, David Marescallus, Malcolmus de Ketenes, Henricus de Brade, Henricus de Roskelyn, Laurencius de Abenrethe, Hugo de Gurley, Ricardus Revel, Walterus Comyn, Robertus de Seincler, Malcolmus Senescallus Comitis de Straderne, Willielmus de Duneglas, Archibaldus de Duneglas,[1] Ricardus Anglim. In cujus etc Teste Rege Apud Windesorum die, et anno supradictis.

Pro Mauricio juniore.

Rex omnibus presentes literas inspecturis salutem in domino. Noveritis nos anno ab incarnacione domini M°CC°LX° primo, vicesimo die Septembris, inspexisse cartam Willielmi Regis Scotie sigillo suo signatum, non, abolitam, non cancellatam, nec in

[1] In other words Archibald, and William de *Dunglas*. Mr. Chalmers has thus fallen into on error, when he says that the Douglasses witnessed no charters of our kings from the time of David I., down to Alexander II. inclusive. Cal. i. 580.

aliqua sui parte vacatam sub hac forma. Willielmus dei gratia rex Scotie, omnibus probis hominibus totius terre sue clericis, et laicis salutem. Sciant presentes, et futuri me concessisse, et hac carta mea confirmasse conventionem factam apud Edinburghe in plena curia mea, inter Mauricium seniorem de Manethe, et Mauricium juniorem fratrem ejus, de Comitatu de Manenthe, quem Mauricius junior petebat sicut jus suum, et hereditatem, et quem Mauricius senior resignavit in manu mea, et quem reddidi Mauricio juniore sicut jus suum. Quare volo, et firmiter precipio, quatenus predicta conventio inter eos inde facta firmiter, et inviolabiliter teneatur, sicut facta fuit in plena curia mea, et sicut cyrographum inter eos inde factum testatur, salvo servitio meo. Testibus Alexandro filio meo, Comite Malcolmo de Fife, Wilielmo de Boscho Cancellario, Comite Gilberto de Stradherne, Philippo de Mubray, Rogero de Mortemer Alexandro vicecomite de Strivelyn, Waltero de Lindeseia, Herveio de Kinros, Harvieo Marescallo apud Edinburghe, septimo die Decembris etc. Teste Rege apud Windesorum die, et anno supradictis."[1]

Omnibus hoc scriptum visuris, vel audituris Dominus Johannes Russellus, et Isabella spousa sua Comitissa de Menethet, eternam in Domino salutem. Noverit universitas vestra nos dedisse, consessisse, et hac presenti carta nostra confirmasse Domino Hugoni de Abyrnethine et heredibus suis, vel suis assignatis, pro servitio suo et fœditate, viginiti libratas terre rationabiliter

[1] Maurice, junior, accordingly succeeded, and appears to have been alive on the 27th of March, in the 12th year of the reign of Alexander II.; for a confirmation of that date, by Alexander to the Abbey of Cambuskenneth, is witnessed, "Mauricio Comite de Menteth vicecomite de Striviling." The next Earl was Walter Cummin, in right of Isabel Countess of Menteith, who figures in the subsequent document, but what is very surprising, and additionally proves the perpetual strife, or contention that reigned in the succession of this Earldom, cotemporary with him there is *Maloom* Earl of Menteith, perhaps the representative of Maurice, *senior*. In a treaty of peace between Alexander King of Scotland, and Henry King of England in 1237, the former "in animam suam fecit jurare Walterum Comyn Comitem de Meneteth, et preterea—Comitem *Maucolmum* Comitem de Meneteth." for its proper observance and fulfilment. Chartulary of Cambuskenneth. Ad. Lib. 167. Ryley's Placita, 161-4, Rymer's Fœdera, v. i. 376.

extensas in territorio de Abirfule ex occidentali parte de forr. Tenendas et habendas dicto Domino Hugoni, et heredibus suis, vel suis assignatis, de nobis, et heredibus nostris, libere, quiete, plenarie, pacifice, et honorifice, adeo sicuti illam unquam melius liberius, quietius tenuimus, et tenere debuimus. Reddendo inde annuatim dictus Dominus Hugo, vel heredes sui, vel sui assignati, nobis et heredibus nostris, pro omni servitio, consuetudine, exactione seculari, et demanda, que de dicta terra, aliquo modo, exigi poterunt, tantummodo unum nisum sorum ad festum Sancti Jacobi, vel sex denarias, salvo tamen Domino Regi forinseco servitio tante terre pertinente, et salvo nobis, et heredibus nostris, tantummodo advocatione ecclesia de Abirfule. Nos vero, et heredes nostri dicto Domino Hugoni, et heredibus suis, vel suis assignatis, dictam terram cum pertinentiis suis, contra omnes homines, et feminas pro dicto servitio warrantizabimus, aquietabimus, et in perpetuum defendemus; et ad majorem hujus rei securitatem faciendam, presentem cartam sigillarum nostrorum munimine roboravimus. His Testibus Domino Dunecano Comite de fiffe, Domino Malisio Comite de Stratherne, Domino Alexandro Cumine Comite de buchane, Domino Willielmo Comite de Mar, Domino Joanne Cumine tunc Justiciario galuvidie, Domino Willielmo de Montefixo, Magistro Willielmo Wishard, Archideacono Sancti Andreo, et aliis.

One seal alone remains to this deed, representing the Countess at full length. The arms of the ancient Earls of Monteith are unknown. The subsequent Earls of Menteith of the family of *Stewart* who adopted the surname of Menteith, retained *their* insignia, which eventually became the feudal arms of the Earldom.

The family of Abernethy, or "Abernithin," who figure in this, and a previous deed, was one of the oldest in Scotland; and from them most of our nobility are descended through co-heiresses, who inherited the greater portion of their estates. Along with the old Earls of Fife, and the "black Prest of Weddale," they shared in the transcendant privilege of a sanctuary. According

to Winton, there were only three originally who were partakers in such a right. B. vi. c. 19, l. 38, *et seq.*

> " That is, ye blak Prest of Weddale,[1]
> The Thane of Fyfe, *and ye thryd syne*
> *Quhaewyre be Lord of Abbyrnethyne.*"

With us the privilege of sanctuary was by no means so common as has been apprehended. On the 13th of June 1553, the Prior and convent of " ye Freris Predicatouris of ye cietie of Glasgow," pursue the Magistrates " havaris, and keparis of William Culquhoune," and Mr. Stevin Betoune, Chamberlain of the Castle of Glasgow, upon this ground—" yat quhare in all tymes bygane, sen ye fundation of yair saide place, or past memor of man, yair saide place hes bene privilegit wyt privileges of sanctuary, and girthe, at ye leist for recent, and suddand crymes, and sua reverendlie observit yat it was never yet violat be any maner of persone yat can be rememberit, quhill lastly, upone ye third day of Junii instant, efter yat ye said Willaime Culquhoune, and Hew lockhart of suddantie had ilk ane hurt uyeris wytin ye said cietie, ye said Williame fled into ye saide place, and sanctuary for girth; being yerintill, traisting to haif bruikit ye privilege of ye samyn, the kin, and freyndis of ye said hew came to ye saide place, ande be fource, and way of deid, tuke him furthe of ye porche Kirk dure yerof, deliverit him to ye provest and baillies of ye said cietie, and Chalmerlane of ye Castell yerof, quha hes, and wythaldis him, and will not restore him againe to ye fredome, and privilege of ye saide Sanctuary, wytout yai be compellit, to ye grait hurt of ye freedome and privilege of halie Kirk, violatioune of ye said sanctuarie, *nane uyer being in ye west parities of the realme fra* TORPHICHING[2] *west, bot ye said place* Acts Dom. Con. et Sess. of that date.

[1] This was rather an important personage,—" pro domino Episcopo Sancti Andreæ jurabit *Presbyter de Weddale.*" *Oldest Border Treaty, anno* 1249, *Border Laws*, 4.

[2] Hence the remarkable " meane portioune" of the Barony of Torphichen independently of containing a hereditary Lordship of Parliament, had also a Sanctuary.

allanerlie, sen ye tulye wes commitit upone suddantie, and na partie is slane be ayer," &c. The defenders appeared and "desyrit ye said Prior, and Convent to schaw yair said privilege of girthe, and sanctuary:" This is thought reasonable, and the Court accordingly grant letters to the prior to summon "ye provinciale Prior of ye Freris predicatouris of the places following, that is to say, Inverness, Elging, Aberdene, Montros, Dundee, Perthe, Sanctandrewis, Wygton, and Air, to bring, and produce—ye saide priviledge of girth granted to yame, and sanctuary, to be sene, and considerit," &c. The Magistrates in the meantime to "keip ye said Wilhaime Culquhoun undisponit upone." In consequence whereof, the Priors of the above places emit a written declaration. "Yet yai nevir newe sic privilege of girth grantit to yame,as above writtin, and *sua denyit ye samyn*,"—whereupon the Court assoilzies the defenders.

Keith's Religious Houses, c. 15.

The Predicant friars, as is well known, were one of the most considerable orders of the Church of Rome, and "when their nests were pulled down, they were found too rich for mendicants," as they, in fact, pretended to be.

No. III.

REPRESENTATION AT COMMON LAW, OF THE HOUSE OF DOUGLAS AFTER THE DEATHS OF JAMES SECOND EARL OF DOUGLAS, AND ISABEL COUNTESS OF MARR, HIS SISTER; WITH THE ORIGIN, AND STATUS OF THE DOUGLASSES EARLS OF ANGUS, &c.[1]

It is not a little singular, that the fact, immediately to be proved, in relation to the well known family of the Douglasses of

[1] This statement, as formerly mentioned, was written, and published in a periodical work several years ago. It here contains a few additions and alterations—another motive for the republication, is the very recent notice of it by the Editor of the Minstrelsy.

Angus, has escaped not only the attention of Lord Hailes, which was certainly directed to the point; but also that of other antiquarians, who have minutely explored the origin and descent of our Scotish families.[1]

They believe, as far as can be gathered from their works—and indeed it is the general opinion at this moment—that George Douglas, the first of that surname, Earl of Angus, born long before the year 1400, and the direct ancestor of the House of Angus, of the modern Dukes of Hamilton, Marquisses of Douglas, Earls of Angus, &c. was a younger *lawful* son of William first Earl of Douglas, and a younger *lawful brother* of James Earl of Douglas and Mar, killed at the battle of Otterburn; and, consequently, that after the death of Earl James, the Angus branch came to represent, and do now, in the person of the Duke of Hamilton, actually *lawfully* represent the principal male line of the illustrious House of Douglas.

The following statement, it is conceived, cannot fail of eliciting a very different conclusion.

William first Earl of Douglas, as Lord Hailes has observed, in the Sutherland case, was certainly married to Margaret, daughter of Donald Earl of Marr; Winton expressly says, that that lady B. viii. c. 7. l. 35.

> ——————" weddyt wes
> Wyth William yat Lord wes of Douglas:
> That William but dowt was he,
> That made of Dowglas a Cownté."

And in a mortification, to be presently quoted, by this Margaret, there designed Countess of Douglas, and Marr, of certain lands in Aberdeenshire, in the year 1384, she particularizes her husband William Earl of Douglas, her father Donald, and her brother Thomas Earls of Marr. The same fact is also attested by the *Rotuli Scotiæ*, which proves the parties to have been married as early as the year 1359, by charters under the great

[1] Vide Caledonia, v. ii. 337-4.

seal; and no person has ever presumed to assert that she was not Earl William's first wife.

It is well known that she became the heir of her brother Thomas in the Earldom of Marr, when both she, and her husband used the titles of Douglas and Marr, as appears from innumerable charters. It is also well known, that he died in the year 1384; which fact indeed, and the important one, that she *survived him*, are proved by the mortification alluded to, which is as follows:—

" Omnibus, &c.—Margarita Comitissa de Douglas, domina de Marr, et de le Garviach, filia quondam bene memorie tertii Domini Donaldi Comitis de Marr, &c.—(she then, in the deed, proceeds to state, that it had been the intention of the husband, there designed, " Dominus noster *quondam* Willielmus *maritus* noster," to have infeft the chapel of the Virgin in Garioch heritably, in a ten pound land, but that dying in the interval, had left the grant incomplete.) " Nos vero Mergareta predicta *Comitissa de douglas*, et de le Garviach, merita devotionis, et intentionis dicti domini nostri quondam Domini Willielmi mariti nostri attendentes, &c. concedimus, et pleno jure donamus (a ten pound land there mentioned) pro salute anime predicti domini nostri quondam Domini Willielmi mariti nostri, et anime carissimi fratris nostri quondam Domini Thome Comitis de Marr, et pro salute anime nostre, et carissimi filii nostri, et heredis Jacobi Comitis de Douglas."[1] —This grant is dated upon the festival of the assumption of the Virgin, in the year 1384.

William Earl of Douglas, and Margaret his wife, had issue, James above-mentioned Earl of Douglas, and Marr, who was killed at Otterburn in the year 1388, leaving no lawful issue. The former had also another child, Isabella, who, upon the death of her brother James, became Countess of Marr; as is proved by the following excerpt from a mortification by her to the Abbey of Arbroath of the lands of Kinlachmund. She is there designed " Ysabella de Dowglas, Comitissa de Marr, et domina

[1] Chartulary of Aberdeen, 44. The deed is also witnessed by Sir James Sandilands " *nepoti nostro*," that is, her nephew through her husband, Sir James, as will be seen, being in that relationship to the latter.

de Garvyache;" and makes the mortification in question, "pro salutes animarum *quondam* bone memorie Domini Willielmi de Douglas patris nostri, et domine Margarete de Douglas Comitisse ejusdem nostre matris, et salute anime nostre, et fratris nostri quondam domini Jacobi de douglas Comitis ejusdem."[1] It is dated at *Kyndromy (Kildrummie)* 27th of May 1403.

The Earldom of Douglas, erected subsequently to the middle of the fourteenth century, having been constantly a male fief, is the reason why she did not, upon her brother's death, succeed to the title. She succeeded, however, to all the unentailed parts of the estate of Douglas, as is perfectly indisputable,[2] and will be further shewn in the sequel.

This Isabel also died without issue.

That Earl James, and Isabell were the only children of Earl William, is proved:—

1. By the above mortification of the lands of Kinlachmund by Isabel; she there mortifies only for the soul of her brother James, and for that of no other brother, or sister.

2. By the authority of Winton, who talking of Earl James, says— B. viii. c. 7. l. 49.

"He by his Fadyr in Melros lyis,
Hys saule I trow in Paradis,
Off Marr hys Syster was *hys* Ayre,
And of ye Garvyauch. That Lady fayre
Schyre Malcolme of Drowmond til his wyf,
Tuk, and weddyt hyr in his lyf.
Barnys on hyr had he *nane*," &c.

[1] Cartulary of Arbroath. 7. b.

[2] In the litigation between the Earl of Marr, and Lord Elphinstone, in 1624, (*vide* p. 50,) Isabel is styled "aire of ye untaileyed lands of ye Erledome of Douglas by her fayer." She also conveys to Alexander Stewart, Lord her second husband in 1404, all claim she had to lands "ex parte *patris*," which may be exclusive, as will be afterwards evident, of the legitimacy of George Douglas Earl of Angus; for she could not be directly the heir of her father—that is to say, to lands to which her brother James had not succeeded if George had been lawful. Hadd. Dec. Adv. Lib.

He then proceeds to tell us, that she subsequently married the son of the Earl of Buchan, by whom she also had no issue; and these are the only children he assigns to William Earl of Douglas.

3. By the authority of Froissard, who had been intimately acquainted with all the members of the family, and who had survived Earl James.

"De ce Comte (Earl James of Douglas) n'en y a plus, Dieu en ayt l'ame, ne ie ne say a qui la terre de Douglas est retourné *car quand ie auteur* de ceste histoire *fu en Escose*, et en son chastel d'Alquest, vivant le Comte Guillaume, ils n'estoyent que *deux enfants fils, et fille.*"[1]

At any rate, it is beyond the possibility of a doubt, that Earl William had only *one lawful son*, James, because,

1. If he had had another younger son by the heiress of Marr, his daughter Isabel would never have succeeded to the Earldom of Marr.

2. He could not have had a son by any previous marriage; if that had been the case, James would never have succeeded his father as Earl of Douglas.

3. He could not have had a younger lawful son than James, by any other wife, because it has been proved that James's mother survived his father.

But William Earl of Douglas had *a son* called George, by Margaret Countess of *Angus*, and Marr, as is indirectly proved by a charter of Robert II. entered in Robertson's Index; in which this George is styled "*brother* of *Isabel* Countess of Marr, and Garrioch," which fact will be additionally fixed in the sequel. That he was the son of the above Margaret Countess of Angus, can be proved by other charters.

Page 139. No. 7.

Page 96. Crawfurd, in his Peerage, pretends to say, that Earl William *divorced* his wife Margaret Countess of Douglas, and Marr, and married secondly, this Margaret Countess of Angus, and Marr, (that is Lady Tercer of Marr, the wife of Thomas Earl of Marr, brother of the prior Margaret,) but this fact rests simply upon

[1] Edit. Lyons, T. ii. 342.

his own allegation; is a frail part of an erroneous statement that has been already refuted; and is supported even by himself, by *no authority whatsoever.*

It is beyond doubt false, from what has been above stated. By her mortification in the year 1384, Margaret Countess of Douglas, and Marr, is proved to have retained the title of Douglas; if she had been divorced *a vinculo matrimonii*,—the divorce here obviously contemplated—she would have lost it—whereas it is evident from this deed, that she not only survived him, but had been on good terms with him to the day of his death, as she implements and perfects his pious intentions respecting the lands therein mentioned, besides styling the Earl *maritus*, and herself in "*viduitate.*" Cart. Aberd. *ut supra.*

But further, this supposed second marriage of Earl William, is disproved by the several notices of the Countess of Angus upon record. She was the daughter, and heiress of Thomas Stewart Earl of Angus, and was married to Thomas Earl of Marr, who was alive, at least, in the year 1378; by whom she had no issue, in support of which there is the evidence of this charter:—

"Robertus, &c. sciatis nos—concessisse, &c.—dilectæ consanguineæ nostræ Margaretæ Senescal Comitissæ de Marr, filiæ seniori, et unicæ heredi quondam Thomæ Senescal Comitis Angusiæ, (certain lands in different counties,) dated 9th April, 1379.[1]

She confirms numerous charters to her vassals, but in them, or in any others, she is never styled Countess of Douglas, but invariably the Countess of Angus, and Marr. In the year 1397, when contracting for her son George's marriage with a Princess of Scotland, she is called "Margarate Countas of Mar and of Angus."[2] And, in a resignation by her of the lands of Brockhole to the Abbey of Coldingham, in the year 1415, she is still simply designed, "Margareta Comitissa *de Angus*, et de

1 Royal grant inserted in the Appendix to the competition for the estate of Douglas, between Archibald Douglas, Esq. and the Duke of Hamilton, in 1762.

2 Ibid.

Marr."[1] To the latter deed her seal is appended, containing (as from the description) two escutcheons, the one on the right hand, being that of Marr, her deceased husband's, the other that of Angus; but there is not the slightest vestige of the arms of Douglas.

From all these circumstances, it would clearly follow, that George Douglas, the *son* of William Earl of Douglas, by Margaret Countess of Angus, and Marr, was illegitimate.—There are other arguments equally strong in support of the same conclusion.

1. In no deed whatever does Earl William call this George his son.

2. In George's marriage contract, in the year 1397, he is only designated the son of Margaret Countess of Marr, and of Angus, and not of William Earl of Douglas, a most remarkable circumstance, little likely to have occurred had he been legitimate.

3. Had George been legitimate, he would, upon the death of Earl James in 1388, have succeeded to the Earldom of Douglas, that having been always a male fief; whereas he, though allied to the Royal Family, never advanced the smallest claim to it. Sometime subsequently, however, as may be presumed, in virtue of an entail, it devolved upon Archibald Douglas Lord of Galloway, *nominatim*, bastard son of the good Sir James,[2] and certainly the most preferable illegitimate—being the nearest descendant *de facto* in the direct line, of the House of Douglas.

4. William Earl of Douglas had an only sister, Eleanor, who married James Sandilands, ancestor of Lord Torphichen, with

[1] Chartulary of Coldingham, Advocates' Library.

[2] This Archibald, who has been erroneously made by genealogists the second son of William the first Earl of Douglas, is proved by a charter in the second year of the reign of Robert II., to have been son of the good Sir James, the Earl's uncle, who is well known to have died without lawful issue. It would be, after all, affectation in the Author to deny that he has seen an authentic and important document, that fully proves that Archibald must have succeeded in the manner stated in the text—however he may be dis-inclined publicly to adduce it. Archibald is called *Bastard* by Froissard.

Reg. Rob. II. 106.

V. iii. c. 129. 342.

whom he got "*in maritagium*," the lands of Wester Calder[1]. By this Eleanor James had a son James.

It is evident, that failing issue of William Earl of Douglas, this James, his sister's son, would have been his heir-at-law, and heir to all the family estates destined to heirs-general. Now, in the Appendix to the Competition for the Douglas estate already quoted, there is a royal charter, dated in the year 1398, as follows:—

"Robertus, &c.—Sciatis nos approbasse, &c. *donationem*, et concessionem illas quas dilectus frater noster Jacobus de Sandilands miles fecit, et concessit in quadem carta sua sub sigillo suo nobis ostenso, dilecto, et fideli nostro Georgio de Douglas Comiti de Angus, *de omni jure, et clameo sibi competente in successione post decessum Isabelle Comitisse de Mar, et de Garioc,* SORORIS *predicti Georgii*, super omnibus terris, et redditibus subscriptis"—viz. the Lordship of Jedworth Forest—lands of Bonjedworth, Lordship of Liddale, Town of Selkirk, Regality of Butil, and Drumlanrig, &c. &c.

By looking into Robertson's Index, it will be found that most of these lands, with the exception of Douglas proper, which would necessarily be attracted by the title and dignity of Douglas, constituted the estate of Douglas, and had been partly granted to the good Sir James Douglas, his nephew Earl William, and to James second Earl of Douglas.

This charter is decisive; had George been lawful, what claim could Sandilands, in that case a degree further removed, upon the event of the death of Countess Isabel, in any shape whatever, have advanced to the succession? The formal renunciation then by Sandilands, sanctioned by the marked interposition of the Crown, would have been entirely idle and useless; on the other hand, it need not be stated how completely this renunciation harmonizes with the general inferences already deduced.[2]

[1] *Carta* ap. *Dip. Coll. MacFar. MSS. Jac. V.* iv. 23. *Ad. Lib.*

[2] In an action of exhibition, 7th of March 1588, at the instance of William Douglas of Glenbervie, both the above renunciation and the following important deeds are mentioned, which do not appear to be extant,—"ane Act. Dom. Con. v. 120.

The *status* of this George Earl of Angus was singularly remarkable. He was the son of William Earl of Douglas by Margaret Countess of Angus and Marr, the wife of the Earl's brother-in-law Thomas Earl of Marr whose sister Margaret of Marr he had married, and through whom the Earldom of Marr afterwards came to the Douglases. Such a connection, as is notorious, would be accounted incestuous, as well as adulterous in Roman Catholic times.

indenture past betwix Margaret Countess of Mar and Angus, and George douglas hir sone, and James Sandilands, Laird of Calder, 28th of July 1397." This was previous to the renunciation. "Charter of confirmation under ye great seill, maid be robert King of Scots, quhare ye lard of Calder tailzies his leving to George Erle of Angus, 9th November 1398." The Laird of Calder had thus great interests in him, which the Douglas descendant was anxious to secure: nor can there be a doubt that these turned upon the Douglas succession, and that Sandilands parted with his birthright, which came to be vested by a singular title in George Douglas Earl of Angus. There is also an indenture, 17th of March 1397, "betwix Sir Malcome Drummond lord of Mar, and Gareoch, and George erle of Angus, anent certain lands." Sir Malcome was the first husband of Isabel Countess of Mar, and this indenture has been probably of a similar nature in reference to the Mar inheritance.

[1] The misconduct of Earl William may, however, receive some counterpoise from an intrigue his wife is said to have had with Sir William Douglas of Liddisdale, "the flower of chivalry," (of the Douglasses of Dalkeith,)* whom the Earl, in a fit of jealousy, slew when hunting in the year 1353. Godscroft notices the event, and quotes in confirmation these lines from an old song:

Hist. House of Doug. v. i. 143.

> "The Countess of Douglas out of her bour she came,
> And loudly there that she did call,
> It is for the Lord of Liddisdale
> That I let all these tears down fall."

"The song (he adds) also declareth how she did write her love letters to Liddisdale to dissuade him from that hunting. It tells likewise the manner of the taking of his men, and his own killing at Galsewood, and how he

* Chalmers is mistaken in supposing him a natural son of the good Sir James.

The family of Sandilands of Calder, or Torphichen, therefore, were the heirs-general—as in fact they still are—of the distinguished House of Douglas, whose arms they have invariably borne in memory of the descent, a circumstance that puzzled antiquarians not a little.[1] The elder, and direct branches of the Douglases

was carried the first night to Lindin Kirk, a mile from Selkirk, and was buried within the Abbacey of Melros." The murder of the gallant knight has removed the obstacle to harmony between the parties. Whatever may be said by moralists in our time, former ages were much more depraved than the present; and these occasional *peccadillos* of the Earl and Countess, although they might for a moment ruffle, did not in the main disturb the general tenour of their life. Earl William, however, afterwards shewed contrition for the offence, by a curious mortification of lands to the Abbey of Melrose, that may be found in the Chartulary of Melrose, "*pro salute domini Willielmi* de Douglas de Laudonia militis, *cujus corpus ante altare beate brigide virginis requiescit.*" This Sir William Douglas *de Laudonia*, or Lothian, can be proved to be the same with the knight of Liddisdale. The tradition has long prevailed, that the latter was buried in Melrose, the receptacle of the Douglases, where even the place of his sepulchre is pointed out; it hence, as well as the song in part are quite correct.

[1] To an original retour, 23d of April, 1471, of Agnes Melville, as daughter and heiress of her father Thomas Melville of Melville, in the Barony of Melville, the seal of Sir John Sandilands of Calder is appended, containing the arms of Sandilands and Douglas quarterly, with a lady for supporter, and a camel's head for the crest. Although not succeeding to the Douglas estates, the family bore the Douglas arms in commemoration of their descent, in the same way as the house of Winton, those of the Earldom of Buchan, as heirs-general of John Stewart Earl of Buchan, son of Robert Duke of Albany, whose Earldom they did not inherit. Torphichen, therefore, had not only in itself a sanctuary, and hereditary Lordship of Parliament, but was graced with a proprietor who was the lawful heir of our most heroic, and chivalrous family. The Douglases Earls of Angus originally for a difference placed the arms of Douglas upon an ermine field, the same as had been used by Archibald Douglas Lord of Galloway, natural son of the good Sir James, before he succeeded to the Earldom of Douglas. This is proved by a precept of seisin, 20th June 1420, by William Douglas Earl of Angus in favour of John Ogilvy, of the lands of Innerquharity to which his seal is appended, having Douglas in the above manner quartered with a lion rampant, and the arms of Stewart Earl of Angus in an escutcheon over all. Innerquharity charter.

are necessarily extinct in the male line. With respect to the Douglases of Dalkeith, they have been asserted upon evidence, which as yet appears not to be altogether satisfactory, to have sprung from the main stem at a remote period long previous to the reign of Robert Bruce; if so, the male representation must centre in them; but who their nearest male descendant may be, whether the Earl of Morton, or some other family, is a point requiring to be established. The Earl of Morton in 1564, formerly noticed, so harshly treated by James V., and styled "ane of ye maist noble baronys of ye realme," was undoubted chief of the Douglases of Dalkeith; but that pre-eminence may be now separated from the title, owing to certain entails, and conveyances, that subsequently occurred, and which carried the honours into different branches of the Douglases. There is every reason to think, however, that the family of Lochleven, ancestors of the present Earl of Morton, are sprung from the house of Dalkeith.

Vide p. 123, *note.*

No. IV.

BIRTH AND CONNECTIONS OF SIR THOMAS CRAIG, THE GREAT FEUDAL WRITER.

Of late years it has been usual in biographical details of eminent persons, especially long ago deceased, to adduce any circumstances that can be recovered regarding their birth, and connections; and, on this account, the following original information in these respects, as to Craig—certainly a distinguished lawyer, and who has reflected considerable lustre upon Scotland, may, perhaps, not be deemed unacceptable.

Mr. Tytler apprehends from evidence to which he alludes,[1] that Sir Thomas was eldest son of Mr. William Craig of Craig-

[1] Life of Craig, p. 2. and *App.* No. III.

fintray, afterwards Craigston. The authorities here subjoined, while they shew that this could not be the fact, instruct that his father was a very different person.

1. Marriage contract, dated, Edinburgh, last day of October, 1573, between Mr. Robert Richardson, Commendator of Saint Mary's Isle, for himself, and Helen Hamilton "his *oy*," (that is, either *niece*, or *grand-daughter*) on the one part; and *Robert Craig Burgess of Edinburgh*, Katharine Ballanden his spouse, and Mr. Thomas Craig, "*yer sone*," on the other part; by which it is agreed that Mr. Thomas shall marry Helen. Helen's portion is two thousand merks, and certain lands are settled upon her in conjunct fie both by her future husband, and father-in-law. The contract was registered upon the petition of "Mr. Thomas Craig, *advocat*." Bonds and Ob. of that date.

2. Will of "Robert Craig, burgess of Edinburgh," dated 3d of June 1575, upon the consideration "yat ye fragilitie, and brukkilness of mannis life is trublit sumtymes wyt ye thocht, and dolor of deith quhen ye samin approches;"—whereby he appoints "Katherane bannatyne his spous and Mr. Thomas Craig *advocat his sone* his executoris," and leaves one half of his moveables "to ye said Katherane his wyffe, and ye uyer half to olipher, robert, Jame Craig his lawful bairnis."[1] It is witnessed by James Craig, burgess of Edinburgh, David Moysie,[2] and Gilbert Bannatyne.

3. Edict in the usual form, by the commissaries, dated 12th of December, 1575, summoning the heirs, &c. of "Helene Hamilton, *spouse* to Mr. Thomas Craig *advocat*," "to hear executors-dative confirmed, &c.—"comperit Mr. Thomas Craig for lawful barnis gotten betwix him, ande helene hamilton his spouse, quhome ye saidis Commissaris decernis etc."[3]

[1] Testamentary Register of Commissary Court of Edinburgh.

[2] This, perhaps, may have been the individual whose Memoirs have been ably edited by James Denniston, Esquire, younger of Denniston, advocate.

[3] Act and Decreet Book of Commissary Court of Edinburgh.

4. Decreet 1st February, 1575, against "Katherine Ballenden relict, and Mr. Thomas Craig executore, at ye leist universale intromettoris wyt ye gudis, and geir of umquhile Robert Craig hir spouse."[1]

It is extremely probable, however, that Robert Craig, the father, may have been a younger son of the Craigs of Craigston; because Baillie,[2] while he correctly styles him Robert Craig merchant in Edinburgh, adds, that he was "ex antiqua *Cragiorum de Craigston* gente oriundus;" and the second son of the chief of that family.

The evidence that led Mr. Tytler to form a different opinion as to Craig's parentage, is a Crown charter on the 16th of April, 1576, to Sir Thomas Craig, and his heirs-male, whom failing, to his brothers John, James, Robert, and Oliver, and their heirs-male; whom failing, to the heirs-male whatsoever of William Craig of Craigfintray, (upon whose resignation the grant proceeds) bearing his name and arms.[3] But here, it will be observed, that Sir Thomas is not called son of William, nor is there any legal proof of relationship, however likely it may be from the general strain of the transaction.

The above notices also apprise us of the names of Craig's mother, and first wife, both of which had hitherto been unknown. Mr. Robert Richardson, Commendator of Saint Mary's Isle, (either grandfather, or uncle of the latter) was a person of note, and a public character, having filled the situation of Treasurer of Scotland;[4] and there can be little doubt, that Katherine Bellenden his mother, was of the distinguished, and powerful family of the Bellendens of Auchinoul and Broughtown, who were raised to the Peerage at the restoration.

This is proved by the will of "ane noble and potent lord Schir John Ballenden of Auchinoul knight, justice Clerk of Scotland,"

[1] Ibid.

[2] Baillie's Life of Craig, prefixed to his work *De feudis*, edit. 1732, p. 16.

[3] Life of Craig, Append. No. III. *ut supra*.

[4] See Crawford's Officers of State, 383.

dated 6th of October 1576, where he styles Mr. Thomas Craig, advocate, his "*cousing;*" and makes him, along with other relatives, one of the tutors to his children. Craig, in this manner, was not originally an obscure person, but had considerable interest and connections to assist his progress through life, independent of his own great and acknowledged talent. Testamentary Reg. Com. Court Edin.

The following is an excerpt from the will of the Justice Clerk above referred to, which is, in some respects, curious, when we consider the public life and peculiar habits of the individual.

"At the hous, ande dwelling-place of ye Cannagait, the xix day of Septembre (1576), the quhilk day, &c. Schir Johne bellenden, &c. being presentlie, at ye plesoure of ye lord his god, be infirmitie, and seiknes, maid his latterwill and legacie, in manner as efter followis, that is to say, In the first, I commit my saule into the mercie of ye lord my god, being assurit of remission of my synnis frelie to be forgevin me be ye deth and passion of my maister, ande onelie Saviour Jesus Christ, being assurit be his halie spirit quha menis my hart to cry abba *pater;* fforyer committis my body to ye erth to be kepit yerin as ane stoirhous to ye joyfull day of resurrectione, at quhilk day I am assurit it sal be raisit wyt immortalitie, be ye power of my lord, ande onelie Salvioure Jesus Christ, and imbrace agane yis my saule, quha baith sall meit my maister wyt joy, and comfort to heir yat comfortabile voice yat he hes promeist to resonat, saying cum unto me thow as ane of myne elect, ande posses yat kingdome yat I haf purchest, and preparit, for to regne wyt joy wyt me, add my angellis for evir." He commits James Bellenden his son, then in the King's service, "under ye lord my god, unto his maiestie, and my lord regentis grace, and ordainis him contínewallie to await upone his maiesties service." He commits the protection of "his remanent barnes, to my lord regents grace, and my lord of angus." He orders Mr. Lues, his son and heir, to serve the Regent and "ye hous of Anguse under ye kingis majesties obedience, as I and my forbearis haf done in tymes bipast, befoir all ye warld." He leaves Agnes Bellenden, his natural daughter, to Lues his son; and "to my cousing Mr.

Thomas Craig ane Zeirlie pensione of twentie pundis to be payit to him Zeirlie be my sone Mr. Lues. Item, ane uyer Zeirlie pensione of ye soume of twentie pundis to be payit to him Zeirlie for my sone James affaris."

Lewis, afterwards Sir Lewis, eldest son of Sir John Bellenden, likewise held the situation of Justice-Clerk, and was employed in important diplomatic capacities. It is not unlikely that Sir Lewes Craig, of Wrichthouses, a Lord of Session, the son and heir of Sir Thomas Craig, may have been named after him; but, at any rate, there is reason to think he was of Craig's first marriage, and not of the last with Helen Heriot, as has hitherto been supposed.

It has been a subject of surprise to Dr. Parr and other writers, that nothing is known of the parentage and connections of the great William Bellenden, who, the Doctor observes, may be rather called "a light, than a man of Scotland." The details of his private history, which are indeed meagre, are exclusively gleaned from Dempster, a cotemporary, who informs us among other things, that he cultivated the fine arts at Paris, where he was Professor of Humanity in 1602, besides having practised as an advocate before the French Parliament.[1] The following evidence seems clearly to relate to him, and at once to fix both of the above points. Action in the Court of Session, 22d of April 1586, at the instance of "Issabel ballenden dochter lauchful to umquhile *Johne ballenden of Leswaid* lauchfullie constitute be *Maister William ballenden advocat in the perliament at Pareis* HIR BROYER," against William Sinclair of Roslin, charging the latter to pay to her an annual rent due out of the lands of Fauside. This celebrated individual, therefore, was of the Bellendens of Lasswade near Edinburgh, and the annual rent was probably a provision settled upon his sister. Whether these Bellendens were related to the Auchinoul stock has not been

Act. Dom. Con. et Sess.

1 "Patronus causarum in supremo Galliarum Senatu." *Dempsteri Historia Ecclesiastica*, p. 119, *edit.* 1627. This author adds, that Bellenden figured in the reigns of Queen Mary, and James VI., and was alive in 1627 when he wrote.

ascertained; if so, Craig and Bellenden would be distant relatives, between whom there existed some degree of similarity both in their pursuits and intellectual accomplishments. It is not believed, however, that the former were very aristocratic, so that their descendant has been one of the numerous instances of accomplished Scotchmen, who, by foreign nurture and intercourse, have rendered themselves distinguished at the period. Indeed all the illustrious Scotchmen, both then and for sometime afterwards, were educated abroad, which verifies in some degree a remark of Dr. Johnson, that much may be made of a young Scotchman, when "early caught."

No. V.

REFUTATION OF THE ASSERTED ROYAL ORIGIN OF THE ENGLISH COURTENAYS, MORE ESPECIALLY IN ALLUSION TO LORD ASHBURTON'S RECENT PERFORMANCE.

THE late Lord Ashburton—a man of an original bent, among his other pursuits directed his attention to matters of antiquity, and history, as appears by a posthumous work, entitled, "Genealogical Memoirs of the Royal Family of France,"[1] printed, but not published by his executors, in pursuance of his orders, after his death. He there discusses at considerable length—although it is to be regretted not in the most satisfactory manner, and hardly ever with the aid of authorities, the pedigree, and descent of that illustrious house, as well as the nice subject of the Spanish succession;—whether, on the failure of the lineal heirs-male of Charles X., the King of Spain is barred by the renunciation of his ancestor at the treaty of Utrecht; or if the Salic law is still

1 Large folio, Nichol, London, 1825, in the library of the Faculty of Advocates, to whom a copy was presented by his Lordship's editor.

to prevail, and to give him the preference as the undoubted heir-male? Recent events may obviously for ever preclude such a question; but still the subject is in itself curious, and productive of much argument, and it cannot be denied that his Lordship, in his treatment of it, displays no small degree of acumen and ingenuity, contending, among other things, that the renunciation may be ineffectual, because not ratified by the States General of the kingdom.

But he has more especially broached this other topic, that has been much canvassed by writers,—whether the *English* Courtenays are a male branch of the same royal house—that is, sprung from Peter of France, younger son of Louis VI., who married Elizabeth, daughter and heiress of Reginald de Courtenay, Baron of Courtenay, and adopted in the same way as the Bourbons, the name and arms of Courtenay—from whom were sprung the Emperors of Constantinople, and the Princes of Courtenay in France, only lately extinct; or, on the other hand, if they be not rather of the original Courtenay stem previous to its failure in the direct line in the person of the heiress? It is very evident, that in the first alternative, they would be of kingly origin, and princes of the blood in France; in the other, only noble and baronial. But even in the latter case, if unsuccessful in fixing a point of high value to the lovers of ancestry—or as the French would call it, the "*solstitium honoris*"—the Courtenays would have little reason to bewail their lot—to them it might be only "the excess of glory obscured," as in our own island they are identified with many high and national remembrances, where, besides being of the first rank and distinction, they have directly intermarried not only with the royal family of England, but also with that of Scotland.[1]

[1] Their alliances with the royal family of England are well known, and need not be expatiated upon. Robert Courtenay married Alize, daughter of William Fitzduncan, Earl of Murray, son of Duncan, King of Scotland in 1095. *Vide Dug. Bar.* v. i. 566. *Dug. Monast.* v. i. 101–400. *Hailes Ann.* v. i. 52–3–79–102. William de Courtenay married Ada, daughter of Patrick Earl of March who succeeded in 1184, by Ada his wife, daughter

Lord Ashburton espouses the theory of the French Royal descent, in support of which he states such facts and circumstances as he can bend to his purpose; and indeed his work has been deposited in public libraries to draw public attention to the subject, and to elicit, if possible, further evidence that may serve to illustrate it.

It is admitted upon all hands, that Reginald de Courtenay, the husband of Hawise de Abrincis—who figured from 1168, to 1194, when he died, leaving by her Robert de Courtenay his heir, who lived down to 1242—was the ancestor of the English Courtenays; hence all that is required, is to fix the birth, and parentage of this Reginald. Such being the case, the question is by no means complicated, and may be truly said to lie in a nut-shell. Lord Ashburton maintains, that he was a younger son of the Peter of France, husband of the heiress of Courtenay, and son of Louis VI., above-mentioned; his authority for this is the Register, or Chronicle of Ford Abbey, a compilation sufficiently inclined to laud the English Courtenays, and to admit any legend or conceit, however flattering, that might tend to elevate them. It certainly does affirm, that the father of Reginald was the son of Louis VI. who married the heiress of Courtenay, but very strangely, and erroneously styles him *Florus*, a name not only then

of William the Lion (in whose right, although said to be illegitimate, Patrick Earl of March, her descendant, in 1291, claimed the Crown of Scotland), by whom he obtained the lands of Home in Berwickshire. *Chartulary of Kelso*, 49, 257. *Cal.* v. ii. 246–1. *Hailes' Ann.* v. i. 156, 230. The name of Courtenay like that of Percy, although planted in Scotland, did not take root there. The Percies were nearly as short-lived in Roxburghshire. Vide Cal. v. i. 508. The Courtenays had thus spread far and wide in Britain; and in the 9th of John, we find Engelina de Courtenay holding the manor of Berncestre in Oxfordshire, &c. These facts are important, as shewing that the family must have been for some time previously settled in the island, and could not have been exclusively sprung from one person, who could only have properly married in the year 1173, which, as will afterwards be seen, must follow from Lord Ashburton's theory. Abbreviat. Placit. 46.

quite foreign to the French family, but also at any period whatever. Here then a difficulty presents itself, which his Lordship attempts to obviate, by supposing that "Florus," (the meaning of which is unknown) may have been a soubriquet, or nick-name, applied to Peter of France, in the very same way as "Rufus" to William Rufus; and, hence, that it does not exclude the possibility that the monks of Forde Abbey, while they talked of Florus, had not also Peter in their eye. But all this is mere conjecture, and the supposed analogy does not hold, for the son of the conqueror is not exclusively designed by his soubriquet, but moreover by his Christian name; and had Florus been Peter, he would, according to this fashion, have been called Peter Florus, like William Rufus—instead of Florus simply—which he never is.

There is a piece of evidence that has not yet been adduced, which evidently determines the point, by proving that the Reginald in question was not the son of Peter, or the imaginary Florus, but of a totally different person. It is an entry in the venerable record, entitled "*Testa de Nevil*,"[1] relative to the Robert Courtenay who has been mentioned, *son and heir of that very Reginald;* and which, after stating that Robert held Sutton, or Sutton Courtenay part of the family estate, "per finem quem fecit cum domino Rege Johanne," expressly declares, that it had been previously
P. 128. granted by Henry II. the "*father*" of the same prince[2] "*Reginaldo* de Courtenay AVO SUO"—namely to Reginald de Courtenay, Robert's *grandfather.*

This intimation is, therefore, decisive, because, as in the maternal line through Hawise de Abrincis his mother, Robert was allied to a distinct family that had no connection with the Courtenays; the Reginald, here designed his *avus* must have been

[1] The Testa de Nevil is an ancient record, containing lists of fiefs in various counties, their tenures, &c. taken by inquisition as early as the reign of Henry III.

[2] Henry II., the father of John, began his reign in 1154, and it lasted till 1199, when he was succeeded by John his son, who died in 1212, the æra of the reign of Henry III.

his *paternal* grandfather; and if so, necessarily the father of *the very Reginald*, into whose filiation we are enquiring. The father of the latter, therefore, was not Peter of France, or Florus, as contended by Lord Ashburton, but Reginald de Courtenay; and there evidently have been two Reginald de Courtenays, father and son, the first of whom seems to have been overlooked by genealogists.

The Royal descent in this manner, is fairly disproved; and it is equally untenable upon the only other supposition that could be urged in its defence—that the *elder* Reginald, (the *avus*) may *himself* have been the younger son of Peter of France; because Peter did not marry until after 1150,[1] and Reginald the younger his son[2] was fully of age, and publicly figuring in 1168[2] —besides being a widower when he married Hawise de Abrincis, (which may be held to have been in 1173,) and having children by a previous wife.[3] These last facts, indeed, of themselves refute Lord Ashburton's theory upon its own grounds, which has only reference to Reginald the *younger;* but at any rate, clearly exclude the previous supposition; because, in point of chronology, the *first* Reginald was evidently cotèmporary with Peter's father, and although he *might* have been the father of Peter, he could not possibly have been his son.

It may be natural also to ascertain what has been affirmed by the historians of the house of Courtenay in France, the original seat of the Courtenays; and independently of their *utter silence as to any Reginald, son of Peter of France*—so remarkable, when we reflect how much the royal pedigree of France has been elaborated—we have the authority of Bouchet their genealogist for the fact, that the English Courtenays came to England with William the Conqueror—that is, so very early as 1066.[4]

[1] Both Cleaveland, the historian of the English Courtenays, and Lord Ashburton admit the fact. See Lord Ashburton's Work, Pp. 120, *et seq.*

[2] Dugdale's Baronage, v. i. p. 634. He quotes here legal evidence.

[3] Ibid.

[4] Ap. Anselme, v. i. 530. He is there made younger son of Acho, the original ancestor, or founder of the family of Courtenay, in which opinion Le Laboureur concurs.

Nor is he here singular in his opinion,—for while it is plain, from what has been stated, that the Courtenays must have been settled in this island before 1173, the date, according to Lord Ashburton, of the arrival there of the *first settler*[1] the son of Peter of France—it receives pointed corroboration from the appearance of the surname in those ancient lists that have been transmitted to us of the followers of the Conqueror.[2] Coupling these facts with the preceding, we may hold that the English Courtenays were of the original stock of Courtenay previous to the time of the heiress; and they certainly bore their arms differenced by a label, a very appropriate mark of cadency; it being then not simply confined to princely families, but also used for the same purpose by such as were noble and baronial.

It is unnecessary here to allude to any thing more adduced by Lord Ashburton, who argues in general rather diffusely—entering into details that really appear to be little relevant, and still more so in respect to a question that seems capable of easy solution. As to Cleaveland's argument in support of the royal descent, it was formerly noticed, and, it is conceived, refuted.

Vide Pp. 104-5.

No. VI.

REMARKS UPON THE EARLY PART OF THE HISTORY OF THE DOUGLASES.

Cal. v. i. 579.

Mr. Chalmers has not been so fortunate in his theory of the origin of the Douglases, as in that of the Stewarts.[3] There

1 P. 121, *ut supra.*

2 Leland's Collect. v. i. 206, &c.

3 Every thing tends to shew, that the Stewarts are of the Norman family of Fitzalan, ancestors of the Earls of Arundel. The objection that they never bore their arms may be easily obviated. Arms were not in use when

is no proper evidence that Theobald the Fleming, who obtained lands from the abbot of Kelso upon Douglas water, about the middle of the 12th century, was, as he alleges, their ancestor, and the point is still involved in its original obscurity; neither is it likely from its antiquity, and other circumstances, that further light will be thrown upon the subject, especially in Scotland. It does not, however, seem to be attended to, that the Douglases were also a Northumbrian family, and possessed the manor of Fawdon in the same county, as far back as 1267. In that year, as we learn from an English record, William Douglas accused Gilbert Umfraville Lord of Redesdale, and John Hirlaw, of having falsely calumniated him at the siege of Alnwick to Prince Edward, son of Henry III., as being an enemy to the King and the Prince, with the view of obtaining the manor of Fawdon in Northumberland, held by William, of Gilbert, *and which Edward had granted to him.* A jury, to whom the matter was referred, acquitted Douglas, who, in consequence, was reinvested by the King in the property. Thereafter Umfraville, at the instigation of Hirlaw, despatched a hundred men of Redesdale to Fawdon, who destroyed, and carried off Douglas's goods and chattels, "et *Willielmum filium* ipsius Willielmi de Duglas, lethaliter vulnaverunt, *ita quod fere amputaverunt caput ejus.*"[1] William the

the Stewarts first sprung from the Fitzalans, and they afterwards only used such as were indicative of their hereditary office—the checkers, their heraldic *insignia*, clearly referring to it. The table upon which the general accounts of the kingdom, originally under the control of the Stewart, were computed, had a checkered covering or *coopertura*, where arithmetical calculations were made by counters, as upon a chess-board. By this means, and the attendant aid of the minstrels, not only the intellects of the officiaries were sharpened, but they proceeded with better humour in the discharge of a duty, that from various reasons, must have been difficult and complicated. Besides, it is proved by a deed in Dugdale's Monasticon, that at the very time the Scotch Walter Fitzalan, the ancestor of the Stewarts, lived, a person of the same name executed a grant of land in Shropshire in the neighbourhood of the seat of the English Fitzalans, which is a remarkable coincidence *in re tam antiqua.*

[1] Abbreviat. Placit. in Curia Regis, 166.

son, however, recovered, doubtless in consequence of the hardiness of his frame, which eventually gave him the surname of "William *the Hardy*," and was father of "the good Sir James," who in 1329, had Fawdon restored to him by Edward III., with other lands in Northumberland, which are stated in the grant to have been held by "Willielmus Douglas *pater* suus," and to have been forfeited by William to Edward.

Rymer, v. iv. 384.

We thus see that William was nurtured in scenes of havock and bloodshed; but what is singular, and could hardly be credited, it thus turns out *that Edward I. was the Patron, and the benefactor of the Douglases*, and may, in all likelihood, have laid the foundation of their greatness by materially adding to their estates, which were then inconsiderable in Scotland.[1]

The ancient records in Northumberland, which are in much better condition than any in Scotland for the period, might be naturally expected to afford further notices in relation to the Douglases.

Rot. orig. in Cur. Scaccar.

When the same William the Hardy in 1289, "cum equis et armis, et multitudine armatorum," had carried off "vi, et armis," a wealthy and noble matron, Alianora, the widow of William de Ferrars, from the manor of Tranent, whither she had repaired to look after her Scottish jointures, Edward I. ordered the sheriff of Northumberland to confiscate his estates in that county, and also to apprehend him; but in consideration of a fine of a hundred pounds paid by William,[2] he obtained the feudal benefit of her marriage. He afterwards married the lady, who survived him, and in her turn benefited by the alliance, having successfully sued for a legal provision out of William's estates in Scotland. She was of distinguished connections, having been the wife of Colban Earl of Fife, in right of whom, and of William de Ferrers —whose mother was one of the De Quincy heiresses, and coparcener of Tranent—she was entitled to large dowers both in

Rot. Par. Ang. *incert. ann.*

[1] Mr. Chalmers observes, that in the 13th century the lands of Douglas "were too narrow to supply a provision for the younger children." *Cal.* v. i. 580.

[2] Dugdale's Baronage, v. i. 267.

England and Scotland, which probably weighed as much with William as her personal attractions.[1]

One cannot but be struck with the strong resemblance subsisting, in many respects, between the Douglases and the family of Guzman in Spain. Both were equally chivalrous, and heroic; and if the "good Sir James" was the first hero of the Douglases in the reign of Robert Bruce, we have, at the same time, Don Alonzo de Guzman, the first illustrious ancestor of the Guzmans, and who, in like manner, was designed "*el bueno.*"

Sir James fell gallantly in Spain, in an engagement with the Moors; so did Don Alonzo de Guzman; and their devoted heroism, in both cases, gave rise to part of the armorial achievements of the future Douglases and Guzmans. Afterwards the descendants of Don Alonzo, to use the words of West:—

> ——————— "by valour, zeal,
> And loyalty distinguished, from their kings,
> Gained *those high honours*, princely signories,
> And *proud prerogatives*, which have extolled
> The name of Guzman to such envy'd grandeur,
> *That scarce above it towers the regal throne.*"[2]

This is obviously the very picture of the Douglases at the height of their power. Each family attained the title of Duke in the fifteenth century, and were at the head of the nobility in their respective countries; and finally, both are blended in houses descended of the blood royal, who at present figure as premier Dukes in Spain, and in Scotland. The Guzmans, it may be observed, with their immense possessions, are merged in the Las Cerdas, Dukes of Medina Celi, who in fact, in the female line, are the preferable heirs at common law to the Crown of Spain. Under

1 Could this lady have been the Alianora, daughter of John Earl of Warren, and Surry, and sister of Isabel, wife of John Baliol—who, according to Dugdale, married first Henry Lord Percy, and afterwards "*the son of a Scotish Earl?*"—if so, she must have been pretty well stocked in husbands—she at least had three whose destiny she out-ran—Earl Colban, William de Ferrers, and William the Hardy. V. i. 80

2 Institution of the order of the Garter.

such circumstances, it is not a little remarkable that, independently of being allowed to bear the royal arms indicative of that high descent, they are not merely tolerated in so despotic a country, but have actually risen there to unexampled wealth and distinction.

No. VII.

DECREET ARBITRAL, PRONOUNCED BY QUEEN MARY IN 1564, UPON THE RESPECTIVE CLAIMS OF ANDREW EARL OF ROTHES, AND WILLIAM LESLEY, HIS ELDEST LAWFUL BROTHER, TO THE EARLDOM OF ROTHES; WITH OBSERVATIONS UPON THAT EVENT, AND THE STATE OF THE SUCCESSION IN THE HOUSE OF ROTHES, BEFORE, AND AFTER THE MIDDLE OF THE SIXTEENTH CENTURY.

March 17, 1566. *Register of Deeds of that date.*

"In presens of the Lordis of Counsale, comperit Maister Thomas Bannatyne, procurator speciallie constitut for ane noble and mighty Lord ANDREW *erle* of *Rothes*, Lord Leslie, &c. be thir his speciall lettres of procuratorie under-written, seillit, and subscryvit with his hand on that ane part; and WILLIAM *Leslie* BRODER LAUCHFULL *to the said erle*, on that uther pairt, personalie, for himself, and gaif in yis decreet arbitrall following subscryvit be oure soverane ladie, and gifin be hir hienes, and siclyk subscrivit with yair handis, and desyrit the samin to be insert and registrat in youre buikes, to have the strenth, force, and effect of ane Act, and decreet of the Lordis," &c. (which is allowed accordingly, and then follows the decreet-arbitral in these terms):—

"Apud Edinburghe, decimo quinto Januarii, anno Domini millessimo, V^c^ sexagesimo quarto. The quhilk day the Quenis Maiestie quhatat the earnest applicatioune, and desyre of An-

drow, now erle of Rothes, on ye ane pairt, and William Leslie his brother, on the uthair pairte, acceptand in, and upoun hir hienes, all actioune, claime, questioune, interess, and debait yat ather of the saidis pairteis had, or micht clame, or pretend to haif aganis utheris, anent the title of richt and clame quhilkis ather of yame hais, or may move, and persew in, and to the erledom of Rothes, howsses, landis, offices, rowmes, and possessionis thereof, to be decided be hir heines, the same, and decisionne thereof being of befoir submitted to hir Maiestie be baith the saidis pairties, as the act of counsale made yerupoune subscrivit with baith yer handis, of the date xx day of July, last bipast, at mair length proportis; being of mynd and will, that the house of Rothes be manteyned in sic honourable estate, as the samin hais bene in tymes bigane, and alswa that the perpetuall amitie, and kyndnes may stand, and remane betwix the saidis pairteis, without ony grudge, or suspicioune, in ony tymes cuming, having heard the matter diverse tymes reasoned in hir maiesties presence, the rychtis, reasoneis, and allegeances of baith the saidis pairteis, being hard, and considderit, and therewith being ryplie aviseid, with consent of baith the saidis pairteis, *Decernis, decretis*, and *deliveris*, that the said Andro erle of Rothes saill brouk, and joise the haill erldome of Rothes, with houses, fortilices, landis, rowmes, and possessiones of the same siclyke, as umquhile GEORGE *Erle of Rothes* FADER[1] possessit the samin in his tyme, heretablie, according to his infefmentis obtenit be him yairupon, and that, but ony stop, or impediment to be made, or done to him, be ye said William in tyme cuming, and *the said* WILLIAME renunces lykas he be the tennor heirof *renunces all rycht, titill of rycht, clame, propertie, possessioune*, and kyndnes quhatsumever he hes, had, or ony wayis may be fundin to have ony tyme bygane, and to cum, to *his said erldome*, landis, rowmes, possessiones yairof, or ony pairt of the samen, be quhatsumevir title, or rychts pertening to him, or that he may ony wayes *lauchfullie* pretend yairto, *be deceise of his fader, mother*,

[1] *i. e.* of the parties, though the necessary words are omitted.

broder,[1] *or as air to yame, or ony of yame*; or any uther persone quhatsumevir, be gift, dispositioune, or uther provisioune quhatsumevir, *in favouris of the said Andro his brother*, sua that he, and his airis, may peceablie browk, and joise the same in tyme cuming but stop, or impediment of the said William, his airis, and assignais, or ony uthairs in his, or yair names, or be his, or yair right maid, or to be maid to upoun uthair yairupon, Provyding alwayis, that gif the said Andro happinis to deceis but airis maill gotten of his body, or in caise of deceis of yame, the *said haill erldome* to RETURN *to the said William* sic lyke as he had never *renunced*, nor *overgewin his rycht*, and kyndnes thair; and alsua ordaynes the said William to deliver to the said erle, his factouris and servitouris in his name, the housses of Rothes *presentlie bruked by the said Williame*, within xx dayis nixt after the date heirof; and sicklyk ordeynes the said Williame to discharge, lyk as he, be thir presentis, dischairgis, the said Andro Erle of Rothes his airis, executoris, and assignais, of all *airschip gudis* or utheris gudis quhatsumevir, *quhilkis he may acclame be the deceis of the said umquhile George erle of Rothes:* for the quhilk causes hir maiestie, and hienes *decernis*, and ordeynes the said Andro erle of Rothes, to infeft the said William and his airis maill lauchfullie to be gottin of his bodie, *quhilkis failzeing to returne again to the said erle, his airis and successouris heretablie* in all, and haill his landis of Cairny, with the pertinentis, lyand in Kerse of Gowry, baronie of Ballinbrech, and Schereffdome of Perth, to be haldin in fre blench firme, to the said Andro erle of Rothes, his airis, and successouris, barrones of Ballinbreich, and sall warrand the saidis landis to be worth in yeirlie proffeit the sowme of tua hundret merkis money of this realme, and sall mak the same fre of all wedsettis, and takis, except the takis quhilkis the tennentis haif yairof presentlie betuix this, and the feist of Whitsonday nixt tocum efter the dait heirof; and gif it happin the said William to haif na airis maill, bot femalle, in yat caise the said Andro erle of

[1] George Earl of Rothes, Margaret Crichton, and Norman Master of Rothes.

Rothes, and his airis, *sall provyd the said airis femall of competent mariageis*, according to yair estate. Alsua ordeynes the said Andro erle of Rothes to infeft the said Williame in lyfrent for all the dayis of his lif, in als meikle of the landis of Ballinbreich with the pertinentis, as will gif be yeir the sowme of fyive hundred merkis money foirsaid, and the said William to sett the samin landis agane to the said erle, and his, during the lyftyme of the said Williame, for zeirlie payment to him of the said sowme of fyive hundred merkis at tua termes in the zeir, Whitsonday, and Mertymes in winter, be equall portiones, the said erle finding sufficient cautioune for yeirlie payment therof acted in the buikis of counsale; and alsua ordanis the said Andro erle of Rothes to discharge, as he be thir presentis dischargis the said Williame, his airis, executoris, and assignais, of all males, fermes, proffeittis, and dewiteis of the landis, and baronie of Rothes, or any pairte yairof, intrometted with, and uplifteit be the said William, or ony utheris in his name in ony tyme bigane, praeceiding the dait heirof; alsua ordeynes the said erle to cause big on his expenses, ane sufficient duelling howse to the said William upoune the foirsaidis lands of Carny, effeiring for sic ane gentil manes ease, and duelling, and to pay the males of ane ludgeing in Sanct Johnnestoune, or Dunde sufficient and competent for the said William, aye and quhile the housse foirsaid be sufficiently bigget, as said is; and ordeynes the said William to be interdicted, and be thir presentis interdictis himself fra all alienatioune of the foirsaidis landis of Cairny, and lettres of publicatioune to pas yairupoun in forme as effeiris, and the said William to deliver the said erle of Rothes the *leteres of regress*, and all utheris evidentis quhilkis he hes in his handis concerning the said erldom of Rothes, and landis thairof, and ordanis ather of the saidis pairteis to discharge, as be thir presentis dischargis ather of thame, uthairis, of all actioune, contraversie, and clame quhilkis ather of yame had, haif, or onywise may haif, move, or persew, contrar uther, for quhatsumever cause, actioune, or occassioune bygane, preceiding the date heirof; and baith the saidis pairteis to stand, and remain in amitie, reverence, and brotherlie lufe, ather of yame to utheris,

as apperteynes amangest brethrene, in all tyme cuming. And this hir Maiesties decret, and deliverance, to all and sindrie quhome it effeires, makis notified, and knawin; and baith the saidis pairteis ar content, and consentis, that the samin be insert, and registrat in the bukis of hir graces counsale, to haif the strenth of ane decreet of the Lordis yairof, with executoriallis to follow thairon in forme as effeiris. In witnes heirof, her Majestie, and alsua baith the saidis pairties, in tokin of their consent, hais subscrived this decret with yair handis, day, yeir, and place forsaidis. Sic subscribitur Marie R. Andro erle of rothes, wyt my hand, William Leslie wyt my hand."

Then follows a procuratory by Andrew Earl of Rothes for registering the above decreet-arbitral, which is only so far remarkable, that he therein styles William "*our* ELDEST *bruder.*"

The explanation of this singular transaction will be best understood by glancing at the previous situation, and circumstances of the Rothes family, which have already attracted the notice and remarks of antiquarians, although they have not proceeded upon just grounds.

George Earl of Rothes, father of the parties, was contracted before the 1st of April 1517, to Margaret Crichton (whose strange and unhappy condition will be afterwards shewn) "per verba de futuro, cum carnali copula," as by a charter in their favour of that date of the Rothes estates; containing also a substitution to them, and their heirs, "matrimonio inter ipsos solempnizato, et stante legitimo; vel per dispensationem, si opus fuerit, legitimato." There was hence a legal objection to their marriage, but it has afterwards been removed, probably by dispensation; and the Earl certainly had by her the well known Norman Master of Rothes, the murderer of Cardinal Beaton, who was put into the fee of the Earldom.[1] They also evidently had William, their second son,

Reg. Mag. Sig. Lib. 21, 195.

[1] Instructed by various deeds in Great and Privy Seal Records.

mentioned in the above decreet-arbitral, who has been entirely overlooked by the Peerage writers. Subsequently it is stated, when Earl George was upon an embassy, that Margaret had an intrigue with Panter Bishop of Ross, by whom "she had a bairn,"[1] owing to which she was divorced. This may have given rise to a proceeding not uncommon in these days. If the Earl had divorced Margaret for the adultery, there would only then have been a divorce *a mensa et thoro*, but not *a vinculo matrimonii*, and therefore it was better to resort to some other plea that would entirely void the marriage. Accordingly it was set aside by means of a pretext that was seldom wanting in these dissolute times—that Earl George, previous to his marriage, had illicit intercourse with Matilda Striveling, who was in the second and third degree of consanguinity to the Countess, and hence in the same degree of affinity to the Earl—in this manner making their alliance incestuous and illegal according to existing law: and whatever may have been the state of the facts, sentence was pronounced to this effect by the Ordinary, the Rector of Flisk, on the 27th of December 1520.[2] Availing himself of his liberty, the Earl, after having been the husband of Elizabeth Gray Countess of Huntly for some time subsequent to 1525,[3] married Agnes Somervile, by whom he had Andrew the other party in the decreet-arbitral: but Margaret Crichton, it is to be presumed, had not acquiesced in the judgment of the Ordinary, but had appealed to a higher tribunal, for she is thereafter mentioned

[1] "Margaret Crichton was divorced by George Erle of Rothes, because when he is Ambassador. she had a bairn to Panter Bishop of Ross." Genealogie of Rothes *from the Rothes Papers ap.* Sir James Balfour's *MSS. Advocates' Library.*

[2] Ap. *Cart. Antiq. Bibl. Har.* No. 30., so referred to in an MS. account of the Leslies of Findrassie in the Advocates' Library.

[3] Reg. Mag. Sig. Lib. 20, 148.—"gudis quhilkis pertinit to Elizabeth Countesse of huntlie intromettit wyt be me Johne Creichtoune of Strathurde Knyt, sen ye tyme *ye saide Countesse was mariit wyt George Erll of Rothes*," anno 1528. *Act. Dom. Con.* Lib. 39.

in such a manner as to render it extremely doubtful whether she was the wife of the Earl or not.[1] At length, however, in all probability, the sentence of divorce being reduced, owing to certain reasons, upon appeal, Margaret was restored to her former situation as his lawful wife, in which character she undoubtedly figures in the years 1541, and 1542.[2] In 1546, at least, the Earl had formed a new matrimonial alliance; for there is an action in that year against "dame mergret lundy, relict of umquhil David erle of craufurde—and George Erle of Rothes *now hir spouse.*"[3]

The Earl had only issue by Margaret Crichton, and Agnes Somerville. Those by the former were clearly lawful; nor can the children of Agnes be supposed to be in a worse predicament, because the principle of *bona fides*—that is, the ignorance of Agnes, if not of her husband, that their marriage, however legally null, was so—had the effect by our law, of making the children legimate;—which, it is strange to think, has actually been questioned in modern times.

Register of the Official within the Archdeaconry of Lothian.

Thus the Official of Saint Andrews on the 10th of March, 1541, while he annuls the marriage between William Quhite and Isabel Ewinston, because William, before the marriage 'carnaliter cognovit" Katharine Ewinston related in the second degree of consanguinity to her, yet, as a matter of course, decerns the children born between them to be lawful—"ipso Willielmo

[1] It will be seen from an authority, to be afterwards quoted, that she is designed Countess of Rothes in 1522; and there is a plea in 1537, by David Earl of Crawford against "Margaret Crechton," and "George Erle of Rothes—for his interes, *giff he ony hes.*" *Acts and Decreets of Council and Session of that date.* Previous to this, in 1536, there is an alienation of George Earl of Rothes and *Agnes Somerville* "*Comitisse de Rothes ejus sponse.*" *Reg. Sec. Sig. Lib.* 4.

[2] Charter, 21st October, 1541, to Norman Leslie, son of the Earl of Rothes, &c. reserving the liferent to Margaret Crichton, *wife* of the Earl. *Reg. Mag. Sig. Lib.* 28—53.

Charter, last of May 1542. "Margarete Crechton *Comitisse de Rothes,*" of lands. Ibid. 189.

[3] Act. Dom. Con., &c. Lib. 41.

tempore contractus hujusmodi pretensi matrimonii, *penitus ignorante.*" And again, on the 19th of February 1542, although the marriage celebrated *in facie Ecclesie* between James Mowbray, burges of Edinburgh, and Margaret Smyth, is in like manner voided, because Margaret had previously carnal intercourse with Alexander Napier of Wrichthouses, related in the fourth degree of consanguinity to James—which made James and Margaret in the same degree of affinity to each other—the legitimacy of the issue is saved for this reason,—" ipso Jacobo hujusmodi impedimentum, *tempore contractus dicti pretensi matrimonii, penitus ignorante.*" The parties being so situated, the marriage was accounted incestuous, and therefore null from the beginning. Ibid.

It was, obviously, very easy for persons to obtain divorces upon pretexts of the above kind. A remark more than once already made may be here repeated, that nothing can be conceived more loose, and depraved than the state of society in Scotland before the Reformation. In many cases it was impossible for individuals to know whether they were married or not—for what wife could have been aware of the intrigues her husband might have had, before their marriage, with her female relatives within the fourth degrees of consanguinity, or affinity—which comprehended innumerable individuals—and which, if divulged, could at once have voided their connexion? And Major, in his history, brings things to a climax, when, after adverting to our laxity in respect to divorces,[1] he intimates, that " plerique laici ad salutem animæ sufficere existimant, dummodo in foro exteriori, *falsorum testium suggestione divortium celebretur*, et sic alias mulieres, quas conjugas putant, *in adulterio contrahunt.*" Certainly, if the exception of *bona fides*, or Edit. 1521, f. 112.

[1] " Scoti hac nostra tempestate *nimis leviter* divortium *procreant.*" Major wrote early in the sixteenth century. He died before 2d June, 1552, when there is a process before the Official of St. Andrews regarding one Catherine Maire, to whom he left a legacy of two pounds. Ibid.

What will be now thought of Janet Beaton Lady Buccleuch, the heroine of the Last Lay, when it is mentioned, that at her own instance, in 1543, she obtained a divorce from her husband Simon Preston, younger of Principal Register of Official of St. Andrews.

ignorantia had not been admitted, the country would have swarmed with bastards.

There is a singular letter to the Pope before the middle of the sixteenth century by John Wemyss of Wemyss, informing his Holiness, that he had contracted marriage with a certain Margaret Otterburn, but nevertheless lately discovered to his surprise, that he was in the third and fourth degrees of affinity to her, because it had so happened, that before the marriage "carnaliter cognovit," another Margaret, who was in the third and fourth degrees of consanguinity to his said wife; and although he instantly apprised the latter of the lamentable circumstance, yet to his horror it turned out, that "eadem margareta, impedimento hujusmodi non obstante, adhuc in matrimonio hujusmodi *perseverare velle se jactavit, et jactat.*" This weighed heavily upon the conscience of John, in all likelihood tired of the connexion,

Craigmiller, upon this ground, that before their marriage "honorabilis vir Walterus Scot de Balcleuch carnaliter cognovit dictam Janetam, quiquidem Symon et Walterus in tertio, et quarto consanguinitatis gradibus sibi invicem attinent?" &c. &c. In this manner, she does not scruple to blemish her own character to free herself of Simon. She is here styled Lady Cranston Riddell, (her first husband's title;) and, after the death of Walter, her paramour, whom, as is well known, she married, she is charged in a process in 1559, with "being *quietly* mariet, or handfast" to the profligate Bothwell, who, subsequently, went through the same forms publicly with the unfortunate Mary. *Act. Dom. Con. et Sess.* vol. xlx.—The Queen, poor woman, has occasionally been tried by a test more fitting the present, than her own age, when it would be absurd to expect the mildness, and far greater purity comparatively, that are now to be found in the sex. There was nothing, after all, so remarkable, when contrasted with cotemporary precedents, in the expression of her resentment in the manner she adopted towards Darnley, who proved unworthy of his situation, and wronged her in "the nicest point," besides being actually guilty of treason. She was still his Queen, and therefore chose to enforce the ordinary penalty, to which she was additionally impelled by her passions, and the arts of interested persons. That there was a considerable *liaison* between Bothwell and the Lady Buccleuch, may be inferred from a placard preserved in Buchanan's detection, which accuses the former of the murder of Darnley, "the Queen assenting thairto through the persuasion of the Erle Bothwell and the witchcraft of Lady Buccleuch."

and he accordingly applied to the Pope to enforce strong measures, (there being a demur in the Scotch Courts) to counteract and overcome Margaret's incestuous propensity.

The same fickleness, and disregard of those ties that are usually held as sacred—not to add, of the plainest motives of decency and propriety, more especially pervaded the higher classes; Margaret of England, resembling, in many things, her royal brother Henry VIII., at length tired of Henry Lord Methven, her third husband, pursued an action against him before the Official of Saint Andrews, concluding for a divorce upon these grounds—that she had been "carnaliter cognita" by Archibald Earl of Angus, by whom she had a daughter Margaret then living, which Earl, and Henry were in the fourth degrees of consanguinity to each other, and hence, she, and Henry being in the same degrees of affinity, their connexion was incestuous, and illegal. The Official pronounced a decree accordingly in 1537, "in quantum possumus presentium per tenorem;" but James V. her son, (Margaret being then in her forty-eighth year,) sensible of the ridicule she would incur, according to Pinkerton stopped further proceedings after "the sentence was written, and ready for public pronunciation." [1]—It is sufficiently obvious what a field

[1] *Hist.* v. ii. 351. The sentence, or decree, however, is to be found recorded in the Register Book of the Official of St. Andrews within the Arch-deaconry of Lothian; and as it may be curious, and is as yet quite unknown, the material portions are here subjoined. It may be only premised, that the Queen had previously rid herself of her second husband Archibald Earl of Angus, whom she had divorced upon the ground of a pre-contract. See *Burnet's History of his own times*, B. i. c. 19, and authority to be adduced in the sequel. The *bona fides*, or ignorance of Queen Margaret of the pre-contract, of course, saved, (as Burnet further states) the legitimacy of Margaret their only child.

"Christi nomine invocato, nos Johannes Weddell in utroque jure Licentiatus, Rectorem de Flisk* ac Officialem Sanctiandreensem infra

* It was the Rector of Flisk who had divorced also Margaret Crichton. The latinity, it must be confessed, is not in all respects what might be expected from an *unexceptionable* Judge.

must have been here opened for scandal, and malicious inquiries of every kind into the habits and conduct of all, which is fully evinced by the *actiones injuriarum* that then so frequently occur.

To return, however, to the case of Rothes, an unfortunate event, well known in history—the murder of Cardinal Beaton in the castle of St. Andrews by Norman the Master, eldest son of Earl George, in 1546—led to his forfeiture, and expulsion from his country; and William, his full brother, it seems, had been implicated in the same affair, for which, in 1548, he obtained a remission from the Crown.[1] Earl George, although he had put

Act Par. v. ii. 479.

Archiediaconatum Laudonie, Judex pro tribunali sedens, in quadem causa matrimoniali tendente ad divortium coram nobis mota, et adhunc pendens, indecisa, inter illustrissimam Principissem Margaretam dei gratia Scotie Reginam *actricem* ab una; et nobilem dominum Henricum Steward dominum Methven *reum*, partibus ab altera, &c. Decernimus, et declaramus, pretensum matrimonium inter dictam Illustrissimam Principissam et dictum nobilem dominum de facto, et non de jure contractum, et ab initio esse, et fuisse nullum, et invalidum, ac contra sacros Canones celebratum, et solempnizatum, causante impedimento subscripto, ex, et pro eo, quod longe, et ante contractum, et consummationem dicti presenti matrimonii inter eosdem, ipsa Illustrissima Principissa fuit carnaliter cognita per nobilem dominum Archibaldum olim Angusie Comitem, quoquidem domino Archibaldo olim Comiti dicta Serenissima Principissa peperit prolem nomine dominam mergaretam douglas superstitem, ante cotractum et consummationem dicti pretensi matrimonii inter dictos Illustrissimam Principissam, et Henricum dominum Methven; quiquidem dominus Henricus, et prelibatus Archebaldus modernus olim Angusie Comes, tempore contracti prefati pretensi Matrimonii inter eosdem serenissimam, et dominum Henricum, attingebant prout de presenti attingent, in quarto, et quarto gradibus consanguinitatis de jure prohibitis, pretextu cujus ipsa serenissima Principissa, et prefatus dominus Henricus attingebant, prout de presenti attingunt, in eisdem gradibus affinitatis, et Impedimentum efficax ad contrahendum matrimonium, ac etiam idem dirimendum, et propterea prefatam Illustrissimam Principissam dominam Mergaretam, et dominum Henricum Stewarde dominum Methven, abinde devortiandos, et separandos fore, &c. in quantum possumus per tenorem presentium." It is dated June 12, 1537.

[1] Preceptum remissionis Willielmi Leslie, fratris germani Normanni Leslie olim Magistri de Rothes, pro ejus proditoria assistentia detentoribus Castri de Sanctandrois, *anno* 1548. Regist. Sec. Sig. lib. 21. It is

Norman into the fee of the Earldom, had only done so conditionally, reserving a power of redemption; and therefore passing over William for some reason or other not perfectly clear—perhaps owing to his concern also in the Cardinal's affair—if not on account of his being the son of Margaret Crichton, he assigned the reversionary right to Andrew his eldest son by Agnes Somerville;[1] who having used it against the Crown as coming into Norman's shoes, ultimately perfected his title to the Earldom,[2] which, indeed, had been further secured to him by his father during his lifetime.[3]

In this manner Andrew, by a singular title—although not the heir-at-law—came to be vested in the succession, which gave him a preferable right to William; and the assignation in his favour has evidently been the chief ground upon which the decreet-ar-

well known, that Norman and his adherents held out the castle, after slaying the Cardinal, until 1547, when they surrendered it to the French.

[1] The following is the substance of the assignation as given by Sir James Balfour, Lord Lyon to Charles I., from the original in the Rothes charter-chest, in a manuscript volume of collections in the Advocates' Library. "Assignation by George Earl of Rothes to Andrew Leslie his son of the order of redemption used by him against Norman Leslie of the estate, and dignity of Rothes, narrating the constitution of the fee in the person of the said Norman, the reversion granted by him to his father, whereby for payment of 100 lbs. at any time at the high altar in Cupar, he might redeem these lands, and dignity; and bearing expressly that Andrew *was his eldest lawful son*, Norman being dead without heirs-male of his body, and also forfeited for the murder of the Cardinal. And in using the redemption, the Queen, and Officers of State are cited; sealed, and signed, 6th Feb. 1567." Andrew is here styled, though erroneously, the eldest lawful son, owing to the strong prepossession of his father from whatever cause. Earl George, in a litigation in 1527, is said to have had "unam filiam *legitimam*" born between him, "et nobilem dominam Mergaretam Creichton Comitissam de Rothes ejus sponsam *pro tunc*," thus further shewing that there was a subsequent divorce.

[2] See charter under the Great Seal, 22d July 1564, after the decreet-arbitral, the Crown merely succeeded in Norman's right on account of his forfeiture *tanquam quilibet*. Lib. 32. 464.

[3] Proved by various grants under the Great Seal that it would be tedious to adduce.

bitral proceeded. Still however, as in the investiture in the person of Norman (who died without issue in 1554), there was a substitution to heirs-male whatsoever,[1] and as other circumstances might have operated, although now unknown,[2]—independently of fair and equitable motives—William had a plea that it may be fairly presumed could not be overlooked; and therefore he obtained, by the just and equitable award of the Queen, the lands of Cairney in the rich Carse of Gowry, in compensation for his birth-right.

But another circumstance must also here strike every one—what then becomes of the claim of the Leslies of Findrassie, who have maintained, that they were the preferable heirs of the family as descended from a son of the Earl's first marriage with Margaret Crichton?[3] If so, it is singular—not adverting to their exclusion by Earl George—that they are not alluded to in any part of these transactions, nor ever obtained, as far as is yet known, any provision or compensation from Earl Andrew, than whom, if at all sprung as is thus stated, they were assuredly nearer heirs at common law. On the contrary, while even William's daughters are to be provided for, the lands of Cairney, granted to this individual, failing heirs-male of his body, are not to go to Robert ancestor of Findrassie, but immediately to Andrew his half-blood brother. This is a point involved in some degree of doubt and mystery. One might think from a legitimation upon record in 1557, of a Robert Leslie, son of Earl George, whose Christian name corresponds with that ancestor's, and from a *possible* theory owing to the latter being designed "*brother*"[4]

See p. 180.

Reg. Mag. Sig. Lib. 31, 555.

[1] See Charter under the Great Seal, lib. 29, 124.

[2] Upon the occasion of the forfeiture of Norman in Parliament in 1546, after a protest by Earl George that it should not affect his right, or that of his heirs and assigns to the lands, owing to the reversion, "My Lord Secretar protestit yat yair suld na assignais be admittit to redeme ye saidis landis, *bot ye airis allanerly*."

Act. Parl. v. ii. 476.

[3] See Nisbet's Heraldry, Article Leslie of Findrassie, v. ii. 141. There is here no mention at all of William the undoubted heir, or of his right, and their ancestor is styled "*younger* brother" of Norman.

[4] The epithet *brother* assuredly would go to disprove the assertion former-

of David Panter, Bishop of Ross at the same time, when obtaining grants from him, that his *status* was questionable; but, in answer to this, it may be urged, that in a pedigree of the Rothes family, once in the possession of Camden, (and left by him to Sir Robert Cotton,) he is distinctly made third son after Norman, and William, of George Earl of Rothes by Margaret Crichton,[1] which seems to afford a pretty good conclusion to the contrary—especially as Earl Andrew, and the children of the second marriage are merely subsequently introduced. The Leslies of Findrassie, however, could only be descended from the third and youngest son; and in the worst point of view, his status, owing to the hereditary frailty (as will be seen) of his mother, might have been a little like that of the late claimant to the Banbury Peerage; and it is rather remarkable that he was principally, if not exclusively provided by Bishop Panter, who left him very large estates, besides appointing him his executor.[2]—But after all, this is chiefly spe- See afterwards.

ly noticed of the Bishop having been the paramour of Margaret Crichton, unless we are to suppose that some cloak is here resorted to to save appearances, in the same way as by means of the term *nepos* in the Romish Church; or that "*fratri*" the word employed, is a mistake for *patri*. The former could not mean brother-in-law, for the Bishop was incapacitated from marrying; and it can be proved that the only wife of Robert Leslie, ancestor of Findrassie, was Janet Elphinstone who survived him, and thereupon married Alexander Bruce. As to the likelihood of any other relationship, it may be better determined in the sequel. See p. 183.

1 This pedigree assigns to Earl George these sons by Margaret Crichton, 1. George, who died young without issue. 2. Norman. 3. William. 4. John, who died young without issue. 5. Robert the youngest. Robert is, also, in one or two deeds, styled *son* of George Earl of Rothes, which affords presumptive evidence, although it be not *probatio probata* of his legitimacy.

2 Royal Confirmation, "Roberto Leslie *fratri* Davidis Episcopi Rossensis" 8th December 1557, of three charters by the Bishop to him, and his heirs—the first of the Baronies of Ferindonald, Ardmanach, and other lands, part of the Bishopric of Ross, dated 9th of January 1556,—the second of the Barony of Ardosier, and other lands with fisheries, &c. in the same diocess, dated 3d of October 1556, and the third of the Barony of Duglie, &c. part of the patrimony of Cambuskenneth, of which the Bishop was

culation. Bishop Keith conceives, that Margaret Crichton, in addition to her other alliances, was wife of David Panter, to whom she had the Bishop;[1] the inference he obviously derives from the relationship specified between the Bishop, and Robert Leslie, for he alludes to no other authority; but it is utterly impossible, because it can be proved by undoubted evidence, that the Bishop was the *illegitimate* son of Patrick Panter Abbot of Cambuskenneth, the Royal secretary, and the celebrated writer of the early *Epistolæ Regum Scotorum.*[2] As to another assertion of Keith, that Margaret was "*first*" Countess of Rothes, and "*afterwards*" married to a Panter, by whom she had the Bishop, it is certainly one of the most preposterous in the world, as is evident from what has been stated, and the relative situation of the parties—Margaret being still Countess of Rothes in 1542, and the Bishop even figuring (as is proved by his legitimation) in 1513. The only remaining alternative then is, that this dignitary of the Church was the issue of Margaret Crichton, by an illicit intercourse with abbot Patrick, the Royal secretary—thus explaining matters satisfactorily for others, at the sacrifice of her own honour and reputation; but it may not seem perfectly reconcilable to the circumstances of the case, or to the age

Commendator, dated 1st of November 1557. *Reg. Mag. Sig. Lib.* 31, 555. The disponee is the undoubted ancestor of the Leslies of Findrassie, who acquired Findrassie from the family of Innes. Robert Leslie is proved to have been the Bishop's executor by a litigation immediately to be quoted.

[1] Keith's History of the Bishops of Scotland, p. 114.

[2] Confirmation in 1539, of a previous legitimation, as far back as 1513, of the Bishop and his sister Catherine, as the natural issue of *Patrick* the *Secretary*, in the Register of the Privy Seal; and litigation upon record after the death of the Bishop regarding his succession, when his legitimation was founded upon by his heirs and disponees, to exclude the counterclaim of the Crown on the express ground of his being "*borne* BASTARDE," &c. &c.

The Bishop filled also the situation of secretary, and wrote the later Royal Epistles, being thus brought up at the very feet of Gamaliel. His parentage and *status* proved as above, refute the account given of them by Keith, Ruddiman, and all our writers.

or standing of the Secretary, he having held that office under James IV.; besides being tutor to his son, who fell at Flodden, and having died abroad, after a protracted illness of two years, in 1519.[1] In short, it is not very easy to penetrate through the veil that obscures this portion of antiquity, and it may be better to leave its solution to the wisdom and penetration of the reader.

Should it really turn out, that there was any such intercourse between the lady, and the secretary or preceptor—he, perhaps, acting the part of another Abelard—it will be a curious coincidence, after what will be immediately shewn.

One or two observations more may be added with respect to Margaret Crichton. Every account concurs in stating that she was the daughter of William Lord Crichton, forfeited in 1483, by Margaret youngest sister of James IV., which is corroborated by her being styled "*consanguinee nostre* (*i. e.* of James V.) in a Royal charter in 1517, in favour of herself, and George Earl of Rothes, formerly quoted. Buchanan, her cotemporary, informs us, that Crichton, resenting an intrigue of James III. with his wife, whom he dearly loved, seduced the Princess, —a person, although young and beautiful, of depraved character, being even charged with too much familiarity with her own brother,[2] —by whom he had the same Margaret Crichton, who, the historian adds, died not very long previous to the period when he wrote.[3] The impression has long prevailed, that

Act Parl. v. ii. 154.

Hist. lib. 12, 51.

[1] Preface to the *Epistolæ Regum Scotiæ*, by Ruddiman, and Vol. i. p. 323, *ib.*

[2] "Forma egregia, et *consuetudine* fratris *infamem.*"—

[3] Princess Margaret had been proposed in marriage by her brother to the Duke of Clarence, in 1476, and she was afterwards to have been married to Lord Rivers, brother-in-law of Edward IV.; but neither of these alliances took place. On the 14th of December, 1482, Edward IV. grants a Commission to forward the marriage between "*Margaretam sororem germanam Fratris nostri* (James III.) ac predilectum consanguineum nostrum Antonium Comitem de Ryvers, Dominum de Scales."—*Rymer's Fœd.* V. v. 126, *Edit.* 1726. The connection between the Princess, and William Lord Crichton must therefore have been at least subsequent to this date.

there never was any marriage between Crichton and the Princess,[1] —certainly, if we are to believe Buchanan, the most dissolute of women—and it is far from being unlikely, considering the silence and oblivion to which she is consigned,[2] —her name being even

[1] Among other authorities, the Cambden Pedigree already referred to, styles Margaret Chrichton, when mentioning her marriage with George, Earl of Rothes, "filia *notha* Domini Creichton."

[2] Pinkerton observes, "Though many writers have laboured the genealogies of the House of Stewart, yet the marriage of Margaret remains obscure." *Hist.* v. i. 315. Buchanan's statement at least that Crichton had another wife is supported by the early period when James Crichton his son and heir, figures upon record; clearly proving he could not have been the son of the Princess, but of a different lady. The previous author conceives that the marriage, if there was any between them, could not have been until 1487, yet James is receiving grants of lands in 1492, and 1493, as is proved by the Great Seal Record. Nay it appears from a process in 1493, that he, without the concurrence of any tutor, or curator, had assigned twenty-seven ounces of gold to Sir Thomas Tod. *Act. Dom. Con.* 311. Margaret Crichton, as well as her son Norman, are occasionally styled "cousin" of James V. by reason of their descent from the Princess—a term equally applied at the time to spurious, as well as lawful relatives—but it is never given to James Crichton, or any other members of the Crichtons, because they were not descended from her. In fact, whatever the Peerage writers may pretend, the wife of William Lord Crichton, father of James, was Marian Livingstone, daughter of James Lord Livingstone (by Marian his wife,) who was certainly alive at least in 1478. This is proved indisputably by the *Acta Dominorum Concilii*, 20th of October 1478, and the *Acta Auditorum*, 8th of March, and 4th of July, in the same year. An interesting circumstance here transpires—Marian has obviously been a peace-offering to reconcile the feuds and animosities of the great families of Livingstone and Crichton, previously, as is well known, keen rivals for political power, and the management of public affairs. The only mistake Buchanan apparently makes, is representing Janet Dunbar the heir of line of the Dunbars, Earls of Murray, and mother of William Lord Crichton, as his wife, instead of Marian. There is nothing in Buchanan to countenance a marriage between the Princess and Crichton, although he darkly speaks of a last interview after Crichton's forfeiture, between the King and him, at Inverness, the issue of which is quite unknown; and then abruptly adds that they both shortly afterwards died, *and that Crichton's tomb was yet to be seen there*, which may lead, in such a singular chain of events, to the worst suspicions. See this author, *ut supra*.

unknown to some writers—and the very low alliances which her unfortunate daughter was originally doomed to make. She first appears in 1505, in the humble capacity of the wife of William Todrick, burgess of Edinburgh, to whom she is then proved to have been contracted in marriage, under the description of "Margaretam Crechton consanguineam domini Regis."[1] Still moving in such society, she next aspires to another burgess of the same city, called George Halkerston, and it was not until after his death, as Halkerston's widow, that George Earl of Rothes deigned to notice her with his attention.[2] It could not have been from political motives, that the grand-daughter of a king was thus "meanly married," as even supposing her legitimate, there were several previous heirs to the crown; so nothing can well explain the low condition in life of the offspring, excepting her own illegitimacy, and the abject and degraded situation of the mother.

[1] Reg. Sec. Sig. Lib. 3. She could not then, from what is stated, have been of age.

[2] "George Halkerston, burgese of Edinburgh; ande Mergrete crechtone, his spouse;" *anno* 1510, *Reg. Sec. Sig. Lib.* 4.

Action subsequent to 10th of October, 1515, before the Official of St. Andrews at the instance of Robert Leslie against "honorabilem mulierem *Margaretam relictam et unicam* Intromissatricem bonorum *quondam georgii halkerston*, burgensis de Edinburghe," &c.; Margaret evidently could not have been married to George Earl of Rothes, until after this date, and it has been proved that their marriage had not been completely solemnised even in 1517. *Register of the Official of St. Andrews.*

Summons "James Halkerstone, and dame mergret Crechton, his moder," anno 1538. *Act. Dom. Con. &c. Lib.* 11.

"*Nobilem mulierem Margaretam Creichton Comitissam de Rothes relictam*, et executricem *quondam* honorabilis viri *Georgii Halkerstone* burgensis de Edinburghe." Nov. 17, 1522. *Official Book of Saint Andrews.*

Summons in 1537, David, Earl of Crawford, against "Mergret Crechton, ye relict and executare of unquhile George Halkerstone, burgesse of edinburghe, and George, erle of Rothes, for his interes, *gif he ony has.*" *Acts and Decrees of Council and Session, &c. of that date.* It need hardly be observed, that these notices further disprove any marriage of Margaret with a Panter, of which no trace has as yet been discovered.

The first legal notice we have of Princess Margaret is as one of a family *groupe* in 1463, when an entry appears in an Exchequer Roll of the expenses incurred at Stirling " per Dominum Comitem de Mar, Dominam Mariam, et *Dominam Margaretam* sorores regis, cum servitoribus." Of these the Earl of Mar, as is well known, came to an untimely end, Mary the eldest sister eventually married James Lord Hamilton, in whose right her descendant, James Duke of Chastelherault, was declared by Parliament to be Regent, and next heir to the Crown failing Queen Mary. Margaret the youngest, as her father James II. only married Mary of Guelders her mother in 1449, must have been then in pupillarity.

As an instance of the imperious and determined character of Margaret of England who has been alluded to, even before the arrival from Rome of the formal divorce between her, and Archibald Earl of Angus, she forced a notary, quite against his will, to draw up the following protestation, asserting her freedom and entire disposal of her person—in defiance alike of the King, and of Angus—which she had previously consigned to Henry Lord Methven. The original on parchment, dated 27th of December 1527, is still extant in a private charter-chest, although rather mutilated and decayed.

" Personaliter constituta Illustrissima et Serenissima principissa, ac domina Margareta Scotie Regina, matura prehabita deliberatione, exposuit quod divortium inter suam serenitatem, et Magnificum virum dominum Archibaldum Angusie Comitem, dominum Douglas, etc. celebratum fuit in Romana Curia undecimo die mensis Martii ultimo elapsi, et ob quamplurima Impedimenta occasione universalis belli in Italia, Gallia, ac aliis partibus transmarinis, satis palam, et notorie cognitum, Sententia celebrationis hujusmodi divortii ad partes hujus regni minime deportari poterit; sua igiter serenitas, UT ASSERUIT, *ab omni jugo maritali, libera existit*, ac etiam a dicto undecimo die mensis Martii ultimo elapsi extitit. Quamobrem ipsa Serenitas, Illustrissima principissa, ac domina Scotie Regina omnibus melioribus modo, via,

jure, forma, et causa, quibus melius ac efficiens.....ac debuit potestque, et debet, protestabatur solemniter, et per hoc presens publicum instrumentum protestabatur quod quicquid alias actum, gestum, seu attemptatum extitit a predicto die undecimo Martii ultimo elapsi per Excellentissimum, et Illustrissimum principem, et dominum dominum Jacobum Scotorum Regem modernum suum carissimum filium, seu etiam per prefatum Archibaldum Angusie Comitem, aliumque quemcunque, eorum nomine, aut imposterum, ante deportationem hujusmodi Sententie ad partes hujus Regni per prelibatos serenissimum principem, et Angusie Comitem, aut eorum alterum, seu quemcunque alium earum nomine, fieri, vel attemptari contigerit, contra honestatem, commodum, vel utilitatem sue Serenitatis eidem in aliquo non preindicet. Accedente etiam ad hoc einsdem Serenitatis consensu, *cum talis consensus ut asseruit,*[1] *nec fuit nec erit in hujusmodi actis, seu gestis, vel attemptatis spontanee prestitis, sed metus causa qui in constantem* VIRUM *cadere poterit, voluitque quod eadem sua Serenitas hanc suam potestatem in forma juris uberrima fieri et extendi, vimque, et effectum talis protestationis sortiri, cum omni solemnitate necessaria pariter, et cautela.* De, et super omnibus et singulis, prelibata illustrissima, et Serenissima principessa, ac domina, a me notario publico subscripto, sue serenitati fieri petiit unum, seu plura, publicum, vel publica instrumentum, vel instrumenta. Acta fuerunt hec in palatio Regis apud Monasterium Sancte Crucis prope Edinburche, hora septima post meridiem, vel eo circa. Presentibus ibidem honorabilibus et providis viris do.....de Abernethy Moraviensis diocesis presbitero, et Roberto Spittale burgensi de edinburche .....vocatis pariterque rogatis.

MARGARET."

The subscription is autograph, after which follows the usual attestation by the notary.

[1] The asseruit here, clearly refers to the notary speaking in his own person.

Was the next alliance of this bold and impetuous Princess, it may be asked, more auspicious than the former? We have seen that it was not, although in the hey-day of their affection, she had lavished every mark of favour upon Methven, and had even perpetuated her attachment in the heraldic *insignia* he was permitted to bear.[1] Neither was this much cherished, although, in his turn, detested minion—her previous paramour, according to Pinkerton—inferior in immorality to his cotemporaries. He had engaged in an adulterous intercourse with *a very noted female*, Janet Stewart Countess of Sutherland, by whom he had four children, all of whom, as an ordinary occurrence, were publicly legitimated in 1551; in this manner still further proclaiming the iniquity of their parents, who are, at the same time, specially described.[2]—But it is disgusting to dwell on such ungrateful

[1] It appears from an original seal of Henry Stewart Lord Methven in 1539, that he bore for his supporters the dragon, the proud badge of Henry VII., Margaret's father, indicative of the Tudor descent, as was said, from Cadwallader the last King of the Britons;—and for crest, a Queen crowned, standing erect, holding a naked sword reversed with her right hand, and leaning upon a wheel, probably the wheel of fortune, with her left. This seemingly may bear some emblematical reference to their mutual history.

[2] *Reg. Sec. Sig. Lib.* 24. It it quite a fable that Henry Lord Methven left descendants by the Queen, upon which visionary basis the late Reverend Mr. Scott founded his theory as to the Gowrie conspiracy. The children legitimated are Henry, Janet, Margaret, and Dorothea, the terms applied to them being "*bastardorum filii, et filiarum naturalium.*" Mr. Scott supposes that Dorothea, (Gowrie's mother,) was daughter of the Queen, but her parentage was clearly as stated. Janet Stewart is styled Countess of Sutherland in the legitimation, but she occasionally elsewhere has the title of "*Domina* de Sutherland. She was four times married, and must have been a person of great attractions, besides remarkable beauty, as we are directly informed. Henry the son of the above parties was second Lord Methven. In his will, dated 7th of October 1572, he talks of Dame Janet Stewart *his mother*; and although clearly illegitimate, as has been seen, he succeeded to the honours of Methven. It may be here asked in what manner?—for there is no vestige anywhere of a patent or conveyance of the honors in his favor—merely by grants of the *baronial fief* of Methven to him, *nominatim* in 1551, and 1564. This therefore is an instance of the territorial

Reg. of Test. Com. Court Edin.

Reg. Mag. Sig. Lib. 30. 668—32. 463.

details; and it is with pleasure, that we remove our eyes to the only spot, where, as Sir David Lindsay observes, chastity had taken refuge—to the quiet and secluded abode of the sisters of the "Schenis,"[1] or of St. Catherine of Sienna, in the Borough-moor of Edinburgh. It was in this institution that the small remnant of the virtuous part of the nobility were educated; and they there, under the distinguished countenance of its principal foundress—that noble and venerable matron Jane Lady Seton, led a life that not only saved them from the shafts of the bitterest satirist of his age, but even elicited his warmest eulogium in the following lines:—

> "There hes *scho*[2] fund her mother Povertie
> And Devotion her awin sister carnal,
> Thare hath scho fund Faith, Hope, and Charitie,
> Togidder with the vertus cardinall,
> Thare hes scho fund ane convent yet unthrall,
> To dame Sensual, nor with Riches abusit
> So quietlye those ladis bene inclusit."[3]

The Pyot (the Magpie,) another colloquialist in the grotesque, although amusing Poem, from which these lines are taken, then somewhat sapiently observes to the Papingo:—

> ——— "I dreid, be thay assailzeit They *rander shame.*"

To which the other replies,

> "Dout nocht, said scho for thay bene sa artailzeit,[4]
> Thay purpose to defend thame with thair gunnis,

practice even as late as 1551, and, with innumerable others, additionally refutes the rash and unfounded proposition of Lord Mansfield, which has been so often adverted to. In the grant in 1551, there is further, a renunciation by the Crown of all right of escheat on account of bastardy.

[1] Now called by corruption, the Sheens. The place is situated to the south-east of the Meadows.

[2] "Dame Chaistitie." *Complaynt of the Papingo.*

[3] The word "have" must be here and elsewhere supplied before "*bene.*"

[4] *Artilleried*, fortified.

Reddy to schute, thay have sax cannonis,
Perseverance, Constance, and Conscience,
Austeritie, Laubor, and Abstinence,
To resist subtyll Sensualitie:—
How lang traist ye those ladyis sall remane,
Sa solitar, in sic perfectioun?
The Papingo said, Brother in certane
Sa lang as they obey correctioune,
Cheising thair heidis be electioune[1]
Unthrall to riches, or to povertie,
Bot as requireth thair necessitie."

Old Sir Richard Maitland gives a very interesting account of the preceding Lady Seton—in which her "*honest conversation*" and chastité are not forgot—the quintessence of female perfection at the time.[2] She lived in a state of exemplary widow-hood for forty-five years, and died in 1558, "at ye place of the Senis," from whence she was transported to be buried beside her deceased Lord in the Collegiate Church of Seton; to which, as well as to all her connections, she had been a liberal benefactress. Although principally a recluse, she did not neglect her worldly duties, and even relieved the House of Seton from many heavy burdens that otherwise would have attached to it—marrying the sons and daughters, and giving most of them dowries, and provisions, besides superintending their ordinary concerns.[3] Her sister-in-law, Katherine Seton "wald never marie, howbeit scho might

[1] It may be regretted that the Papingo had not lived in our days to lend its decided support to the question of the abolition of Church Patronage.

[2] See History of the House of Seton, by Sir Richard Maitland of Lethington, lately printed by the Maitland Club in Glasgow.

[3] *Sir Richard Maitland's History, ut supra*, Pp. 38, *et seq.* A family transaction occurred in 1550, at the "*Place of the sisteris of the Shenis*," whereby payment is made to *Lady Seton* on behalf of Beatrix, sister of George Lord Seton, her grand-daughter, of a sum in lieu of her share of the casualities, accruing from a grant of the ward and marriage of George, that had been conferred by the Crown upon Beatrix, and her sisters. This was not an ineligible mode of alimenting famales, and younger branches of amilies in those days. Maitland of Lethington, *the Curator* of Beatrix, was present. *Bonds and Obligations of that date.*

have had many gud marriages; but vowit chastité," and then, as a matter of course "enterit, and was ane sister of the ordour of *Sanct Katherine of the Senis*." In a Record in 1542, there is mention of "Devoit religious Wemen *Katrine* Seton, Priores of ye Place and Abbey of ye Senis; situat upon ye Commune Mure of edinburghe, and Convent of ye samyn." She thus became Prioress; and dying at the age of seventy-eight was buried at the Sheens, as Sir Richard Maitland has intimated. In the year 1551, James Hamilton of Sprouston, with the consent of his brother the licentious Bishop of St. Andrews, a principal party, is contracted in marriage to Mary Hepburn; but Mary, as a most necessary and effectual precaution, is to be "deliverit to my Lady Seton, to remane wyt hir into ye place of ye sisteris of ye Senis," until the marriage be completed. The family of Seton, in its general characteristicks, affords the best specimen of our ancient nobility. They seem to have been the first who introduced the refined arts, and an improved state of architecture into Scotland; they were consistent in their principles; and, upon the whole, as remarkable for their deportment, and baronial respectability, as for their descent and noble alliances. The following expressions are used in reference to the Setons by an old writer, "clarissima autem hæc, atque *ob generis splendorem*, vetustatemque, *vix ulli Scoticarum secunda gens*."

Act. Dom. Con. et Sess. of that date.

Ibid.

ADDENDA.

P. 114. The word "*hostilagiis*" in the grant of the office of Constable by Robert Bruce, is here interpreted, (upon the authority of Du Cange,) the privilege of exacting a duty upon foreign merchandise sold within burgh. This explanation seems to be corroborated by a petition, or complaint, of the Constable depute to the Privy Council in 1581, *(Privy Council Register,)* wherein he maintains the right of the Constable "to collect, ande uplift *certaine small custumes* callit of auld the *Parliament fee*, or *Archearis wyne*, for *all victuallis and merchandise enterand wytin ony his hienes burghes*, quhair the Court of Parliament hes been haldin for the tyme;" and this custom or duty, he adds, the Constable had been in the habit of receiving *past memory of man*.

P. 160. The third reason for the illegitimacy of George Earl of Angus being perhaps unsatisfactory as it at present stands, it may be proper further to add, from the important document referred to in the note, that, *previous* to the substitution in the regulating entail of the fief of Douglas, &c. in favor of Archibald Douglas *nominatim*, there is one to William first Earl of Douglas, and to the *lawful heirs-male of his body*. George, therefore, *the son of Earl William*, would thus have taken, if lawful, in the first place, and quite to the exclusion of Archibald; and hence the fact of Archibald having succeeded to his prejudice, while no claim was ever made either by George, or his descendants, may be held of itself fully decisive of the question at issue. This piece of evidence had not been seen by the author when he wrote the article, which was many years ago.

P. 169. If we admit a very secondary authority, the Lauders of Fountain-hall, are descended from the Bellendens of Leswade, and thus were relatives of the great Bellenden. Playfair, in his Pedigree of that family in his Scotch Baronetage, makes Andrew Lauder the grand-father of Sir John Lauder of Fountain-hall, (created Baronet in 1688,) the husband of a Bellenden of Les-
Lib. 60. 47. wade. In a charter in the Great Seal Record, dated 14th January 1662, there is mention of Margaret Cockburn, wife of *Andrew Lauder in Melvill Mill*, (in the vicinity of Leswade,) whose first husband was Mr. Thomas *Bannatyne*—the same as *Bellenden*—and which is witnessed by *John Lauder burgess of Edinburgh*. The latter, afterwards Sir John Lauder of Fountain-hall, was the father of the celebrated Judge. John Lauder, Burgess of Edinburgh, is called sister's son to George Ramsay of Polton, in
Edin. Com. Records. George's will, dated 25th April, 1646. This is a kind of corroboration, because, if we believe Playfair's account, Andrew Lauder, the son of the Andrew Lauder whom he makes husband of a Bellenden of Leswade, is further stated to have married Janet, daughter of David Ramsay of Polton. But a good deal of obscurity seems to hang over the descent, and connection, which even the Public Records may possibly be unable to dispel.

P. 192. In 1562, there is an action by Catherine Panter, the natural daughter of Abbot Patrick, the Secretary, designed "*sister* and *air be provision of ane legitimation*, to umquhile Mr. David Panter, Bishop of Ross," against David Panter in Montrois, stiling himself in Newmanswells, for production of a charter of Newmanswells, and other lands beside Montrose granted by "umquhile Mr. Patrick Panter, Abbot of Cambuskenneth, to umquhile David Panter, *younger*, bishop of Ross," and the heirs-male of his body, &c., in the year 1516. *Act. Dom. Con.* et *Sess. Lib.* 25. In the same Record in 1555, there is mention of "Mr. William Lamb, parsone of Conreth, *sister sone* and ane of ye *airis* of umquhile Patrick, Abbot of Cambuskenneth, Secretar to the lait King," &c. He was evidently one of Patrick's nearest and lawful heirs. Great dubiety prevails as to the connections of

the famous Lesslie, Bishop of Ross, the successor of Bishop Panter. On the 28th of July, however, Andrew Lesslie, son to the deceased William Lesslie of New-Lesslie, a pupil, summons, "Michael Lesslie of Wartill, and *Mr. John Lesslie, parsone of Une*, (afterwards the Bishop, as is well known) as *nerrest of kin* to *ye saide Andro* on his *fayeris side*," &c. *Act Book of Commissary Court of Edin.*

It is singular that enough transpires from Butler, the friend of Lord Mansfield, to countenance a notion that may possibly be formed of his Lordship, from previous statements in this publication. He admits that "It has been 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 was an early charge brought against him. Mr. Pope alludes to it," &c.—And the same gentleman explicitly states that Lord Mansfield spoke of Lord Coke, particularly of "his attempting to give reasons for every thing" (that was his phrase) with great disrespect." "*Horæ Juridicæ Subsecivæ.*" Pp. 222. 218.

FINIS.

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