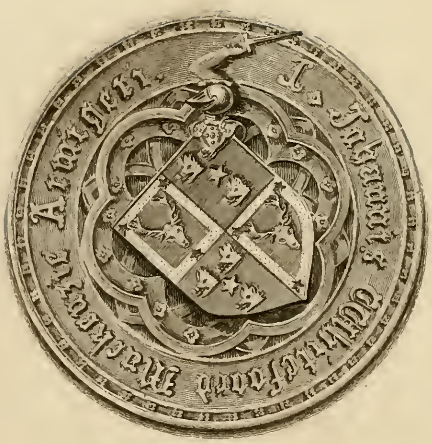

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REPORTS OF CLAIMS

PREFERRED TO

THE HOUSE OF LORDS

IN THE CASES OF THE

CASSILLIS, SUTHERLAND, SPYNIE, AND GLENCAIRN PEERAGES.

BY

JAMES MAIDMENT, ESQ.

ADVOCATE.

EDINBURGH. M.DCCC.XL.

EDINBURGH PRINTING COMPANY, SOUTH ST DAVID STREET.

PREFACE.

The Reports included in this volume embrace the whole Scottish cases (excepting the Borthwick and Roxburghe Baronies) in which the rule has been recognised as absolute, that where no patent of creation exists, the presumption is in favour of heirs-male, unless it can be shown by competent evidence that the descent is to heirs-general.

In the Borthwick Peerage, where no patent could be found, the claimant was not the heir of line, but the heir-male of the body. The exclusion of the former from the title was never controverted, and the question was argued upon the assumption that the Barony was a male fief—the only point in dispute being, whether Mr Henry Borthwick had proved his pedigree, and this having been done, it was, 8th April 1762, adjudged that "the Petitioner hath a right to the title, honour, and dignity of Lord Borthwick, as heir-male of the body of the first Lord Borthwick."

In the claim to the Roxburghe Barony, it was resolved, May 11, 1812, "That none of the persons claiming the Barony of Roxburghe have established any title thereto, it

being the opinion of this House, that as the said dignity might have been granted by letters patent to the grantee and a series of heirs, not so comprehensive as to carry the said dignity to such heirs as the claimants respectively represent themselves to be, it ought, according to law, to be presumed that the same was not granted to such heirs; and it appears to this House that the said dignity has not been in fact assumed or enjoyed since the death of Robert Baron of Roxburghe without heirs-male of his body begotten, by any heir or heirs of the said Robert Baron Roxburghe."

Accident having put the Editor in possession of authentic copies of the speeches delivered in the cases of Cassillis, Sutherland, and Glencairn, and of such notes as had been preserved of the observations of Lord Mansfield on moving the resolutions in the claim to the Barony of Spynie, he was induced to preserve them in this shape, and to print for private circulation a volume, which, it is hoped, will not be unacceptable to those who take an interest in Peerage Law.

J. M.

10, Forres Street, 10*th Dec.* 1839.

THE

CASSILLIS PEERAGE.

1760–4.

CASSILLIS PEERAGE.

Upon the death of John, eighth Earl of Cassillis, in August 1759, his estates devolved, by virtue of a deed of entail executed by him on the 29th day of March preceding, on Sir Thomas Kennedy of Culzean, Bart., the nearest heir-male of the family; but his right was unsuccessfully contested by William Earl of March and Ruglen, grandson of Lady Anne Kennedy, Countess of Ruglen, daughter of John, the seventh Earl of Cassillis, the heir of line. The case was given in favour of the heir-male by the narrowest majority in the Court of Session, and the decision was affirmed by the House of Lords.

The Earl of March, assuming the title of Cassillis, presented a petition to the King, claiming the honours, and Sir Thomas Kennedy made a similar application. Both applications were laid before the House of Peers on the 31st March 1760, and the following Cases were thereafter submitted by Sir Thomas and the Earl to the consideration of their Lordships.

FAMILY OF CASSILLIS.

by Royal Charters,

our, dated 22d July

:tour, the 22d July

THOMAS KENNEDY of Culzean, Second Son. Infeoffment of the Lands of Culzean, given by Gilbert, Fourth Earl of Cassillis, *in Person. Thomæ Kennedy suo fratri*, dated 14th September 1569. 2. Charter, by John, Fifth Earl of Cassillis, to Sir Thomas, designed *dilectum nostrum patruum*, dated 23d August 1597. 3. Charter of Confirmation thereof by King James VI., 26th August 1597. Died in 1605. Had Issue.

MES KENNEDY, Eldest Son. Precept for infeoffing him in the Lands of Culzean, as Heir of his Father, Sir Thomas, 5th September 1606. Died without Issue.

ALEXANDER, afterwards Sir Alexander Kennedy of Culzean, Second Son. 1. Contract between James and Alexander Kennedy, his Brother, 12th June 1622. 3. Charter by James to Alexander, his Brother, 30th July 1622. Died in 1655. Had Issue.

IN KENNEDY of Culzean. Retour as Heir of Sir Alexander, his Father, 8th February 1656. Died in 1665.

ARCHIBALD KENNEDY of Culzean, Bart. Retour as Heir of John Kennedy, his Father, 17th April 1672. Died in 1710.

JOHN KENNEDY of Culzean, Bart. Retour as Heir of Sir Archibald, his Father, 12th March 1711. Died in 1742.

JOHN KENNEDY of Culzean, Bart. Retour as Heir of Sir John, his Father, 28th January 1743. Died in 1744. No Issue.

Sir THOMAS KENNEDY of Culzean, Bart.—THE CLAIMANT.—Retour as Heir of Sir John, his Brother, 12th July 1747.

an, now of Cassillis, Cassillis, as Heir Male he First Earl of Cas-

THE CASE OF SIR THOMAS KENNEDY

(CLAIMING THE TITLE, HONOUR, AND DIGNITY OF)

EARL OF CASSILLIS.

GILBERT KENNEDY, Grandson of *Robert* III. King of *Scotland*, (by *Mary Steuart*, his Daughter,) was created a Lord of Parliament in 1459, by King *James* II., by the Title of Lord *Kennedy*; and *David*, the Grandson of the said *Gilbert* Lord *Kennedy*, was created Earl of *Cassillis* by King *James* IV. in 1509.

The Title and Dignity of Earl of Cassillis conferred on the Claimant's Ancestor in 1509.

As Patents of Honour were not introduced till long after, in the Reign of *James* VI., these Dignities were conferred by the Sovereign himself in Parliament, without any Writ limiting the Descent of the Honours, or any mention of particular Heirs; and as Service in Parliament, Fidelity and Homage were due in consequence of the Dignity thus conferred, so they have been always understood to be governed by the Rules of the Feudal Law, and to descend uniformly to the Heirs Male of the Person

Which descends as a Male Fief.

first ennobled, unless *Heirs whatsomever*, or Heirs Female, were specially and particularly called to the Succession.

The Estate and Barony of *Cassillis*, before the Creation of *David* the first Earl of *Cassillis*, in 1509, as aforesaid, appears by the following Grants to have been limited to Heirs Male only.

Ancient Investitures of the Estate of Cassillis to Heirs Male. 2d Nov. 1404.

By a Charter in 1404, *Robert* III. King of *Scotland* granted the Lands and Estate of *Cassillis* and others, in the County of *Air*, to Sir *Gilbert Kennedy*, and to *James Kennedy*, his Son, and the *Heirs Male* of his Body; which failing, to *Alexander Kennedy*, his Brother, and the *Heirs Male* of his Body; which failing, to four other Brothers successively, and the *Heirs Male* of their Bodies; which all failing, to the *Heirs Male whatsoever* of Sir *Gilbert*, their Father.

28th Jan. 1405.

And King *Robert* made a Grant in favour of the said *James Kennedy*, then married to *Mary Stuart*, his Daughter, whereby he and *his Heirs Male* are appointed "the Head of the whole Tribe in all "Questions, Articles, and Affairs that could pertain "to the *Kenkynol*," or Head of the Tribe.

2d Aug. 1450.

These two Charters in favour of *James Kennedy* were, of this Date, confirmed by two Charters granted by King *James* II.

13th Feb. 1450.

Who, of this Date, granted a Charter of the said Lands and Estate of *Cassillis* and others, in favour of *Gilbert Kennedy*, Son of the said *James Kennedy*, and Grandson of King *Robert* III., and the *Heirs Male* of his Body; which failing, to *Thomas Kennedy* of *Kirkoswald*, and his *Heirs Male;* which failing, to *Gilbert Kennedy*, *David's* Son, and his

Heirs Male ; which failing, to the remanent Persons named in the ancient Charters of the Estate.

By other two Charters of the same Date, King *James* granted the Lands of *Dunnure* and Castle thereof, and other Lands, and also the Custody of the Castle of *Lochdune*, and Lands thereto belonging, to the said *Gilbert Kennedy*, and his *Heirs Male*.

And by a fourth Charter of the same Date, King *James* appointed the said *Gilbert Kennedy*, and his *Heirs Male*, to be the Head of the whole Tribe, and granted to them the heritable Office of Bailie of the Earldom of *Carrick*.

By a Charter in 1501, King *James* IV. granted the Lands and Baronies of *Cassillis* and *Denure*, and others, to *David Kennedy*, (soon after created Earl of *Cassillis*,) upon the Resignation of his Father, *John* Lord *Kennedy*, " Tenen' et habend' " omnes et singulas prædict. terras, &c. dicto " *David Kennedy*, et hæredibus suis de nobis et " successoribus nostris, &c. in feudo et hæreditate, " &c. *secundum tenorem antiquarum infeodationum* " *dict' terrarum eis desuper confect.*" 17th Feb. 1501.

The said *David*, created Earl of *Cassillis* in 1509, was succeeded in his Estate and Honours by his Son *Gilbert*, the second Earl of *Cassillis*, to whom succeeded his Son *Gilbert*, the third Earl of *Cassillis*, who, in 1540, obtained a Charter from King *James* V., granting the whole Estate and Barony of *Cassillis*, and other Lands therein mentioned, to him and the *Heirs Male* of his Body ; which failing, to *Thomas*, his Brother, and the *Heirs Male* of his Body ; which failing, to *David*, *Quintin*, *Archibald*, 6th Feb. 1540.

Hugh, and *James Kennedy*, his Brothers, successively, and the *Heirs Male* of their Bodies; which failing, to *James* and *Thomas Kennedy*, his Uncles, successively, and the *Heirs Male* of their Bodies; which failing, to *Hugh Kennedy* of *Girvain Mains*, to *William Kennedy* of *Glentig*, to *Alexander Kennedy* of *Bargeny*, and to *James Kennedy* of *Blarquhan*, successively, and the *Heirs Male* of their respective Bodies; which failing, to the lawful and nearest *Heirs Male whatsoever* of the said *Gilbert* Earl of *Cassillis*, bearing the Name and Arms of *Kennedy;* which all failing, to his nearest and lawful Heirs Female whatsomever.

The Estate and Dignity descended in the Male Line.

The said Estate and Barony, and the Title and Dignity of Earl of *Cassillis*, descended in the Male Line from the said *Gilbert*, the third Earl, to *John*, the eighth Earl of *Cassillis*, who died the 8th of *August*, 1759, without Issue, as appears from the Table of Pedigree hereto annexed.

The Claimant, Sir Thomas Kennedy, served nearest Heir Male of the Family, 28th Jan. 1760.

Upon the Death of the said *John*, late Earl of *Cassillis*, the Claimant, Sir *Thomas Kennedy*, agreeable to the Laws of *Scotland*, was duly served and cognosced, upon the most authentic and indisputable Evidence of Charters, Retours of Services, and Infeoffments, by a sworn Jury of Noblemen and Gentlemen, to be the nearest and lawful Heir Male of the said *John* late Earl of *Cassillis*, lineally descended from Sir *Thomas Kennedy* of *Culzean*, the second Son of *Gilbert*, the third Earl of *Cassillis*, who was Grandson of *David*, first created Earl of *Cassillis* in 1509, as before-mentioned.—The Genealogy and Connection of this Branch of the Family

is likewise contained in the Table hereto annexed, wherein the Proofs are referred to.

Prefers a Petition to his Majesty for establishing his Right.

The Claimant, Sir *Thomas Kennedy*, lately presented a Petition to his Majesty, praying, That the Title and Dignity of Earl of *Cassillis* might be declared to belong to him and his Heirs Male; and his Majesty has been graciously pleased to refer this Petition to the Consideration of the House of Lords.

The Claimant most humbly hopes the foresaid Title and Dignity will be found of Right to belong to him, for the following, among other

REASONS.

Reasons for declaring the Claimant's Right to the Title of Honour and Dignity of Earl of Cassillis.

I. Feus of Lands anciently, before Charters or Grants in Writing were introduced, were conferred by Investiture, in Presence of the *Pares Curiæ*.—And in the same Manner, until the Reign of *James* VI. of *Scotland*, when Patents appear to have been first introduced, the Dignity of Earl was conferred by the Sovereign himself in Parliament, by Cincture or Girding the Person ennobled with a Sword, and by Proclamation made by Heralds—In Feus of Lands, military Service and Fidelity were due by the Vassals to the Over-Lord or Superior; so in Dignities the Person ennobled was bound to perform Service in Parliament, Fidelity, and Homage—Feus of Lands, before the Descent was limited by Grants in Writing, uniformly descended to Heirs Male, and could not be aliened without the Consent of the Superior; so Dignities conferred by Investiture

in Parliament descended to the Heirs Male of the Body of the Person first ennobled, and could not be aliened or transferred in any other Manner than by Resignation thereof in the Hands of the Sovereign.

II. As the original Constitution of Feus and Dignities was derived from the Feudal Law, every Question, with respect to Dignities, conferred without Patent, must be governed by the Rules of that Law, which has hitherto, and must always be resorted to as the common Law of *Scotland*, where the statutory Law, or a Course of Decisions of the Sovereign Court, has established no certain Rule of Judgment; and, therefore, in the present Case, the Right to the Title and Dignity of the Earl of *Cassillis*, conferred on the Claimant's Ancestor in 1509, can only be judged of by the Feudal Law of *Scotland*, which has ever regulated the Descent of all Dignities, originally conferred by Cincture or Investiture, before any special Grants or Patents were in Use.

Sir Tho. Craig, Lib. 1, Dieg. 8, § 2 and 16.—Lib. 1, Dieg. 10, § 6.—Lib. 2, Dieg. 14, § 3.

III. By the Feudal Law, the Succession of Lands, in all Cases, devolved on Males only, to the entire Exclusion of Females.—This Law was early received in *Scotland;* and long after the *Norman* Conquest, when the Succession of Females was introduced into the Law of *England*, it continued in its original Purity in *Scotland*, and the exclusive Privilege of the Male Succession wore out more slowly and gradually.—At first, Females were entitled to succeed by Paction or express Provision, and were understood to succeed only upon the Failure of Males.—Afterwards, when the Settlements of Estates were made in favour of *Heirs whatsom-*

ever, Female Heirs were understood to be comprehended under that general Description; but this can have no Influence on the Succession of Dignities conferred by Cincture in Parliament, which was originally regulated by the Feudal Law; and the Descent once established in the Male Line will not be presumed to be altered, unless such Alteration appears by the clearest Evidence.—The Continuance of the Descent in the Male Line is proved by the History of the several noble Families in *Scotland*, who have possessed these Dignities.—In every Case where the Male Line separated from the Female, the Heir Male was always preferred both in ancient and later Times, which is the strongest Proof that can be had, that the Consuetudinary Law of *Scotland* has, in this Particular, never varied from the Feudal Law, to which it owed its Origin.

IV. It appears that the numerous Resignations of Titles of Honour made in the Hands of the Sovereign, for the Purpose of obtaining new Grants, agreeable to the Law and Usage of *Scotland* before the Union of the Kingdoms, were all uniformly in Favour of *Heirs Female*, and none of them in Favour of Heirs Male; which puts it beyond a Doubt, that *Heirs Male* had ever the *legal* Right of Succession, and that this Right could only be altered or defeated by a Resignation of the Dignity, and a new Grant thereof by the Sovereign limiting the Descent to Heirs *Female*.

V. The ancient Settlements of the Estate of *Cassillis*, in the present Case, in Favour of Heirs Male only, affords a most convincing Proof, that the Title

of Honour and Dignity was by Law understood to descend in the same Channel, as it is not possible to believe that the Persons who enjoyed this Rank and Dignity would for Ages have anxiously conveyed their Estates to Heirs Male, if they had understood that the Dignity could have descended to Heirs Female.

VI. As the Descent of Peerages (originally conferred without Patents) to the nearest Heir Male of the Person first ennobled, has uniformly taken Place in a great Number of the noble Families of *Scotland;* so this Rule of Descent was never called in Question until the Year 1729, in a Dispute before the Court of Session, between *Simon* the late Lord *Lovat*, the undoubted Heir Male of the Person first ennobled in the Year 1540, and *Hugh Fraser*, Esq., the nearest Heir of Line, descended of a Daughter of *Hugh* Lord *Lovat*, who died in 1697.—On Occasion of this Dispute, many Instances of the Descent of Peerages (without Patents) in the Male Line, to the Exclusion of the nearer Heirs Female, were exhibited and proved to the Satisfaction of the Court of Session. And though some Instances were likewise brought, tending to show that such Dignities had sometimes been assumed by the nearest Heir Female, yet the Court, being of Opinion that all Dignities thus conferred before Patents were introduced descended by Law to the nearest Heir
3d July 1730. Male of the Person first ennobled, they found the Title and Honours of Lord *Fraser* of *Lovat* descended to *Heirs Male*, and of Right belonged to the said *Simon* late Lord *Lovat*, as Heir Male of the Family of Lord *Fraser* of *Lovat*.—This Judg-

ment was acquiesced in, and has stood unimpeached for thirty Years; and the said *Simon* late Lord *Lovat* having as a Peer of *Scotland* been impeached, brought to a Trial, and convicted of High Treason for his Accession to the Rebellion 1745, the Law in this Particular must now be considered as established, and cannot be called in Question.

Objection I.

It may be objected, That by the Law and Usage of *England*, Dignities as well as Lands, unless limited by special Grant, always descend to the right Heirs, or Heirs of Line, and consequently to Heirs Female; and that this Rule ought to take Place in the present Case.

Answer.

To this it is answered, That the Feudal Law was only introduced into *England* at the *Norman* Conquest; and at the same Time the Female Succession was established agreeable to the *Norman* Custom.—But it appears from the Laws of *Malcolm* the IId, who reigned in 1004, and from the most undoubted Authorities, that the Feudal Law, by which the Female Succession was excluded, took Place much earlier, and continued much longer in its original Purity in *Scotland*, where it has ever been considered as the proper Law of that Country in Matters of Succession, unless where it has been clearly altered by Custom, which will not be maintained in the present Case.

Leges Malcolumbi 2di, cap. i. Reg. Majestat.

Sir Tho. Craig, Lib. i Dieg. 8, § 2 and 16.

Hoc enim certissimum est, nos purius hoc jus habere quam vicinos.—Hoc jus proprium hujus Regni dici potest, cum ex ejus scaturigine et fontibus omne jus, quo hodie utimur in foro, omnisque usus et praxis defluxerit; et si quid dubii oriatur, origines semper repetendæ sunt, ut inde quod æquum est dignoscatur.

Objection II.

It may be further objected, That there occurred one Instance of the contested Right to the Title and Dignity of Lord *Oliphant* in 1633, where the Court of Session found, That where the Person last

Durie's Decisions, 11th July 1633. Oliphant against Oliphant.

deceased had no Male Children, and where there was no Writ extant to exclude the Female, Use was sufficient, conform to the Laws of *Scotland*, to transmit such Title to the Heir Female.

Answer. But this extraordinary Case, said to have been determined in Presence of King *Charles* the Ist, being very indistinctly reported, without any Mention of the original Constitution of the Peerage, or any Traces of such Dispute appearing from the Records, can have no Influence in the present Case.—The Question appears to have been only with Respect to a Resignation of the Title and Dignity made by Lord *Oliphant*, in Favour of *Patrick Oliphant*, his Heir Male, which was never accepted of by the King.—The Court of Session, on this Occasion, as the Report sets forth, FOUND, That Usage was sufficient to transmit the Title to the Heir Female; but no Reason is given for this Determination, nor was this any Part of the Question: And the Report adds, with respect to the real Question before the Court, That the Lords FOUND, "That the Heir Female, the Daughter of the last Lord *Oliphant*, was excluded as not having Right to this Dignity, seeing the King had not conferred the same upon her, and her Father had renounced his Right thereto, which, though not sufficient to establish the Right in Favour of the Donee, yet was sufficient to denude the Resigner and his Descendants, until the King should declare his Pleasure; and they found that none of the Parties could claim the said Honour, but that it remained with the King."

William Earl of March prefers a Petition to his

William Earl of *March* and *Ruglen* likewise presented a Petition to his Majesty, (which has been

referred to the House of Lords,) claiming the foresaid Title and Dignity of Earl of *Cassillis*, as nearest Heir General, or of Line, of *David*, the first Earl of *Cassillis*, being the Great-Grandson of *John*, the seventh Earl of *Cassillis*, by *Anne*, Countess of *March*, the Daughter of *Anne*, Countess of *Ruglen*, who was the eldest Daughter of the said *John* Earl of *Cassillis*.

Majesty, claiming the foresaid Title of Honour and Dignity.

I. The said *William* Earl of *March* insists, that where no Patent exists, the Descent of the Title of Honour is regulated by that of the Family Estate, as it stood devised by the Investitures at the Time the Dignity was conferred; and that, when the Title of Honour and Dignity was first conferred on the Family of *Cassillis* in 1509, the Estate was settled in Favour of Heirs General, or Heirs of Line, as appeared by the following Writings.

1st Proposition on which the Claim of William Earl of March is founded.

1. Charter to *David Kennedy*, Knight, Son and apparent Heir of *John* Lord *Kennedy*, of the Office of Bailiary of *Carrick*, with the Pertinents. "Tenend' prædicto David Kennedy militi *et hæredibus suis*."

9th July 1489.

2. Charter of the same Date to the said *David*, and *Agnes Borthwick*, his Spouse, of the Lands of *Balgra*. "Tenend' præfatis David et Sponsæ suæ, "et eorum alteri diutius viventi in conjuncta infeodatione et heredibus suis inter ipsos legitimè procreandis; quibus forte deficientibus, legitimis et "propinquioribus hæredibus dicti Joannis Domini "Kennedy sui patris quibuscunque."

9th July 1489.

3. Charter before-mentioned in Favour of the said *David*, of the Baronies of *Cassillis* and *Denure*. "Tenend' dict' David et hæredibus suis de

17th Feb. 1501.

"nobis et successoribus nostris, &c. in feodo et "hæreditate, &c. *secundum tenorem Antiquarum* "*Infeodationum dict' terrarum eis desuper con-*"*fect.*"

12th Feb. 1505. 4. Charter in Favour of *John* Lord *Kennedy*, of the Lands of *Coiff*. "Tenend' dict' Joanni "Domino Kennedy et *hæredibus suis*."

30th March 1506. 5. Charter in Favour of *David*, Son and Heir apparent of *John* Lord *Kennedy*, of the Lands and Barony of *Leswalt*. "Tenend' dict' David Ken-"nedy et *hæredibus suis*."

28th Jan. 1506. 6. Charter in Favour of the said *David*, of the Lands of *Mackwardstoun*. "Tenend' dict' David "et *hæredibus suis*."

5th Feb. 1511. 7. Charter granting to *David* Earl of *Cassillis*, Lord *Kennedy*, et "*hæredibus suis*," the Castle and Barony of *Cassillis*, and Lands of *Macmartinston* and others.

20th July 1536. 8. Charter to *Gilbert* Earl of *Cassillis*, of the Lands of *Balmacawell*, which are thereby annexed to the Barony of *Cassillis*, "Tenend' dict' *Gilberto* "*comite* de *Cassillis* et *hæredibus suis*."

But that these Charters cannot avail the Claimant, the Earl of *March*, in his Argument with respect to the Settlement of the Family Estate, will appear from the following Considerations.

Answers to the first Proposition on which the Earl of March's Claim is founded. 1. As the Charter in favour of *David Kennedy*, in 1501, expressly specifies, That the Estate is to be holden by his Heirs, *secundum tenorem antiquarum infeodationum eis desuper confect.* it can only be understood to mean the Heirs of the former Investitures, which are proved to have been in Favour of *Heirs Male* only.

2. The two Charters in 1489, of the Bailiary of *Carrick*, and Lands of *Balgra;* the Charter in 1505, of the Lands of *Coiff;* the Charter in 1506, of the Lands of *Leswalt;* the other Charter in the same Year, 1506, of the Lands of *Macwardston*, are all of them Grants of inconsiderable Parcels of Lands, separate and distinct from the Barony of *Cassillis*, and have long since been aliened and gone from the Family: And even admitting the general Destination of *Heirs*, as contained in these Charters, included Female Heirs, yet most certainly the temporary Grants of these detached Parcels of Land cannot influence the Succession of the Family Estate, which, at that time, was indisputably limited to Heirs Male only.

3. The Charters in 1511 and 1536, being subsequent to the Time the Dignity was first conferred on *David* Earl of *Cassillis*, in 1509, they can have no Influence in varying the Descent of the Title of Honour. But it will appear, the Words *hæredibus suis*, contained in these Grants, did then only mean the Heirs of the former Investitures; and there can be no Reason to construe them otherwise: Because the Lands in the Charter 1536 are thereby annexed to the Barony of *Cassillis*, and most certainly will be understood to descend to the same Heirs Male who succeeded to that Barony.

4. There is demonstrative Evidence, that there was no Intention of altering the Course of Succession by the general Words *hæredibus suis* contained in these Charters; for it appears, that *Gilbert* Earl of *Cassillis*, a few Years after, in 1540, obtained a Charter of his whole Lands and Estate, then of new

erected into one entire Barony, in Favour of the *Heirs Male* of his own Body ; and failing these, in Favour of six Brothers successively, and their *Heirs Male ;* which failing, to his two Uncles and their *Heirs Male ;* which failing, to several other *Heirs Male* therein named ; which failing, to his *own Heirs Male whatsomever :* And last of all, to prevent the Crown's taking the Estate through default of Heirs, to his Heirs Female whatsomever.

2d Ground on which the Earl of March's Claim is founded.

II. The Claimant, the Earl of *March*, further insists, that, agreeable to the Usage and Practice of *Scotland*, the Title and Dignity of Earl of *Cassillis* was resigned along with the Family Estate in the Hands of the Crown; and thereupon two several Grants were made, limiting the Descent of the Honours to a particular Line of Heirs, whereby the Claimant was entitled to take and enjoy the same, as Great-Grandson of *John*, the seventh Earl of *Cassillis*, the Grantee of these Charters, by his eldest Daughter *Anna* Countess of *Ruglen*, all the Male Issue of his Body being extinct. And in support of this Plea, he refers to the two following Charters.

29th Sept. 1642.

1st, Charter under the Great Seal, proceeding upon the Procuratory and Deed of Resignation executed by *John*, the sixth Earl of *Cassillis*, whereby he resigned in the Hands of His Majesty's Commissioners, the Barons of Exchequer, *the Earldom and Lordship* of *Cassillis*, comprehending the Lands therein particularly named and described, for new Infeoffment thereof to be given and granted to the said *John* Earl of *Cassillis* in Liferent, and *James* Lord *Kennedy*, his eldest Son, and the Heirs Male

of his Body; which failing, to return to the said *John* Earl of *Cassillis*, and the other Heirs Male of his Body; which failing, to the Daughters of Lord *Kennedy*, without Division, and the Heirs Male and Female of their Bodies; which failing, to the Daughters of the said *John* Earl of *Cassillis*, without Division, and the Heirs Male and Female of their Bodies; which failing, to the Earl's Heirs Male whatsoever; which failing, to his Heirs and Assignees whatsoever. And the Charter contains a *novodamus* and Erection of *the Lands and Estate*, "In unum integrum et liberum *Comitatum et Do-* "*minium*, nunc, et in omni tempore, *Comitatum et* "*Dominium* de Cassills nuncupand. per dict' Co- "mitem de Cassils, duran' vita sua, et post ejus "decessum per præfat. Jacobum Dominium Ken- "nedy ejus filium, et hæredes suos respective ante- "dict' *secundum præcedentiam et prioritatem loci* "*illis per eorum jura legesque et praxin dicti reg-* "*ni nostri Scotiæ debitam et competentem*, omni "tempore affuturo, fruen. gauden. et possiden."— And this Charter was ratified in the Parliament immediately following.

2d Charter under the Great Seal, proceeding upon the Procuratory of Resignation contained in the Contract of Marriage, dated 26th of *December* 1668, executed between *John* the seventh Earl of *Cassillis*, and Lady *Susan Hamilton*, Daughter of *James* Duke of *Hamilton*, whereby the said *John* Earl of *Cassillis* resigned *the Lands and Barony* of *Cassillis*, comprehending the particular Lands and others therein mentioned, all united into one whole and free *Earldom*, called the *Earldom of*

Cassillis, in the Hands of his Majesty, or his Commissioners, in Favour, and for new Infeoffment to be made and granted to the said *John* Earl of *Cassillis*, and the Heirs Male of his Body; which failing, to the eldest Heir Female of the said Marriage, without Division; which failing, to the Sisters of the said Earl successively, and the Heirs Male of their Bodies; which failing, to his nearest Heirs Male; which failing, to his Heirs and Assignees whatsoever.—This Charter contains a Reference to the former Charter passed in 1642, in these Words:—"Quæ Integræ Terræ, Baroniæ, &c. sunt omnes "unit. prius annexat. erect. et incorporat. in unum "integrum et liberum Comitatum et Dominium nun- "cupat. et nuncupand. omni tempore affuturo Comi- "tatum et Dominium de Cassils, *cum titulo, digni- "tate, præcedentia, et prioritate dict. Comiti et "predecessoribus suis, per leges et praxin hujus "regni nostri debit. secundum cartam per quondam "nostrum, carissimum patrem Carolum primum, "Regem beatissimæ memoriæ, sub suo magno "sigillo hujus regni nostri Scotiæ concess.* de data "penult. die Septembris 1642."—And it contains likewise a new Erection of the Lands, "in unum "integrum et liberum Comitatum et Dominium, "nuncupat. et nuncupan. nunc et in omni tempore futuro, Comitatum et Dominium de Cassillis, fruend. "gaudend. et possidend. per prefatum Joannem "Comitem de Cassils, ac per hæredes suos masculos "provisionis et talliæ respective antedict. *secundum "precedentiam et prioritatem loci ipsis debit. et "competen.* per eorum jura et per leges dict. hujus "Regni nostri Scotiæ, omni tempore futuro."—A

Ratification of this Charter likewise passed as usual in the Parliament 1672.

But that these Charters and Ratifications thereof can have no Effect to alter the legal Descent of the Title of Honour and Dignity of Earl of *Cassillis* from the Heir Male of the Family, will appear from the following Considerations:—

Answers to the 2d Proposition, on which the Earl of March's Claim is founded.

1. It appears by the Procuratory of Resignation, upon which the Charter 1642 proceeded, that the Title of Honour and Dignity was not resigned by the Earl of *Cassillis* in the Hands of the Crown, and of consequence no new Limitation could be made, or was intended, by this Grant.

2. It appears by the Signature or Warrant of the Charter in the Records of Exchequer, that it was not superscribed by the King, which was indisputably necessary; and accordingly the Charter was only granted by *the Lords of Exchequer*, who had no Power to receive Resignations, or make new Grants of Titles of Honour.

3. The Charter 1671 proceeds upon the Procuratory of Resignation contained in the Marriage Settlement between *John* Earl of *Cassillis* (the Son of the former Earl *John*, who obtained the Charter 1642) and Lady *Susan Hamilton*. And as there is no Warrant for resigning the Dignity, nor is it once mentioned in the Marriage Settlement, most certainly no Alteration could be made of the Descent of the Title of Honour. For though Resignations of this kind are peculiar to *Scotland*, yet no Instance ever occurred of a new Limitation made of Honours *without a special Resignation;* nor can it, without Absurdity, be supposed that the King

would alter or impair a Right vested in a Subject, without his special Consent.

4. As the *Lands and Estate* were only resigned by the Earl of *Cassillis*, so the Docquet subjoined to the original Signature, which is intended as a Cheque to prevent Grants by Subreption, contains a special Description of the whole Lands and the Substitution of Heirs, but does not once mention *the Title of Honour or Dignity*.

5. The Words of the Charter 1642, or of the Charter 1671, cannot, by the most strained Construction, import the Grant of a Title of Honour.—The Erection of the Lands, by both these Charters, into a *Lordship and Earldom*, to be possessed by the Earl of *Cassillis* and his Heirs, "*according to* "*the Precedency and Priority of Place due and* "*competent to them by their Rights, and the Laws* "*and Practice of* Scotland," can most certainly confer nothing more than the common territorial Jurisdiction belonging to Lands thus distinguished by the Name of a Lordship and Earldom, and are only the Work of the Attorney who formed the Signature, without any Warrant from the Procuratories of Resignation.

6. The Ratifications of these Charters in Parliament passed of Course, and were considered as Matter of mere Form. They were neither read in Parliament, or passed as other Acts, nor do they contain any more than a general Confirmation of the Charters themselves; which, as has been already shown, do not comprehend the Title of Honour or Dignity in question.

WHEREFORE, as the Claimant Sir *Thomas Kennedy* is the undoubted Heir Male of the Family of *Cassillis*, lineally descended from the Person first ennobled in 1509.—As it appears from the most undoubted Authorities, that the Descent of Titles of Honour conferred without Patent, must be regulated by the Feudal Law, which always preferred the Succession of Heirs Male, so long as any existed.—As it appears by a Variety of Instances in many noble Families of *Scotland*, that Peerages without Patent did in fact descend to a distant Heir Male where a nearer Heir Female existed.—As it appears that Female Heirs were never entitled to such Dignities, but upon a Resignation and a new Grant thereof by the Sovereign, which was the only Method of defeating the *legal* Succession of the Heir Male.—As by the Settlement of the Estate in Favour of Heirs Male, and the continued Descent thereof in that Line, there arises the strongest presumptive Evidence, that by Law the Title of Honour was understood to descend to the same Heirs Male.—And as it appears that no Resignation or new Grant of this Dignity of Earl of *Cassillis* was ever made in Favour of Heirs Female, IT IS MOST HUMBLY HOPED the said Dignity will be found of Right to belong to the Claimant, Sir *Thomas Kennedy*.

C. YORKE.
CH. HAMILTON GORDON.

THE CASE OF WILLIAM EARL OF RUGLEN AND MARCH,

(CLAIMING THE TITLES AND DIGNITIES OF)

EARL OF CASSILLIS AND LORD KENNEDY.

First Creation of the Honours of Lord Kennedy and Earl of Cassillis.

GILBERT KENNEDY, Grandson of King *Robert* III. of *Scotland*, was, in the Reign of King *James* II., created Lord *Kennedy;* and his Grandson *David* Lord *Kennedy* was, about the year 1509, created Earl of *Cassillis*.

There is no Patent on Record of these Creations extant; but there is complete Evidence of them from the Rolls of Parliament and from ancient Papers; which Instruments likewise show that after the Family of *Kennedy* was ennobled, their Estate was from time to time settled, not upon the Heirs Male, but the Heirs General.*

Charters. To Heirs in general.

* The Instruments are—

1. A Charter under the Great Seal of the Lands of *Balgrae*, resigned by *John* (called therein) Lord *Kennedy*, to Sir *David Kennedy*, his Son and apparent Heir; and the Limitation of the Lands in this Charter is to the *Heirs* to be procreat of the Marriage between him and *Agnes Borthwick*, his Wife; whom failing, to *the nearest and lawful Heirs whatsoever* of the said *John* Lord *Kennedy*. This Charter is dated the 9th *July* 1489.

Charter of Resignation in 1671.

The Titles of Earl of *Cassillis* and Lord *Kennedy*, being come by a regular Course of Succession in the Male Line to *John* the seventh Earl, he, upon his own Resignation, obtained a Charter under the Great Seal, (warranted by a Signature under the King's Hand, dated at *Whitehall*, 24th *April* 1671,) whereby the King gives and grants to the said Earl of *Cassillis*, and the Heirs Male of his Body; whom failing, to the Heirs Female of his Body, without Division, *(Heredes Femellæ respective predict. omni modo, viro nobili vel generoso qualificato Cognomine de* Kennedy *nuben., saltem, uno, qui et heredes inter illos legitime procreand. ad Terras et Statum Subscript. Virtute hujus presentis Talliæ et Provisionis Succeden. assument, suscipient, ferent, gerent et utentur, omni Tempore futuro Cognomine de* Kennedie, *Armis et* Dignitate *Familiæ de* Cassillis,) with Divers other

2. A Charter of the same Date, upon the Resignation likewise of *John* Lord *Kennedy*, of the Office of Bailiff of *Carrick*, to his Son *Sir David and his Heirs*.

3. A Charter upon the like Resignation, of the Lands and Baronies of *Cassillis* and *Dunure*, to his Son Sir *David and his Heirs*. This Charter is dated the 17th *February* 1501.

4, 5, 6. Besides these, there is a Charter of the Lands of *Coiff* to *John* Lord *Kennedy*, dated 12th *February* 1505; and a Charter of the Lands of *Markwardstone* to Sir *David Kennedy* and his Heirs, dated 12th *January* 1506; and also a Charter of the Barony of *Leswalt* to the same Sir *David Kennedy;* and the Limitation in all these is the same as above, to *Heirs* in general.

7. A Charter of the Lands and Barony of *Cassillis*, with several other Lands, to *David* Earl of *Cassillis* Lord *Kennedy*, the Limitation to the said *David* and *his Heirs*. This Charter is dated 5th *February* 1511.

By the Exchequer Rolls for 1509, it appears that the said *David* is only marked Lord *Kennedy;* but in the Roll dated 10th *August* 1510, he is marked Earl of *Cassillis*.

Remainders, over the Earldom and Lordship of *Cassillis*, to be bruiked, enjoyed, and possessed by the said *John* Earl of *Cassillis*, and by his Heirs Male, and of Provision and Tailzie, respectively foresaid, *conform to the Precedency and Priority of Place due and competent to them by their Rights, and Laws and Practice of this Kingdom;* and this Charter was ratified in Parliament *Anno* 1672.

Descent of the Titles to the Earl of March.

This *John* Earl of *Cassillis* had issue a Son, *John* Lord *Kennedy*, who died in his Father's Life, leaving Issue only one Son, *John*, the last Earl of *Cassillis;* and a Daughter, Lady *Anne*, married to *John* Earl of *Ruglen*, by whom she had Issue one Son, who died unmarried, and two Daughters, *Anne* Countess of *March* and *Ruglen*, and *Susan*, now Countess Dowager of *Cassillis*.

By the Death of the last Earl of *Cassillis* without Issue, in 1759, the Earl of *March* became entitled to the Honours and Dignities of Earl of *Cassillis* and Lord *Kennedy*, as descended from the eldest Daughter of *John* the seventh Earl of *Cassillis*, to whom the Honours were limited by the Charter of 1671, or as Heir at Law of the Earls of *Cassillis* and Lords *Kennedy;* and preferred a Petition to his Majesty, claiming the said Titles to be allowed him.

Sir *Thomas Kennedy* having likewise petitioned, claiming these Titles by Descent to him as Heir Male, his Majesty has been graciously pleased to refer both to the House of Peers.

Claim of the Earl of March. 1st, Upon the Charter of 1671.

The Earl of *March's* Right is founded, in the first Place, upon the Charter of 1671; for if that Charter operates as a new Grant from the Crown

of the Title and Dignity of Earl of *Cassillis*, with the ancient precedency, there is no room for any Question as to the Descent of the Right to the Ancient Peerage.

The following Propositions are submitted in support of his Claim, as founded upon that Charter :—

1. That the Earl of *March*, as Great-Grandson of Earl *John*, by his Daughter the Countess of *Ruglen*, is the Heir, to whom the Rights conveyed by that Charter have descended, on failure of the said Earl *John's* Issue Male in the Person of the last Earl.

2. That by the Law and Usage of *Scotland*, a Grant of a Title of Honour upon a Resignation *in favorem*, did effectually convey the ancient Title to the Heirs therein mentioned. This was proved by the Instances of the Practice of *Scotland* in such Cases, quoted upon the Claim of the Peerage of *Stair*, and is now established by the Determination of the House of Lords upon that Case in 1748.

3. That by the express Words of this Charter of 1671, the Title and Dignity of Earl of *Cassillis* is conveyed. The Charter, it is true, does also convey the Lands of the Earldom and Lordship of *Cassillis*. But it was usual in *Scotland* for Charters to contain a Conveyance, both of the Lands and Honours of the Person upon whose Resignation they passed, especially where (as in the present Case) the Lands were united and erected into an Earldom or Lordship ; and that the Title of Honour, as well as the Lands and Earldom, were meant to be granted by this Charter to Heirs Female on

Failure of Male of the Grantee's Body, is evident from the Condition of bearing the Arms *and Dignity* of *Cassillis* annexed to the Limitation in Favour of Heirs Female, and from the Grant of the Earldom, " To be enjoyed and possessed by the said " Earl of *Cassillis* and his Heirs aforesaid, conform " to the Precedency and Priority of Place due and " competent to them by their Rights, Laws and " Practice of this Kingdom;" Words which can have no meaning as applied to a Grant of Lands, but plainly imply the Grant of a Title of Honour, to which only they are applicable: And it is farther evident from the Circumstance of a Signature under the King's Hand, having issued as the Warrant of this Charter, which was necessary where a Title of Honour was to be conveyed, but not at all so for a Grant of Lands only.

2d, As lineal Heir of the old Peerage.

But if this Charter should be held not to operate as a Grant of the Title of Honour, then the Earl of *March* claims the Titles of Earl of *Cassillis* and Lord *Kennedy*, as descended upon him the Lineal Heir, by the Law and Course of Descent of Peerages created without special Limitations.

By the most ancient Usage of *Scotland*, the Dignities of Earldoms and Lordships were Territorial, and the Title was annexed to the Land. In course of Time they became personal and inherent in the Blood of the Person ennobled. And at this Period there were two Methods by which the Crown could create a Man, an Earl or Lord of Parliament; the one was in analogy to the ancient territorial Dignities, by a Charter granting Lands erected into

an Earldom or Lordship, with the Dignity of Earl or Lord, to the Grantee, with such Limitations of Heirs as the King pleased. The other was by a Solemnity of Creation performed in full Parliament, *per Cincturam Gladii*, and other Ceremonies; and an Entry of this Creation was made in the Rolls of Parliament.*

This being premised, the following Propositions are submitted in support of the Earl of *March's* Claim, as founded upon his Right, by Descent and Lineal Heirship, to the Titles of Earl of *Cassillis* and Lord *Kennedy*.

1. That these Titles were originally established by Creation in Parliament, without any Patent or Grant expressing any Limitation of the Descent of the Honour.

The Proof of this is, that the Lands of *Cassillis* were not erected into an Earldom till 1642, in which Year there is a Charter uniting and erecting them into an Earldom. The older Charters convey no Dignity, but merely the Lands. Patents of Honour

* Sir *George M'Kenzie*, in his Treatise of Precedency, c. 8, mentions Peerages by feudal Erection, and by Patent of Honour; and adds, "A third Way of Nobilitating with us is by Creation and "solemn Investiture," and then mentions the Form used in the Creation of the Marquisses of *Hamilton* and *Huntly*.

This Method of Creation is mentioned in an Entry in the Parliament Rolls of the Creation of *Patrick* Lord *Hales* to be Earl of *Bothwell* in 1487, "Ipsumque Dominum Patricium in Comitem creavit, et "Comitis Titulo decoravit per præcinctionem Gladii, ut mos est, ita "quod ipse, et sui heredes, pro perpetuo futuris temporibus Comites "de Bothwell vocentur, Comitisque dignitate fulgeant." The Entry of the Creation of a Peer is seldom so full as this, for commonly it is but a note of the Creation; as in the Lord *Hume's* Case, the Entry is only in these Terms:—"2 *Augusti* 1473, Quo die, *Alexander Hume*, "de eodem Miles, factus fuit Dominus Parliamenti."

were first introduced in the Reign of *James* VI., which began in 1567. As, therefore, the Title of Earl of *Cassillis* is clearly as ancient as 1510, it could not be by Patent, neither was it granted by Charter, and must, therefore, have its Original from a Creation in Parliament.

2. A Creation in Parliament gave the Person ennobled an Estate of Inheritance in the Honour.

Of this there can be no Dispute, since the Succession of most of the ancient Peerages has proceeded upon that Ground alone.

3. This Estate is descendible according to the ordinary Course by which every other Right of Inheritance descends, and therefore will descend to the Daughters and their Issue, on failure of Issue of the Sons.

The Presumption is in Favour of the Truth of this Proposition, and it ought naturally to lie upon the Party who denies it to prove that Titles of Honour are regulated by a different Law in Point of Descent from every other Inheritance. But, besides the general Reason to support this Proposition, there are strong Authorities in its Favour.

And, 1st, *The Opinion of Lawyers.*

Stair's Instit. B. 3, Tit. 5, § 11.

Lord *Stair*, Instit. B. 3, T. 5, § 11, says, "Heirs Portioners are amongst Heirs of Line; for, when more Women or their Issue succeed, failing Males of that Degree, it is *by the Course of Law* that they succeed;" and, "though they succeed equally, yet Rights indivisible fall to the eldest alone, without anything in lieu thereof to the rest; as the Dignity of Lord, Earl, *&c.*

Instit. B. 3, Tit. 8, Works, vol. ii. p. 326.

Sir *George M'Kenzie*, Institutions, B. 3, T. 8, § 25,

speaks to the same Purpose; and it is obvious that both these Authorities are directly applicable to the present Question, because both Authors are speaking of the Rules of Descent *by Course of Law;* and, unless an Heir Female is capable of inheriting a Peerage erected by Creation in Parliament, there is no Title of Honour which she can inherit by *Course of Law;* for all Peerages by Patent and Charter contain express Limitations of the Honour, by Virtue of which, and not by Course of Law, the Succession thereof descends.

2dly, The Number of Instances of Females succeeding to ancient Peerages without any Question being made.

So it was in the Case of the Earldoms of *Athole*, *Angus*, *Buchan*, *Fyfe*, *Lennox*, *Mar*, *Monteith*, *Ross*, and *Strathern*, created prior to the Reign of *James* I. of *Scotland*. And of later Creations, in the Earldoms of *Athole* and *Buchan*, and the Lordships of *Carlisle*, *Dirleton*, *Harris*, *Oliphant*, *Salton*, and *Semple*, all which are set forth in the Proceedings upon the Peerage of *Lovat* in the Court of Session in 1730.

3dly, The Authority of two adjudged Cases.

The first is that of the Title of *Oliphant*, which was claimed by the Heir Male of Lord *Oliphant*, and also by the Daughter: There was no Patent to show any Erection of the Lands into a Lordship, and the Peerage was proved only by the Evidence of ancient Papers, and by the Enjoyment of it by the Ancestors of the last Lord, as in the present Case; and the Court of Session there held, *that this Use was enough, conform to the Laws of this*

Case of Oliphant, July 11, 1633.

Realm, to transmit such Titles to the Heir Female, where there was no Writ extant to exclude her.

Durie, 685. This Case is reported by *Durie*, and the Decree was pronounced in the King's Presence.

Case of Buchan. *James Stewart* was created Earl of *Buchan Anno* 1469. His Grandson, *John* Earl of *Buchan*, had two Sons, *John* and *James*. *John* died in the Life of his Father, leaving a Daughter, *Christian*, who succeeded her Grandfather, and was Countess of *Buchan ;* she, by her Husband, *Robert Douglas*, had Issue a Son, who died, leaving only one Daughter, *Mary*, who, by the Name of *Mary*, Countess of *Buchan*, was, on the 20th *May* 1615, served Heir to her Grandmother, *Christian*, Countess of *Buchan*, there being then alive an Heir Male, the Grandson of *John* Earl of *Buchan*, by *James*, his second Son. In 1628, this Countess of *Buchan* brought an Action for declaring her Precedency against six or seven Earls who had been placed before her, and her Claim, founded on the Right of an Heir Female to succeed to a Title without Patent, was allowed by the Court of Session.

Objection. The only Objection, it is apprehended, that can be made against the Doctrine here maintained is, that Titles of Dignity are Masculine Fiefs by the Law of *Scotland*, and have often so descended, and were so held by the Court of Session in the Case of *Lovat*.

Answer. The Female Succession is universally received in *Scotland*, and there never were any Fiefs by their Nature incapable of descending to Females; the Crown was descendible to an Heir Female, and all hereditary Offices have been so, even at the strictest

Periods of the Feudal Law. Wherever the Succession went to the Male Line, it has done so by particular Provision, and not by the Course of legal Descent.

There is a Fallacy in arguing from the Cases of ancient Peerages that have descended to Heirs Male in Exclusion of a nearer Heir Female, because it might often so happen, and most commonly did, in Peerages created by Charter containing Grants of Lands and special Limitations; but no Conclusion can be drawn from thence to the Case of Peerages by Creation in Parliament, without any special Words of Limitation.

The Proceedings before the Court of Session on the Peerage of *Lovat* were without Power or Jurisdiction, and can have no Influence on the present Question. But even were any regard paid to the Authority of that Opinion, it does not apply to the present Case; for what weighed with the Court there was, that the Right to the Lands of the Barony had gone in a perpetual Channel to Heirs Male, and here these Rights have, for upwards of a Century, been limited to Heirs General.

M'Dowall's Institut. B. I. T. 2, § 30, vol. i. p. 52.

AL. FORRESTER.
AL. WEDDERBURN.

ABSTRACT OF THE SIGNATURE.

CHARLES R.

OUR Sovereign Lord, &c. ordains an Charter to be past and expede under his Majesty's Great Seal, in due Form, GIVING, &c. To *John* Earl of *Cassillis*, &c.

Fo. 3. (*Proviso*) The saids Daughters and Heirs Female respective and successive, who shall happen in any Time coming to succeed to the Lands and Estate underwritten, always marrying a Gentleman of Quality, of the Sirname of *Kennedy* at the least, who, and the Heirs to be procreat betwixt them, to succeed to the Lands and Estate underwritten, by Virtue of this present Taillie and Provision, shall assume, take on, bear, and use in all Time coming, the Sirname of *Kennedy*, Arms and *Dignity* of the Family of *Cassillis*.

3. ALL and HAILL the Earldom and Lordship of *Cassillis*, &c.

9. All which remanent Lands, &c. were all formerly united, annexed, erected, and incorporated in an whole and free Earldom and Lordship, called, and to be called in all Time coming, the Earldom and Lordship of *Cassillis*, with the Title, Dignity, Precedency, and Priority due to the said Earl, and his Predecessors, by the Laws and Practice of this Realm; conform to a Charter, granted by his Majesty's umquhile dearest Father, King *Charles* the Ist, of ever blessed Memory, under his Majesty's Great

Seal of this Kingdom, of the Date the penult Day of *September*, 1642.

11. Whilks haill Lands, &c. pertained heritably of before to the said *John* Earl of *Cassillis*, holden by him immediately of our said Sovereign Lord for his Highness self, as King, and as Prince and Stewart of *Scotland*, his immediate lawful Superiors of the same respective; and Whilks were by him, and his lawful Procurators in his Name, to that Effect specially constitute, *and by his Letters Patent, duly and lawfully resigned, surrendered, upgiven, and overgiven*, in the Hands of the Lords, and other Commissioners of his Majesty's Exchequer, &c. as in the Hands of our said Sovereign Lord, for his Highness self, as Prince and Stewart of *Scotland*, immediate lawful Superiors of the same respective above-mentioned, purely and simply by Staff and Baston, as use is, At the Day of together with all Right, Title, &c.

15. As authentic Instruments taken upon the said Resignation in the Hands of
Notar Publick, at more Length proports. And SICK-LIKE, our said Sovereign Lord, for his Highness self, as King, and as Prince and Stewart of *Scotland*, for the many great, true, and thankful Service done and performed to his Majesty, and his Highness most noble Progenitors, of ever blessed Memory, by the said *John* Earl of *Cassillis*, and his Predecessors in Time bygone, and for many other good Respects and weighty Causes and Considerations, moving his Highness, his Majesty for himself, as King, and as Prince and Stewart of *Scotland*, with Advice and Consent foresaid, HAS OF NEW GIVEN, &c.

17. The saids Daughters, and Heirs Female *respective and successive*, who shall happen in any time coming to succeed to the Lands and Estate abovewritten, always marrying an Gentleman of Quality, of the Sirname of *Kennedy* at the least, who, and the Heirs to be procreat betwixt them, to succeed to the Lands and Estate abovewritten, by Virtue of this present Tailzie and Provision, shall assume, take on, bear, and use, in all Time coming, the Sirname of *Kennedy*, Arms and Dignity of the Family of *Cassillis*.

ALL and HAILL the Earldom and Lordship of *Cassillis*, &c.

Fo. 24. Likeas the haill foresaids Lands, Baronies, &c. are all formerly unit, annext, erect, and incorporat in an haill and free Earldom and Lordship, called, and to be called in all Time coming, the said Earldom and Lordship of *Cassillis*, with the Dignity, and Precedency, and Priority, due to the said Earl and his Predecessors, by the Laws and Practice of this Realm, conform to the Charter abovementioned, granted under his Majesty's Great Seal of this Realm thereanent.

28. And in like Manner, our said Sövereign Lord for himself, and as Prince and Stewart of *Scotland*, with Advice and Consent foresaid, has of new, unite, erect, and incorporate, and by these Presents unites, erects, and incorporates, ALL and SUNDRY the foresaids Lands, Baronies, &c. in an haill and free Earldom and Lordship, called, and to be called in all Time coming, the Earldom and Lordship of *Cassillis*, to be bruiked, enjoyed, and possessed, by the said *John* Earl of *Cassillis*, and by his Heirs Male, and of Pro-

vision and Taillie respective foresaid, conform to the Precedency and Priority of Place, due and competent to them by their Rights, and Laws and Practice of the said Kingdom of *Scotland*, in all Time coming, without any Revocation or Contradiction whatsoever.

41. Likeas our said Sovereign Lord promises *in verbo principis* to ratify and approve this present Charter, with Infeftment to follow thereupon, and all that shall happen to follow upon the same, in the haill Heads, Articles, Clauses, Provisions, Conditions, and Obligements thereof abovementioned, and that in the next Parliament to be holden by his Majesty and Estates thereof within his Highness said ancient Kingdom of *Scotland*.

ABSTRACT OF THE CHARTER 1671.

Carolus, &c Sciatis, nos, pro nobis, &c dedisse, concessisse, disposuisse, et hac presenti Carta nostra, confirmasse, tenoreque ejusdem cum avisamento et consensu prædicto pro nobis metipsis, tanquam Rege, et tanquam Principe et Senescallo *Scotiæ*, dare, concedere, disponere, ac pro nobis et Successoribus nostris pro perpetuo, confirmare, confiso et prædilecto nostro Consanguineo et Consiliario, *Joanni* Comiti de *Cassillis*, Domino *Kennedie*, et Heredibus Masculis inter eum et Dominam *Susannam Hamiltone* ejus Sponsam legittime procreat. vel procreand. Quibus deficien. dicto *Joanni* Comiti de *Cassillis*, suis Heredibus Masculis de corpore

suo legittime procreand. de quovis alio Matrimonio cum quacunque alia legittima Sponsa, Quibus etiam deficien. Heredi Femellæ natu maximæ legittime procreat. vel procreand. inter dictum *Joannem* Comitem de *Cassillis*, et dictam Dominam *Susannam Hamilton* ejus Sponsam, successive sine divisione, Quibus deficien. Heredi Femellæ natu maximæ de Corpore dicti *Joannis* Comitis de *Cassilis* ex quocunque alio Matrimonio procreand. sine divisione ut dictum est; Heredes Femellæ respective prædict. omni modo viro nobili, vel generoso qualificato, Cognomine de *Kennedie*, nuben., saltem, uno qui et Heredes, inter illos legittime procreand. ad Terras et Statum subscript. virtute hujus presentis Talliæ et Provisionis succeden. assument, suscipient, ferent, gerent, et utentur omni tempore futuro Cognomine de *Kennedie*, Armis et *Dignitate* Familiæ de *Cassillis*, et implementes et observantes alias conditiones et provisiones subscript, tantumodo et non aliter, &c.

Totum et Integrum Comitatum et Dominium de *Cassillis*, &c. Quæquidem omnes reliquæ terræ, &c. sunt annexat. creat. et incorporat. in unum Integrum et Liberum Comitatum et Dominium, nuncupat. et nuncupand. omni tempore futuro, Comitatum et Dominium de *Cassillis*, *cum Titulo*, *Dignitate*, *Precedentia et Prioritate dicto Comiti et Predecessoribus suis*, per Leges et Praxin. hujus Regni nostri debit. secundum Cartam per quondam nostrum charissimum Patrem *Carolum* Primum, Regem beatissimæ memoriæ, sub suo magno sigillo hujus Regni nostri, concess. de data, penultimo die mensis *Septembris*, 1642.

Et similiter, &c nos pro nobis, &c pro plurimis magnis fidelibus et gratuitis servitiis, nobis et nostris Progenitoribus beatæ memoriæ, per dictum *Joannem* Comitem de *Cassillis* suosque predecessores impensis et prestitis, ac pro multis aliis bonis respectibus, magnis et onerosis causis et considerationibus, nos moven. &c de novo Damus, concedimus, disponimus, ac pro nobis et successoribus nostris Regibus et Principibus *Scotiæ*, pro perpetuo confirmamus, dicto nostro confiso et prædilecto Consanguineo et Consiliario *Joanni* Comiti de *Cassillis* et Heredibus Masculis, inter eum et dictam Dominam *Susannam Hamiltone*, ejus Sponsam, legitime procreat. vel procreand. Quibus deficien. Heredibus Masculis de suo Corpore ex quovis alio Matrimonio legitime procreand. Quibus etiam deficien. Heredi Femellæ natu maximæ, inter eum et dictam suam Sponsam legitime procreat. vel procreand. sine divisione, Quibus deficien. Heredi Femellæ natu maximæ, de Corpore dict. Comitis procreand. ex quovis alio legitimo Matrimonio, sine divisione, ut dictum est; dict. Heredes Femellæ respective omni modo Nobilem seu generosum virum qualificatum, Cognominis de *Kennedie*, nuben. saltem, unum qui et dict. Heredes Masculi legittimi inter illos procreand. ad Terras et Statum supra et superscript. virtute hujus presentis Talliæ et Provisionis successuri, assument, suscipient, gerent, ferent, et utibuntur omni tempore à futuro, Cognomene de *Kennedie*, Armis *et Dignitate* Familiæ de *Cassillis*, et Implementes et Observantes, alias conditiones et provisiones superscript. tantum modo, et non aliter, &c. Totum et Integrum predictum Comitatum et Dominium de

Cassillis, &c. Quæ quidem omnes sunt per prius unit. annexat. erect. et incorporat. in dictum integrum et liberum Comitatum et Dominium, nuncupat. et nuncupand. omni tempore futuro, dictum Comitatum et Dominium de *Cassillis*, *cum Titulo*, *Dignitate*, *Precedentia et Prioritate dicto Comiti*, suisque Predecessoribus debet. per Leges et Praxin hujus Regni nostri, secundum tenorem Cartæ supra mentionat. sub nostro Magno Sigillo hujus Regni nostri quatenus concess. &c.

Ac similiter, nos, pro nobis et tanquam Princeps et Senescallus *Scotiæ*, cum avisamento et concensu prædicto, de novo univimus, ereximus, et incorporavimus, tenoreque presentis Cartæ nostræ, de novo univimus, annexamus, et incorporamus, omnes et singulas prædictas Terras, Baronias, &c in unum integrum et liberum Comitatum et Dominium, nuncupat. et nuncupand. nunc et omni tempore futuro, Comitatum et Dominium de *Cassillis*, fruend. gaudend. et possidend. per præfatum *Joannem* Comitem de *Cassillis*, ac per Heredes suos masculos, provisionis et talli, respective ante dict. *secundum precedentiam et prioritatem loci*, ipsis debit. et competen. per eorum Jura, et per Leges et Praxin. dicti hujus Regni nostri *Scotiæ*, omni tempore futuro, sine ullo revocatione aut contradictione aliqualis. Tenendum et Habendum, &c.

Nec non nos promittimus in Verbo Principis hanc presentem cartam nostram, cum Infeofamento de super sequen. et omne quod desuper sequi contigerit, ratificare et approbare in integris capitibus, articulis, clausulis, provisionibus, conditionibus, et obligationibus earundem supra mentionat. idque in

proximo Parliamento per nos et status ejusdem infra hoc antiquum Regnum nostrum *Scotiæ* prædict. tenen.

Consideration of the two claims was from various causes deferred; latterly, upon the application of the Earl of March, who petitioned the House of Peers for delay until access should be procured to certain ancient writings preserved amongst the family muniments, and which had, under authority of the Court of Session, been sealed up.* Upon the 22d day of January 1762, after a full discussion, the following opinions were delivered:—

The Earl of Marchmont addressed the Committee in substance as follows. He observed that the cause had been argued at great length. That it was the single cause of Peerage that had come before the House for half a century past, for the few causes which had been determined since the Union, singly related to matter of succession upon patents of honour; but this comprehended the constitution of Peerages, and the general rule of descent. That therefore there behoved to be great variety of opinion, as some would found their judgment upon the principles of the law of England, and others would be influenced by a mixt notion of the laws of both countries. That this case, however, must certainly be determined upon the general principles of the law of the country where the case itself took its rise. The case in general is, Whether the heir-

* See Appendix.

male descended of the body of the first Earl of Cassillis, or the heir-general of line, is entitled to the Peerage?

The counsel laid the case very properly on two foundations; first on the charter 1671, and then on the notion of a feudal dignity. With respect to the first, he took occasion to enlarge on the nature and importance of charters. That they were evidence, *omni exceptione majores*. That nothing could affect their validity. That they were drawn and revised with great accuracy. That their constitution was the same in all ages. That some in Scotland were as old as the time of Malcolm the Fourth, in the eleven hundred and odd, some in 1094. That they all began with the King's name, after which followed the dispositive clause, then the tenendas, and lastly the reddendo. That it was a fixed rule of law, that nothing could be carried by the charter but what is contained in the dispositive clause. That Craig was not clear whether the tenendas carried any thing. That after the dispositive clause followed the quæquidem, which contained the *causa* and *modus vacandi*, by what means the estate came into the King's hands. That the interpretation of charters was of the utmost consequence, and merited the greatest attention, as they affected all property. That the cases of Rothes and Kilmarnock, &c. mentioned at the bar, were different from this, as they mentioned the *titulum dignitatis* separate from the lands. That there was no erection in these charters, therefore the title was separate; but when the lands are erected into a Lordship or Earldom, as in the present case, then the title is not separated,

the expression therefore is different; and it is very observable in this case, that the expression in the charter 1671 is *dominium et comitatum et terras*, &c. The reason is, the lands were erected *cum titulo;* there was a novodamus in this charter, and this new grant operated as an original charter. It was said that nothing new could be carried by this grant; but certainly new subjects may be carried by a novodamus. A man may have a fishing and other subjects; and there are many cases directly in point which prove this. He then read a paragraph from Dirleton, p. 135. He said that in this charter there was a *comitatum*, which always contained a dignity; that this was explained by the words *secundum prioritatem*, &c. That the counsel in arguing in this case had been guilty of great mistakes, particularly in saying that a Peer could be created in Parliament by cincture. That the cincture was merely a symbol. That the next mistake was in saying that these dignities were feudal. That it appeared there were no Lords of Parliament till the feudal law was out of date. That the first were in the time of James the First, who introduced the forms of the law of England. It was a general rule there could be no Peer without writ; the creation in Parliament was all a mistake; the cincture was merely a symbol. Symbols were very ancient, and prevailed in all ages; they are mentioned in the Bible, in the case of swearing. Craig mentions all the usual symbols, but makes no mention of the symbol of a dignity. The notion of a creation in Parliament has arisen from a very superficial writer, Sir George M'Kenzie. He read the paragraph from Sir George M'Kenzie,

p. 335, concerning Peerage and the solemnity of investiture, and said that it appeared that the patent was always carried, which shows the patent then existed. That it appeared after the solemnity of investiture wore out, the modern patents contained a particular clause, dispensing with the ceremony of investiture; and he mentioned the patents of the Earldom of Wigton, Dunfermline, and Lothian. He said there could be no investiture without writ. That the Lords of Erection were all made by charter. That there could be no feudal succession where there were no words in the investiture limiting the descent. He introduced Craig as author of the feudal law in Scotland; made great encomiums on him for the elegance of his style, and his having been educated with Cujacius, the greatest civilian that ever existed, but that his notions were all derived from the feudal law of Lombardy. That his notions were wrong, for we had certainly the feudal law earlier, the books of the feud being wrote in the eleventh century. That we had charters as early as the year 1094. That Craig makes a doubt with regard to female succession; but certainly our succession was always lineal and always female, and where there was an heir-male, he was no heir of law, but an heir of provision. That the case of Lovat had no weight with him; the Judges differed in opinion, and Lord Newhall, the greatest of the Judges, supported the female succession. That the question was amicably determined by a decreet-arbitral of Lord Dun and Lord Grange, the first their Lordships had seen in this house, and the other was well known. That the late Lord Lovat, who suffered justly for his crimes, paid a com-

position of L.12,000, and the heir-female was prohibited from taking the title, under a penalty of L.30,000. That he had given his clear and impartial opinion upon the general points in this case, still open to conviction, and under correction when he was mistaken. That he chose to deliver his opinion first, (without claiming any precedency from his knowledge in the law of Scotland,) because he did not doubt there would be a variety of opinions; but for his own part he could not give up his opinion, in compliance to any authority, or to any character, however respected.

Lord Mansfield spoke next, in substance as follows:—

My Lords, I rise up to deliver my opinion upon this question, which is of great extent. The *ratio decidendi* must be sought for through a load of rubbish, and matters are so involved in obscurity, that I may use the expression of a celebrated author, that the little light which we have, like the flash of lightning in a storm, only serves to make the darkness more visible.

The facts which gave rise to this question are shortly these. Upon the 10th of August 1510, it appears that David Lord Kennedy was then Earl of Cassillis, and in 1509 it appears by the Rolls of Exchequer that he was only Lord Kennedy. The Rolls of Parliament from 1505 to 1524 are lost; but it appears in 1524 the Earl of Cassillis sat in that Parliament.

Sir Thomas Kennedy claims this dignity, and derives his pedigree as heir-male descended of the

body of David the first Earl of Cassillis, which he certainly is. The Earl of March claims the same dignity, as heir-general of line by female descent. There are two questions. The first is, Whether a title of honour, by its own original nature and constitution, descends to an heir-male, or to the heir-general? And the second question is, Supposing it descends to an heir-male, whether in this case there is any grant, with limitations such as will carry it to the heir of line?

The first question is, how we shall discover a rule of descent where there is no evidence of an actual creation, no letters patent, no investiture or introduction into Parliament, and no charter of erection? But in this case we are certain that the Earl of Cassillis must have been made an Earl *titulo hereditario*, because he sat in Parliament as an Earl, and the heirs-male, who were always heirs-general, enjoyed the dignity successively until the last Earl, who died in 1759. In this case, I am of opinion that the descent must be determined by a legal presumption; but there being no evidence of facts sufficient to determine clearly what that presumption should be, there is a great difficulty in the question. I have in this case taken great pains, and I think I have found some probable reasons which have satisfied me, and on which I have founded my opinion. I will only trouble your Lordships with the general grounds of my opinion, without attempting to support it by authorities, or to give the reasons at large, which would run to a great extent, and be the work of days.

It appears that the feudal system was very early

introduced into Scotland. It brought with it Earldoms and other territorial dignities, which in their proper original and first nature were territorial offices, accompanied with a power and jurisdiction. They were held *in capite* by a military tenure, and were unalienable without consent of the King or Lord Paramount. They most certainly descended to the issue male, and the representation was in the right line, that is, the heir always took under the first grantee, and as descended of his body, not as connected with the last successor. How long these territorial dignities continued we are totally in the dark; how, or when, the lands of territorial Earldoms became alienable, and got into commerce, no where appears, but they were certainly masculine fiefs. When they came to be *in commercio*, the alteration from territorial to personal dignities followed by degrees. Territorial dignities could not remain after the fee was dismembered. The dignity could not fall to any particular parcel or part of the lands more than to another, unless the dignity had been annexed to the capital seat or some other part of the fief; but nothing of this kind can be shown. Lord Kames, in his Essays, conjectures, but it is merely a conjecture unsupported by evidence, that when feus began to be split and divided, personal dignities were first introduced. There is great ground to believe the territorial dignities ceased long before the 1424, when King James the First returned from England. The territorial form continued, though the substance was gone. There are many charters granting in appearance territorial Earldoms and Lordships; and yet before 1424 all

lands were *in commercio*, and the territorial honours must have been gone when the lands were sold. This is most evident, for we find in 1467 a judicial sale was introduced for debt as to all lands, whether noble or not. Personal dignities gave rise to new ceremonies by investiture.

The Lords of Session's report to your Lordships concerning the Peerages of Scotland was formed with great thought and care. It says, " Titles of honour were created before the reign of King James the Sixth, by erecting lands into Earldoms and Lordships, and probably by some other method that cannot now, in matters so ancient, be with any certainty discovered."

But I incline to be of opinion with the noble Lord who spoke last, that there was no creation of any Earl or Lord of Parliament, without some charter or writing; but though these creations sprung from territorial dignities, yet there is no proof that they are the same in any respect. The form and words accompanying territorial dignities continued, though the substance was gone. The creation of Patrick Lord Hailes as Earl of Bothwell, in 1487, is a creation by writ, with a limitation of heirs. The words are, " *eundemque Dominum Patricium in Comitem creavit, et Comitis titulo decoravit, per præcinctionem gladij ut mos est, ita quod ipse et sui hæredes pro perpetuo futuris temporibus Comites de Bothwell vocentur, Comitisque dignitate fulgeant.*" From this there may be several observations drawn, and particularly that at this time, in 1487, girding with the sword alone did not make him an Earl; there behoved to be words of limitation, *ita quod hæredes*

sui, &c. Sir George M'Kenzie says, " that none were nobilitated by patent before the time of King James the Sixth." The Lords of Session, in their report concerning the Peerages of Scotland, don't lay it down as certain that there were no Peerages by patent before this time; they only say, " They can't discover any in the records earlier than the reign of King James the Sixth;" but certainly there were several Peerages by patent, though not upon record. In the present case there is no patent, yet that is no proof that the Peerage was not granted by writ. The Peerage of Glencairn was granted by patent in the reign of James Third, in 1488, yet it does not appear on record. I observe in a note, mentioning the creation of Lord Darnley in 1565, it is added, " that if need bees, letters patent should be expede." This shows that patents then were thought necessary. In the year 1592, when church lands and tithes were erected into temporal Lordships, King James Sixth, by an express act, " excepts and reserves all erections, charters, and infeftments granted to such persons as had then received the honours of Lords of Parliament, by the solemn form of belting, and other ceremonies used in such cases." Thus it plainly appears, that the ceremony of belting existed even after charters of erection were introduced. Sir George M'Kenzie says, there was a form of nobilitating besides letters patent and the ceremony by investiture. He mentions the creation of the Earl of Huntly in 1599. He there states that the patent was carried in the procession; and though it was not read, it was delivered as a part of the title, and therefore was not for the first time in-

troduced. It was not proved at the bar, that any Earl was created without words of limitation. Lords of Parliament have been compared to Barons by writ, and were said to have been brought from England by King James First. But every authority contradicts this. Before the 1458, the King's vassals all sat in Parliament. The Lords of Parliament who did not sit there as vassals of the Crown must have been some way created or made. The creation of the Lord of the Isles in 1476 was by writ, though the record only mentions "quo die factus fuit Dominus Parliamenti."

It appears that most frequently there was a charter of erection of the lands at the time the title of honour was conferred. If the lands were limited to heirs-male, the title of honour cannot be supposed to descend in a different channel from the lands in the charter. Therefore, every creation of a Peerage must have been of words some way or other, and there is no authority to the contrary. And as to there being no letters patent before James Sixth, it is plainly a mistake. The first question must therefore be, what is the presumption as to the descent of these titles of honour where there are no words to direct us? This can only be determined by presumption. Many things concur to prove, that lands descended to the heirs-male of the body of the person to whom the fee was originally granted. The presumption of law follows properly the nature of the fee. Every fee was presumed to be held by a military tenure, unless a soccage or some other tenure was shown. It was therefore presumed that the lands descended to heirs-male. This presumption is

strongly supported by the instance mentioned at the bar, that *hæredes*, without any addition, meant heirs-male; and as this took place in lands, so the same rule followed in noble feus. This is proved by the case of the Earldom of Strathern, which was granted *hæredibus suis*, and Buchanan mentions that it was considered as a masculine fief, and returned to the King on failure of heirs male. There is a more modern instance in the title of Lennox. Other authorities confirm this; and the presumption is supported by the authority of Craig, who says, if a feu is limited to heirs-male and female, the females cannot take till the male line is extinct. But further, besides the fees being feudal, another circumstance confirms the presumption in favours of the heir-male —Lord March has only been able to bring one instance of an Earldom descending to a female. It was the case of Buchan. But the force of this instance was taken off, by the resignation, and the new grant of the honours in favour of the heir-female, with the express consent of the heir-male. On the other hand, the eleven instances brought by the heir-male afford convincing evidence of the exclusion of females. There was only one answer made to these, and that was, that the titles of honour might possibly have been so limited by charters of erection, though these did not appear. But this can have no weight. Where there is no light to direct us, the way most frequent must be presumed. In England, patents of honour in the fifteenth century were uniformly in favour of the heirs-male. Patents of honour in Scotland, in the time of Queen Mary and afterwards, were limited to heirs-male. The reason

of the presumption subsists now as strongly as in former times; and it cannot be doubted, that if the question had occurred in these times, the presumption would have stood in favour of heirs-male. This is farther confirmed by the case of the Earl of Sutherland and the Earl of Crawford, concerning precedency. There is no bad report of the case in Forbes' Collection of Decisions. He says, the Commissioners who determined the precedency in 1706 proceeded on this general ground, that " an estate did not pass to females, unless provided *hæredibus quibuscunque*, males being only understood by heirs simply, or *hæredes inter ipsos;* and where the provision was to heirs whatsoever, the heir-male was still preferred, and the female succeeded only *æquis portionibus*. It was yet much later that an heir-female was allowed to succeed to a dignity with jurisdiction, upon the account of personal unfitness, and the absurdity of possessing the indivisible title with a part of the divided estate. The dignity in this case was not feminine by King David's charter to William Earl of Sutherland and the Lady Margaret his spouse, for that neither conveyed the estate nor the dignity, but only added a regality to it." The Court of Session proceeded on the same grounds, that where no limitation appeared, they presumed in favour of the heir-male of the body of the person first ennobled. The case was determined in the Court of Session in 1706, when there was an opposition on the same grounds, and the Court of Session had then most certainly a competent jurisdiction.

It is a farther presumption in favour of heirs-

male, that so many resignations appear on record, all calculated to let in the heirs-female, who could not otherwise have taken the dignities. Four of these were read at the bar, viz. Rothes, Errol, Kilmarnock, and Kinghorn. There is no authority to presume otherwise than in favour of the heirs-male, except in the case of Oliphant, determined in 1633. But I pay no regard to that case. It does not appear that 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, 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. I hold the case of Lovat as a good authority, though there was a difference of opinion among the Judges. The case was long argued, and maturely considered. At least, I hold it to be as good authority as that of Oliphant. The gentleman who argued the case of Lovat, Mr Duncan Forbes, afterwards President of the Session, was strongly with the determination; and the judgment so far acquired an authority, that the Parliament proceeded upon it in the trial of Lord Lovat. But let the case have what authority it may, it appears the report of the Lords of Session gives sanc-

tion to it in some measure. It says, that there is not any maxim established in the law of Scotland, that can be applied universally to determine the descent of Peerages, when the original constitution, or new grant upon resignation, do not appear; yet, on mentioning the case of Lovat, it is added, that they found the title descendible to heirs-male. One of the books of Reports says, that the Court of Session determined this case on the evidence that the estate was limited to heirs-male. This shows that the descent of the title of honour was founded only on presumption. And as in the present case there is no proof of a limitation of the title of the Earl of Cassillis, I am of opinion it ought to descend to the heir-male of David first Earl of Cassillis. If so, it is necessary to consider the 2d question, Whether in this case there was a new grant, upon a resignation, to a series of heirs, so as to let in the heir-general? And in this I shall give such reasons as fully satisfy me that I cannot agree with the noble Lord who spoke before me. I have seen and considered the charters, and I take the charter of 1642 to explain and illustrate the charter 1671.

In 1642 the title of honour was personal, without any connection with lands. There was no charter of erection till this time; and though the lands are in the instruments preceding this charter called the Earldom, yet they were only so called in vulgar speaking. They were not erected into an Earldom at that time. The instrument of resignation runs thus:—"For establishing the fee of the estate in favour of my heirs after-mentioned." Here there is no word in the resignation which has any tendency

to an Earldom. The intention is to establish the fee of the estate, but no word of the title of honour. Then follows,—"in favours, and for new infeftments," of what? not the title of honour, but of the lands of the Earldom. It is agreed that this charter was not signed by the King, and of consequence the erection could not be good. There are many words in this charter which have a strange appearance; but these can have no weight. Charters pass *periculo petentis;* many lands are inserted in charters to which the grantee has no title. I take it that nothing can pass by such right. It is clear the King could grant nothing but what was resigned. Here the honours were not resigned, and therefore could not pass. The dispositive clause does not contain any word relative to honours; and nothing could be granted but what is contained in the dispositive clause. The novodamus can give nothing but what was resigned, unless casualties of superiority, feus, jurisdictions or privileges, immediately flowing from the King. This charter contains a clause erecting the lands into an Earldom; after this follows a sweeping clause, to be enjoyed "secundum præcedentiam et prioritatem loci, illis, per eorum jura legesque et praxin regni nostri Scotiæ, debitum et competentem." The import of this is, that what was then erected could be enjoyed only according to law. The personal title never was granted, and the old title never could follow this new erection. No person can conjecture whether it related to an old or new title. I won't pretend to guess what the words do mean, whether to give any rank or not; but it is plain the title was not granted.

Thus the charter 1642 can have no effect; there was no connection between the lands and the title. The Earl of Cassillis might have sold the one and kept the other. The new resignation in 1671 is only relied on. This resignation don't appear; but it makes no difference. The contents of it are sufficiently clear, and appear two ways; 1st, by the docquet subjoined to the signature, which makes no mention of the dignity; and, 2dly, by the dispositive clause, which grants the Earldom and Lordship exactly as in 1642. No word of the title of honour. No general words which can carry it. After the description of the lands, there follows two *Quæquidems.* The first mentions that the lands were erected by the charter 1642; but here it is shown there was no distinct grant or resignation of honour or dignity. Then follows another *Quæquidem*, which mentions what was resigned, and this distinctly mentions that the lands only were resigned. Then follows a novodamus, which erects the lands into an Earldom, as in the charter 1642—*secundum præcedentiam et prioritatem loci*, &c. The words are the same in both. In the charter 1671, the clerk copied them exactly from the charter 1642. It is not easy to know what meaning these words have, nor of another clause relating to the husband of the heirs-female assuming the dignity on marrying such heir-female. If those words could carry a title of honour, it would create strange consequences. At any rate, the title of Lord Kennedy is not in this charter. If, therefore, this charter was to operate as a new grant, the title of Lord Kennedy must go one way,

and that of Earl of Cassillis be separated, and go in a different channel. But it is not possible to believe that this could ever be intended.

I speak with great diffidence; but I can see no argument that can be urged from the law of Scotland to oppose the construction of the charter in the way I have laid down. The charter 1671 passed when every notion of territorial dignities had ceased for above a century. The whole estate might have been sold or adjudged, and yet the title of honour have remained with the family. The very form of resignation, and of the new grant of a dignity, was established before this time, and there were four instances read at the bar, which clearly and properly conveyed the title and dignity, as separate and distinct from the lands. I remember several other instances that occurred in the question with respect to the Peerage of Stair, where the dignity alone was resigned for the purpose of a new grant. Many of them were about the same time with the present charter in 1671. For these reasons, I am inclined to be of opinion that the charter 1671 does not grant the title or dignity. I ask pardon for speaking at so great length, but the question is of great consequence.

Lord Marchmont answered—

My Lords, I do not rise up to dispute. There are two things very material in the proceedings, which I wish to mention to your Lordships. The first is the interpretation of the charter 1671 from the charter 1642. I never saw the charter 1642, so that I could not found any reasoning upon it; all I said re-

spected only the charter 1671.—The next material circumstance is with relation to the proceedings in passing of charters. I repeat what I formerly said, that charters do not pass *periculo petentium.* By the practice of the Exchequer, they are regularly examined and revised. If the Barons should neglect their duty in this particular, they are liable to forfeit their office. It is true, lands may be repeated in a charter, though they no longer belong to the grantee; but this happens seldom, for as the composition paid for the charter is stated in proportion to the value of the lands, it is not to be imagined that any person would pay composition for lands when they do not belong to him. I beg pardon for troubling your Lordships, but it was necessary to mention this.

Lord Mansfield replied—

The charter in 1642 was fully stated at the bar. It was indeed waved, except in so far as it served to explain the charter in 1671, which recites it. I saw and read the original charter, and the instrument of resignation upon which it proceeded, having been attended by the agents on both sides.—I stated the very words of the charter itself.

Lord Hardwicke spoke next, in substance as follows—

My Lords, I shall trouble your Lordships with a few words on this occasion, which I would not have done, but that I find there is a difference of opinion.

There is a great deal of obscurity in the case, but no doubt one or other of the two claimants are

entitled to the peerage in question. The difficulty is, which by law is entitled to it? There were two questions made, and both were very ably treated at the bar. I was determined to have heard the pleadings at large, but unfortunately I was not able to attend on the last day, having been disabled by sickness. I heard, however, what passed, and I find that nothing very material occurred.

The first question is, what was the original nature and constitution of peerage, and to what heirs they ought to descend, where no patent appears? The second question is, whether in this case any alteration has been made in the legal descents by a new grant? This last depends upon the construction of the resignation and charter in 1671; for the charter 1642 cannot be used but to assist in explaining the charter in 1671.

The first question is very large, and of great importance. If ancient peerages, where no patents appear, are found to descend to the heir-general of line, it may have very extensive consequences. It is agreed that there was no creation of superior peerages, such as Dukes or Earls, without some writ limiting the descent. If no limitation appears then for supplying thereof, some method must be followed for discovering the heirs entitled to succeed. If the instrument of limitation is lost, the Court will raise a presumption on the most probable grounds. The loss of the instrument won't prevent the Court from proceeding on those grounds.—In Scotland, it appears by some cases that were mentioned, that the cincture in parliament was the ceremony used; but it does not appear that it was the actual creation

or constitution of the peerage. Here, in England, every constitution of a peerage is supposed to be attended with a particular ceremony, though in fact that ceremony is now laid aside. In Scotland, it appears the ceremony has been particularly dispensed with, by a clause for that purpose in the patent; but in England it is not so. In all creations of peerage in England, the patent bears, "Tenend. de nobis et successoribus nostris sicuti nos tenemus coronam," &c., and the ceremony of the sword is always mentioned. If the instrument of limitation is lost, some presumption must be found to regulate the descent; and I think that presumption ought to arise from the nature of the fee. Peerages in early times were attended with offices, and were certainly masculine fiefs. This founds a presumption in favour of the descent of the heir-male.—Another presumption, when the instrument is lost, arises from the method most frequent. It appears that peerages most frequently descended to heirs-male, and that the resignations were only introduced to let in heirs-female. What possible occasion could there have been for a resignation, if the peerage would have gone so otherwise? There has been only one instance proved of the descent of a peerage to an heir-female where no patent appeared.—Therefore, where the instrument is lost, I think there is the strongest presumption in favour of the heir-male, and I think this is by much the safest method of proceeding in cases of ancient peerages.

The second question is more doubtful. I think it would be very dangerous to hold that the dignity passed by the charter 1671. In England, the ho-

nours only are contained in the patent or grant. In Scotland, the lands are erected into a Lordship or Earldom, and the dignity is at the same time granted. It is agreed, that by the charter 1642 no honours passed, because it was a personal honour, and was not resigned—the words *secundum præcedentiam et prioritatem loci*, and so forth, could not possibly carry the dignity. One cannot say what these words mean. The noble Lord who spoke first said that they meant the precedency of the old peerage; but it is of no importance. As the honours were not granted, no precedency of peerage could be granted. There are two old charters which constitute the family—the head of the Tribe or Kenkynnull.—I think this shows some note of distinction or precedency, though I have not been able to discover the meaning of the word Kenkynnull—possibly this may be the precedency and priority of place alluded to in the charter 1642. But this is only an imaginary construction of words. The Quæquidem of the charter 1671 says, "Quæquidem omnes terræ erectæ fuerunt in unum integrum comitatum, secundum cartam concess." in 1642. It is manifest this gives only such right as the charter 1642 gave. Then follows another Quæquidem, which mentions that the lands only were resigned. As the peerage was not resigned, it could not be granted. The crown could not grant it by the novodamus. And as there is no appearance of words to convey the dignity, it is impossible to say that it passed by this charter. I therefore incline to be of opinion that this charter cannot operate as an

alteration of the legal succession, which I think is to be presumed to be in favour of the heir-male.

Resolved, It is the opinion of this committee that Sir Thomas Kennedy has a right and title to the dignity of Earl of Cassillis, as heir-male descended of the body of David first Earl of Cassillis; and also has a right and title to the dignity of Lord Kennedy, as heir-male descended of the body of Gilbert the first Lord Kennedy.

Upon the 27th January 1762, the "Lord Willoughby of Parham reported from the Lords Committees of Privileges, to whom it was referred, to consider of the petition of William Earl of March and Ruglen, claiming the titles and honours of Earl of Cassillis and Lord Kennedy, and also the petition of Sir Thomas Kennedy of Colzean, Baronet, claiming the same titles and honours, with his Majesty's reference thereof to this House: That the Committee had met and considered the matter to them referred, and have heard counsel for the petitioners upon their respective claims; and after debate and full consideration, heard what was offered and produced in evidence by the counsel on either side, their Lordships are of opinion that the petitioner, Sir Thomas Kennedy, hath a right and title to the honour and dignity of Earl of Cassillis, and that he hath also a right and title to the honour and dignity of Lord Kennedy, as heir-male of the body of Gilbert the first Lord Kennedy.

"Which report being read twice by the Clerk, was agreed to by the House.

" Resolved and adjudged, by the Lords Spiritual and Temporal in Parliament assembled, that the petitioner, Sir Thomas Kennedy, hath a right and title to the honour and dignity of Earl of Cassillis, as heir-male of the body of David the first Earl of Cassillis, and that he hath also a right and title to the honour and dignity of Lord Kennedy, as heir-male of the body of Gilbert the first Lord Kennedy.

" Ordered, That the said resolution and judgment be laid before his Majesty by the Lords with white staves."*

* The notes of the speeches delivered by Lords Marchmont, Mansfield, and Hardwicke, are taken from the original MS., belonging to the Marquis of Ailsa, collated with a MS. belonging to the Editor.

APPENDIX.

I.

PROCEEDINGS IN THE HOUSE OF PEERS ON THE CLAIMS TO THE CASSILLIS PEERAGE.*

31*st March* 1760.—The Earl of Holdernesse (by his Majesty's command) presented to the House a petition of William Earl of Cassillis, Ruglen, and March, relating to the titles and honours claimed by the petitioner, with his Majesty's reference thereof to this House.

And the same was read by the Clerk, and is as follows:—

"TO THE KING'S MOST EXCELLENT MAJESTY,

'The humble Petition of William Earl of Cassillis, Ruglen, and March,

'*Sheweth*,

'That from the Records of the Parliament of Scotland, and 'other authentic documents, it appears that Gilbert Kennedy of 'Donure was by King James the Second of Scotland, about 'three hundred years ago, created Lord Kennedy, and that in 'the year 1500 David Lord Kennedy, his descendant, was created 'Earl of Cassillis; but of those creations there is no patent now 'extant or upon record.

'That David, the first Earl, was succeeded by his son Gilbert; 'he, by his son, likewise Gilbert; the second Gilbert by his son,

* From the Journals of the House of Lords, Vols. 29 and 30.

'also Gilbert; who was succeeded by his son John; and he by 'his nephew, John, the sixth Earl of Cassillis.

'That the last mentioned John Earl of Cassillis having re-'signed his Earldom and Estate into the hands of the Crown, 'King Charles the First, by charter under the Great Seal, dated 'the 29th of September 1642, re-granted the same unto the said 'Earl for life; and to John Lord Kennedy his eldest son, and the 'heirs male and female of their bodies respectively, as mentioned 'in the charter; whom failing, to the Earl's heirs male whatso-'ever.

'That the said John Lord Kennedy, become Earl of Cassillis 'by his father's death, likewise resigned the honours and estate of 'Cassillis into the hands of the Crown; and King Charles the 'Second, by charter under the Great Seal, dated the 24th of 'April 1671, re-granted the same to the said John, the seventh 'Earl of Cassillis, and the heirs male and female of his own, 'and his father John, the sixth Earl's bodies, in manner therein 'mentioned; whom all failing, to the said John, the seventh 'Earl's nearest heir-male.

'That the said John, the seventh Earl of Cassillis, had a son, 'John Lord Kennedy, who died in his father's lifetime, leaving 'issue only one son, John, who was the eighth and last Earl of 'Cassillis.

'That, by the death of the said John, last Earl of Cassillis, 'without issue, the titles and honours of Earl of Cassillis and 'Lord Kennedy are descended to your petitioner, the great-'grandson of John, the seventh Earl of Cassillis, grantee of the 'charters 1642 and 1671, by his eldest daughter Anne, Countess 'of Ruglen, all the male issue of his body being extinct.

'That nevertheless, Sir Thomas Kennedy of Colzean, Baronet, 'has assumed the said titles and honours of Earl of Cassillis 'and Lord Kennedy, under pretence of being heir-male of the 'family.

'The petitioner, therefore, most humbly prays your Majesty, 'that you will be graciously pleased to declare and allow his 'right to the said titles and honours of Earl of Cassillis and 'Lord Kennedy, or give such directions therein as your Ma-'jesty in your great wisdom shall think proper.

'CASSILLIS, RUGLEN, & MARCH.'

'*Whitehall, March* 31*st*, 1760.

'His Majesty, being moved upon this petition, is graciously 'pleased to refer the same to the Right Honourable the House of 'Peers, to examine the allegations thereof, as to what relates to 'the petitioner's title therein mentioned; and to inform his Ma- 'jesty how the same shall appear to their Lordships.

'HOLDERNESSE.'

Ordered, That the said petition and reference be referred to the Lords Committees for Privileges to consider thereof, and report their opinion thereupon to the House.

Then the Earl of Holdernesse (by his Majesty's command) presented to the House a petition of Sir Thomas Kennedy, relating to the same titles and honours, with his Majesty's reference to this House.

And the same were read by the Clerk, and are as follows:—

'To the King's most excellent Majesty, the humble
'PETITION of SIR THOMAS KENNEDY, Heir-Male
'of JOHN late Earl of CASSILLIS,

'*Sheweth*,

Nov. 2, 1404. 'That by a charter in 1404, Robert the Third, King of Scot- 'land, granted the barony of Cassillis to Sir Gilbert Kennedy, 'and to James Kennedy, his son, and the heirs-male of his body; 'and, failing these, to several other heirs-male therein named.

Jan. 27, 28, 1405. 'That King Robert the Third soon after granted to the said 'James Kennedy, and to Mary Stewart, his wife, King Robert's 'daughter, and the same heirs-male mentioned in the former 'grant, the barony of Dalrymple; and appointed the said James 'Kennedy, and the heirs-male aforesaid, the head of the whole 'Tribe in all questions, articles, and affairs, thereto belonging.

Aug. 2, 1450. Feb. 18, $14\frac{50}{51}$. 'That his Majesty King James the Second, in 1450, not only 'confirmed the two last mentioned grants, but of new granted 'the barony of Cassillis in favour of Gilbert, the son of the said 'James Kennedy, and grandson of King Robert the Third, and 'the heirs-male of his body; and, failing these, to a series of 'heirs-male only.

' That the said Gilbert was soon after created Lord Kennedy;
' and in 1509, before patents were in use, his son, Lord Kennedy,
' was created Earl of Cassillis; since which time, for the space of
' 250 years, the estate and the title of honour and dignity of Earl
' of Cassillis have been held and enjoyed by the heir-male only
' of David, first created Earl of Cassillis in 1509.

' That by the law of Scotland, titles of honour, where there is
' no patent regulating the descent, are considered as male fiefs,
' and do invariably descend to the heirs-male of the first grantee,
' so long as any exist.

' That your petitioner, upon the death of John, late Earl of
' Cassillis, in August 1759, was, agreeable to the forms of the
' law of Scotland, duly served and cognosced to be the nearest
' heir-male of the said John, late Earl of Cassillis, and being
' lineally descended of David, the first Earl of Cassillis, he
' most humbly apprehends he is entitled to the title and honour
' and dignity of the Earl of Cassillis.

' The petitioner most humbly prays that the title and
' dignity of Earl of Cassillis may be declared to belong to
' the petitioner and his heirs-male.

' And your petitioner shall ever pray, &c.

' Thomas Kennedy.'

' *Whitehall, March* 31, 1760.

' His Majesty, being moved upon this petition, is graciously
' pleased to refer the same to the Right Honourable the House of
' Peers, to examine the allegations thereof, as to what relates to
' the petitioner's title therein mentioned; and to inform his Ma-
' jesty how the same shall appear to their Lordships.

' Holdernesse.'

Ordered, That the said petition and reference be referred to the Lords Committees for Privileges to consider thereof, and report their opinion thereupon to the House.

Ordered, That the said Committee do meet to consider the said petitions on Wednesday next.

2*d April* 1760.—The House was informed, 'That the Lords 'Committees for Privileges, to whom are referred the petition of 'William Earl of Cassillis, Ruglen, and March, relating to the 'titles and honours claimed by the petitioner, with his Majesty's 'reference thereof to this House: and also the petition of Sir 'Thomas Kennedy, Baronet, claiming the same titles and ho-'nours, and his Majesty's reference thereof, have met, and ap-'pointed Monday the 5th day of May to proceed on the consi-'deration of the said petitions.'

Ordered, That notice be given to his Majesty's Attorney-General, and his Majesty's Advocate for Scotland, of the said reference, and the time of the meeting of the said committee.

15*th April* 1760.—A petition of William Earl of March and Ruglen was presented, and read, setting forth, 'That the petitioner 'having applied by petition to his Majesty, praying to have his 'right declared to the titles and honours of Earl of Cassillis and 'Lord Kennedy, and Sir Thomas Kennedy having likewise by 'petition claimed the same titles and honours: his Majesty was 'graciously pleased to refer both petitions to this House, and the 'same having been by their Lordships referred to the Lords 'Committees for Privileges, the said Committee has appointed 'Monday the 5th day of May next for hearing both petitions. 'That the petitioner's agent in Scotland having been wrote to, 'to collect and transmit the evidence necessary to support the 'petitioner's claims, he, by his letters of the 5th and 10th instant, 'acquaints, that it will be impossible for him to have the neces-'sary searches made, so as to be prepared against the time ap-'pointed for the hearing; alleging, that the charter-room of Cas-'sillis must be searched, and all the many writings in it must be 'gone over with care: and that this room is now sealed up, and 'in custody of the law, and it will require weeks together to have 'that single piece of work done:' and therefore praying, 'that 'their Lordships will be pleased to put off the hearing of the said 'petitions till the above searches can be made.'

And thereupon the agents for both the said claimants were called in and heard at the bar.

And being withdrawn,

Ordered, That the said petition do lie on the table.

25*th April* 1760.—The House was moved 'To take into consideration the petition of William Earl of March and Ruglen, 'which was presented to the House and read the 15th instant, 'and then ordered to lie on the table: setting forth that the petitioner having applied by petition to his Majesty, to have his 'right declared to the titles and honours of Earl of Cassillis and 'Lord Kennedy; and Sir Thomas Kennedy having likewise 'by petition to his Majesty claimed the same titles and honours, 'his Majesty was pleased to refer both petitions to this House: 'and the same having been by their Lordships referred to the 'Lords Committees for Privileges, the said Lords Committees 'have appointed Monday the 5th day of May next for hearing 'the said petition;' and praying, for the reasons therein alleged, 'That the said hearing may be put off till proper searches can be 'made in Scotland for the evidence necessary to support the petitioner's claim.'

And thereupon the agents for both the said claimants were called in and heard at the bar.

And being withdrawn,

Ordered, That the hearing of the said claim, upon both the said petitions, before the Lords Committees for Privileges, be put off till Monday the 2d day of June next; and that his Majesty's Attorney-General, and his Majesty's Advocate for Scotland, have notice thereof.

10*th February* 1761.–[In consequence of the demise of George II., accession of King George III., and the summoning of a new Parliament, it became necessary for the claimants to present petitions of new. This was accordingly done, and references made to the House of Peers, and by their Lordships to the Lords Committees; but as both the petitions and references are the same as those previously given, it is unnecessary to repeat them here.]

Ordered, That the said Committee do meet to consider the petitions on Wednesday the 4th day of March next, and that notice thereof be given to his Majesty's Attorney-General, and his Majesty's Advocate for Scotland.

27*th February* 1761.—Upon reading the petition of William Earl of Ruglen and March, setting forth, 'That the hearing upon 'the petition of the said Earl and Sir Thomas Kennedy of Col- 'zean, Baronet, severally claiming the titles and dignities of Earl 'of Cassillis and Lord Kennedy, before the Lords Committees for 'Privileges, being appointed for Wednesday, the petitioner, whose 'documents were only transmitted from Scotland last week, can- 'not be so early prepared;' and therefore praying, 'That their 'Lordships would be pleased to put off the said hearing till Mon- 'day the 9th day of March next.'

It is ordered, That the meeting of the Lords Committees for Privileges, to consider of the said petitions, be put off from Wednesday next to Monday the 9th day of March next, as desired, and that notice thereof be given to his Majesty's Attorney-General, and his Majesty's Advocate for Scotland.

26*th November* 1761.—Upon reading the petition of Sir Thomas Kennedy, claiming the title and dignity of Earl of Cassillis, setting forth, 'That the petitions in the behalf of William Earl of 'March, and the petitioner, severally claiming the title and dig- 'nity of Earl of Cassillis, having been referred by his Majesty to 'this House, their Lordships, on the 10th day of February last, 'were pleased to refer the same to the Lords Committees for 'Privileges, to meet and consider thereof on Wednesday the 4th 'of March: That the consideration of the matter of the said pe- 'titions was delayed from Wednesday the 4th to Monday the '9th of March last, but as some necessary writings founded on 'by the parties could not then be exhibited before the Commit- 'tee, no further proceedings were had thereupon during the last 'session of Parliament.' And praying, 'In regard the said writ- 'ings are now recovered, that their Lordships would be pleased to 'order, that the said petition and references may be taken under 'consideration on Wednesday the 9th day of December next, or 'any such other day as to their Lordships in their great wisdom 'shall seem meet.'

It is ordered, That the said petitions, with his Majesty's reference thereof, be again referred to the Lords Committee for Privileges to consider thereof, and report their opinion thereupon to

the House; and that their Lordships do meet to take the same into consideration on Wednesday the 16th day of December next; and that his Majesty's Attorney-General, and his Majesty's Advocate for Scotland, have notice of this order.*

II.

OLIPHANT PEERAGE,

11th July 1633.

[As the Oliphant Peerage has been so much relied on by the Earl of March, and so severely criticised by Lord Mansfield, the report by Lord Durie† has been appended. Notwithstanding Lord Mansfield's scepticism as to the case having been argued before Charles I., there can be little doubt on the point, and the following extract from a letter preserved in the Pollock charter-chest, from William Maxwell, advocate, to his cousin, Sir John Maxwell of Pollock, may be considered as pretty decisive proof on the subject:—"His Majestie to-morrow is to heir a despitt, in the matter of the tytell of the Lord Oliphant, betwixt Sir James Douglas and the Lord Oliphant's brother's sone; Mr Lewis [Stewart] is for him, and Mr Thomas Nicolsone for Sir James and his ladie, quha is heir of lyne; and my Lord Advocate for the King. They have taken great paines to prepair themselfis, swa that we think it sall be a creditable despitt." See "Remarks upon Scotch Peerage Law," by John Riddell, Esq. advocate. Edin. 1833, 8vo, p. 94, a most valuable work, in which many of the fallacies in Lord Mansfield's argument in the Cassillis case are pointed out.]

Oliphant *contra* Oliphant, *July* 11, 1633.

Sir James Douglas having married the only bairn and daughter of umquhile the last Lord Oliphant, and she being served heir-general to her immediate predecessor, who died before her said father, pursues *hoc titulo*, as heir to her said predecessor, Patrick Oliphant, nearest heir-male in bloud to her said father, for

* The remaining proceedings, so far as engrossed in the Journals, will be found at page 60.

† Decisions, p. 685. Edinburgh, 1690. Folio.

annulling a contract made betwixt him and her father, whereby he dispones all his lands, together with the title and dignity of the Lordship of Oliphant, to the said Patrick and his heirs-male, which failing, to return to the disponer and his heirs-male, containing a procuratory of resignation,—to hear and see it reduced, because it was a paction for honour, which is not *in commercio*, not being allowed by the Prince, *qui est fons omnis honoris*, and so is null, and the defender to be decerned to have no right to that title, and that the title pertains to the pursuer as nearest heir *in recta linea* to him, to whom that title belongs, notwithstanding of the said contract. The Lords considering, after that the parties' reasons were *hinc inde* heard, and at length dispute in presence of the Lords, that the pursuer had founded the pursuit upon her claim, as heir to her grandsir, and not upon any succession, as heir to her father, which father was served heir to the same person her goodsir, before his decease. Likeas her father had bruiked the title of Lordship during his lifetime, by ryding in Parliament, and by being designed in the infeftment of his lands, granted to him by the King (his cousin) with the title of Lord Oliphant, and by doing of all other acts, whereby it might appear that he was Lord Oliphant, there being no writ more extant, nor patent, to show any erection of it in a Lordship, or whereby he or his predecessors were created Lords, but only the custom foresaids, and such acts as is before mentioned. They found, that this use was enough, conform to the laws of this realm, to transmit such titles in the heirs-female, where the last defunct had no male children, and where there was no writ extant to exclude the female. And because, by the contract foresaid, the pursuer's father had disponed the title to the defender, *ut supra*, in the which there was a procuratory of resignation, albeit the king had not conferred the honour according thereto. The Lords found that the pursuer had no right to claim this honour, in respect her father was last possessor, and died in possession, by the acts foresaid, (there being no seasin requisit for the title thereof,) and therefore seeing her father had disponed the same, as said is, she could never misken him, who behoved to be repute as *in tenemento*, and pass to her grandsir in an higher degree, to eschew the deed of her father, whose deed she behoved to warrand, if she pursued as heir to him, or by right competent to her as nearest to him, and therefore the Lords excluded this pursuer, as not hav-

ing right to this dignity, seeing the King had not conferred the same upon her, and that her father, as said is, by the foresaid contract, had renounced his right thereof, which albeit it was not found by the Lords to be a sufficient right, to establish the honour in the person of the defender, which no subject can dispone, without the approbation of the Prince, which being acquired, then the act convalesces: Yet it was found enough to denude himself, and his descendants, ay and while the Prince should declare his pleasure, and either confer the honour on the pursuer or defender, at which time the act would take perfection. And in the mean time, seeing the Prince had not interponed himself to allow any of these acts, They found, that none of the saids parties could claim the said honour, but it remained with the King, which he might confer to any of them he pleased: For albeit honour be not annailziable by buying and selling, yet the Lords found, that the party having it might quite his own interest, which albeit it would not avail him in whose favours he had done it, unless the Prince should allow it, yet it was enough to denude him as said is. Actor. Nicolson. Alter. Stuart. Advocatus for the King present.*

III.

DECISION IN THE QUESTION OF PRECEDENCY,

THE EARL OF SUTHERLAND *v.* EARL OF CRAWFORD.

JAN. 23, 24, 25, 1706.

[As Lord Mansfield quotes a passage from the argument of the Earl of Crawford, p. 59, as the grounds of decision in the question of precedency between the Earls of Sutherland and Crawford, the judgment of the Court, as given by Forbes, is here subjoined. A brief note of the pleas is necessary, however, to make it intelligible.

Lord Crawford contended, amongst other things, that he had prescribed a right of precedency to Lord Sutherland, by the decreet of

* This decision, notwithstanding the attack upon it by Lord Mansfield, is clearly a sound one.

ranking in the year 1606, and by possession under it for a century—as also by immemorial anterior possession. He further asserted, that this decreet was *res judicata*, and that, moreover, the old dignity of Sutherland was "interrupted" by the marriage of Elizabeth, the heiress of the family, with Adam Gordon. Lord Sutherland answered, that titles of honour cannot be acquired by prescription—that the decreet in 1606 did not operate as *res judicata*, but was merely an interim regulation—that granting the decreet was a competent title, still prescription, could only commence running from the date of the act 1617, and not of the decreet 1606—that there had been sufficient interruption by summons in the year 1630; and by protestations in Parliament 1641, 1647, 1661,—that Elizabeth succeeded to the ancient title as heiress, and was in her own right Countess of Sutherland.]

The Lords found, That the citation at the Earl of Sutherland's instance against the Earl of Crawford, in the year 1630, was not renewed in the terms of the act 15, Parliament 1685, by the remit of Parliament 1693, in respect the same is not within seven years of the date of that act, the 13th of May 1685, and eleven months and fifteen days more allowed to be deduced in short prescriptions, conform to the act 40, Parliament 1690: and, therefore, the said citation can import no interruption of prescription. But found, that protestations made in Parliament are legal interruptions of prescription of precedency: and the prescription of 40 years doth commence from the act of Parliament 1617, and not from the date of the ranking in anno 1606: and found the Rolls of Sederunts of Parliament, not to be a sufficient document of the Earl of Crawford's possession of precedency to the Earl of Sutherland, when both were marked present. And found that the descent of the dignity by propinquity of blood from William Earl of Sutherland, who married King David's sister, to Earl John, who succeeded in 1512, is sufficiently instructed: but that the dignity was not conveyed from him with the estate to his sister Elizabeth.*

* Journal of the Session, by William Forbes, Advocate. Edinburgh, 1714. Folio. Page 85.

THE

SUTHERLAND PEERAGE.

1771.

SUTHERLAND PEERAGE.*

William Earl of Sutherland died upon the 16th June 1766, leaving an only child, a daughter, Lady Elizabeth, who inherited the family estates; and who, through her guardians, laid claim to the honours of Sutherland as descendible to heirs-female.

The dignity was counter claimed by Sir Robert Gordon of Gordonstoun, Bart., and by George Sutherland, Esq., of Forse, as descendible to heirs-male.

These various claims came before the House of Peers, and Cases and Additional Cases were lodged for the parties above mentioned, and also for Lady Elizabeth Wemyss, sister of the late Earl, who had an interest to support the pretensions

* As every Peerage lawyer must be well acquainted with the masterly production of Lord Hailes, entitled The Additional Case of Elizabeth Countess of Sutherland, which contains a mass of invaluable matter, illustrative of the descent of titles of honour in Scotland in early times, it was deemed altogether unnecessary to do more than give a general outline of the claims to the Earldom,—excepting in so far as regarded Mr Sutherland of Forse, whose case being very scarce and inaccessible, the reasons by which he supported his pretensions have been given *ad longum*.

of her niece as next heir to the title, in the event of her death without lawful issue.

The material facts of the case may be briefly stated. The family of Sutherland, Earls of Sutherland, were of great antiquity, but the precise period when they were ennobled did not appear from any existing record. The title descended through a series of heirs-male to John, the tenth Earl, who died in 1514. At this period his sister Elizabeth was his general, and John Sutherland of Forse* his heir-male, as representing Kenneth, second son of William, sixth Earl of Sutherland.

Elizabeth was served and retoured heir in the Earldom of Sutherland to her brother,† and was thereafter infeft therein the following year. She was previously married to Adam Gordon, a man of noble family and great power, who, after the demise of his brother-in-law, was usually styled Earl of Sutherland, but there is no evidence that he enjoyed this title by any grant from the Crown ;—on the contrary, the presumption was, that he took the title by courtesy. The Countess died in September 1535, and her husband in March 1538. Of this marriage there was one son, Alexander, who predeceased both parents, leaving John, who became eleventh Earl of Sutherland. His son Alexander, the twelfth Earl,

* Mr Sutherland of Forse mentions in his case, that Alexander Sutherland, a bastard of one of the Earls of Sutherland, besieged and took Dunrobin Castle, the family seat, but afterwards was defeated and captured by Adam Gordon, who, without any ceremony, put him to death, cut off his head, and carried it in triumph to the castle, where it was "hung up on a high spire," p. 2. This catastrophe of the luckless bastard, and the power of Adam Gordon, are put forth in the case as a reason why John Sutherland, the undoubted *lawful* heir-male, did not then think proper to assert his claim to the honours.

† Special retour, dated 3d October 1514.

died in 1594, leaving John his successor, the thirteenth Earl, ancestor of Lady Elizabeth Sutherland and Lady Elizabeth Wemyss, and Robert, the admitted ancestor of Sir Robert Gordon. Thus the two ladies just mentioned were heirs-general, and Sir Robert the heir-male of Adam Gordon and Elizabeth Sutherland.

The pleas used by the female claimants in support of their pretensions were :—

I. That, as far as history and records reach, female succession in land estates had been established in the law of Scotland.

II. That, by the words of limitation of an estate in an ancient charter, to the grantee, *et hæredibus de corpore suo legitime procreatis vel procreandis*, or to the grantee, *et hæredibus suis*, were understood heirs-general, and not heirs-male.

III. That, as in ancient times, land estates in Scotland were descendible to females as heirs-general ; so, in the like manner, ancient territorial peerages were descendible, and did *de facto* descend, to females.

Sir Robert Gordon maintained,

I. That it was an established maxim in the law of Scotland, that ancient peerages are presumed descendible only to the heirs-male of the person first ennobled, where there is no patent or act of creation directing a different course of succession.

II. That Adam Gordon having been proved to have enjoyed the title, rank, and privilege of Earl of Sutherland without objection, it was a clear legal presumption that he must have obtained this dignity by a *new* creation, although no evidence of such *new*

creation could be traced. Assuming this proposition, it was contended, that the title necessarily descended to heirs-male.

Mr Sutherland of Forse argued,

I. Before charters or grants in writing were introduced, feus of land were conferred by investiture, in presence of the *Pares Curiæ*. And before the introduction of patents, feudal dignities, such as the dignity of *Comes*, or Earl, were conferred by the Sovereign himself in Parliament by cincture, or girding the person ennobled with a sword, and by proclamation made by heralds. In feus of land, military service and fidelity were due by the vassals to the overlord or superior. So in dignities the person ennobled was bound to service in Parliament, fidelity, and homage. As feus of land, before the descent was limited by grants in writing, uniformly descended to heirs-male, and could not be aliened without the consent of the superior, so dignities conferred by investiture in Parliament descended to the heirs-male of the body of the person first ennobled, and could not be aliened or transferred in any other manner than by resignation thereof in the hands of the Sovereign.

II. As the original constitution of feus and dignities was derived from the feudal law, every question with respect to dignities conferred without a grant in writing, or where such a grant does not appear, must be governed by the rules of that law which has hitherto been resorted to, as the common law of Scotland, where the statutory law has established no certain rule, and, therefore, in the present case, the right to the title and dignity of Earl of Sutherland,

conferred on the claimant's ancestors, and enjoyed by them prior to the year 1347, can only be judged by the feudal law. By that law the succession of lands, in all cases, devolved on males only, to the entire exclusion of females. It was early received in Scotland, and long after the succession of females was introduced in England, it continued in its original purity in Scotland, where the exclusive privilege of the male succession wore out more slowly and gradually.* At first females were entitled to succeed by covenant or express provision, and were understood to succeed only upon the failure of males. Afterwards, when the settlements of estates were made in favour of heirs whatsoever, female heirs were understood to be comprehended under that general description. But the original rule of the feudal law with respect to the succession of dignities received no alteration. In every case where the male line separated from the female, the heir-male was preferred both in ancient and late times, which is the strongest proof that can be had that the consuetudinary law of Scotland had in this particular never varied from the feudal law, to which it owed its origin. It even appears, from the history of the family of Sutherland, that in 1460, John Earl of Sutherland succeeded to his father, Earl John, in the dignity and estate, in preference to Marjory, the only daughter of her eldest brother, Alexander, and her issue. This proves that the general rule of male succession took place in the descent of the very peerage now in question, not long before the time

* Sir Thomas Craig, Lib. I. Dieg. 8, § 2 and 16. Lib. I. Dieg. 10, § 6. Lib. II. Dieg. 14, § 3.

of Elizabeth Sutherland and Adam Gordon, and in the succession which immediately preceded the claim of Elizabeth herself.

III. The numerous resignations of titles of honour made in the hands of the Sovereign for the purpose of claiming new grants, agreeable to the law and usage of Scotland, before the union of the kingdoms, were all uniformly in favour of heirs-female, and none of them in favour of heirs-male, which puts it beyond a doubt, that heirs-male had ever the legal right of succession, and that this right could only be altered or defeated by a legal resignation of the dignity, and a new grant thereof by the Sovereign, limiting the descent to heirs-female.

IV. In peerages where no grant in writing appeared, as the descent of the dignity to the nearest heir-male of the person first ennobled has uniformly taken place in a great number of the noble families in Scotland; so this rule of descent was fully established to be the law of Scotland, in the cases above mentioned, of the Peerages of Lovat in 1730, Cassils and Borthwick in 1762. These judgments ascertain the principle that such titles of dignity are annexed to the blood of the first grantee in a male line, and upon the extinction of males of the first branch, do descend upon the males of the second branch lineally descended from the body of the first grantee, and upon each male of that branch as he comes to the succession, as heir-male of the body of the original grantee; and, consequently, the claimant having brought sufficient proof of his pedigree by the documents herein referred to, the dignity of Earl of Sutherland has descended upon him.

Counsel were heard upon these various claims at great length, and thereafter the following opinions were delivered:—

21*st March*, 1771.

Lord Mansfield.

My Lords—This is a question concerning a very ancient peerage. Three several persons have preferred petitions to his Majesty, (which have been referred to this House,) claiming the titles, honours, and dignities of the Earldom of Sutherland.

It appears by the evidence which has been produced, that this peerage was enjoyed as far back as 1275, by William, then designed Earl of Sutherland, in an original instrument produced.

Mr Sutherland of Forse claims this peerage as heir-male of William Earl of Sutherland, and has proved his pedigree.

It is claimed by Lady Elizabeth, the daughter and only child of William, late Earl of Sutherland, who died in 1766, as heir of the body of this William Earl of Sutherland, who existed in 1275; that is, as legally entitled to this dignity, it having been originally granted, and descending to heirs-general, and there appearing no subsequent resignation or new creation in favour of heirs-male.

Sir Robert Gordon claims upon a resignation of the dignity, and a new grant thereof, sometime between June 1515 and September 1516, in favour of his ancestor, Adam Gordon, who married Elizabeth, the heiress of the Earldom.

When these petitions came to be supported at

your Lordships' bar, all the several parties concurred and agreed in these facts—that an heir-male existed in 1515, who did not then claim the dignity; and that there appeared no special grant, no original creation or limitation of this honour, in favour of any particular line of heirs.

All the parties treated this peerage as descending in the male line, until the death of John Earl of Sutherland in 1514, when, as admitted in Lady Elizabeth's case, Adam Gordon assumed and bore the title of Earl of Sutherland.

This fact, proceeding out of your own mouth, says Sir Robert Gordon, shows there must then have been a new creation; and both he and Mr Sutherland argue, that when the original creation or grant does not appear, the legal presumption is in favour of the heir-male of the body of the person first ennobled, unless evidence is shown to the contrary; and they lay it on the other side to show the contrary.

Lady Elizabeth says, I do show the contrary. And she argues, that the general presumption insisted on cannot take place in this case; for, upon the death of John Earl of Sutherland in 1514, this dignity was taken and enjoyed by a Lady, and was so enjoyed by the descendants of her body for the space of 250 years, without any claim on the part of the heir-male.

Sir Robert Gordon, on the other hand, insisted that the dignity did not descend to Lady Elizabeth in 1514, but that there was a new creation in favour of his ancestor Adam Gordon, and the heirs-male of his body.

Thus in general it was insisted on by the parties,

and though the case was argued upon former precedents, and many points were stated not affecting the merits of the present question, yet I think it necessary to say something for the sake of these precedents.

I take it to be settled, and well settled, that where no instrument of creation or limitation of the honours appears, the presumption of law is in favour of the heir-male, *always open to be contradicted by the heir-female*, upon evidence shown to the contrary. There is not a judgment of this House, of the Parliament of Scotland, or of the Court of Session, when they had an undoubted jurisdiction to try such questions, which impeaches this general presumption, except the single case of Oliphant, determined by the Court of Session in 1633. This was a very particular case, and appears to have been very ill determined.

In that case there was a resignation of the dignity, which, though legally made, had *not been accepted* of by the Crown. The heir-female claimed the peerage as heir-at-law. Her right as such does not appear to have been disputed, though there was no instrument of creation or limitation of the honours. The Court of Session, however, found that the resignation was sufficient to divest the granter, so that the dignity could not pass to the heir-general, but that the resignation not having been accepted of by the Crown, the resignee had no right, and the peerage became *extinct*.

The only other appearance of a decision of this point is the interlocutor of the Court of Session, in the proceedings concerning the precedency between

the Earl of Sutherland and the Earls of Crawford and Errol, in 1706. But this was no direct definite judgment upon the point.

Since the union of the kingdoms, all the other judgments in cases of peerages have passed in this House, your Lordships being the only judges in such questions.

When peerages were territorial, it cannot be doubted that the dignity followed the estate. How long this continued no person has presumed to say; and no case has hitherto occurred wherein any satisfactory evidence has been shown upon this point; nor is the matter any clearer from any thing that has been stated in Lady Elizabeth's case, though the last. Yet many cases have occurred, and many instances have been stated, to show the descent of peerages; but none of these show when they ceased to be territorial.

It is clear, that when they were territorial, the husband had a right by courtesy to his wife's title of honour, as well as to her estate. But, in personal peerages, no courtesy could take place.

Another thing is clear, that, when peerages were territorial, the heir succeeded to the person last seised of the estate, and thereupon took both estate and honour. *Now* no sasine is necessary, because the heir takes from the person first ennobled.

I shall state to your Lordships all the questions I know that have occurred with respect to the descent of peerages, in cases *where no limitation* of the honours appeared.

The first question arose in the course of the proceedings concerning the precedency in 1706. The

Court of Session did not then determine the point, but it is clear they would not presume a female descent.

The next case was that of Lovat. The Court of Session proceeded in that case, though not a competent Court. The judgment certainly went upon a *private award* for money paid. It went, however, upon a general presumption in favour of the heir-male. I have had occasion to hear a great deal concerning that case. Lord Lovat was supported in it by the Duke of Argyle. The lawyers, who were very eminent on both sides, were of different opinions. When Lord Lovat was to be tried, much deliberation was had. It was foreseen he might turn himself to avoid the trial. If he was tried as a commoner, he might claim to be a peer; if tried as a peer, he might insist he was a commoner. Every thing was fully considered; and the true solid ground upon which he was tried as a peer, was the presumption in favour of the heir-male.

After that the case of Cassillis came before this House. It was very fully argued, and was heard with much attention. The judgment then proceeded on the general presumption in favour of the heir-male, unless the contrary is shown. There was no difference of opinion upon this point. The judgment did not proceed upon the investitures of the estate. One noble Lord, not now present, thought that the charter in 1672, which gave the Earldom, with precedency, &c., carried the dignity. But it appeared that all the matters in that charter had been resigned in 1642. The House thought there was no resignation. It was settled with Lord Har-

wicke, that, in cases where no instrument of creation or limitation of the dignity appeared, the legal presumption was in favour of the heir-male. The judgment was penned at his sight, with this view. It does not mention the investitures of the estate, but says that the title and dignity belonged to Sir Thomas Kennedy, as heir-male of the body of the person first ennobled.—Why? Because it was to be presumed that the dignity descended in that line, when no evidence to the contrary appeared. If it had gone upon the presumptions arising from the limitations of the land estate, Lord Harwicke's accuracy would have so worded it.

Then comes the case of Borthwick. The Crown supplied the claimant with money to prosecute his right. In that case *no regard was had to the limitation of the estate;* the only question was with respect to the pedigree. The evidence of the pedigree, upon the first hearing, did not satisfy the House, and an opportunity was given, by an adjournment of the cause, to supply the defect of that proof. The judgment then went of course, and the claimant was found entitled to the dignity, as the heir-male of the body of the person first ennobled.

The general question, therefore, having been so solemnly determined upon these grounds, many peerages may be affected, if determined again upon other notions. Upon the new discoveries that have since been made, and are stated in this case, I am infinitely more of the opinion of the soundness of the judgments that have been given.

In this case much learning has been shown, and much labour bestowed. It comes out that all the

peerages created before 1424, (when King James I. returned from England,) whose limitations now appear, are to heirs-male; and that of all the peerages created since that time, nine-tenths have been in favour of heirs-male. Of twenty-five instances of peerages stated by Sir Robert Gordon, it is admitted that twenty have gone to heirs-male, in preference to nearer heirs-female. These are strong additional confirmations of the presumption in favour of heirs-male. Though ten of the thirteen original peerages stated in Lady Elizabeth's case have gone to females, yet I am not convinced but that the original limitations might have been to heirs-male. If a resignation was necessary at the time, a new limitation might have been introduced. In the case of an only daughter, it is natural to believe the limitations of the old investitures would be altered.

I say it is remarkable, that before the times of James I. of Scotland, all the creations that now appear were to heirs-male. Lord Kames, in his Treatise upon Peerages, mentions the creation of Randolph Earl of Murray, in 1306, to heirs-male. Another produced in this case, that of Carrick, is to heirs-male. Likewise, Wigton is to heirs-male, and so are Fife and Monteith. Others come after 1424, but I do not quote them. The Earldom of Ross is to heirs-male, with an additional substitution to heirs-female.

It is not now open to litigate this general matter. I hold it to be of great consequence. The presumption in favour of heirs-male has its foundation in law and in truth. I am satisfied many claims would start up were it departed from. Most estates

are entailed to heirs-male. A contrary doctrine would be attended with greater inconveniences in Scotland than in England, because the King can grant to any of the heirs-female in England, but in Scotland the dignity must go to the eldest, and, consequently, must be enjoyed for ever.

I now come to the particular and the only question in this case, and that is, whether Adam Gordon was in 1515 created Earl of Sutherland. I never saw a case so clear. It is now established that there existed at that time several branches, heirs-male of the family of Sutherland, particularly Duffus, and the ancestor of the other family now claiming; but it appears that the heir-female enjoyed the honours.

But it is said, how comes it she does not appear to take the title upon the death of her brother? She takes the estate by a service and infeftment, and yet does not take the honours—there must therefore have been a new creation. A creation, Why? Her brother succeeded without being called by the title of honour in an instrument of the same kind; but surely there was no new creation.

But it is farther said, that in all the deeds and instruments after 1516, wherein Adam Gordon is mentioned, he is called Earl of Sutherland; and he could have no right to that title without a new creation.

The answer is, he took it according to the usage of the times. In England, when a person is made an Earl, he is still by analogy called Earl of some county, though it is a personal honour. The idea of a connection between the territory and the title of honour did not wear out all at once, but by de-

grees. It is very well known, if a territorial peerage descended to a female, the husband must have been tenant by courtesy, both of the estate and peerage. It was indisputably so in England, and there is no ground to think it was otherwise in Scotland. The Duke of Ancaster's ancestor, in the time of Henry VIII., claimed, and was allowed his wife's title, as tenant by courtesy. Henry VI. allowed the title of Salisbury or Talboys to the husband, to hold during life.*

There are numbers of instances of husbands enjoying titles of honour in right of their wives; and this did not cease till Queen Elizabeth's time.

There have been shown many instances of the same kind in Scotland; and it appears this usage was not dropt in 1515.

There is not only no ground for the presumption of a new creation in this case, but it is actually disproved.

Adam Gordon could not take by a new grant without a resignation. Sir Robert Gordon's counsel were much perplexed on this head, and therefore they raised up Alexander the bastard, and insisted he was a lawful son. But was he ever considered otherwise than as a bastard until this difficulty occurred in the present case? It is quite an imagination to set him up on the present occasion, as a person capable of taking and resigning the title of honour.

The counsel then insisted that John, the brother of Elizabeth, might have resigned. This was still more absurd; for the resignation must have been

* See Collins' Peerage.

kept till the arrival of the Duke of Albany the Regent, in May 1515. But this would not do, for no new grant could pass upon this new resignation by John, as it was vacated by his death in 1514. It is therefore clear there could have been no creation upon any resignation. The history, the tradition, the opinion of the family, all concur to show there could be no new creation in the person of Adam Gordon.

Nothing can be drawn from the entries of the rolls of Parliament, of the rank of the nobility before 1606, because it appears they were all marked at random, as they came severally earlier or later into the House. When a commission was granted that year for classing the nobility according to their several rights, the Earl of Sutherland was ranked, and then the evidence of a new creation might have appeared, if any had ever existed. By that ranking the Earl of Sutherland takes place of ten Earls, whose interest it was to have shown a new creation. But so little notion had they of a new creation at that time, that we see the family soon after complaining that it was not carried to its original. In 1630, it appears, they began, and then entered a protestation. Sir Robert Gordon's ancestor wrote a book, a history of the family, which ends that year, and expressly mentions the ancient peerage as descending to Elizabeth. It having been accordingly so enjoyed for 250 years, no judicature would allow a proof to affect a right so established. There might have been a limitation of the honours to heirs-male, but no colour of evidence has been shown of such limitation.

I am therefore clearly of opinion, that the claim-

ant Lady Elizabeth is entitled to the dignity, as heir of the body of William, who was Earl of Sutherland in 1275.

A doubt has arisen out of the additional case published for Lady Elizabeth, which has occasioned some difficulty.

It has been contended by the counsel for Sir Robert Gordon, that the charter in 1601, which grants the whole estate of Sutherland, had limited the Earldom to heirs-male, and particularly to the stock from which Sir Robert claims, and that Sir Robert would now be entitled, in virtue of that limitation, to take the dignity, if it passed by the words of that charter, there being *no later charter under the royal sign manual*, that could possibly carry the dignity.

It is certainly true that this charter would pass the dignity, upon the principles maintained in Lady Elizabeth's case: for, in answer to the instances stated by Sir Robert Gordon, of the heirs-male taking the dignity in preference of nearer heirs-female, and through the whole of the case, it is expressly and positively stated, that the charters granting the Earldom or Lordship, without mentioning the dignity, some of which are near the same period of time with the charter 1601, did carry the dignities to heirs-male. The Lord Advocate laboured this point much; he confounded me, but he did not convince me.

It is indeed impossible, upon the doctrine maintained in Lady Elizabeth's case, to give the question in her favour.

After 1214, I think it is clear, that territorial peerages must have gone, because lands then became saleable; yet it is maintained in Lady Eliza-

beth's case, that when the Earldom or Lordship was granted, the honour must have gone along with it; and upon this principle, the case answers many instances of male descent. The Lord Advocate says, that upon the same principle, the charter 1601 carried the title.

Sir Adam Fergusson could not say at what particular time territorial honours ceased; he insisted they continued long after lands became saleable, and wore out gradually; but he took vast care to be right in not specifying any particular time.

It is of importance that all questions concerning peerages should be settled upon the principles of expediency as well as of law; and, upon considering this matter, I thought your Lordships must determine upon the charter 1601.

I sent to the agents on both sides, to know whether there appeared any resignations of an honour separate from the land estate, either in the same instrument, or in a separate instrument, before the year 1601. I do not find that any of them can produce any such resignation. That in 1578, or near that time, patents of honour appear to have been first introduced, may be true. Many instances of such patents are stated in the case of Kirkcudbright, now depending before your Lordships; but this does not solve the difficulty. There are two charters stated in Lady Elizabeth's case, that would be decisive against her, they come so very near the date of the charter now in question. There is a charter of Boyd in 1591 stated in the case; and it is said that the dignity went to the heir-male, because this charter so limited the Lordship or dignified fief. I ask

when did this stop? This is only ten years before the date of the charter of Sutherland.

I find it likewise averred in the case, that the title of Earl of Murray was enjoyed by the male line, because there was a charter of the lands granted to heirs-male in 1611. This is ten years after the charter in question.

This doctrine, if true, would cut up the claim of Lady Elizabeth. I was yesterday in doubt whether your Lordships ought not to appoint the counsel to speak farther to this point. I have the greatest respect for the author of Lady Elizabeth's case, but his zeal for the family of Sutherland has led him to maintain an hypothesis which, I am now persuaded, is without foundation?

There certainly cannot now exist any territorial peerages—no man can say when they did exist. Possibly before 1214, but not after. Can it then be maintained, that a grant of the *comitatus* carried the honours so late as the time mentioned?

I am now fully satisfied, that no prejudice can arise from putting a negative upon this hypothesis. I am convinced it was only introduced to account for the descent going in the male line. In the present case no prejudice can follow from it. The presumption must still be in favour of the heir-male, unless evidence is shown to the contrary.

I am myself satisfied, upon the whole, that the claimant, Lady Elizabeth, is entitled to this dignity. If your Lordships concur with my ideas, I would humbly move this as the opinion of this committee—

That it is the opinion of this committee, that the title, honour, and dignity of the Earldom of Suther-

land descended to Elizabeth, the wife of Adam Gordon, upon the death of her brother John Earl of Sutherland, without issue, in 1514, as heir of the body of William, who was Earl of Sutherland in 1275, was assumed by her husband in her right, and from her has descended to the heirs-male, who were also heirs of her body, down to the last Earl of Sutherland in 1766, without any objection on the part of the male line of the said William: That none of the charters produced affect the honour, title, and dignity of Earl of Sutherland, but operate as conveyances of the estate only: That the claimant Elizabeth Sutherland has right to the title, honour, and dignity of the Earldom of Sutherland, as heir of the body of William, who was Earl of Sutherland in 1275.

Lord Camden.

My Lords,—Very little would be but tolerable after what has been said by the noble Lord who has spoke so fully and so ably to this question. I would sit still, unless I judged it proper to add something to what has been said, in order to strengthen and fortify these general rules laid down by the noble Lord, which are of more extent and consequence than occurs in most cases. This may be a means, in future controversies of this kind, to prevent the question from being overloaded with such a prodigious quantity of foreign matter as occurs in this case.

When the question was moved upon the first day appointed for the hearing, I was terrified with the appearance of it, and would have withdrawn myself

from attending it; but, after hearing the counsel answer some questions that were put to him by the noble Lord who has now spoke, I soon discovered the whole would be reduced to a very short point, when cleared of all the rubbish that has been thrown upon it. In fact, it now appears to me to be a very clear case.

This is a mere question of fact.—Much time and labour have been bestowed to show whether peerages descended to males only, so as to exclude the females; or whether females could take by legal descent. Many instances of the descent of peerages have been stated, and all the instruments relating to these are only to prove that fact. Two hypotheses and systems have been set up by the parties; but both are erroneous.

With respect to the descent of the dignity, the first charter insisted on, in point of time, by Lady Elizabeth, is only an erection of the lands into a regality, and could not operate as a transmission of the dignity. The next charter, in 1455, contains a grant of the *comitatum hæredibus suis*, without any express description of the honours. Lady Elizabeth contends that this passed the honours, upon this idea, that then, and much later, all dignities were territorial, that a grant of the Lordship or Earldom always carried the title of honour, and that a limitation of the lands was a limitation of the dignity. This is the foundation of her claim.

The counsel have laid it down that peerages were territorial in 1455, in order to show that many peerages, on that account, went along with the land estate to males, in preference to females. They

were under a necessity to give that answer to the instances stated, and to insist that the charter of the lands passed the dignity.

The idea of territorial dignities, applied in this way, has carried Lady Elizabeth's counsel too far. They have even carried it to 1601, without considering that there is a charter of the Earldom of Sutherland in that year, which, by this rule, would carry the dignity to Sir Robert Gordon.

This shows that counsel do not always, in supporting a hypothesis, consider what consequences may follow. If Lady Elizabeth's counsel had seen that this would have overturned her claim, they would have changed the doctrine.

It is impossible to give any answer to what the noble Lord stated upon this point. If the charter of Boyd in 1591 carried the dignity, it must be very difficult to give a solid reason why the charter of Sutherland, a few years after, should not operate the same effect. Your Lordships are much obliged to the noble Lord for the great attention he has given, and the great trouble he has taken to establish the legal rules to govern the descent of peerages. According to these rules future cases will be decided; and I am sure they are such as your Lordships will now, as I myself do most heartily, concur in opinion. If they are adopted, the decision will be clear, whenever the case occurs again. It will be understood it is to proceed upon the same principle as the case of Cassillis.

It will likewise be understood as an established point, that no charter of the Earldom or Lordship, without specially mentioning the dignity, shall be

understood to carry the title of honour, after what has now been said with respect to the charter in 1601.

It is certain that in *very old* times, the grant of the barony itself carried the dignity; but peerages as now enjoyed are totally different. So long as territorial law took place, a conveyance of the Lordship or Barony conveyed the dignity. They needed only look to the lands, and the dignity followed of course. But, when the territory and dignity divided; when the Crown created peerages without regard to estates; from that time no instrument regarding the lands could affect the dignity.

When a question arises with respect to this matter, it is impossible to lay down a different rule from what has now been stated.

In 1455, the charter of the lands could not convey the dignity, unless you can show me that dignities were then territorial. It is impossible to show this. You must show it clearly, by direct evidence, and not by conjecture.

Territorial honours must have ceased at a very early period; and it is not difficult to guess how this came to be brought about. The King could erect *any* lands into a barony, and from thence the title was derived. Now, in process of time, when peerages became *personal*, the title came to be perfectly nominal, and might be taken from a rock or from a castle. It proceeded gradually, and the title grew to be merely nominal, and no longer territorial. But, for the same reason, it is impossible to say when the one ceased, or the other began. The

only thing to be considered is, shall you begin from old times, or begin now and go backwards? I am sure they are not territorial now. You must show then when they were territorial.

With regard to the charter 1455, I am clear it ought not to be received as a grant or transmission of the dignity. I am persuaded that this rule, with respect to the effect and import of such charters, was adopted in the case of Cassillis. There were in that case *twenty* different instruments, some to heirs-female, some in tail male. If the judgment had proceeded upon these, it is difficult to account for it. It passed upon other grounds—upon the proposition that has been stated, that where no limitation of the dignity appears so as to instruct the descent, we must presume it to go to males. This was clearly the principle of the decision.

I am therefore of opinion, that the charter in 1601 can have no effect with respect to the dignity; and that the whole other charters produced have as little effect, and ought to be no evidence in this case. The ancient limitations may operate as a circumstance, but ought not to be admitted as a rule of evidence to determine absolutely the descent of peerages.

The next evidence to be considered is that upon which the whole cause rests. If your Lordships shall be of opinion that Lady Elizabeth took the dignity in her own right, in 1514, the case is clear.

Sir Robert Gordon carried the matter so far as to maintain, that it was impossible females could be admitted to succeed to dignities strictly according

to the principles of the feudal law; and he argued that this continued to be the law of Scotland to this day.

This is most certainly a mistake, and without foundation. I do not discover in England when the feudal law was adopted as the law of the country. It was only introduced in part, and was soon incorporated with the customs or common law of the kingdom. I see the law of England and Scotland stand, in this particular, upon the same bottom. Can there be any doubt that females were capable of taking lands at any period of time in England? By the law of Scotland they were equally capable. *All* the law books say that females had a right to take lands by legal descent. *There never existed a total exclusion of females.*

This is not denied; but they endeavour to make a distinction between lands and dignities. I can find no distinction. I see from indisputable evidence, that no less than nine of the thirteen ancient Earldoms passed through females and came to females.

I have found an additional evidence in confirmation of this. In the great contest between Bruce and Baliol, King Edward I., to whom the rights of the several competitors for the kingdom of Scotland were referred, was assisted at a meeting on the Borders by forty auditors chosen by Bruce, forty by Baliol and Cumyn, and by twenty-four English peers. King Edward desired that this question should be answered, By what laws and customs judgment should be given? and whether otherwise concerning the Kingdom than concerning Earldoms, Baronies, and other fiefs? The answer is remark-

able, and was given unanimously. It was in these words : "*De prædicto regno est judicandum quoad jus succedendi, sicut de comitatibus, baroniis, et aliis tenuris impartialibus.*" And judgment was given agreeable to this answer, "Secundum leges et consuetudines regnorum quibus præest, de jure subditorum habet judicare, quod quidem ab omnibus prædictorum regnorum est incolis approbatum atque receptum." It is remarkable, too, that both Bruce and Baliol claimed in right of women, and it was admitted that by the law of the land the kingdom itself, as well as dignities, passed to women.

This satisfies me—it is a great authority, and I am persuaded that by the intercourse which had for a long time subsisted between the kingdoms, the laws of succession in both were pretty nearly the same. The adopting the Regiam Majestatem as the law of Scotland is a proof of this. It is almost a transcript from Glanville. Sir Thomas Craig, indeed, would not admit it to be the law of Scotland : he is angry, and says it is a plagiary. It shows, however, how like both kingdoms were at that time in law. I wish they were the same now.

Sir Robert has, however, discovered, that his ancestor Adam Gordon, who married Lady Elizabeth, must have been created Earl of Sutherland ; and he has built supposition upon supposition, sufficient as he thinks to overturn the evidence of Lady Elizabeth taking the dignity in her own right.

For this purpose Sir Robert makes no scruple to say that his ancestor was most ambitious, artful, and violent; that he imposed upon one brother, and overpowered the other, in order to attain his ends;

that he imposed upon John, whom he had entirely under his management, and that he drove Alexander out of the field.—He says farther, that the Duke of Albany, who was then Regent of Scotland, was induced, from the great power and influence of his brother the Earl of Huntly, to bestow upon Adam the title of Earl of Sutherland, descendible to his heirs-male.

There is a short answer to all this. It is clear that Adam Gordon imposed upon nobody. Most certainly he did not take the estate of Sutherland, for it remained with his wife. And, as to the dignity, what did he do with respect to the male branch of the family then existing, and who by this doctrine had a right to the dignity? Nothing. It is admitted he did nothing. The whole circumstances he has stated have been invented to give a colour to his claim.

If Adam Gordon had been ambitious, would he not have first secured the estate? This was certainly an object worth his attention. But there is not a colour of evidence of any kind to support this claim.

Sir Robert has farther introduced a resignation by John and Alexander, without expressly saying from which of them it proceeded. Then a question arose, whether a Regent had, by the law of Scotland, any power to confer dignities?

I am of opinion, that a Regent could not, by the law of Scotland, have done it. There is no evidence of any creation by a Regent in the long time of minorities which happened in that kingdom.

The Lord Advocate seemed to admit, that the dig-

nity could not have been granted without a previous resignation. Yet there is not only no evidence of any such resignation, but it now comes out that it was absolutely impossible there could have been any resignation to be the foundation of a new grant of the dignity; for, even supposing a resignation had been granted by John, the Lord Advocate could not deny but that it must drop by his death.

As, therefore, there could be no resignation, or any new grant of the dignity, Lady Elizabeth must have taken it in her own right.

I have no doubt that Adam Gordon, her husband, enjoyed the title by courtesy or the usage of the times. I am not even sure but that the husband had a right to sit in Parliament.

The instances stated in proof of this are clear. The case of Buchan is indisputed. Athole is still stronger, for there two daughters successively took the estate and Earldom. Isobel, the eldest, married Thomas de Gallovidia; and, failing their issue, both the estate and dignity passed to her sister Fernelith, who married David de Hastings. It appears that both husbands took the title. These are strong facts. The heiress of Angus married two husbands, and they successively took the title. Every one of the nine instances of ancient peerages stated by Lady Elizabeth, prove the husband taking the title in right of his wife. I will not mention the English cases—they are very numerous.

It is clear, from Regiam Majestatem, that in lands the husband had a right by courtesy, the same as in England. If the right of courtesy took place in England, as it indisputably did, with respect to

dignities, it ought by analogy to do so in Scotland. Why make any distinction? When the law and usage were the same in the descent and enjoyment of lands, why should they not be the same in this case?

In this view, if Adam Gordon was Earl of Sutherland only in right of his wife, it becomes unnecessary to mention any of the other points insisted on. Lady Elizabeth was clearly entitled, in her own right, to enjoy the dignity as Countess of Sutherland, and of consequence the claimant, Lady Elizabeth, is now entitled to it.

The decision or interlocutor of the Court of Session, in 1706, certainly does not prove any thing for Adam Gordon's creation. The Court of Session had no occasion, in the course of the proceedings in the precedency, to enter into all the evidence, and into that full state of the question now laid before your Lordships. Your Lordships are not bound by their opinion, and I dare say you will not deem it of any weight in this case.

I am, therefore, upon the whole, clearly of the opinion which the noble Lord has stated to your Lordships, and I concur with the motion he has made.

The Committee of Privileges having agreed with the opinions delivered, resolutions in conformity therewith were adopted and reported to the House of Peers; whereupon, and in conformity therewith—

21*st March*, 1771.

It was resolved and adjudged, by the Lords spiritual and temporal in Parliament assembled, that the

title, honour, and dignity of the Earldom of Sutherland descended to Elizabeth, the wife of Adam Gordon, upon the death of her brother, John Earl of Sutherland, without issue in 1514, as heir of the body of William, who was Earl of Sutherland in 1275, was assumed by her husband in her right, and from her descended to the heirs-male, who were also heirs of her body, down to the death of the last Earl of Sutherland in 1766, without any objection on the part of the male line of the said William.

Resolved and adjudged, by the Lords spiritual and temporal in Parliament assembled, that none of the charters produced affect the title, honour, and dignity of Earl of Sutherland, but operate as conveyances of the estate only.

Resolved and adjudged, by the Lords spiritual and temporal in Parliament assembled, that the claimant Elizabeth Sutherland has a right to the title, honour, and dignity of the Earldom of Sutherland, as heir of the body of William, who was Earl of Sutherland in 1275.

Ordered, that this judgment be laid before his Majesty by the Lords with white staves.

APPENDIX.

APPENDIX.

NOTES OF LORD MANSFIELD'S SPEECH.*

THERE are three claimants to this title and dignity. 1*st*, Mr Sutherland of Forse, who claims as *heir-male* of William Earl of Sutherland, in 1275; and there is no doubt he is the heir-male, having clearly proved his pedigree.

2*d*, Elizabeth, the daughter and only child of the last Earl of Sutherland, *i. e.*, *heir-general* of Earl William, who lived in 1275.

3*d*, Sir Robert Gordon claiming as *heir-male* of Adam Gordon, who, Sir Robert Gordon says, was created Earl of Sutherland, upon a resignation of the honour into the hands of the Crown, sometime between June and October 1515.

When the petitions of these several claimants came to be supported by cases, and even down to the hearing at the bar, the dignity was considered by all parties as an ancient one, and of which the limitations did not appear; the author of Lady Elizabeth's case, not pleading as a counsel, but delivering it as his opinion as a judge. None of the claimants ever had an idea of any instrument of creation. Sir Robert Gordon rests upon the presumption of law, that there being no evidence of the grant, the peerage

* These notes, which supply many omissions in the preceding speech, are given as taken from the MS. of the late Robert Hamilton, Esq., Advocate, one of the Principal Clerks of Session, now in the Library of the Faculty of Advocates. It was deemed better to give each set of the notes separately, instead of attempting to blend them into one. In essentials, both sets of notes agree.

must be presumed to stand limited to heirs-male of the body of the person first ennobled. Says Lady Elizabeth, I answer this presumption by the *fact*, that in 1514 the dignity actually descended to a female.

The cases have gone into a good deal of learning and matter; but the question comes, notwithstanding, to be the shortest and clearest case I ever saw. When neither original creation nor the limitations of a peerage appear, the presumption is to the heir-male, but always open to the heir-female to contradict.

It is very remarkable, that there is no law of peerage before the Union; not a decision by the King, or Parliament, or Court of Session, except one in the case of *Oliphant*, and all agree, it was a very bad judgment; for there the Court found, that the mere resignation into the hands of the Crown of a peerage, *in favorem*, extinguished the dignity, leaving it to the will of the Sovereign to revive the peerage or not, at pleasure, which was certainly wrong. The only other question agitated before the Union, touching peerage, was the Precedency cause. The judgment there was not final, and the Court clearly proceeded on a mistaken apprehension, that in 1514 the heir-male existed; the contrary now appears, and even that there were several families. Therefore, the judgments made in this House, upon the several questions, which have from time to time occurred respecting the Peerage of Scotland, are the only rules that can be depended on, for guiding in competitions of this nature. There is nothing in the books, nor any thing quoted from them, relative to peerages, and yet certain things are known—certain things established by custom, particularly that dignities were originally territorial,—that they followed the estate, as we find now in England a manour to have a lord of the manour. The husband of the wife having a territorial dignity was seised thereof in *courtesy*. Another distinction likewise took place, that these dignities went by *service* to the person last seised, and thereby a sister of the full, let in to the exclusion of a brother of the half-blood. But they have been personal for centuries, the doctrine of service to the person last seised is exploded of course, and the descent now taken from the person first ennobled. I make this preface to show how little positive evidence there is relative to peerage.

In the Precedency cause, the Court of Session would not pre-

sume a *female* descent. In the case of Lovat in 1729, the question was taken up in the Court of Session, which certainly had no jurisdiction. The judgment went partly on a private award, which gave the estate on payment of a sum of money to *Lovat.* It did not go on in consequence of the investitures or limitations of the estate, but on the presumption of its being a personal dignity, and as such, the original limitation in favour of males. At that time, politics and party mixed with the determination. Lord Lovat had the countenance of the Duke of Argyle, and the heir-general was protected by the Duke of Roxburgh. I remember I talked that matter over with Mr Forbes and Mr Dundas. Mr Forbes would have lost his life to have supported the male succession; and Mr Dundas was no less zealous for the female line. When Lord Lovat, after the Rebellion in 1745, was committed to the Tower, it was matter of much deliberation, how he should be proceeded against.—If as a peer, he might say he was a commoner;—if as a commoner, it was apprehended he might plead his peerage. I was of opinion, that the true, solid ground, was the presumption for the heir-male. Accordingly, he was proceeded against as a peer, and he never thought proper to contradict it. Afterwards came the case of *Cassillis*, which was very fully and deliberately considered and attended to. The judgment there went on the general ground, that in an ancient peerage, where neither instrument of creation nor limitation of the honour appeared, the legal presumption was in favour of the heir-male of the body of the person first ennobled; and in all such cases, this presumption must operate until the contrary appear. Upon this rule of construction, and not upon the limitations of the *estate*, at the time when the family was ennobled, did the judgment proceed. It is true, however, that the investitures were mentioned as a circumstance in the scale for confirming the general rule. There was no difference of opinion respecting this part of the cause. I remember, indeed, a noble Lord, who I don't see here, was of opinion, that the charter 1671, according to the custom of those days, carried the peerage and precedency with it, to the *heir-general.* The words struck me; but on a more careful examination of that charter, I discovered that it bore reference to a former one, dated in 1642, as containing every thing intended to be granted by this latter charter; and on looking at earlier

charters, I saw it never meant to pass, nor could pass, the peerage, being only a private charter of lands, without a royal signature or words applicable to a dignity. Lord *Hardwick*, therefore, was of opinion, that the charter 1671 could not carry the peerage. I was of the same opinion, and after this explanation, if I remember right, the noble Lord, who first thought otherwise, at last concurred in opinion with us. I settled with Lord Hardwick the penning of the judgment, and we settled it with a view, that it might be a rule, so as to exclude all future questions. It was declared that Sir Thomas Kennedy had a right to the dignity of Earl of Cassillis, as heir-male descended of the body of David the first Earl of Cassillis; and also to the dignity of Lord Kennedy, as heir-male descended of the body of Gilbert the first Lord Kennedy. If the peerage had been adjudged to Sir Thomas Kennedy, because he was heir under the original investitures of the estate, some of your Lordships were too well acquainted with my Lord Hardwick's accuracy to suppose, that this ground would not have been stated in the judgment.

In the case of *Borthwick*, the Crown furnished the claimant with money to make good his title, and he had nobody to oppose him. I only stated the chasms in his pedigree, which put it off for a session. The next year he supplied his proofs. Judgment went of course for him the heir-male, in consequence of the former judgment in the case of Cassillis; and no regard whatever was had to investitures.

All the laws of peerage are since Queen Elizabeth; many since the Revolution; and some in my own time. I am very glad to find, that upon the nice discussion in this case, the judgment of Cassillis seems to stand on solid ground; and to have received additional strength from the thorough investigation which has been here made into the limitation and descent of ancient peerages; insomuch, that I am now infinitely more convinced of the propriety and justice of that judgment.

It now comes out, that this Peerage of Sutherland is the only one subsisting at this day, which was created prior to 1274. That nine-tenths of those since are limited to *heirs-male*. Twenty out of twenty-five limitations unknown are admitted to have gone to heirs-male. What comes out by going farther back does not satisfy me, that these more ancient dignities did not go to *heirs-*

male. Whenever the lord of an estate had an only daughter, he applied to the Crown, and the Crown gave it to *heirs-general*, notwithstanding the original limitation might be, and probably was, to heirs-male. Nine of them appear in this case, and yet the probability is, that the original limitation was to *males*.

Before the reign of James I. of Scotland, that is, about the 1424, most of the original creations are to *heirs-male*. It appears from a book, the author of which (Lord Kames) deserves well of the republic of letters, that the Earldom of Murray, in 1305, was granted to Randolph and his *heirs-male*. Another, Carrick, in 1270—Earldom of Wigton the same limitations in 1341—Fife in 1362—and Monteith in 1427—all to heirs-male. The Earldom of Ross stands in a particular situation. The first limitation is to heirs-male, but with a remainder over to heirs-general. It was very unnecessary to go over this ground, were it not to show, that all these old instances strengthen this general presumption founded on law and truth, that in every original grant or constitution of a dignity, the first limitation was to heirs-male. If a contrary presumption was to take place, many claims would start up. In England, whenever a peerage went to *co-heirs*, it was in *abeyance*, and optional for the Crown to revive it. I take by analogy in such a case, it went in Scotland to the eldest female.

But to return to the only question in this cause, whether Adam Gordon in 1515 was created Earl of Sutherland or not? I have always been of the same opinion, as some of your Lordships know. I never saw a clearer or a plainer case. It is now established, that there existed at this period several male descendants of the body of William Earl of Sutherland, who lived in 1274. For besides Sutherland of Forse, Lord Duffus's family, and other branches which had come off the same stock at later periods, were living. The fact is agreed, that Elizabeth took the estate by descent, as heir to her brother; and that through her it transmitted to the succeeding heirs totally unconnected with any right flowing from her husband Adam. She is likewise found in possession of the dignity. Both have gone together in her descendants for upwards of 250 years. The estate, Sir Robert Gordon admits, is her right; and his only ground for separating the dignity is an as-

sumed presumption, that there must have been a creation of her husband. But why? I lay out of the case the service 1514, and infeftment 1515. The same observation occurs on that of her brother's service to his father; and in other instances, the service of her own grandson; in neither of which is the title of Earl given. The amount of all the other proofs is, that Adam Gordon was called Earl of Sutherland. He certainly took it according to the notions which then prevailed, (rightfully or wrongfully,) by his wife.

In both kingdoms, personal honour came in place of territorial. They assimilated by degrees—one crept imperceptibly on the other. Some peers of this House were made Earls of a county—keeping the idea by analogy—but still as personal honours, the territorial being worn out. In territorial dignities, the husband took by the *courtesy*. At the coronation of Richard II., the Duke of Lancaster claimed to act as tenant by the courtesy. In the reign of Henry VI., the Earl of Salisbury claimed on the death of the Countess of Salisbury without issue. It comes down to the reign of Elizabeth, as appears from Collins. It was only abolished in her reign, but it was as certainly held before as law. There are many instances in Scotland of the tenants by the courtesy before 1514. Adam Gordon could not be created without a resignation—a resignation from whom? one of the counsel put it from Alexander a bastard—till this came—how comes he to have anything to say? His right [to succeed] to John —quite an imagination to set him up. The second counsel did not care to meddle with him, but put it on John's resignation—Impossible—there was then no King—there could be no resignation executed after the resignee's death. The tradition and sense of the family that the dignity went to Elizabeth is very strong. No argument or presumption can arise from the entries in Parliament. They were marked as they entered, but in 1606, there issued a commission for ranking the nobility, and how does this stand? The Peerage of Sutherland, though not far enough back, is ranked, as in respect of the old peerage; taking place of ten others, which, upon the supposition of a new creation, must have preceded it. There could not be a new creation. In 1630, the family enter a protestation, complaining that they were not car-

ried further back. In 1630, Sir Robert Gordon's own ancestor wrote a book, wherein he mentions it as having come to Elizabeth.* This being the case, it is quite impossible to doubt that it did so —nor will a proof or presumption to the contrary be now endured or let in: and as there is no doubt, that women were capable to take it, it is a clear answer to the presumption relied on by Sir Robert Gordon. In this state of the laws, I am extremely clear, and have always been of the same mind.

A doubt has arisen out of the original case of Lady Elizabeth, which has given me much trouble. It is contended that the charter 1601, which grants the whole earldom, changing the holding from *ward* to *feu*, limits the honours as well as the estate to heirs-male. This plea is grounded on the principles maintained, and the facts stated in the additional case of Lady Elizabeth, for showing that dignities were originally territorial, and transmitted by charters along with the lands. It was first struck out at the bar by the Lord Advocate, and argued very ably by him, particularly in reply; and it is impossible, upon the doctrine of Lady Elizabeth's additional case, not to give judgment against her. For if her doctrine is right, the charter 1601 carried the peerage. No answer was given to it by Sir Adam Fergusson, only that it was too modern; but he could not fix where to draw the line. Your Lordships will take great care, and consider it deliberately. Since the hearing, I sent to both sides to inquire whether there existed a resignation of an honour separate from the land, either in the same instrument, or in a separate instrument. None can be produced. Letters patent 1488 don't affect the ancient earldoms. There are *two* instances decisive against Lady Elizabeth, on the foundation that the charter 1601 is a good conveyance. *Boyd*, in 1591, where it is said, in the additional case, that the honour descended to the heir-male, because of the resignation of the barony. "*Dominium et baroniam hæredibus masculis ratione talliæ.*" And in the Peerage of *Moray*, 1611, ten years after the charter 1601, the same argument occurs. I employed a good deal of thought on this matter, talked with the noble Lord hereon

* Ferrerius, however, affirms that Adam Gordon was created Earl of Sutherland. His words are—"Adamum secundo genitum dominium de Aboyne instituit, cui postea per nuptias Elizabetham Sutherlandie hæredem junxit matrimonio, qua de re Comes Sutherlandiæ deinceps creatur."

within these two days, and doubted whether we should not allow the counsel to speak to it. With all due deference to the author of the case, I am now satisfied there is no foundation for his territorial principle. It certainly does not now exist, and no man living can say when it did. It clearly must have ceased before 1214, when lands come *in commercio*, and adjudication went against them. When the *comitatus* did not carry the honour, a charter ought to be held only a conveyance of the estate. I am now satisfied no inconvenience can arise from the negative of this hypothesis. It only supports the presumption of male succession. I thought it proper to mention this solution, but if your Lordships are any ways doubtful, you would choose to hear counsel upon it.

I would propose to your Lordships to come to an opinion. 1*st*, The title, honour, and dignity of the Earldom of Sutherland, descended to Elizabeth, the wife of Adam Gordon, upon the death of her brother, John Earl of Sutherland, without issue, in 1514, as heir of the body of William, who was Earl of Sutherland in 1275, was assumed by the husband in her right—and from her descended to the heirs-male, who were also heirs of her body, down to the death of the last Earl of Sutherland in 1766, without any objection on the part of the male line of the said William.

2*d*, That none of the charters produced affect the title, honour, and dignity of the Earl of Sutherland, but operate as conveyances of the estate only.

3*d*, That the claimant, Elizabeth Sutherland, has a right to the title, honour, and dignity of the Earldom of Sutherland, as heir of the body of William, who was Earl Sutherland in 1275.

THE

SPYNIE PEERAGE.

1785.

SPYNIE PEERAGE.

Alexander Lindsay, a younger son of David Earl of Crawford, was a great favourite of King James VI. and held the offices of Vice-Chamberlain and Gentleman of the Bed Chamber. He attended his Majesty to Norway in November 1589, and made considerable pecuniary advances to his royal master on that occasion. He married Lady Jane Lyon, Countess-Dowager of Angus, and the King previously condescended to solicit her hand for his favourite, and addressed a letter, under his own hand, to her, in which he urges the lady to listen favourably to her lover, and promises to take them both under his especial protection.*

In 1590 his Majesty raised Mr Lindsay to the Peerage by the title of Lord Spynie. The only existing writing to which this creation is referable is a Crown charter, dated the 6th of May of that year, by which the lands, lordship, and barony of

* A fac-simile of this singular document will be found in the Abbotsford Miscellany. The original is preserved amongst the Balfour MSS. in the Library of the Faculty of Advocates, Edinburgh.

Spynie, and various other lands in the counties of Elgin, Inverness, and Banff, formerly the possessions of the Bishop of Moray, are conveyed to the grantee, *his heirs and assigns.* These estates were erected into the Barony of Spynie, and thereafter follows this clause:—" Dando, concedendoque dicto Magistro Alexandro, *suis predictis*, Titulum, Honorem, Ordinem, et Statum *liberi Baronis, qui nunc et imperpetuum Barones de Spynie nuncupabuntur.*"

The " Tenendas" clause is in these words:— " Tenendas et Habendas totas et integras terras et Baroniam de Spyne nuper (ut dictum est) erectam comprehendend. particulariter omnes et singulas prenominatas terras, dominia et baronias, &c. prefato Magistro Alexandro Lindsay, *heredibus suis et assignatis*, in feodo et hereditate, liberaque baronia imperpetuum."

Lord Spynie sat and voted in the first Parliament summoned after his creation, and obtained a Parliamentary ratification of the Crown grant in his favour.* In this act the charter is engrossed at full length, and is confirmed in every respect, and of new " gevis, grantis, and disponis to the said Alexander, Lord of Spyne, and Dame Jane Lyoun, Countes of Angus, his spous, the langest levar of thame tua in coniunctlie, *and to the aires laufullie gottin or to be gottin betuix thame*, quilkis failzeing, to the narrest and lauchfull airis maill of the said Alexander quhatsumevir and thair assignais, heritablie, all and sindrie," &c. " To be all unitit, annexit, and incorporat, lyk as our souverane Lord, with

* Thomson's Acts of Parliament, 2d vol. p. 650.

auise foirsaid, unitis, annexis, creattis, and incorporatis the samen in ane temporall Lordschip and Baronie, callit and to be callit in all tymis cumming the said Lordschip and Baronie of Spynie: and gevis and grantis to the said Alexander Lord of Spynie and *his foirsaidis*, the Honor, Estate, Dignity, and Preeminence of ane frie Lord of Parliament, to be intitulat Lords of Spynie in all tyme cumming, with all privilegis belanging thereto: To be haldin of our souerane Lord and his successors in frie heritage, and in ane frie temporal Lordschip, Baronie, and Regalitie for ever."

This act was followed by a Crown charter, dated 17th April 1593, with the same destination, conveying the barony, and especially giving and granting to Alexander Lord of Spynie, "suisque heredibus et assignatis supra recitatis," the title, honour, order, and status of a free Baron and Lord of Parliament, who should be styled and entituled Lord of Spynie in all time to come.

Alexander, first Lord of Spynie, died in 1607, and was succeeded by his son Alexander, then an infant, who in 1621 was served heir to his father, and thereafter was infeft in the estates.

It appears that a Crown charter was passed on the 26th of July 1621 in favour of the second Peer, by which in the outset his Majesty gave and disponed to his Lordship, and *his heirs-male* and assigns whatsoever, the lands of Ballysack, &c. as also various patronages of churches, unnecessary here to enumerate. These lands and patronages are stated to have belonged to Alexander Lord Spynie, Sir John Scrymgeor of Dudhope, Knight, James Tweedy

of Drummelzier, James Harper, and David Mitchell, merchant-burgesses of the city of Edinburgh, and to have been resigned in the hands of the Crown for new infeftment, "consanguineo Alexandro Domino Spynie, *heredibus suis masculis et assignatis.*"

These lands and patronages are distinct from those originally erected into the Barony of Spynie, and were intended to be substituted in their place, as will be seen from the following clause, by which a new destination is apparently given to the descent both of titles and estates. It may be here as well to remark, that there never appears to have been *any resignation* of the honours of Spynie in the hands of the Crown by the second Baron—unquestionably a valid mode of changing the order of succession—but, on the contrary, there was merely a new creation, with a different remainder, without any other attempt at destroying the original substitution.

"Præterea, nos considerantes, quod nos ex nostra specialibus gratia et favore, erga dictum quondam Alexandrum Dominum Spynie, patrem dicti nostri prædelicti consanguinei, Alexandri, nunc Domini de Spynie, gesto . . . . die mensis . . . . . Anno Domini Millesimo . . . . . fecimus et creavimus dictum quondam Alexandrum Dominum Spynie temporalem Dominum, ac dedimus et disposuimus dicto quondam Alexandro Domino Spynie, totas et integras temporales terras Episcopatus de Murray, quæ in unum liberum dominium et baroniam, Dominium de Spynie nuncupat., unita fuerunt, et quod postea, nos, episcopos ad suam integritatem restaurare determinati, dictus quondam Alexander, Dominus

Spynie, nostro mandato, suum jus et titulum integrarum terrarum et ecclesiarum ad patrimoniam dicti Episcopatus de Murray, pertinen., voluntarie renunciavat et extradonavit, ac nos volentes quod sicuti titulus, honor, et dignitas, dicti Dominii de Spynie ad dictum nostrum prædilectum consanguineum Alexandrum nunc Dominum Spynie pertinent, ac cum ipso et successoribus suis remanent, ita etiam una pars terrarum et status de præsenti ad dictum nostrum prædilectum consanguineum, Alexandrum, Dominum Spynie, pertinen. nomine dicti Dominii de Spynie in perpetuum gaudebit. Igitur, nos, cum avisamento et consensu prædicto, ordinavimus et ordinamus prædict. villam et terras de Ballysack, cum maneriei loco et fortalicio earundem, terras maneriei, locum et fortalicium de Spynie, nuncupand. Et similiter, nos, cum avisamento et consensu præscript. de novo fecimus, univimus, annexavimus, creavimus et incorporavimus, tenoreque præsentis cartæ nostræ, facimus, unimus, annexamus, creamus et incorporamus, Omnes et Singulas terras, aliaque prescript., cum manerierum locis, fortaliciis, domibus, edificiis, hortis, pomariis, molendinis, multuris, tenentibus, tenandriis libere tenentium, servitiis, partibus, pendiculis et hujusmodi pertinen., cum advocatione, donatione, et jure patronatus beneficiarum, dignitatum, aliorumque supra mentionat., et omnibus privilegiis, communitatibus, casualitatibus, proficuis, et divoriis iisdem spectan. et pertinen. in unum integrum et liberum Dominium et Baroniam nunc et omni tempore a futuro, Dominium et Baroniam de Spynie nuncupand. ordinand. prædict. maneriei locum et fortalicium antiquitus nuncupat. maneriei locum et fortalicium de Ballysack, et nunc,

et omni tempore a futuro, manerïei locum et fortalicium de Spynie nuncupand. principale fore messuagium dicti dominii et baroniæ : ac volumus et concedimus et pro nobis et successoribus nostris, decernimus et ordinamus, quod dictus noster consanguineus, Alexander Dominus de Spynie, *suique antedicti*, prædicto titulo et ordine dignitatis dicti dominii de Spynie, [fruentur ?] cum omnibus honoribus, dignitatibus, prerogativis et preeminentiis eisdem spectan., secundum tenorem *infeoffamenti dicto quond. suo patri desuper confect. ac secundum dicti quond. sui patris creationem, in temporalem Dominium, tempore præscripto.*"

Alexander, the second Lord Spynie, married Lady Margaret Hay, daughter of George, first Earl of Kinnoul, and by her had Alexander, who married, but predeceased his father without issue, George, who succeeded him, and two daughters, Margaret and Anne.

George, the third Lord, suffered both in his property and person during the Usurpation on account of his loyalty. He was long confined in the Tower of London ; his estates were forfeited ; he was excepted in Cromwell's Act of Indemnity in 1654, and he was obliged to pay a large fine to the Protector for a reversal of the forfeiture, whereby he incurred very heavy debts, and his estates were sold or carried off by his creditors in his lifetime. He died insolvent in 1671, without issue, and his testament was confirmed by his brother's widow, Jane Lindsay, as executrix-creditrix.

His sister, Margaret Fullarton, married William Fullarton of Fullarton, Esq. in the county of Perth, but she did not assume the honours; and although

the Peerage was included in the Parliament roll made up at the Union, and was regularly called along with the other Peerages at elections, no attempt was made by the heirs of this lady to vote, or to claim the dignity, until the year 1785, when a petition was presented to the King on behalf of William Fullarton, Esq. great-great-grandchild of the Honourable Margaret Lindsay, claiming the honours as heir-general of the marriage between Alexander, first Lord Spynie, and Jane, Countess of Angus. This petition was referred to the House of Peers, and by their Lordships, 1st March thereafter, again referred to a Committee of Privileges.

In the case lodged for the claimant he maintained, that by the original creation the honours were destined to the heirs-general of the marriage, and that the charter 1621, by which a limitation to heirs-male was introduced, could not affect the previous creation, more especially as there was no resignation of the honours. That the charter 1621, moreover, proceeded upon a mistake as to the former limitation of the lands, contained no resignation of the honours, and pointedly referred to the original creation as to the enjoyment of them.

That the charter 1593 must be the rule of succession to the honours, and that the claimant's right as heir-general by virtue thereof was strengthened by the charter 1621, which referred to the previous infeftment. In regard to the long silence in claiming the dignity, the claimant stated that the family difficulties made it inconvenient previously to assume the title, and that it was therefore allowed to remain dormant, as there was no prescription in peerage matters.

Upon hearing counsel for the claimant, and the Lord Advocate for the Crown, it was, 15th April 1785, "Resolved, That it is the opinion of this Committee, that although the original creation of the title, honour, dignity, and peerage of Spynie has not been shown, yet it sufficiently appears from the act of ratification 1592, the charter 1593, and the charter 1621, that the descent was limited to the heirs-male of Alexander Lord Spynie, consequently that the claimant has no right to the said peerage."

Which report was agreed to by the House.

The following somewhat imperfect notes of the speech of Lord Mansfield are preserved in the charter-chest of the present representative of the noble family of Spynie, together with the important observations of Lord Hailes on the judgment.

15*th April* 1785.

The claimant founded on charter 1590 by petition and case—now admitted that this charter has nothing to do with Peerage. No other instrument of original creation appears. Act 1592 refers to a Peerage existing—charter 1593 does the same—charter 1621 does the same—none of them original.

Honour created by belting, without writing or mention of descent. Lord Spynie sat in Parliament before Act of Ratification.

His Lordship referred to the act 1592, c. 121, respecting belting. Wherever limitation of a Peerage does not appear, established rule now fixed and settled, that presumption is in favour of heirs-male

of the body. So decided in case of Cassillis, and anxiously adhered to ever since. In Sutherland case, the contrary rule of descent proved.

Principle here is descent to heirs-male, but does not rest here. Instruments produced taken to heirs-male.—Act 1592, and charters 1593 and 1621.

Highly improbable title should in this manner go to a daughter. Niece disinherit her uncle.

Several grants appear to father and son. All to males.*

No pretence for a new creation.

By 1621 no variation intended either to lands or honours. Then only one son.

New lands to be added, and then general words extending to the honour new lands. Expressly to the heirs-male.

REMARKS BY LORD HAILES ON THE DECISION.

The difficulty arising from the charter 1621 is certainly very great, and it might warrant the judgment.

Still the case is not clear. Alexander Lindsay could not have been made a Peer of Parliament by

* The Crown gave in evidence a charter to the first Lord of the lands of Burnsyde, dated in February 1606, in which the destination was, "Heredibus suis *masculis* et assignatis quibuscunque." Three charters to the second Lord, all dated after the charter 1621, in which the lands were limited to heirs-male of the body. The first (March 1623) was of the lands of Carrestoun, the second (April 1624) of the Dominical lands of Leyis, and the third (January 1631) of the lands and Barony of Fineven. It is to these grants, probably, that Lord Mansfield alludes. What he means by saying that the charter 1590 had nothing to do with the Peerage is not very intelligible.

belting, or investing with a belt and sword, between 1590 and 1592. That ceremony was performed in Parliament, if I mistake not, and was a public notification of the King's pleasure in making a Peer, the same in effect and different in form from letters patent. I say he could not have been belted between 1590 and 1592, for there was no Parliament either in the year 1590 or 1591. The illustration from the case of Douglas Lord Belhaven is nothing to the purpose; he was belted not about that time, but forty years after, in the first Parliament of Charles the First. As I take it, the grant 1590, and act of Parliament 1592, and what followed upon it, was all that Alexander Lindsay had by way of patent. The destination is singular enough, but that may be accounted for in this way:—The King meant to favour the children of the Countess of Angus, male or female, but he would not give the temporal Lordship to any other female descendants of Alexander Lindsay. The silence of Lord Spynie's niece is nothing to the purpose; it would have been silly in her to have assumed a title which in those days did not so much as secure the person of a Peer when there was no estate to take along with it. The title of Somerville was laid aside in the last and during part of this century for the very same reason.

THE

GLENCAIRN PEERAGE.

GLENCAIRN PEERAGE.

James the Third, by charter under the Great Seal of Scotland, dated at Edinburgh, 28th of May 1488, created Alexander, therein designed Alexander Earl of Glencairn and Lord Kilmaurs, an Earl. The words used are, " facimus et creamus eundem nostrum consanguineum Comitem in exaltationem sui honoris, perpetuis futuris temporibus Comitem de Glencairn et Dominum de Kilmawris nuncupand." In support of this honour, his Majesty, by the same deed, granted the thirty pound land of Drummond, and ten pound land of Duchray, in the Earldom of Lennox, and County of Stirling, to be held by his Lordship, and *his heirs*, of the King, and his heirs and successors for ever.

Prior to his elevation to the Earldom, Lord Glencairn had the title of Lord Kilmaurs, the consequence of which was, that after his death, at the Battle of Sauchie-burn, in June 1488, his son Robert was enabled to retain the barony, although the Earldom was as a new dignity granted since the 2d of February preceding the creation, annulled

after the Accession of King James IV., by proclamation issued at Scone, and thereafter (6th October 1488) ratified by Parliament.

Cuthbert, the son of Robert, and grandson of Alexander, had the title of Glencairn recognised by the Crown as existing in his person, and the honour descended in a direct male-line from father to son, till it came to William the ninth (or, if Robert, Earl Cuthbert's father, be excluded, the eighth) Earl of Glencairn.

This Lord having great political influence, obtained letters patent, dated at the Palace of Oatlands, (21st day of July 1639,) which referred to and confirmed the grant in favour of Earl Alexander, and the enjoyment of the honour by his descendants. "Volumus et concedimus, et pro nobis et successoribus nostris decernimus et declaramus, quod hæc presens nostra generalis ratificatio est, et erit, tam valida, efficax et sufficiens, ac si prædictæ literæ patentes de verbo in verbum presentibus insererentur, quocirca, nos dispensavimus, tenoreque presentium dispensamus, nunc et in perpetuum. Preterea volumus, et concedimus, ac pro nobis et successoribus nostris, decernimus et declaramus, quod præfatæ literæ patentes factæ et concessæ per dictum quondam Jacobum Tertium, Scotorum Regem, dicto quondam Alexandro Comiti de Glencairn, et hæc presens nostra ratificatio earundem, sunt et erunt, validum, perfectum et sufficiens jus et titulus, unde præfatus Willielmus nunc Comes de Glencairne, heredes sui et successores, omni tempore futuro, libere, quiete, et pacifice, prefatis ho-

nore et dignitate Comitis secundum validitatem predictarum literarum patentium fruentur et gaudebunt."

Earl William was succeeded by his eldest son Alexander, who died 26th May 1670, leaving by his wife, a daughter of Sir William Stewart of Kirkhill, one child, Lady Margaret, who married John, sixth Earl of Lauderdale, and died in 1740.

The dignity was, however, assumed by John, second son of Earl William, who sat in Parliament, and was uniformly recognised as Earl of Glencairn. He died on the 14th December 1703, and was succeeded by his only son, William the twelfth Earl, who, departing this life upon the 14th March 1734, was succeeded by his son, William the thirteenth Earl. His sons, James the fourteenth, and John the fifteenth Earls, successively became heirs to the title and estates, and upon the demise of the latter, 24th September 1796, the whole male descendants of William the ninth Earl failed.

Lady Harriet Don was the sister of the two last Earls, but Sir Adam Fergusson, Bart., of Kilkerran, was the heir of line of Lady Margaret, the only daughter of Alexander the tenth Earl, and, consequently, his Lordship's heir-general.

Upon the death of Earl James, a petition was presented by Sir Adam Fergusson to his Majesty, claiming the Earldom, which was referred to a Committee of Privileges, and a case submitted by the claimant. Lady Don appeared, and claimed, as did Sir Walter Montgomery Cuningham, Bart., who represented himself as heir-male, but no case was lodged for either of these parties.

After Counsel had been heard, the following opinion was delivered by the Lord Chancellor :—

13*th July* 1797.

LORD LOUGHBOROUGH.

This matter comes before your Lordships by a petition from Sir Adam Fergusson, claiming the title of Earl of Glencairn and Lord Kilmaurs, as heir-general of Alexander Earl of Glencairn, who died in possession of these titles in 1670.

In this claim he is opposed by Sir Walter Montgomery Cuningham, stating himself to be heir-male of the family; but whether he be such heir-male or not, is not in evidence before your Lordships. He has given some general evidence of his propinquity in the male line, and therefore has an interest to say that the titles descend to heirs-male. The heir-general of the last Earl of Glencairn, and the Crown, also oppose the claim of Sir Adam Fergusson. Lady Harriet Don is the sister, and undoubted heir-general of this last Earl, and defends the possession of the title by her family.

The claim of Sir Adam Fergusson is stated in his printed case to be founded on a muniment discovered in the repositories of that branch of the family which last obtained possession of the titles, but not entered upon any public record; and it was produced by a person who inspected these repositories, together with an inventory of the writings of the family, which he found along with it. Sir Adam insists that this instrument, which bears date the

28th of May 1488, is in the nature of letters patent, with words of limitation to carry the honours to heirs-general.

The argument at the Bar on behalf of the claimant took a larger scope than in his printed case. It was contended, that though this patent should be found not to regulate the descent of the honours, the peerage was to be decided upon general principles in favour of heirs-general; and the argument upon this point was supported by Sir Adam's counsel with much ingenuity. Had the matter rested here, I should have had no occasion to trouble your Lordships much at large.

It has been fixed by repeated determinations of this House, (and I know of no other authority competent to decide in matters of this nature,) that where the limitation of a peerage is not to be discovered, the presumption is, that it descends to the heirs-male of the body of the original grantee. In the case of the peerage of Lovat, where there was a competition between the heir-general and the heir-male, it was determined by the Court of Session in favour of the latter, and on the ground of that opinion Lord Lovat was tried as a peer. The judgment of this House, in the case of the peerage of Cassillis, was penned expressly to mark the opinion of their Lordships, that the presumption of law was against the heir-general, in favour of the heir-male. The judgment in that case was followed in several other instances by this House, down to the cases of Sutherland and Spynie. In the case of the peerage of Sutherland, the heir-general obtained the title by a judgment of your Lordships; yet the reason was,

because, in the middle of the sixteenth century, the title had been taken up and enjoyed by the heir-general, and transmitted to her descendants; so the ground of the decision there was, that the general presumption of law was done away by the facts in that particular case.

The case of the peerage of Spynie, which afterwards occurred, turned upon the same question. In that title several charters and instruments were referred to as creating the title; but all attempts to prove the limitations by collateral evidence were fruitless; the creation of the title was by the form of *belting*, after which the person so created sat in Parliament, and his son sat also. And this House decided, that the presumption of law carried the title to heirs-male. I recollect not only the speech of Lord Mansfield upon this occasion, but also a consultation I (not then having a seat in this House) had with his Lordship previous to the decision.

If there be any thing certain in the law of peerage, it is this presumption in favour of heirs-male. Though there be many ingenious arguments in favour of the heir-general in that elaborate paper, the additional case in the peerage of Sutherland, it is remarkable that in the speech of Lord Mansfield, in giving judgment upon that claim of peerage, his Lordship brought the greater part of the instances, stated in the Sutherland case, in aid of the doctrine laid down by this House in the case of Cassillis.

The other question, therefore, in this case must determine the right of the claimant. If the creation of the title be referable to the patent 1488, we must take the limitation from the construction of

that instrument. In it the lands are limited to Alexander the grantee and his heirs in fee, and from the probability that the titles and the lands would be limited in the same manner, an argument was raised upon the patent, which bore with considerable force in favour of the claimant.

The question here arising is rather a question of fact than of law, namely, whether the origin of the title be referable to this instrument, or to some other creation. Our inquiry upon this point is much narrowed by the evidence. In 1505 Cuthbert appears sitting in Parliament as Earl of Glencairn. From him all the parties state themselves to be descended; and this is the first time that an Earl of Glencairn is to be found sitting in Parliament. The question therefore is, whether this Cuthbert sat in Parliament as Earl of Glencairn in 1505, by descent from Alexander the grantee in the patent 1488, or whether his sitting was to be attributed to some other, and what other mode of creation?

In examining this instrument, it must have occurred to your Lordships, (it occurred to the counsel at the bar, and it is admitted in the printed case,) that it is of a singular nature, but it does not seem to be a grant confined to the person of the grantee. It received existence under very particular circumstances, and at a turbulent period, respecting which there is a good deal of confusion among historians. A gentleman of much accurate research (Mr Pinkerton) has, however, thrown great light upon this entangled portion of history, the latter end of the reign of King James the Third, and the commencement of the reign of his successor. What I am to

state to your Lordships on this subject, I have collected not so much from history as from acts of Parliament.

A great part of the nobles had rebelled against James the Third, and on the 2d of February 1488, the prince, his son, then about sixteen years of age, was taken out, or took himself out, of Stirling Castle, and joined the rebellious party. With them he set up his standard, and the government was usurped. An action took place soon after at Blackness, in which the advantage appears to have been on the side of the King. (All this I state from the acts of Parliament.) A proposal was afterwards made for a treaty between the opposite parties, and, accordingly, articles were drawn up for that purpose. These articles appear to have been very unfavourable to the King and his party. The articles were not observed, and it appears from an act of Parliament, that the Prince's party accused the other of having entered into a treaty with England. Several of the northern lords, the Earl of Huntly, the Earl of Erroll, the Earl of Marischal, the Lord Glammis, and many others, left the King's party, and went over to the confederates. The war broke out again, and the King's camp was somewhere near Stirling. About this time many grants were made by King James the Third, and this patent, 1488, has an evident relation to the circumstances of those times. The Lord Kilmaurs was then very powerful, and had, with his forces, assisted the King's party in the action at Blackness. His services were also to be rendered in future, as appears from the words of the patent: " Et quod nobiscum cum suis ser-

vitoribus durante toto tempore instantis discordiæ commoretur et remaneat."

Several grants of a similar nature were made about the same time; the then Earl of Crawford, who had become an adherent of the King, was by a patent, dated the 18th of May 1488, created Duke of Montrose, and had a grant of the town of Montrose, which, in his favour, was erected into a regality.

The grant in question, in the present case, creates Alexander Earl of Glencairn and Lord Kilmaurs. Lord Kilmaurs he certainly was before this period. It also grants to him the thirty pound lands of Drummond, and the ten pound lands of Duchray. The lands of Drummond, as appears from the name itself, were the estate of the Lord Drummond, who was of the Prince's party; and it is stated that the lands of Duchray are in a similar situation, and belonged to the family of Lennox. These lands of Drummond and Duchray are never mentioned in any of the posterior deeds of the family, nor in the inventory of those deeds, in which the lands are generally marked with exactness. As to them, therefore, the patent, 1488, must have had no effect.

There is another singular circumstance attending this patent. Though the grant to the Earl of Crawford as Duke of Montrose was dated the 18th of May 1488, yet as one of the witnesses to this patent, on the 28th, he is still stated to be Earl of Crawford. And William Bishop of Aberdeen is here mentioned as Chancellor, though, from several instruments in Rymer's Fœdera, it appears that Colin Earl of Ar-

gyle is styled " Cancellarius Scotiæ" about this period. If it be proper to mention a supposition, I would be inclined to suppose that he continued to be taken as Chancellor by the Prince's party, and that the Bishop of Aberdeen then became the King's Chancellor. Certain it is, that the Earl of Argyle was Chancellor both before and after this period; and in that turbulent interval the office may have been used by both parties.

This scene closed upon the 10th of June 1488. The King was killed in an action with the opposite party, and with him fell Alexander, the grantee in this patent. The only period, therefore, when this instrument could have had any effect was from its date, 28th May 1488, till the death of the grantee; for, on the 12th of June, two days after the action, the young King made a proclamation, which was followed up by an Act of Parliament, annulling every grant made by his father from the 2d of February preceding.

The new Parliament, after the death of the King, met upon the 6th of October 1488. In the collection of the Acts of Parliament, known in Scotland by the name of the Black Acts, the acts of this period are fully stated, though omitted in the later editions. At their first sitting, the Parliament began with several acts of great violence against the late King's party. All persons having hereditary offices, who had been in the field of Stirling, were suspended from their offices for three years. There were acts of forfeiture passed against several persons, and amongst others John Ramsay Earl of Bothwell, a very conspicuous character, who flou-

rished about this time; yet I can hardly say flourished, for he was stript of his honours and large possessions.

The 14th chapter of the acts of this Session was an act for their own justification. It recites that a treaty had been made, but that the same had been broken by the late King's party. They afterwards passed the Act of Revocation, which, after mentioning the proclamation that had been made on the 12th of June, ordained "that all alienation of lands, heritages, long tacks, &c., and creations of new dignities, granted to any person, &c., since the 2d day of February last bypast, by umquhile our Sovereign Lord's father," (and that he is thus described, and not styled King, is worthy of notice,) "which may be prejudicial to our Sovereign Lord that now is, be cassed and annulled," &c.

Against this act it would certainly have been difficult to set up any claim; but another act shows more plainly that James the Third was not held to be King from the 2d of February. This act enables all those whose fathers fell in the field of Stirling to complete a service to them, "though (the act says) it may be objected that their fathers and antecessors died not in the faith and peace of the King." To do away this, the King consented to grant letters under the Privy Seal, without which the brieves were not to be given. There cannot be a stronger assertion, that the Government in defence of which they died was not a legal Government, than that they did not die "at the faith and peace of the King;" and it was on this account that the Privy Seal was

given. I do not take upon me to say whether this was good law or good morality, or not.

They were not yet satisfied, however, but in the next Parliament they made another act, reciting the former act, declaring all alienations of lands, heritages, &c., to be of "no avail after the 2d day of February," and they add in a parenthesis, "which was the day of our Sovereign Lord who now is coming forth of Stirling." They took that day as the commencement of the new reign, from which all grants made by the late King were to be deemed null, and they ordained all persons to bring in such grants to be destroyed, under a penalty.

Under the circumstances of those times, we would not expect to find a person claiming under a patent like that now in question. Accordingly, in that first Parliament of King James the Fourth, (the Sessions in those days were of short endurance,) on the 17th of October 1488, we find Robert, the son of Alexander, the grantee in the said instrument, sitting in Parliament under the title of Lord Kilmaurs. He took the benefit of the before-mentioned act, for on the 4th of November he served himself heir to his father, Alexander Lord Kilmaurs, upon a Privy Seal warrant, to do away the objection that the father did not die at the faith and peace of the King.

In the next Parliament, on the 14th of February 1489, this Robert is also present, and he is also marked as sitting as Robert Lord Kilmaurs. He died soon after. The exact date of his death does not appear, but from a paper in the inventory produced to your Lordships, of 20th October 1492, it

appears that Cuthbert his son was then Lord Kilmaurs. This Cuthbert, I believe, must then have been a young man, for he lived till 1540. There is another circumstance which tends to confirm this; in the account of the ceremonial of the marriage of King James the Fourth with Margaret of England by Mr Young, Somerset Herald, to be afterwards mentioned more particularly, Cuthbert Lord Kilmaurs appears at a tournament as a challenger against James Lord Hamilton, who was then a very young man, as appears by the date of the marriage of his father with the Princess Mary, sister of James the Third.

This Cuthbert married the daughter of the Earl of Angus, a very powerful nobleman. I find an instrument mentioned in the inventory, which I can only describe as it is entered there. It is dated the 20th of January 1493, and is called "A Declaration by King James, and that the Parliament made no farther inquisition, and so was sufficient to purge Alexander Lord Kilmaurs." This seems to have been intended to do away all incapacity on the part of Cuthbert on account of his father's acts. Two other papers are material, Nos. 24 and 48 of the inventory. The first is a charter in 1498 by King James to Cuthbert *Lord Kilmaurs*, and Marieta, his wife, and the other a charter to William, son to Cuthbert *Lord Kilmaurs*, also dated in 1498. Till this period, therefore, Cuthbert was treated only as Lord Kilmaurs.

In 1505 it appears clearly that he was Earl of Glencairn. On the part of the claimant, it was argued as probable, that the title had been somehow

or other continued since the date of the patent, 1488. His counsel had some difficulty how to account for this. They say, there may have been an Act of Parliament for that purpose, but no such act appears; and such a measure would have been opposed by the proprietors of the lands of Drummond and Duchray. It might be said that the title was continued without the lands, by some grant from the Crown; but it is straining too much to say that any such grant was made.

Accidentally an historical account comes to our aid in this difficulty, the before-mentioned account of the marriage of James the Fourth, given by Mr Young, Somerset Herald. This is but historical, it is true, but the Herald appears to have taken down the occurrences with accuracy, and from day to day. It is found in Leland's Collectanea. In this account Cuthbert Lord Kilmaurs was a principal figure, and the Lord Hamilton another. The author describes a tournament where Cuthbert was a challenger, and Lord Hamilton a defender. He afterwards describes the creation of three Earls by *belting*. Marchmont Herald proclaims Largesse—1st, Of James Lord Hamilton, as Earl of Arran; 2d, Of William Lord Graham, as Earl of Montrose; and, 3d, Of Cuthbert Lord Kilmaurs, as Earl of Glencairn.

The Earl of Arran took his seat in the Parliament 1503, but neither the Earl of Montrose, nor the Earl of Glencairn, sat till 1505. The Parliament of that year was held by a commission, a copy of which was given in evidence by Sir Walter Montgomery Cuningham. In this commission Cuthbert Earl of Glencairn is stated the last in or-

der of all the Earls, though, if he had come in upon the old titles, he would have had precedency of some of the Earls mentioned in it. In the ordinary sittings in Parliament, the marking of the Peers present on the rolls has little regard to precedency: I suppose their names were taken down as they came in, without regard to that point. But in a commission a due precedency would probably be given to the several noblemen. In it the Earl of Bothwell (not the John Ramsay already mentioned, but Patrick Lord Hailes, created Earl of Bothwell in 1490) takes place of the Earl of Glencairn; therefore the latter did not sit in virtue of the patent 1488.

Under all these circumstances, it was impossible to found upon this patent by itself. The claimant therefore called in aid of it a charter granted by King Charles the First to William Earl of Glencairn, in July 1637. This charter is not in the form of an Inspeximus, but begins with an assertion, not as usual, that the King had seen the former, but "nos compertum habentes," that such a patent had been granted. Then it confirms the former patent, and promises that the King will give consent to an act of confirmation. This was giving nothing but what the patent 1488 had granted; but it is clear that the King was deceived in several particulars. It was impossible that the King could give effect to the former patent, which had been done away by Act of Parliament. It says, too, that the dignity of Earl of Glencairn had been enjoyed continually from the date of that patent, which was not the fact. The claimant in his printed case states, that the patent 1488 was produced in the action of reduction

relative to precedency against the Earl of Eglintoune, and, consequently, against some others, the Earls of Caithness, Cassillis, and Montrose. I have looked into the decree pronounced in that action, and find this patent among the productions; but the decree is not founded upon it. The three noblemen last mentioned did not appear to the action, though summoned, except, indeed, the Earl of Montrose, whose sons were made parties, for the Scots judicatures did not then treat that nobleman, who was afterwards put to death for his attachment to the King, as a Peer. The contest, in fact, was only with the Earl of Eglintoune, and to prevail against him there was no necessity for recurring to the patent 1488, for the Earl of Glencairn produced sittings in Parliament and in Council, where the *Earl* of Glencairn and the *Lord* Montgomery were both marked as present. The Earl of Eglintoune's claim to precedency was founded on an error in the books of Session, where Comes Montgomery is entered in one place along with Dominus Kilmaurs, they being then Judges of that Court, and on an allegation that his house had been burnt by the Earl of Glencairn, where all his deeds and writings were destroyed.

The creation, therefore, cannot be referred to the patent 1488, but to Young's account of its origin. The patent appears to have had no force at all, and to have been rather of prejudice to the family than in their favour. If the question be brought to this point, and the creation referred to the date of 1503, and the mode of creation then observed, the presumption of law established by so many cases must prevail.

It was ingeniously argued, that where no express limitation of the descent of honours appeared, it might be proved by collateral circumstances. I think that under such an inquiry, the circumstances of the present case would confirm the presumption of law.

At the time of the creation in 1503, the then Earl of Glencairn could not have any other idea or wish than that his title should descend in the male line. In 1498 he had made a very accurate entail of his estates, putting his son in the fee, and reserving his own liferent. The son must then have been an infant, otherwise it would not answer to the age of his father and mother by any system of chronology. He begins with obtaining a charter of the 1st of June 1498, containing the lands of Finlaystoune Cuningham, to himself and his wife in conjunct fee and liferent. On the 16th of June he takes a charter of seven baronies, Kilmaurs, Finlaystoune, Kilmarnock, Glencairn, Reidhall, Hasselden, and Hiltoun, most of them holding ward of the Crown or of the Prince, and in two of them there were manor-places and fortalices. These are conveyed to himself in liferent, and to his son and his heirs-male in tailzie. Finlaystoune is excepted from this destination, because settled on Cuthbert and his wife in conjunct fee and liferent.

After Cuthbert took the title of Earl of Glencairn, there cannot be a question in what line he would have chosen to settle his lands, if the title went to heirs-general. But on the marriage of William his son, in 1509, he settles the baronies of Reidhall, and the castle and demesnes of Kilmaurs, to his son

and wife, in conjunct fee and liferent, and the heirs-male of the marriage, whom failing, to the heirs-male of Cuthbert. It is particularly provided in the charter, that the lands disjoined from the barony of Kilmaurs were only to be held separately during the lives of the son and his wife, but after their decease should be re-united, and held as one entire barony.

Some stress was laid by Sir Adam Fergusson upon a charter 1511, erecting certain lands *in comitatum*, to be held by Cuthbert and his wife in liferent, and by William, their son, and his heirs, in fee. Whoever reads this charter will see it does not relate to the present question. The object of it was to change the barony of Glencairn, which was before held in ward, or military tenure, to a blench holding, for the annual payment of a pair of spurs. This was of immense consequence to the family; and in order to make this grant available, Cuthbert, Marieta, and William, are all made grantees, in respect of their several interests under the subsisting charter of 1498. But this was merely an accessory right, and did not change the entail in any sort, nor the succession of the family from the ancient investitures.

In 1614, (the succession had always hitherto gone to heirs-male,) the then Earl of Glencairn makes a long entail of his estates, calling to the succession many persons of the name of Cuningham, and the heirs-male of their bodies.

His son, in 1642, but five years after he had obtained the charter 1637 from King Charles the First, instead of altering the succession of his estates, and limiting them to heirs-general, as a man think-

ing that his title went to heirs-general would naturally do, still continues them to the heirs-male, and passes a new charter under the entail of 1614. And thus it went on till 1670, when the second son of this Earl took up the title in prejudice of his grand-daughter.

I have delivered my opinion upon this case with regret. I must have much respect for the opinion of others more conversant with such subjects; and I know not any person to whose opinion, in a question of this nature, I should have more respect than for that of Sir Adam Fergusson, from my knowledge of his learning and judgment. I am sure he was convinced that he had a right to this Peerage; and this had much weight with me when I came first to consider the subject. I regret it in another point of view; for if the claim could have been sustained, there could have been no doubt that your Lordships would have had the benefit of the claimant's abilities and judgment in this House, by that election which his character would have secured to him; and if the opinion I have given be agreed to by the House, it will deprive your Lordships of much valuable assistance in one branch of your judicial authority.

The proposition which I have, upon the whole matter, to submit to your Lordships' consideration is, that Sir Adam Fergusson has shown himself to be heir-general of Alexander Earl of Glencairn, who died in 1670, but hath not made out the right of such heir-general to the dignity of Earl of Glencairn.

Which was agreed to by the House.