1812.

EARL OF ELGIN, &c. v. M'LEAN.

[Fac. Coll. et Mor. App. v. Manse 1.]

The Right Hon. THOMAS, EARL OF ELGIN AND KINCARDINE, L. BLACKWOOD of Pittreavie, Esq., ROBERT WELLWOOD of Garvock, Esq., and Others, Heritors of the Parish of Dunfermline, . . . *Appellants*;

The Rev. ALLAN M'LEAN, first Minister of Dunfermline, ... *Respondent*.

House of Lords, 9th March 1812.

MANSE AND GLEBE, RIGHT TO—RES JUDICATA.—(1st.) Held that a minister of a parish, chiefly situated within the royal burgh of Dunfermline, with a landward part, was entitled to have a manse designed to him, together with a glebe of four acres of arable land; and a grass glebe sufficient to pasture two cows and a horse, and that the sums which a predecessor in the incumbency had agreed to accept in lieu of these, did not shut out this claim. (2d.) Held that a question raised by a predecessor, in regard to the same subject, was not *res judicata*, in the circumstances, so as to foreclose the present claim at the instance of the present incumbent.

The respondent is the first minister of the parish of Dunfermline, which includes the royal burgh of Dunfermline, including the precincts of the Abbey, together with a landward part of the parish situated in the adjoining country.

He had neither manse nor glebe. The act 1592, c. 118, "statutes and ordains that the acts of parliament made of "before, anent manses and glebes, to be given to ministers "of God's holy evangel within this realm, shall be under-"stood and extended to all abbeys and cathedral kirks "within this realm, where no other manse nor glebe per-"taining to parson or vicar was of before; so that the "minister presently admitted, or hereafter shall happen to "be admitted, to the office or cure of the ministry, within "the said kirk, shall have a sufficient manse and dwelling "place within the precinct of the abbey where he serves, "together with four acres of land, &c., with special pro-"vision that it shall be in the option of the abbots, priors, "and other prelates and persons whatsoever, feuars of the "said cathedral or abbey places, either to grant a manse "to the minister, within the precinct of their place, or else

"a sufficient manse lying as commodious to the parish "kirk."

The act 1644, c. 31, was passed, extending the former acts as to the designing of manses and glebes, which contained this clause: "*Borrowstown kirks being always excepted*," which was founded on by the appellants. And the act 1649, c. 45, followed, with regard to ministers' stipends, glebes, and manses, and that these two latter being once designed and built, the cost and charges were to be laid on the heritors. This act contained the following clause, which was also founded on by the appellants: "And it is hereby appointed that burghs, and the landward parts of the parish, "provide all competent dwelling-places and houses for their "ministers, the same not being above nor beneath the sum "expressed."

The two acts of 1644 and 1649 were rescinded or repealed after the Restoration, and the act 1663 substituted, which sets forth, "Because, notwithstanding divers acts of "parliament made of before, divers ministers are not yet "sufficiently provided with manses and glebes, and others "do not get their manse free at their entry, therefore statutes and ordains, that where competent manses are not "already built, the heritors of the parish, at sight of the "bishop of the diocese, or such minister as he shall appoint, "with two or three of the most knowing and discreet men "of the parish, build competent manses to their ministers, "the expenses thereof not exceeding 1000 and not beneath "500 merks; and where competent manses are already "built, ordains the heritors of the parish to relieve the minister, and his executors, of all costs of charges and expenses for repairing the foresaid manses; declaring hereby that the manses being once built and repaired, and the "building and repairing satisfied and paid by the heritors "in manner aforesaid, the said manses shall thereafter be "upholden by the incumbent ministers during their possession, and by the heritors in time of vacancy, out of the "vacant stipend." Then follows the stipulations with reference to glebes: "In like manner ordains that every "minister have fewel, foggage, feal and divots, according "to the act of parliament made in the year 1593; as also "that every minister (except such ministers of royal burghs "who have not right to glebes), have grass for one horse, "and two kine, over and above their glebe, to be designed "out of kirk lands, and with relief according to the former "acts of parliament standing in force."

In these circumstances, the appellants contended that the minister's right to manse and glebe did not apply to parishes situated for the most part within royal burghs. That the clause in the act 1644 excepting "Borrowstown kirks," and the provision in the act 1649, giving *dwelling-houses* to ministers within such burghs; and the clause in the above quoted statute 1663, showed that such ministers were neither entitled to manses nor to glebes. This being their view of the acts, the respondent presented his petition to the presbytery of the bounds, stating, That by an act of the Scotch parliament 1592, ministers of abbey kirks are entitled to a sufficient manse or dwelling-house within the precincts of their abbey; and that by act 1663, c. 21, ministers of all landward parishes, whether connected with a burgh or not, are entitled to a manse, and also to a glebe, consisting of four acres of arable land, and as much pasture land as is necessary for pasturing a horse and two cows.

The respondent further stated, that he was unprovided in a manse, having only forty pounds Scots (*i. e.* £3. 6s. 8d. Sterling) yearly in lieu of one; that his glebe was not of the legal dimensions, and that in place of pasture ground he had only twenty pounds Scots (£1. 13s. 4d. Sterling) yearly allowed him for grass. He therefore prayed the presbytery to order a visitation, and to take the usual steps appointed by law for designing a legal manse or glebe.

June 7, 1803.

After a variety of proceedings before the presbytery, that court pronounced the following judgment: "The presbytery having considered Mr. M'Lean's petition, and the whole "of this cause, find that he is in law entitled to a manse or "dwelling-house, and suitable offices, within the precincts "of the abbey of Dunfermline, in lieu of the forty pounds "Scots presently paid to him, to a legal glebe, consisting of "four acres, and to half an acre of ground as a stance for a "manse, offices, and garden enclosed with proper walls; "the presbytery find, that Mr. M'Lean is entitled to grass "or pasturage for one horse and two cows, in lieu of the "twenty pounds Scots presently paid to him; and they "also find that the pigeon-house upon the glebe ought to be "removed. The presbytery delay the designation of a "manse and the ground for pasturage." At a subsequent date they proceeded to design these, and also correct the deficiency in the size of the glebe, so as to make it up to the full legal quantity of four acres.

July 1803.

The appellants then brought the present case by advocation before the Court of Session.

1812.

EARL OF ELGIN, &c. v. M'LEAN.

The question brought before the Court by this advocation being, Whether the judgments of the presbytery were well founded under the act 1663, c. 21? the respondent was advised to bring a separate action against the officers of state, and certain persons having interest within the precincts of the abbey of Dunfermline, libelling upon the act 1592, c. 118, and concluding that he had right to a manse within the precincts of the abbey, by virtue of that act. But as the Court adhered to the judgments of the presbytery, finding the respondent entitled to a manse under the act 1663, c. 21, it became unnecessary for the respondent to rest upon his subsidiary claim under the act 1592, c. 118.

The appellants maintained, 1st, That the general question here was, Whether, in the case of a parish where there is a royal burgh, *and likewise a landward part*, the minister is in the same situation with respect to the right of having a manse, as the minister whose parish does not contain a royal burgh, or is a mere country parish? They contended, 2d, That the respondent, being a minister of a *royal burgh*, had no right to a manse; and, in the 3d place, That this question had been definitively settled in the Court of Session in 1750, in an action raised by his predecessor and the heritors of the parish, and therefore the exception of *res judicata* was a complete bar to the claim.

It was more in detail argued, that as the act 1644 excepted *Borrowstown kirks*, this must mean all parishes where the church was situated within a burgh, whether there was landward parish annexed to it or not. In answer, the respondent contended that the minister of every landward parish, not excepting parishes connected, as this was, with burghs, was entitled to a manse under the act 1663, and other acts of parliament. That the Court had never refused manses to ministers whose benefices were so situated. That the decisions of the Court had only refused manses to ministers whose parishes were wholly within burgh, or upon some other special grounds. That it had been decided in the case of Williamson, so far back as March 26th 1685, that the heritors were liable for the reparation of the manse, though Williamson was minister in a royal burgh, because it has a manse and glebe, and landward parish. Several decisions since that time have been pronounced unfavourable to the claim of ministers of royal burghs, having part landward parishes; but these all went on specialties, and

Mor. 5121.

cannot be viewed as having settled the general point; and the recent decision in the case of the minister of Linlithgow against the Heritors, 6th March 1802, where the parish was in a similar situation, the minister was held entitled to a manse, but leaving the question as to the proportion of the expense to be borne by the heritors and the proportion by the magistrates of the burgh for discussion. It was stated from the bench, in this case, as had been done in the previous case of Dysart, that all the previous cases had proceeded on specialties. Indeed here there was evidence that the first minister of Dunfermline anciently possessed a manse. This is put beyond doubt by a decision observed by Lord Durie, as early as 13th Feb. 1629, in the case of Lord Dunfermline *v.* M'Gill, minister there, thus: "In a "suspension of charges, for removing from a minister's "glebe, upon a reason that there was as much land as would "extend to four acres nearest to the manse, and nearer "than the land designed, which was condescended to be of "the lands within the precincts of the abbey, and which "the suspender alleged ought to be designed, conform to "the act of parliament anno 1512, the same being arable "land. This reason was not sustained, because the land "within the precinct condescended upon, was parked in "within the precinct which was now become the King's "Park, and the abbacy being annexed to the crown, and "the said precinct kept for the King's Park, and the land "never being laboured or tilled before. Neither was it re-"spected, that the suspender alleged, that the same might "be tilled, and was commodious for that use; and that the "*minister had this manse within the precinct*, which ought "to draw with it the glebe."

Fac. Coll. vol. xiii. p. 504. Mor. App. 1. Manse No. 1. Note.

The Heritors of Dysart *v.* The Magistrates of Dysart in 1777, (unreported.)

Durie, p. 425, et Mor. 5137.

It appears that, in 1658, some dispute had arisen between the minister and the town and the heritors of the parish, which ended in a contract, whereby the minister for the time being agreed to the sum of forty pounds Scots in lieu of manse, and the other sums as stated in his petition.

These circumstances showed clearly that the minister was at one time in possession of a manse. Then again, with reference to the plea of *res judicata*, the circumstances of that plea are soon disposed of. The question there discussed with his predecessor in 1750, went on the ground of the presbytery not having any jurisdiction to design a manse under the act 1663, and the Court confined themselves to particular findings, without deciding the general abstract

1812.

EARL OF ELGIN, &c. *v.* M'LEAN.

point of law, to the effect that he was not entitled to a manse under the act 1663, and that the presbytery had no power to design him one, but reserving his claim for a dwelling-house under the act 1592. No decerniture, however, followed. With these findings it was remitted back to the Lord Ordinary, but no further procedure took place before the Lord Ordinary; and, in point of fact, there was no final interlocutor or decree pronounced that could be extracted. Even there was no decree of absolvitor; and nothing upon which the plea of *res judicata* could be founded.

Jan. 17, 1805.

The Lord Ordinary, Woodhouselee, reported the case to the Court. The Court pronounced this interlocutor: "The "Lords repel the reasons of advocation, and remit the "cause *simpliciter* to the presbytery, except as to the re-"moval of the pigeon-house, with regard to which, find it "incompetent for the presbytery to take cognizance there-"of, reserving to the minister to apply to the Judge Ordi-"nary for having the same removed, and to the other par-"ties concerned, their defences as accords."

Nov. 9, 1805.

On reclaiming petition, confined to the point of *res judicata*, the Court adhered.

Against these interlocutors the present appeal was brought to the House of Lords.

Pleaded for the Appellants.—The question here is, whether the minister of a parish, consisting of a royal burgh and a landward part, is entitled to have a manse designed by the presbytery, to be built at the expense of the heritors, under the construction of the act 1663. The act says, that where manses are not already built, *the heritors of the parish* shall build them, a term surely not applicable to royal burghs, and therefore if the act be construed as extending to parishes comprehending a royal burgh, if there be also a landward part, the whole expense would necessarily be thrown upon the owners of that part, however inconsiderable it might be, a piece of injustice which could never enter the mind of the legislature. When a burden is laid upon heritors, it is perfectly understood to be apportionable by their valued rent, but a burgh has no valued rent. Where a burgh is subjected, regard is always had to the mode of payment peculiar to burghs. In a word, this act of parliament, to those who consider that the legislature must have had in view, how it was to be executed, or how it could be extricated, is the same as if it had expressly limited the enactment to country parishes, or parishes in which there

1812.

EARL OF ELGIN, &c. v. M'LEAN.

was no burgh. This is rendered clear by the rescinded acts 1644 and 1649, which make a marked distinction between Borrowstown kirks and proper country parishes; and that by Borrowstown kirks was not meant merely parishes entirely within burgh, or which had no landward part, is demonstrated by the act 1649, which laid down one rule as to manses, which were to be built by *heritors*, and another rule with respect to the provision of dwelling houses for the ministers of burghs, and the landward part of the parish, which last part of the act was omitted in the act 1663. And that this is the proper construction is demonstrated by the usage subsequent. If it had been understood to authorize the building of manses at the expense of the heritors, in parishes containing both a burgh and a landward part, how comes it that there should be so many parishes of that description at this day without a manse? For near the period of a century after the passing of the act 1663 there is not the least trace of a demand made by any minister of a parish so circumstanced, to have a manse at the expense of the heritors. The first time it was broached was in the case of Dunfermline in 1750, but the claim there was negatived, as not being founded on the sense of the act; and the same decision was given in four other cases between that period and 1784. It has been doubted whether these latter cases did not go on specialties; but there can be no doubt about the Dunfermline case, which decided the general abstract question. But whatever may be thought of the general abstract point, it is clear that the respondent's demand is barred *exceptione rei judicatae.* Nor is it any answer to say, that this exception only applies to cases between the same parties, and that no decision come to in the time of a previous incumbent can raise up such a plea, but these pleas are untenable. It was brought by the minister of the parish, and that is enough. To say that a decree in an action brought regularly by a beneficiary, and which he alone, as such, can bring, is not binding on his successors, is to maintain that a question relating to a benefice can never be settled to the end of the world. Nor are the proceedings which are reported by Durie in 1629 any evidence that anciently the incumbent had a manse, and this, together with the agreement in 1658 giving him forty pounds Scots *in lieu of a manse*, are proofs entirely against his claim.

Pleaded for the Respondent.—The respondent, in common with every other parochial minister in Scotland who

1812.

EARL OF ELGIN, &c. *v.* M'LEAN.

has a stipend out of the tythes of the parish, is by law entitled to a manse, and also to grass for a horse and two cows, and a glebe consisting of four acres of arable land. 2. Because the first minister of Dunfermline was at one time in possession of a manse, and it cannot hurt the respondent's claim that some of his predecessors accepted of a sum of money in lieu of a manse and grass ground. 3. The plea of *res judicata* opposed to the respondent's claim for a manse, is a plea depending upon the practice of the Court of Session, to whom your Lordships will give respect in what regards a rule of their own Court. But the plea is in itself obviously not well founded; 1st, Because the action in which the judgment in 1750 was pronounced, regarded only the jurisdiction of the presbytery, and the judgment therefore cannot be considered as binding, in so far as it may be supposed to have decided any thing more than the question of jurisdiction. 2d, Because the interlocutors in that proceeding were never applied, and no decree ever was pronounced. 3. Because those interlocutors, in so far as they may be supposed to have determined the merits of the minister's claim to a manse are referable to the ground, that *Mr. Thomson* was barred by *his acceptance* of manse mail; but this plea cannot affect the respondent, who was no party to that contract. And, 4th, Because even if these interlocutors should be considered as having proceeded upon more general grounds, they are not binding upon the respondent, who does not represent his predecessor to the benefice.

After hearing counsel, it was

Ordered and adjudged that the appeal be dismissed, and that the interlocutors complained of be, and the same are hereby affirmed.

For the Appellants, *Wm. Adam*, *William Erskine*.

For the Respondent, *Henry Erskine*, *Arch. Campbell*, *Fra. Horner*.

NOTE.—For sometime after this decision, it was thought, and frequently discussed, that the above case, in the House of Lords, was not affirmed on the general question, but went on specialties, until the subsequent decision in the House of Lords in the case of Auld *v.* Magistrates of Ayr, (Vide 2 S. and M'L. p. 600), where the judgment of the Court of Session was reveresd, and the case remitted, " with an instruction that it is fixed by the judgment of the

"House of Lords in the Dunfermline case, that the minister of a "royal burgh, having a landward district annexed, is by law entitled "to have a manse assigned to him."

(Before the Lords' Committees for Privileges.)

ADDITIONAL CASE* FOR SIR JAMES INNES KER, BART.,

Claiming the Titles, Honours, and Dignities of Duke and Earl of Roxburghe, Marquis of Beaumont and Cessfurd, Earl of Kelso, Viscount of Broxmouth, and Lord KER of Cessfurd and Caverton.

House of Lords, 11th May 1812.

ROXBURGHE PEERAGE CAUSE—INTEREST TO APPEAR.—Two questions of law were made in this case. 1. Whether the deed of nomination of heirs, and tailzie 1648, carried and conveyed, along with the estates, the titles and dignities of the Earl of Roxburghe? 2. Who were the persons in law entitled to succeed to the dignities under the destination in that deed, of "the eldest dochter of the said Hary Lord Ker, without division, and yr airis maill?" The House of Lords held, 1. That the honours and dignities of the Earl of Roxburghe were conveyed by the deed 1648; and, 2. That the destination to the eldest daughter, meant the eldest daughter at the time of the succession opening. The question then assumed two branches, 1. As to the honours and dignities of the barony of Roxburghe; and, 2. The Earldom and Dukedom of Roxburghe. Held, as to the first, that none of the claimants had established any right to that dignity or honour. But as to the second, that Sir James Norcliffe Innes had made out his claim to the dignities of the Dukedom and Earldom of Roxburghe.

Principles of law laid down for allowing parties to appear for their interest in peerage questions, in which Mr. Bellenden Ker was not allowed to appear, but Lady Essex Ker was allowed to appear.

The original case for the claimant was given in in 1808, along with that of General Ker. On account of the connection between the claim to the honours of the Rox-

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* This and the following case, though not strictly appeals, are reported here, because they are intimately connected with the Roxburghe causes, and complete the series of those appeals.

1812.

KER v. INNES.

burghe family, and the claim to their landed estates, that case entered into a statement of deeds more extensive than would have been necessary, if there had not existed such connection.

Since that period, various points have received decision in the last resort, in regard to the estates of the family; and the situations of the different parties, competitors for these estates as well as for the honours, have been materially altered.

The claimant, therefore, conceives that it may contribute to convenience, to bring shortly into view, first, What has been already done; and, second, What remains to be done, on the subject of the claim to the peerage.

On behalf of the claimant, Sir James Innes Ker, the following documents have already been produced and proved before the Lords' Committees of Privileges.

1. The patent of the dignity of an Earl granted to Robert Lord Roxburghe in 1616, by which he was in all time coming directed to be denominated Earl of Roxburghe, Lord Ker of Cessfurd and Cavertoun.

July 17, 1643.

2. Procuratory of resignation executed by Robert Earl of Roxburghe of his estates and of his dignities.

3. The notarial instrument of resignation proceeding upon that procuratory, 26th Feb. 1644.

4. The charter granted by King Charles the First, to Robert Earl of Roxburghe, of his estates, and of his dignities to himself and the heirs-male of his body, "Quibus deficientibus heredibus suis vel assignatis quibuscunque in ejus optione designandis, nominandis vel constituendis, per ipsum aliquo tempore in vita sua vel ante ejus decessum per assignationem designationem nominationem seu declarationem sub subscriptione," &c. Dated 31st July 1646.

5. An exemplification of the act of Parliament, ratifying the above charter. 11th June 1648.

6. The tailzie, nomination, and designation, executed by Robert Earl of Roxburghe, of his estates and of his dignities. 23d February 1648.

7. An exemplification of an act of Parliament of Scotland, 20th May 1661, again ratifying the aforesaid charter of 31st July 1646, and the foresaid tailzie, nomination, and designation of Robert Earl of Roxburghe of 23d February 1648.

Upon these, and upon the patent of the Dukedom of Roxburghe, to be afterwards mentioned, the right of the present claimant was founded.

By the previous appeal it has been seen upon what ground General Ker's claim was founded to the estates and dignities, ante p. 333.

Both stated a preliminary objection to the right of Mr. Bellenden Ker, as well as to the right of Lady Essex Ker, appearing for their interest before the Committee of Privileges, which objection was disposed of by the Lord Chancellor in the following manner.

Lord Chancellor (Eldon) said,—

" My Lords,

" Your Lordships are aware that an objection was taken before the Committee of Privileges on the part of Sir James Innes Ker and Brigadier-General Walter Ker, against the right of Mr. Bellenden Ker and the Lady Essex Ker, who do not claim the dignities, to be heard as parties before the committee, against those who do claim those dignities; and that this objection was referred by the committee to be considered by the House. Upon this point counsel have been heard for several days.

" The chief objection is made to Mr. Bellenden Ker; as to Lady Essex Ker, the objection taken is but faintly stated.

" Of the latter, it is to be remarked, that she disputes the right of all the other claimants, and says she has a better right; though she has not laid a claim thereon to his Majesty. Mr. Bellenden Ker is in a situation perfectly different; he makes no suggestion of a claim to the dignities, but he insists he has an interest to be heard, because he says the dignities can only be given to the claimants on a construction of certain deeds, and which he says will affect his right to those estates, which also originally passed by the same deed.

" I conceive it is impossible to say that this kind of *concern* is a proper interest. From the practice in this country, familiar instances might be adduced upon this point. A person might have devised, by will, landed estates, to different individuals, in nineteen different counties, and in a question betwixt the heir at law and the devisee in one of these counties, as to the validity of the will, not one other of the nineteen devisees, though their interests depended on the same question with regard to the will, could be heard for his interest.

" Mr. Bellenden Ker is admitted to have a direct interest in the competition of brieves, but with regard to the peerage he has no such interest. And I hold it to be quite clear, that, according to all the rules that prevail in this House, unless he has an *interest in the very thing* to be discussed, he has no right to be heard with regard to it.

" On his behalf, various cases were cited. (The cases cited were

those of Willoughby *v.* Parkham, Kircudbright, Sutherland, Caithness, Anglesea, and Glencairn. In the four first, all having interests, were ordered to be heard. The Anglesea case is stated in the Glencairn case). Of these, I shall only mention the Anglesea case, as it alone appears to have reference to this question. In that case, the question turned on the legitimacy of the claimant; and the ancestor of Lord Mulgrave, who had right to certain estates, if the claimant was a bastard, presented a petition, praying to be heard against the claim to the peerage, as the decision therein would affect his right to the estates. He was upon this admitted to be heard.

" It is impossible to say that this petitioner had an *interest* in the dignity; he could not take the peerage in question. If he was admitted upon the point of *interest*, it is clear that this case proceeded upon a bad principle. But if it proceeded upon a point of *discretion*, this may have been very properly decided. In claims of peerage you always proceed with deliberation. The question of legitimacy was one in which the House might look for information from a private party, as being more fully within his research, than in that of the Attorney-General or Lord Advocate.

" But in every case, this House must exercise a sound discretion, and consider what is fit to be done, otherwise claimants might be put to a ruinous expense. In a Scotch peerage, destined to heirs whatsoever, you might have 1500 petitioners at your Bar, were such discretion not to be exercised.

" Lady Essex Ker is in a very different situation. She says she has a better title than the other claimants, by legal inheritance and descent, though she has not brought this forward by petition to his Majesty. I conceive that you are in the constant habit of hearing petitioners for their interest under circumstances similar to those in which she stands.

" With regard to Mr. Bellenden Ker, his alleged right to the estates gives him no interest in the dignity. It is quite clear that he is not to be admitted as matter of right.

" That brings it to the question, if, in sound discretion, he ought to be heard. And, in deciding upon this, I must call your attention also to the present shape of this business; the question referred by the House to the committee is, If the titles and dignities did pass by the charter 1646, and deed 1648, to the persons described in a certain clause of the deed 1648? Whether they did so pass or not is a question in which he has no interest; he claims the estate under a different deed.

" Upon this question, we shall have the assistance of the Attorney-General and Lord Advocate.

" On the whole, I shall move that it be our instructions to the committee that Mr. Bellenden Ker is not entitled to be heard, but that Lady Essex Ker is entitled to be heard before the Committee."

This was ordered accordingly.

Two points then remained to be argued in the competition for the estates and honours. Whether under the words "Richt "to the said estate," in the deed of tailzie, nomination, and designation, executed by Robert Earl of Roxburghe in 1648, the titles and dignities of Earl of Roxburghe were conveyed? 2d. What was in law the true intent and meaning of the following clause in the same deed, "And qlkes all failing be "deceis, or be not observing of the provisions, restrictions, "and conditions above wr'n, the richt of the said estait shall "perteine and belang to the eldest dochter of the said "unql Hary Lord Ker without divisioun and yr airis maill, "she always mareing or being maried to ane gentleman," &c., and who were the persons in law to be considered as described by the word "the eldest dochter of the said Hary "Lord Ker, without divisioun, and yr airis maill."

On the 18th June 1810, the Lords' Committees for Privileges, after hearing counsel for several days, came to special resolutions on both these points as follows:—

On the first they resolved,

Journals of the House of Lords.

"That under the words 'richt to the said estait,' the titles "and dignities of Earl of Roxburghe are conveyed; "provided Robert Earl of Roxburghe was in due form "of law qualified to make the nomination contained "in the charter or deed 1648; or provided every dis- "qualification was subsequently legally removed, so as "to give effect to the nomination therein made?"

On the second point they resolved,

Journals of the House of Lords.

"That the words, 'the eldest dochter of the said Hary "Lord Ker, without divisioun,' are to be understood "to describe the several daughters of Hary Lord Ker "*seriatim* in their order; and that the words 'yr airis- "'maill,' are to be understood as describing the heirs- "male of their respective bodies lawfully begotten. "The Committee are therefore of opinion, that, in case "there are no heirs-male of the body of Lady Jane "Ker, the eldest daughter, nor of Lady Anne Ker, "the second daughter, the heir-male of the body of "Lady Margaret Ker, the third daughter, is to be "preferred to the heir-male of Lady Jane Ker, and to "the heir of line, or heir-female of Hary Lord Ker."

A decision to a similar effect was come to at same time by the House of Lords, in the question relative to the landed estates.

Since then the claimant has been served, retoured, and

1812.

KER v. INNES.

infeft as heir of entail in these estates under the tailzie, nomination, and designation, executed in 1648.

In further prosecuting his claim to the dignities and honours, the claimant gave in evidence, the patent of the Dukedom granted to John, the fifth Earl of Roxburghe, in 1707, founding upon the following parts thereof:—" Anna, " Dei gratia, &c. Noveritis igitur nos fecisse, constituisse, " creasse, et inaugurasse, sicuti nos tenore præsentium faci- " mus, constituemus, creamus, et inauguramus, eundem Joan- " nem comitem de Roxburghe Ducem de Roxburgh, " Marchionem de Beaumont et Cessford, Comitem de Kelso, " Vicecomitem de Broxmouth et Dominum Ker de Cessford " et Caverton, dando, concedendo, et conferendo sicuti nos " per præsentes damus concedimus et conferimus in dictum " Joannem Comitem de Roxburgh ejusq. hæredes musculos " de suo corpore quibus deficientibus alios hæredes suos " titulo et dignitati Comitis de Roxburgh per priora diplo- " mata prædecessoribus dicti Joannis Comitis de Roxburgh " eatenus facta et concessa succedere destinatis dictum " titulum honorem ordinem gradum et dignitatem Ducis," " &c. Apud aulam nostram de Kensington 25 die. mensis " Aprilis anno Domini 1707," &c.

It only remains for the claimant, in terms of the resolutions of the Lords' Committees for Privileges above quoted, to show:—

1. That there are no heirs-male of the body of Lady Jane Ker, the eldest daughter of Hary Lord Ker.

2. That there are no heirs-male of the body of Lady Anne Ker, his second daughter.

And, 3d. That the claimant is the heir-male of the body of Lady Margaret Ker, his third daughter.

(Here the case went into a detail of each of those heads.)

Under the third head, Sir James Norcliffe Innes Ker proved that his great grandfather, Sir James Innes, Knight, eldest son of Sir Robert Innes of Innes, married Lady Margaret Ker, third daughter of Hary Lord Ker, and that he was heir-male of the body of his great grandmother, Lady Margaret Ker.

Sir James did not offer any remark upon the claim to the *Barony* of *Roxburghe* and Cavertoun; and seemed rather to stand on his own rights to the titles and dignity of Earl of Roxburghe and Dukedom.

Sir Samuel Romilly, Ar. Cullen.

(Before the Lords' Committees for Privileges).

CASE OF THE LADY ESSEX KER,

Claiming the Titles, Honours, and Dignities of the Duchess and Countess of Roxburghe, Marchioness of Beaumont and Cessfurd, Countess of Kelso, Viscountess of Broxmouth, Baroness Ker of Cessfurd and Cavertoun, and Baroness Roxburghe.

Sir Robert Ker of Cessfurd, who was born in the year , and died in the year 1650, was first raised to the dignity of a Baron, or Lord of Parliament in Scotland, by the title of Lord Roxburghe; but in what year, or by what form of creation, the claimant, with all the diligence which she has employed in the search, has not been able precisely to ascertain.

In the Rolls of Parliament of Scotland which are preserved in the General Register House at Edinburgh, it appears that Lord Roxburghe is entered by that title as present in the year 1604. He is also marked as present among the peers and lords of parliament in the years 1607 and 1612.

No patent or charter has been found creating this *barony* of *Roxburghe* in the person of Sir Robert Ker; although it is strongly to be presumed, if the dignity had been granted to him by an instrument of that description, that it would have been preserved carefully with the other title-deeds of the family.

It is known, however, to your Lordships that, besides the form of creation by patent or charter, another mode of creating dignities of peerage was established in the laws of Scotland by summons and investiture in parliament, a form of granting the dignity of the peerage much more ancient in the constitution of that realm than that by patent, and which, though it became less frequent than the latter in the grant of the higher dignities, was still not wholly disused in the time of Sir Robert Ker, when the first step in the peerage was conferred.

The claimant is humbly to maintain before your Lordships, that as no patent appears, which would doubtless have been preserved if it ever existed, the title of Lord Roxburghe is to be held as having been conferred upon Sir Robert Ker by investiture in parliament; and she will then further

1812.

LADY E. KER v INNES, &c.

contend, that all titles so granted, do, by the law and constitution of Scotland, descend to heirs female in default of heirs male, unless a special limitation of the descent is stated upon the Rolls of Parliament in the entry of the record of the investiture.

Further, she claimed right to the title of Earl of Roxburghe, because Lord Roxburghe was raised to the title of Earl of Roxburghe and Lord Ker of Cessfurd and Caverton, by patent bearing date 18th Sept. 1616. The limitation in this patent being "*sibi suisque heredibus masculis.*"

She further deduced her title to the dignities in the same manner as it has been seen she did with reference to the estates, as follows:

1st, That the whole descendants in the male line of the body of the said Robert, first Earl of Roxburghe, and likewise of the bodies of Sir William Drummond and Lady Jean Ker, the eldest daughter of Hary Lord Ker, have failed; and also that all the younger sons of John Lord Fleming, and the heirs male of their bodies called by the deed of nomination 1648 have failed.

2d, That the claimant is eldest lawful daughter of Robert, second Duke of Roxburghe, and consequently she is clearly eldest female heir by descent and primogeniture of Hary Lord Ker; and hence she humbly presumes she has right to the honours of the Dukedom of Roxburghe.

And also, in the same character, she claims, and humbly hopes your Lordships will find her entitled to the dignity of Lady Ker of Roxburghe and Caverton.

The Lords' Committees for Privileges, after hearing counsel for several days,

Journals of the House of Lords.

"Resolved and adjudged, 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."

Resolved and adjudged, That Sir James Norcliffe Innes, Bart., hath made out his claim to the titles, honours, and dignities, of Duke and Earl of Roxburghe mentioned in his petition.

For Lady Essex Ker, *J. Henry Mackenzie, Alex. Maconochie, Henry Brougham, Fra. Horner.*

(Feu Cause, Fac. Coll. vol. xiv. p. 63.)

JOHN BELLENDEN KER, Esq. . . *Appellant;*
SIR JAMES INNES KER, Bart., and JAMES HORNE, W.S., his Commissioner, . } *Respondents.*

House of Lords, 6th July 1812.

ENTAIL—PROHIBITORY CLAUSE—GRANTING FEUS.—Here the entail of Roxburghe contained strict prohibitory clauses against alienation, contracting of debt, or doing any deed whereby the estate might be adjudged, or doing any other thing to the hurt and prejudice of the said tailzie and succession; but "reserving always liberty to "the said heirs of tailzie to grant feus, tacks, and rentals, of such "parts and portions of the said estate and living as they shall think "fitting, providing the same be not granted in hurt and diminu-"tion of the rental." An heir of entail having granted sixteen separate feus of the whole estate, Held, in a reduction of these feus, that this was not a proper exercise of the reserved powers in the entail. In the House of Lords, case remitted for reconsideration, and with special directions.

It has been seen, in the reduction raised as to the effect of the old entail of 1648, executed by Robert, first Earl of Roxburghe, that, in anticipation of disputes arising as to the succession to the estates and honours after his death, the late Duke of Roxburghe executed various deeds, having for their object the setting aside that entail, and creating a new one in favour of the appellant.

In that reduction, ante p. 362, it was decided by the Court below, and affirmed in the House of Lords, that the Duke held the estates of Roxburghe under a strict entail (1648) against alienation, or altering the order of succes-