BEFORE THE LORDS' COMMITTEE FOR PRIVILEGES.

DUKEDOM OF MONTROSE,

OF THE KINGDOM OF SCOTLAND—CREATED IN 1488.

JAMES EARL OF CRAWFORD AND BALCARRES, LORD LINDSAY, &c., — CLAIMANT.

HIS GRACE JAMES DUKE OF MONTROSE,—A DUKE OF GREAT BRITAIN, BY CREATION OF QUEEN ANNE, IN 1707, — OBJECTOR.

1853. 18*th*, 19*th*, 21*st*, 22*nd*, 25*th*, 26*th*, 28*th*, *and* 29*th July*. 1*st*, 2*nd*, *and* 5*th August*.

Held.—That the Rescissory Act of the Scotch Parliament, 17th October, 1488, destroyed the Dukedom of Montrose, created by James III., and that the Dukedom of Montrose, created by James IV., was only for the life of the grantee. Remarks on Life Peerages.

When a peerage is rescinded by Parliament, it cannot be restored by the Crown. To effect restoration another Act of Parliament will be necessary.

The construction of an old Act of Parliament may be cleared by *Contemporanea Expositio*, showing the conduct and understanding of parties at the time of its passing, and subsequently; and for this purpose the annals or histories of the period, and antiquarian researches, may be referred to.

Mere lapse of time is no bar to a peerage claim, although whether it may not be fit to prescribe some limitation, *quære*.

Semble.—That Scotch peerages were originally territorial; *i.e.*, incident to, or accompanied by, tenure.

Peerages were often, for greater solemnity, created by the Crown in full Parliament; but the Parliament had no share in the act done. Thus, the creations by Ric. 2, in his last Parliament, continued valid and effectual, although the Parliament itself, and all its proceedings, were subsequently annulled.

The opinion of Lord Chancellor Loughborough in the Glencairn Peerage case (*infra*, p. 445), explained and confirmed.

Remarks on the jurisdiction of the Court of Session in Scotch peerage questions—Lord St. Leonards of opinion that it is absorbed by the References from the Crown.

How the House of Lords has come to acquire jurisdiction in Scotch peerage questions.

Method of putting documents in evidence before the Committee for Privileges.

Opinions of the Lord Chancellor and of Lord St. Leonards; the latter stating the entire concurrence of Lord Brougham; and the partial concurrence of Lord Lyndhurst, who had heard only a part of the argument.

FOR the proceedings in an earlier stage of this case, see *suprà*, p. 57.

The *Solicitor-General*, (a) (by license in consequence of his original retainer); Sir *Fitzroy Kelly*; the Hon. *John Stuart Wortley* (the *Recorder*); Sir *John Bayley*, Bart.; and Mr. *Riddell*; appeared as counsel for the CLAIMANT.

The *Attorney-General*; (b) the *Lord Advocate*; (c) and Mr. *Cosmo Innes*; attended on behalf of the CROWN.

The OBJECTOR had not obtained permission to appear by counsel—although his printed case was lodged in pursuance of the order of the 14th April, 1851 (d). But Mr. *Rolt* and Mr. *Cosmo Innes* (e) were in attendance on behalf of his Grace.

(a) Sir Richard Bethell. (b) Sir A. J. E. Cockburn.

(c) Mr. Moncreiff. (d) *Suprà*, p. 64.

(e) When Mr. Innes was putting documents in evidence, he was informed that he could not do so on the part of the OBJECTOR, as the Objector had not obtained leave to appear by counsel, but simply to lodge his printed case, and communicate with the officers of the Crown. *Suprà*, *p.* 63.

Mr. *Innes* said he held a brief for the Crown.

The CHAIRMAN (Lord *Redesdale*): Very well; then as you put in the evidence, you must state what each document proves.

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The argument, and the authorities, are incorporated in the following opinions :—

The LORD CHANCELLOR (*a*):

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My Lords, this claim arises under an alleged grant or charter, by King James III., of Scotland, bearing date the 18th of May, 1488 (*b*): and, my Lords, two questions present themselves. First of all, is this charter now a valid grant and in force? And if it is, the next question will be, has the noble Claimant made out that he is the party entitled under it.

During the progress of the argument, the House intimated an opinion that the more convenient course would be to have these two questions discussed separately; and that one should be decided before the other was entered upon; for it was evident that the determination of the first, in one way, might render any further inquiry unnecessary. And, my Lords, the only point which has to be disposed of now is the first proposition; whether or not, upon the evidence, it has been made out that that grant is now a grant in force for the benefit of some one, if there be any person answering to the description of "heir" of the original grantee.

Now, my Lords, it is asserted that almost immediately after the grant, this Dukedom was extinguished by the operation of an Act of Parliament directed against it, and which expressly destroyed it. My Lords, in order to understand this, it is necessary to advert to the circumstances of the period. The grant was made by King James III., when he was at war with his nobles, and had had a general action with them at Blackness, in which he had worsted them. Those nobles had on their side the King's son, who afterwards became James IV. How far he took an active part is uncertain; but, undoubtedly, we may

(*a*) Lord Cranworth.

(*b*) *Suprà*, p. 57.

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treat him as at that time in league with the Scottish nobles, who were opposed to his father, King James III. In that state of things, King James III. granted this Dukedom, on the 18th of May, 1488. On the 11th of June following, James III., with such of the Scottish nobility as adhered to him,—including amongst them the Earl of Crawford, then Duke of Montrose,—had a conflict with the other nobles, who had secured the young King on their side ; and the result was the total defeat of King James III. He was himself killed in the field, and many of his nobles perished; but not amongst them the Duke of Montrose.

James IV. met his Parliament in the following October, and on the 17th day of that month an Act was passed, called the "Act Rescissory," which Act is as follows:—

> Item anent the Proclamacione maid at Scone:—It is statut and ordanit that all alienacions of landis, heretages, lang takkis, fewfermez, officez, tailzeis, blanceferm, *creacion of new digniteis*, grantit or given to ony persone or personis, quhat estate, condicioun, or degre that ever thai be of, *sene the secund day of Februar last bypast*, be unquhile our Soverane Lordis faider, quham God assoilze, quhilk mycht be preiudiciale to our Soverane Lord and to the Croune that now is, be cassit and adnullit, and of nane effect nor force in ony time to cum becaus that sic alienacion, giftis, and privilegis war grantit sene the said tyme for the assistance to the perverst counsale that was contrar the common gud of the realme, and caus of the slauchter of our Soverane Lordis fader.

The question is, did, or did not, that Act of Parliament of the 17th October annihilate the grant of the Dukedom of Montrose that had been made on the 18th of May preceding? I take it to be a matter admitting of no controversy that if it was an Act of Parliament, and if the "creation of new dignities" was an expression properly referring to the creation of the Dukedom of Montrose, the effect was to destroy that creation. It was not necessary that there should be any attainder. Parliament was omnipotent.

Now, *primâ facie*, I think it must strike everybody that not only did it point to that creation, but that it is impossible for language to have done so more clearly. All the creations of new dignities, alienations of lands, &c., are abolished. It is true that it goes on to say, "which might be prejudicial to our Sovereign Lord and to the Crown that now is." But does that mean, as contended on the part of the Claimant, that nothing was abolished that was not prejudicial, and so that it was to be left open to argument in each particular case to ascertain whether it had, or had not been, prejudicial? Or does it mean that all those alienations and creations of new dignities should be annulled *because* they were, or might be, prejudicial to the successor? I must confess that the latter appears to me to be the clear meaning of the words.

But, my Lords, even if there had been any difficulty in this interpretation, I apprehend all possible doubt is removed by a subsequent statute, to which both the Claimant and the Crown have referred: I allude to the statute passed about a year and a half afterwards, on the 15th of February, 1489, old style,—1490, new style;—in which I find that this was ordained:—

Item.—It is thought expedient, that because there was a statute made in our Sovereign Lord's Parliament, that now is held at Edinburgh, on Wednesday, the 8th day of October, the year of God 1488, declaring all alienations of land, heritages, lang takks, feufirms, officez, tailzies, blanch fermis, lands made ,of ward, of nane avail after the second day of February, which was the day of our Sovereign Lord that now is coming forth of Stirling, unto the coronation of our Sovereign Lord's Highness, made by his faider of most noble mind, made of nane avail, force, nor effect for certain causes contenit in the said act and statute; that therefore all they which got the pretended gifts of alienation of heritage, lang takks, feufirms, officez, tailzies, giving of blanch firm, of ward lands, should bring their letters and evidences grantit thereupon to our Sovereign Lord within forty days to be destroyit.

It appears to me that the Legislature have put their

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own construction upon the former statute; because they have here said that it was not to be a question in any case whether a grant was prejudicial; but that the reason why the Legislature thought fit to interfere was because *it was prejudicial.* The Legislature clearly thought that all those alienations were hit at by the former statute; and they enact that every one must come and surrender his title deeds. I am aware that in this Act there is no mention of dignities; but I do not think that circumstance signifies at all. Probably every creation of a dignity contained (as I think we certainly see in this case) a grant of lands, and the surrendering the title deeds might be very important, because they might get into the hands of other persons, and questions might afterwards arise.

Therefore putting upon the first statute the clear interpretation that all new dignities created by King James III., since the preceding 2nd of February, were struck at by the Act, called the Act Rescissory, if I had any doubt, it seems to me removed by the subsequent statute. Then, if that be so, there is an end to the case;—because I certainly feel that the exact question, and the only question we can be called upon to decide, is,—did that Act of Parliament destroy this dignity, or did it not?

But, my Lords, it has often been held, and not unwisely or improperly, that the construction of very ancient statutes may be elucidated by what, in the language of the Courts, is called *contemporanea expositio;* that is—seeing how they were understood at the time. And if such a practice is in any case admissible, I think it is preeminently so in a case where all is in great obscurity, not only from the lapse of more than three centuries and a half, but from the troubles of the period. Therefore it is, that great attention has been directed to see how far contemporaneous exposition

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would enable us to come to a safe conclusion one way or the other, as to what was understood at the time to be the effect of this Act Rescissory.

Now, it appears to me that there is a body of evidence showing that the Act was understood by everybody at the time to have annihilated this Dukedom; and further, that this understanding, so acted upon at the time, was acted upon afterwards down to the moment at which I have the honour of addressing your Lordships.

Now, my Lords, if the dignity was annihilated, what would you have expected to happen? Why you would have expected that one who had received a grant of a dignity, the Dukedom of Montrose for example, would thenceforward appear, not under the title of Duke of Montrose, but under his former designation, whatever it was. That is exactly what occurred. The Duke of Montrose made his peace, to a certain extent, with the successor of King James III.; who took from him, or made him surrender, some of his valuable possessions; and those were granted away. King James IV., having stripped him of much that he had before, granted him anew the Dukedom of Montrose, but granted it to him only for the term of his life. The Duke of Montrose after the Act Rescissory sat in Parliament as Earl of Crawford upon one occasion. After the grant to him of the Dukedom for life, he sat in Parliament as Duke of Montrose, and he enjoyed, during his life, the rents of the property granted to him with the Dukedom, the customs and borough rents of Montrose, and the Lordship of Kinclevin. He died at the end of the year 1495, the day after Christmas-day, and his widow retained the title of Duchess of Montrose till her death, which happened some thirty or forty years afterwards. His son succeeded him, and sat in Parliament, not, however, as Duke of Montrose (which if the former

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grant was available he would have done), but as Earl of Crawford.

If these propositions are made out, they afford a most wonderful confirmation of the interpretation which I have suggested as the right one to be put upon this Act of Parliament. The question is, whether these propositions are or are not established?

And first, with respect to the Dukedom being re-granted, how is that proved? Why, my Lords, we have an Act of Parliament, on the 18th of September, 1489, not quite a year after the Rescissory Act, which says:

> Be it known that our Lord the King, considering the obedience and the commendable promptitude which his faithful cousin, David Earl of Crawford, [the person who, upon the hypothesis of the Claimant, was then Duke of Montrose,] and his illustrious predecessors, have exhibited towards the predecessors of the said our Lord the King, and being willing that the said David should shine with ampler dignity, has, by his plenitude of power and special grace, elevated, made, created, and anew raised the said David his cousin, Duke of Montrose, to a dukedom, according to the form and tenor of the charter of our said Lord the King, to be executed in favour of the said Duke of Montrose upon the terms premised.

What then was the Charter that was thus to be made pursuant to this Act of Parliament? My Lords, the Charter itself is not forthcoming;—and this need not be wondered at. The wonder is, that so many documents of those days are still extant; but the Register Book of the Great Seal of Scotland has been produced, in which all documents under the Great Seal were then, and, I suppose, are still registered. And persons conversant with those books have told your Lordships, that, on looking through them, they find this distinction; namely, that in the case of grants which were made to parties in fee simple, they are usually entered at full length; but very often, when a life interest merely is given, they are entered shortly, as abstracts. That would seem to have been the ordinary rule, and

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so general indeed as to be very nearly universal. Now, my Lords, on the very day on which you would have expected this Charter to be granted, the day after the passing of that Act, which was on the 18th of September, on the very next day, the 19th of September, you find this entry in the Register, which I will read from the translation:

A LETTER has been given to the Earl of Crawford, creating him Duke of Montrose *for the whole term of his life*, and granting him the capital messuage, &c.

In short, granting to him for life the same property which had been originally annexed to the Dukedom in fee. Now, my Lords, everything harmonises with the supposition that it was under that grant, and it alone, that the Duke held his honours and his estates; and is quite inconsistent with the hypothesis that he held it under any other title. The "LITERA" expressly says that there had been a grant made to him for life, and it is entered in the Register in the mode in which life grants ordinarily were entered. And, my Lords, you find that he did hold it for his life: and you also find, that at his death all the property was accounted for to the Crown, and that it has been in the possession of the Crown or its grantees ever since. You find further that the son of the Duke sat in Parliament, not as Duke of Montrose, but as Earl of Crawford, although the Duchess continued still to be Duchess of Montrose for nearly forty years afterwards.

But, my Lords, is it true that he received the rents of this property? Yes. And the fact has been made out with a degree of certainty, which, after such a lapse of time, was hardly to be expected (*a*).

Then, my Lords, it was endeavoured to be shown that, even supposing this Act Rescissory had destroyed the dignity, the Duke had never acquiesced. Now, if

(*a*) Here his Lordship went into a minute analysis of the evidence.

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it was an Act of Parliament, whether he acquiesced or not was totally immaterial. His protesting, or his saying that he would still call himself Duke of Montrose, was utterly insignificant. But when we come to look at what the facts are upon this part of the case, I think that so far from bearing out the proposition of the Claimant, they fortify the truth of that put forward in opposition to the claim. True it is, that on some occasions he did call himself Duke before the new creation of the Dukedom, but they were all occasions that were, so to say, behind the back of the Crown.

This, my Lords, appears to me to illustrate the whole course which the parties were taking. I dare say that the Duke of Montrose resisted, as far as possible, the operation of this Act of Parliament, but it was an Act of Parliament. In public transactions, he is only called by his own title, and he sits in Parliament by his own title of "Earl of Crawford." When it is a mere private transaction, he chooses to call himself "Duke of Montrose;" and in one instance, namely, the grant to his wife, we will assume that it was known to the Crown, or to the officers of the Crown, that he had so designated himself; and the Crown ratifies the grant as he had made it for the benefit of his wife, be he Duke or Earl, but describing him as Earl.

It appears to me, therefore, my Lords, that all these documents afford the most irresistible contemporaneous evidence that the Act Rescissory was then understood to have the effect which I propose now to ask your Lordships to attribute to it.

But, it was urged that a doubt might arise whether this was an Act of Parliament at all. My Lords, I can attach no sort of weight to this argument. The Act Rescissory is, and purports to be, one of the Acts of the Scottish Parliament, and it is

enrolled as such. Whether the King was present at its passing or not is immaterial. The Monarch was then only fifteen or sixteen years of age. The Act has been treated as such, and it is called an Act of Parliament in the subsequent statute to which I have adverted. Therefore I pay no regard to the suggestion that the Rescissory Act was not to all intents and purposes a binding Act of Parliament.

But then it was said, supposing it an Act of Parliament, was it not afterwards revoked? It appears that on the 13th March, 1503, an Act of Parliament was passed, whereby—

> Our Soverane Lord revokit, with consent of the three Estates, all donationis, giftis, actis, statutis of Parliament or Generale Consale, and uther thingis done by him in tymis bigane, either hurtan his soule, his croune, or halie kirke.

It is said that this Rescissory Act was an Act of Parliament that did hurt, or ought to have hurt his soul; inasmuch as it took away something that had been granted by his father to a loyal subject. But it is impossible to hold that grants under which parties had acted could be in any way affected by language so loose and vague as this. And here again the *contemporanea expositio* comes in aid. Why did not the successive Earls of Crawford call themselves Dukes of Montrose? why did they not claim the rents of the lands that belonged to the Dukedom? in short, why did not exactly the contrary take place of that which actually did take place?

Authorities were next cited,—one taken from our own history, and the other from that of Scotland.

The one from our own history is this: We find that Richard II., in his last Parliament, created a number of new Peers. The Parliament Rolls (*a*) of 1397 state that—

(*a*) See Rolls of Parliament, vol. iii. p. 355.

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The King caused to be declared openly in Parliament his resolution, that certain personages of his kingdom should be raised to greater honours and estate, namely, certain who were earls to the estate of duke; one earl to the estate of marquis; and certain who were barons and bannerettes (*a*) to the estate of earl. Whereupon the King, sitting in Parliament, crowned in royal majesty, and holding in his hand the royal sceptre, made and created his cousin, Henry de Lancastre (en duc), Duke of Hereford; and thereupon delivered to him his charter of creation, which was read in Parliament; and the King girded him with a sword, putting on his head the cap of honour and accepting his homage. Likewise the same day, and in the same form, Edward Earl of Rutland was made and created Duke of Albemarle; Thomas Earl of Kent, Duke of Surrey; Thomas Moubray Earl of Nottingham, Duke of Norfolk.

Now, by the first Parliament of Henry IV., all the Acts of the last Parliament of Richard II. were revoked (*b*). The record states that

The Commons represented to our Sovereign Lord (Henry IV.) that a parliament had been holden by Richard II. in the twenty-first year of his reign, and that divers statutes, judgments, and ordinances were erroneously, and injuriously, and fatally made thereat; whereupon the said Commons prayed the King and the Lords spiritual and temporal, that they would be pleased to revoke and annul all that had been done by the said parliament of Richard II.; upon which the King, with the advice and assent of the said Lords, adjudged the said parliament of Richard II., the authority thereof, and all its circumstances and dependencies, to be entirely reversed, revoked, irritated, cassed, repealed, and for ever annulled (*c*).

What was argued was this, that although there was a revocation of the Acts of the former Parliament in words and language as strong as words and language could be, yet, nevertheless, it was held not to destroy the Dukedom of Norfolk; and it

(*a*) Bannerettes were inferior peers, unknown since the Plantagenet reigns.

(*b*) Rolls of Parliament, vol. iii. p. 425.

(*c*) The students of our constitution will see from this record the position of the House of Commons more than two centuries after its institution.

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was urged by the Claimant's counsel that that was a precedent for saying that exactly the same rule ought to be applied to the present case.

To this contention I think, my Lords, there are several answers. In the first place, all that was annihilated by the first Parliament of Henry IV. was the Acts and dependencies of the former Parliament. Nothing that had been done by the King *proprio vigore* was affected. In the case of the Scotch grant of the Dukedom of Montrose, what was struck at by the Act Rescissory, was by name the Act of the King in the "creation of new dignities." What was struck at here was the Acts of the last Parliament; and, therefore, unless it can be made out that the creation of the Earl of Nottingham to be Duke of Norfolk was an Act of the Parliament, it was not to be affected. But was it an Act of the Parliament? It is true that for greater solemnity Richard II., having the crown on his head and the sceptre in his hand, did what he did in the presence of the Parliament; but it was an Act *of the King*, and not of the Parliament.

It appears, however, that the Duke of Norfolk thought that he was struck at, and did not take the title of Duke of Norfolk, but continued as Earl of Nottingham. We find, however, that about twenty-five years afterwards, a dispute arose as to the precedency of the Earl of Nottingham and the Earl of Warwick. The Earl of Nottingham was then Earl Marshal; but the earldom of Warwick would have been a higher dignity than the earldom of Nottingham; and the Parliament, to whom this was referred, considered a good deal what was to be done about it, finding themselves in a difficulty as to reconciling the conflicting claims of these great men. What they said was this, why should we have to decide this at all? a dukedom is superior to an earldom; whether the Earl Marshal

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is superior or not is unimportant, because if you are the Duke of Norfolk you are certainly superior to the Earl of Warwick; and we have come to the conclusion that you are Duke of Norfolk. A petition was presented by the Earl Marshal, upon which the Parliament came to this resolution :—

Which petition having been duly considered, and regard being had to the circumstance, that the late King Richard had, in his Parliament, created the aforesaid Thomas, late Earl of Nottingham, Duke of Norfolk, and inasmuch as although the proceedings of the said Parliament of Richard were revoked, yet by reason that the making of Dukes and Earls and other dignities appertains to the King alone, and not to the Parliament : Therefore, the said duke and his heirs, in the absence of any special mention of them, are in no respect injured nor their title in any degree weakened by such revocation (*a*).

Therefore they came to this conclusion : We need not say whether the Earl Marshal takes precedence of the Earl of Warwick; we get over that by saying that you are clearly still Duke of Norfolk.

But, my Lords, how does that affect this case? This appears to me to have no bearing upon the case before your Lordships. All the *indiciæ* referred to there, as proving that the Dukedom of Norfolk was not annihilated, are wanting here. This title was struck at by name; not the title of the Duke of Montrose; but the titles which had been created by the King subsequently to the preceding February were struck at, *nominatim*. It, therefore, appears to me that the case of the Dukedom of Norfolk is no precedent at all in this case. It would indeed have been a precedent if, instead of the Rescissory Act, there had been an Act of Parliament passed revoking some prior Act of Parliament of James III., but that is not the case. The Act Rescissory has abolished the title of the Duke of

(*a*) Rolls of Parliament, vol. iv. p. 274.

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Montrose, not because it abolished any prior Act of Parliament, but because it abolished all new dignities that had been created by James III.

The main reliance, however, of the Claimant was placed on what has been called the *Glencairn case*. But I think that also entirely fails as a precedent, and ought not to have any influence with your Lordships in this case. The *Glencairn case* may be shortly stated thus. The Dukedom of Montrose was created, as I have already stated, on the 18th of May, 1488. A few days afterwards, I think on the 28th of May, the then Lord Kilmaurs was by the same King and for the same cause created Earl of Glencairn. Now the argument was this. It has been established that the Earldom of Glencairn was not destroyed by the Act Rescissory, therefore it follows that the Dukedom of Montrose was not destroyed.

In the first place I do not think that the two cases necessarily stand in the same category; but then, further, I do not think it ever has been so determined that the Earldom of Glencairn was not affected by the Act Rescissory, as that the case can at all bind your Lordships.

The circumstances were these. First of all as to the *contemporanea expositio*, substantially the same series of facts occurred with reference to the Earldom of Glencairn, as those which occurred with regard to the Dukedom of Montrose. The Earl of Glencairn sat after the Act Rescissory, or rather his son was served heir to his father, not as Earl Glencairn, but as Lord Kilmaurs; and he always sat in Parliament as Lord Kilmaurs. There was an action brought by the executors of the former Lord, and he is described in that action as Lord Kilmaurs. He died, I think, in 1492, and was succeeded by his son, Cuthbert; and Cuthbert executed many deeds, always describing himself as

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Lord Kilmaurs. Why was that, if it was not understood that the Earldom of Glencairn had been abolished and annihilated, "cassez et adnullez?" Why did he describe himself as Lord Kilmaurs? And what strikes me as not being at all an unimportant thing is this, some of these instruments were handed in to your Lordships with his seal appended to them—a large seal, as big as a crown-piece—such as seals were in those days; and it has this upon it, "*Sigillum Cuthberti Domini Kilmaurs.*"

Then, again, it appears that the property included in the grant to the Earl of Glencairn, consisting of the property of Drummond and Dochray, never was enjoyed by the Earls of Glencairn, but passed away to different families. I think some of the property is the property now of the noble Duke, the present Duke of Montrose. However, that is immaterial; it was not the property of the Earl of Glencairn. There was, therefore, at that period, everything to indicate that these parties, just as the Duke of Montrose did at the time, supposed that their titles had been struck at by the Act Rescissory.

The new King, James IV., married in the year 1503; and it is natural to expect that upon the occasion new titles would be created, such being the custom at a coronation or marriage. We know upon the most authentic evidence that in the year 1503, just about the date of the marriage, one Scotch nobleman or gentleman of distinction, one of the Hamiltons, was made Earl of Arran. We have also contemporaneous history to guide us. I will suppose this for a moment to be but doubtful evidence; that is, doubtful whether it is what we could legally accept. History says that three noblemen were created. We know that the ancestor of the present Duke of Montrose was then created Earl of Montrose. An observation which I would make on this creation is, that I cannot conceive anything in the

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world so excessively improbable as that if there were at the time a Duke of Montrose, the King, wishing to confer favour on Lord Graham, should create him Earl of Montrose. That of itself, I think, irresistibly shows it was not at the time understood that there was a Dukedom of Montrose existing. We then find that from that time, I think so early as 1504, Lord Kilmaurs, who had, in an immense number of instances, been always called Lord Kilmaurs (not only on his own seal, but in transactions with the Crown, and in transactions with private persons), is again designated "Earl of Glencairn," and so on, from that time downwards, he and all his descendants continued to be called Earls of Glencairn. Independently of any historical evidence, what is so extremely natural as to imagine that, if he had made his peace again with the Crown, the King would have given him back his higher title, and created him Earl of Glencairn? The fact that we do not find the grant seems to me perfectly immaterial. We all know very well that we should be thrown into difficulties as to many of our possessions, if the circumstance of a grant 350 years ago not being forthcoming were considered fatal. We should be acting upon principles which, in fact, do not guide us in the ordinary circumstances of life. Therefore, my Lords, it appears to me that what happened to the Earl of Glencairn after the passing of the Act Rescissory is exactly what you would have anticipated. He is always called from that time "Lord Kilmaurs." He has none of the property which was granted to him by the original grant of the Earldom of Glencairn; he sits in Parliament as "Lord Kilmaurs;" he has his seal engraved as "Lord Kilmaurs;" and so he continues down to a period just after the time at which nothing could be so probable as that he should be again created Earl of Glencairn. From that time we find him called the Earl of Glencairn. Is not the

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inference almost irresistible, that at the same time that Lord Hamilton was created Earl of Arran, and at the same time that Lord Graham was created Earl of Montrose, Lord Kilmaurs was created Earl of Glencairn. We cannot entirely reject the information we gain from antiquarian researches. We find there a long description given of "the Belting" of these noblemen. But if we had no trace of it at all from that source, I should think the inference that such was the fact, not only not an unnatural one, but one at which your Lordships could hardly fail to arrive.

My Lords, that being the evidence, contemporaneous, if I may say so, I now come to the only other transaction to which I shall think it at all necessary to call your Lordships' attention. That is, what is supposed to make this a *res judicata* in favour of the present applicant. It has been truly remarked that nobody could be so tenacious as the Scotch Nobles were of their precedence; and this observation leads me to advert to a remark which was made (but not with much impression upon my mind), that the sittings of these Noblemen, one as Earl of Crawford, instead of Duke of Montrose, and the other as Lord Kilmaurs, instead of Earl of Glencairn, might be regarded according to the customs prevailing among foreign nobility, who often take not their highest title but their oldest. And, therefore, it might be that he called himself in society "Lord Kilmaurs" instead of "Earl of Glencairn." But, my Lords, the sitting in Parliament and getting ranked as a Baron when he had a higher title, is not an act which a Scotch nobleman would have done, unless he had been compelled to do so.

My Lords, I will now proceed to the only remaining question with regard to the precedency of the Earls which led to the litigation in the 17th century. Just after the accession of James VI. of Scotland, and I.

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of England, to the crown of this realm, there seems to have arisen a dispute among the nobility in the Scotch Parliament as to *precedence*. A Decreet of Ranking, as it is called, was made, I believe, by the Parliament itself, in which they classed the Peers according to their order. They classed the five following Noblemen in this order:—The Earl of Eglinton, the Earl of Montrose, the Earl of Cassilis, the Earl of Caithness, and the Earl of Glencairn; putting Lord Glencairn below Lord Eglinton and the others. In 1610, Lord Glencairn, being dissatisfied with this arrangement, instituted a proceeding in the Court of Session to have it corrected; alleging that he took precedence of those other noblemen. The Court of Session came to the conclusion that he was right, and that he took precedence of the Earl of Eglinton and the Earl of Cassilis; nothing being said about the other two, and for this reason: they had never, as we should say, been made defendants—had never been heard. And, therefore, the decree of the Court could not affect them. My Lords, the consequence of that was a very absurd state of things; Lord Eglinton and Lord Cassilis were put down at the bottom, because the Court could not affect the Earl of Montrose, nor the Earl of Caithness; and therefore after the Earl of Caithness came the Earl of Glencairn, then the Earl of Eglinton, and then the Earl of Cassilis. Against that decision there was a further appeal on the part of those who had been put down improperly; and in 1617 the decision of 1610 was reversed, and the old order restored. And then, again, a further proceeding was instituted upon the ground—at least so it was alleged—that the Earl of Glencairn's title took precedence (dated from, I think, 1488) of the Earl of Eglinton's, the date of whose title does not very clearly appear, but might have been some ten or twenty years afterwards. In this confused state of

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things, there having been first a Decreet of Ranking in one way, corrected afterwards by the Court of Session in another way, it appears, my Lords, that the Earl of Glencairn had made great favour with King Charles I., and in the year 1637, King Charles I. took upon himself to issue letters patent confirming the original grant of 1488. Now, I need not tell your Lordships, that though the Crown is the fountain of honour, and though King Charles might have created the Earl, Duke of Glencairn, if he had thought fit, or bestowed upon him any other title, yet the Crown cannot set up as a valid grant that which has been annulled and declared invalid by an Act of Parliament (*a*). Charles I. did that. And in consequence, Lord Glencairn again applied by a Summons of Reduction, to the Court of Session in Scotland. It certainly does seem to us in these days rather strange that the question of the precedency of these two noble Earls should have occupied the Courts, in one way or another, for nearly half a century; but so it did; and finally having gone through such a course of litigation as it is sickening almost to look at, in January, 1648, old style (1649 new style), only a few days before the execution of Charles I., the Court of Session decreed in favour of the Earl of Glencairn. That is to say, it decreed that the original charter was still in force; and that he, therefore, took precedence of the Earl of Eglinton. Well, what happened upon that? Why,

(*a*) See the Third General Report on the Peerage, attributed to the late Lord Redesdale (author of the admirable "Treatise on Chancery Pleading"). In the print of 1822 of this Report, the references are pp. 49, 50, 51, 52. In the print of 1829, pp. 58, 59, 60. The doctrine to be collected is that where a peerage has been extinguished by Act of Parliament, Parliament alone can restore it. The Crown, indeed, may grant a dignity of the same degree, and by the same name; but it will not be the same dignity, and it will give precedence as a new creation only.

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the Earl of Eglinton (who, I suppose, was on the other side in the politics of the day), went before the Parliament of Scotland, and in the following year Parliament reversed what the Court of Session had done; so that from that time the Earl of Eglinton took precedence of the Earl of Glencairn. Then came the Commonwealth. And then, in 1660, the Restoration. And in 1661, the Act of Parliament which had revoked the decree of the Court of Session was swept away; so that the decree of 1648 was set up again.

Now, what is said is this (not that it touches the Montrose case, it has nothing to do with it except as a precedent), that the Court of Session, being a competent tribunal, decided, in 1648, something which necessarily shows that the Act Rescissory had not the effect of destroying dignities; and that if that were so, if it did not destroy the one, it could not have destroyed the other.

My Lords, in the first place, I must observe (not that I attribute much weight to the argument), that in course of discussion upon the hearing of that case before the Court of Session, it was distinctly argued that the case of the Duke of Montrose differed from that of the Earl of Glencairn; because, it was said, a dukedom is in every sense a new dignity: and that, therefore, although the Act Rescissory may have destroyed the Dukedom of Montrose, it does not follow that it destroyed the Earldom of Glencairn. The force of that argument would depend upon this, What is the meaning of "new dignities?" The argument would be very good if "new dignities" meant creating persons to dignities which had been unknown, as far as the subjects of Scotland were concerned up to the time of that creation. But it has no weight if the true interpretation be (as I consider it), that it meant to strike at dignities which had been newly granted.

The Court of Session came to the conclusion

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that the Earl of Glencairn took precedence of the Earl of Eglinton; they must have come to the conclusion, therefore, that the original patent was in force. But, my Lords, it is very difficult indeed to be certain that one understands exactly the principles upon which the Court of Session proceeded in that case. No doubt the Act Rescissory was pressed upon them in argument; but there is nothing in the judgment which shows that they acted upon the Act Rescissory at all. The Court of Session decided one way, and, as a matter of course, Parliament decided the other way. And afterwards, when the tables were again turned, the new Parliament revoked what the former Parliament had done. It is very difficult, indeed, to arrive at anything satisfactory from transactions occurring at that period, particularly in matters of this special nature, relating to precedence of persons no doubt taking a part in the troubled affairs of those times. I must, however, remark, although it may seem like a paradox, that I believe we have just as good means of judging as to the truth of this case, after the lapse of 350 years, as they had after the lapse of 150 years. For 150 years would just as completely annihilate everything like oral testimony, or traditionary testimony, as 350 years. The increased use of printing, and the greater facilities for transmitting knowledge, render our position very superior in that respect to that of our ancestors; and I very much doubt whether, in the reign of Charles I., even independently of the troubles of the times, they were in the least better position to investigate the truth of a case which had happened in the reign of James III. than we are in the reign of Queen Victoria. There are a great quantity of documents illustrating and throwing light upon this subject, which are before your Lordships, but which the Court of Session had not the advantage of consulting; whereas

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all the documents which they had are referred to your Lordships. Therefore, I am of opinion that that which can be looked at only as a precedent, is not what can or ought to be looked at as a precedent guiding your Lordships in this case. But if it is to be relied upon at all as a precedent, it appears to me, that taking the whole of the Glencairn case, it is against, and not for, the Claimant. The grant in the Glencairn case was an original grant to Lord Kilmaurs, "et hæredibus suis;" that is, the heirs general of the Earl of Glencairn. Those who resist the Claimant's case say, that the Earldom must be dated, not from that patent, but from some lost patent, about the year 1503. But the immediate male line became extinct in the year 1796. Now, my Lords, the presumption of law is, if you have not the grant of a dignity, that the grant is to the party and to the heirs male of his body (*a*). That line thus becoming extinct, the party, who would not be the heir male of the first Earl of Glencairn, but heir general of the party to whom the grant was made in 1488 (when the grant was certainly to heirs general), petitioned the Crown; and the question came to be considered in your Lordships' House, whether that party had made out his title to the Earldom of Glencairn. He certainly made out that he was the heir general of the original Earl of Glencairn. Why was it, therefore, that this House held that he had not made out his title? For this reason: the House held that the Earldom of Glencairn had been granted, not under that patent of 1488, but under some later patent, the presumption as to which was, that it was not a grant to heirs general, but to heirs male. Now, my Lords, that decision could proceed only on the presumption that the Act Rescissory was in force; there was nothing to annihilate the first patent but the Act Rescissory. That

(*a*) See the next case.

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was the judgment of my Lord Loughborough, who entered into the case in a very elaborate manner, and was distinctly of opinion that the original grant had been annihilated. And for myself, I think that his judgment forms a precedent upon which your Lordships may rely with infinitely more satisfaction than upon what took place in the Court of Session, and in the Scotch Parliament, in the troublous times which occurred at the end of the reign of Charles I. I shall therefore take the liberty of moving your Lordships to resolve that the charter of the 18th May, 1488, was annulled by the Rescissory Act, that the grant of the Dukedom by James IV. was but for the life of the grantee, and that, consequently, the present petitioner has not made out his claim.

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The Lord ST. LEONARDS:

My Lords, if you look at a few of the leading points of this case, it will be seen at once with what great difficulties the Claimant has had to contend all through.

The Dukedom was created in May, 1488, and created in most express terms, so as to give an estate of inheritance to all the heirs. It was granted in consequence of the aid which the newly created Duke had personally given to the monarch who granted it, in the field of battle. The monarch himself died in another field of battle within a few weeks afterwards, and his successor upon ascending the throne issued a proclamation annulling all grants which had been made by his predecessor from the 2nd of February, which date over-reached the date of the grant of this Dukedom. And all the accounts we have of those times would lead to this conclusion, that the reign of James III. was considered by his successor and by Parliament to have ended really upon the 2nd of February, although he did not die till the end of the year.

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Now, my Lords, under those circumstances, after a proclamation had been made, Parliament met, and the Act which has been commonly called the Act Rescissory, was passed. Without entering at this moment into its construction, nobody will deny that at least it was open to the interpretation which has now been put upon it—namely, that it struck at this newly created dignity and annulled it. We find that that construction was acted upon, if not by the Duke himself, certainly by the Crown. The Duke, ceasing then to be Duke, being Earl of Crawford, and of course not in favour with the successor on the throne, was put under terms very onerous to bear; but ultimately, in the very next year, was forgiven by the Crown. What was the consequence? A re-grant of the same Dukedom to him for life. He married, and his Duchess as his widow enjoyed her rank and title as Duchess during the whole of her life, which extended to a very late period. But the Duke's successor took no title of Duke; and no claim has been ever made to that Dukedom for three centuries and a half.

You see, therefore, my Lords, with what extraordinary difficulties the Claimant must have had to contend to establish the claim now advanced by him: *primâ facie* upon half a dozen facts, it seemed almost impossible that such a claim could ever be substantiated.

I wish to say one word about time. Time, considered merely as time, in regard to dignities, goes, I may say, for nothing. The great title (*a*) which is possessed by a noble and learned friend of mine, now present, had certainly not been claimed for a long time; but then, observe, there was nothing striking at that dignity. The title, if it were valid, remained just as good as it was the moment after the grant was made (*b*).

(*a*) Earl of Devon.

(*b*) See Sir Harris Nicolas' Report of the Devon Peerage Case.

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But, my Lords, it may well deserve consideration, whether it would not be wise to put some limit of time upon Peerage claims; and the circumstances of the present case are well calculated to excite the observation. If the investigation had been left to the Crown alone, and if the Crown had not thought proper to incur the expense of procuring evidence counter to the claim—although my apprehension is that your Lordships would have come to the same conclusion—yet you would not have come to that conclusion so satisfactorily as you will probably now do. The claim has aroused another of your Lordships. Naturally enough the noble Duke, who possesses his title under a later grant, must have felt unwilling, unless with right on its side, that the more early Dukedom of the same name should be established. No doubt the noble Claimant in the most handsome way declared that if he should succeed, he would be ready, with the aid of Parliament, to take another title, and not to interfere with that of the noble Duke. But still it was natural that there should be that feeling, and it has led to a vast mass of evidence being produced, at great expense, not by the Crown, but by the noble Duke (a), which, however, having been produced by him, has been made use of by the Crown, and thus has elucidated the case in a manner which could never have been hoped for without that assistance.

The first document, the Charter, admits of no doubt; and when you come to contrast it with the re-grant, it is of great importance to bear in mind that the original grant was to the Earl of Crawford as Duke, and to his heirs general. And there was a grant in the same Patent of certain estates, then I have no doubt of considerable importance, which were erected into a Dukedom, and would descend to the heirs general.

(a) *Suprà*, p. 63, as to the Objector communicating information to the Crown.

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When James IV. ascended the throne, he by a proclamation annulled all the previous grants of his father, his predecessor, from the preceding 2nd of February. That proclamation, as has been truly stated at the bar, could not by law operate to destroy those grants. That I freely admit. But it shows the intention of the Crown to strike at those grants. It is probable that some of the property which had been granted to the Duke had been resumed by the Crown, and had been granted away before the Act Rescissory was passed. It was said this was a mere act of violence and power, for you find that this property was re-granted by the Crown before the original grantee had lost his title to it. That may be true enough, but it was granted after the proclamation, with the knowledge of the Crown that those grants would be defeated by Parliament. And almost the first act of the Parliament, which met early in October, 1488, was to pass the Act Rescissory.

Now, my Lords, your Lordships have heard this Act called a Rebel Act of Parliament, and you have heard a great deal about loyal, dutiful, and excellent subjects, and so on. But these topics cannot receive the slightest attention from your Lordships in disposing of this claim. The question is, what is the true construction in law of the grants, and what was the operation of the Act of Parliament—because it should be borne in mind that loyalty to one sovereign was disloyalty to another. He who was loyal in his last moments to James III., was disloyal to James IV. It would have been just the reverse if the other party had succeeded.

The learned counsel at the bar, dwelling upon the supposed merits of the Duke of Montrose, said, How can it be possible to construe the words of this Act as striking at the dignity conferred upon so loyal and excellent a subject? That is, a loyal and excellent subject to

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James III., but not so esteemed by James IV., till he restored him partly again to his favour. The original grant of the Dukedom set forth expressly that one consideration for it was the Duke's services upon the field of Blackness. There was nothing that could have operated so strongly *against* the Duke with James IV. as that very act which had caused this special favour to be shown to him by James III.

With respect to the Act of Parliament, I have never been able from the first moment down to the present, during all the arguments day by day, to entertain the slightest doubt. It expressly rescinds the "new dignities granted or given to any person or persons, what estate, condition, or degree, that ever they be of" (which certainly would include nobles—Earls as well as Dukes), "since 2nd day of February last by past." Your Lordships will recollect that that is the date which, beyond all possibility of doubt, had been assigned as the real determination of the reign of James III. Throughout these Acts of Parliament, in all the places in which he is referred to, he is spoken of as the present "King's father," and not as the "late King." It is not till a later period that they refer to him as "the late King." They treat him, therefore, as a person who made these grants without having the authority to do so.

By the Act Rescissory, all grants are struck at "which might be prejudicial to our Sovereign Lord, and the Crown that now is." The expression is, not "all which *may* be prejudicial," but "which *might* be prejudicial;" that is to say "which," but for this Act, "might be prejudicial." But even if there could have been a question upon this Act at the time, what are we to say, after three centuries and a half of acquiescence with every thing entitled to any weight that has taken place during that long course of time, as it

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appears to me, when properly considered, consistent with the construction which I now submit to your Lordships to be the right one? It is clear that the Duke never sat in Parliament upon that title, and he had no opportunity of doing so. It is shown that there might be a question (which I will not enter into) whether letters patent had been granted. I will assume that a patent *was* granted.

Now, as regards the other dignity, let us see how it stands. The Duke insisted, as much as any man could do, upon his title as Duke. Wherever he had an opportunity of making use of the title, in a way which could not be prevented, he did use that title. That is beyond all question. It appears that he was received partially into favour. And it has been much contended at your Lordships' bar, that it was impossible, when you read the re-grant, to say, that he was a person whose title was to be destroyed, because referring to the words "which might be prejudicial," it is asked, How could it be prejudicial to preserve the title of the man to whom the re-grant was made, and he so worthy a subject? But if we want to know the terms upon which James IV. and the Duke were, we have only to turn to the protest which the Duke of Montrose executed at his own place, with his own dependents around him, and there, when he was forced to surrender the sheriffdom of Forfarshire, he takes care, behind the back of his sovereign (for which I do not blame him), to express his griefs, and to make the protest, looking forward to better times, in order to save his right, if by law it could be saved. [Here his Lordship read the protest of the Duke, showing his deep mortification at the displeasure of James IV. on the ground of his constancy to James III.; and the resolution of the Duke in surrendering by compulsion the sheriffdom of Forfar to have "remedy of law at the proper season".]

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Your Lordships may therefore easily collect what the feelings of James IV. were towards this nobleman. And what follows? There is a procuratory of resignation which comes out of Lord Gray's muniment room, and which for the purpose I will take to be a genuine instrument. That purports to be a resignation by the Duke, calling himself by that name, of this office to the Crown. And that is stated to have been at Hailes, which is near to Edinburgh. It is stated also to have been in the King's presence.

But then, my Lords, when the Crown comes to act upon it, you see, at once, the difference which has just been pointed out. The Crown, in the re-grant to Lord Gray, refers to a surrender by the former owner, but a surrender by the "Earl of Crawford," which would be his proper title if that Act of 1488 had struck at the Dukedom—and it re-grants the office to Lord Gray as having been surrendered by the Earl of Crawford. Then that is followed by another document of the Crown, a Precept of Sasine—and that Precept of Sasine is in precisely the same terms as the actual re-grant by the Crown to Lord Gray. So that so far as this goes there is nothing which tells with such wonderful effect against the title as the very attempts which the Duke made to set up the title of Duke; because he never did one single act by which he attempted to set up his title as Duke, with the Crown, which was not immediately repelled by the Crown. Look at the grant to his wife, which required the confirmation of the Crown. There he called himself Duke—and what did the Crown do? The Crown in confirming the Charter took care to prefix to it his proper title—calling him Earl of Crawford and confirming the grant by that title. Surely these acts are conclusive.

Then we come to a matter that may well startle

anybody, and that is the re-grant after he had been stripped of the Sheriffdom of Forfar. He was compelled to give it up—there is no doubt about that—and he says he only gave it up because in surrendering it he was operated upon by that reasonable fear of death which even a brave man might fairly give way to. He desires not to be considered in mere cowardice to have yielded; but he says, There is such a fear of death hanging over me that I am justified as a man of sufficient physical and moral courage in giving way to the Crown. Then what follows? Very shortly after, he is partially restored to favour; and then comes the re-grant of the Dukedom upon which there has been so much discussion. Now, my Lords, compare that re-grant with the original grant, which was only a few months before, and what do you find? The original grant was in the strictest and strongest terms hereditary, to him and to his heirs. What do you find in the *re-grant?* which is to be carried further into effect by a regular Charter. You find it wholly silent about any hereditary right or succession. Therefore, my Lords, I should have been of opinion, upon that document alone, that the Dukedom was granted only for life. You find also that the estates which had been granted by the original Charter, and had been constituted a Dukedom to go with the dignity, are re-granted with the same title, but without the former words of limitation. And what does the Crown state in making a re-grant of these estates? It asserts the title of the Crown to those estates—it calls them the estates of the Crown. Now they could only be estates of the Crown by that grant of 1488 having been annulled. If that grant had not been annulled they would have still been the estates of the Duke. Therefore, that, of itself, would go a great way. But what does the re-grant state? The services and considerations which induced

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James IV. to make it; (nearly the same as in the original grant, which is almost copied here). Services which were to be performed, not to the dead Monarch of course, but to the living Monarch. To whom is the re-grant? To the *Earl of Crawford.* Why what a mockery is it to talk of that being a confirmation to the Duke. How is it possible for any man, as a lawyer, to say that it was a confirmation to the Duke? What would have been the true mode of drawing a confirmation, according to any mode of conveyancing, or according to any law, if the object had been to confirm to the Duke the Dukedom granted to him in 1488? When King Charles, in 1677, attempted to confirm the other title of Glencairn, he expressly confirmed it *to the Earl, as under the old Patent of* 1488. And so this must have been, if that had been intended. But there is not a single word in the re-grant to the Earl of Crawford, which can be twisted into anything like a confirmation. The whole is *de novo.*

Then, my Lords, it was said, that you might *imply* a limitation to heirs—that it was a creation of a Dukedom which in itself would carry it to heirs. We are not, as it appears to me, under the necessity of discussing this question, because we know what follows. There is upon that Register a LITERA, which purports to tell you what the contents of the grant were. It begins by stating, in so many words, that the Dukedom had been re-granted to the Duke for his life, in the most plain and explicit terms, and also that there had been granted the estates—because the grant of the Dukedom the second time said nothing about the estates. The grant of the estates depended entirely upon the LITERA. That was the only evidence they had that the estates had been granted. It states them to have been given—it speaks generally of rights and privileges, and then you find the words "*et cætera.*" Now Lord Coke, in

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his work upon Littleton, tells us that there may often be great virtue in an "*et cætera*," and he actually collects every instance of an *et cætera* which he can find. But I never before knew so much weight laid upon an *et cætera* as there has been by the Claimant at your Lordships' bar;—for it was urged that *et cætera* should import, contrary to the very words of the LITERA, that there was some limitation beyond a limitation for life, and we have had produced documents of all sorts, to show that there have been in the Law of Scotland grants for life in so many words, and that in one or two instances those grants extended to heirs. Generally speaking they were grants to other persons—what in this country would be called remainders. There is nothing extraordinary in that. But in one instance there was an attempt to prove that there was a grant to a man during his life in most express terms—*tenendum* to him and to his heirs generally. That turned out to be a mistake. In point of fact the words of the grant referred to the homage he had done, and which he was to continne to do during the whole of his life—he was always to be a good subject—and the *tenendum* was the only matter in the grant which referred at all to the extent of the estate which the grantee was to take. That took away the force of that argument, and left the case to stand, as it does stand, upon the construction of the grant itself, and upon the LITERA.

My Lords, my clear opinion is that the re-grant was for life only—that the evidence clearly shows that it was so—and that it is impossible to feel any doubt upon the point. But even supposing there were a question about it, contemporaneous usage, as my noble and learned friend has said, must guide, and always has guided, in these cases—particularly if you are called upon to supply certain words in an ancient grant,

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which are not found there. You must then look at the acts; or in the case of a Peerage, you must look at the sittings. If you find a constant sitting on the part of heirs male of the body of the original grantee—you do not let in heirs general (*a*). Now if we look to see what was done in this case, I think I never saw facts in all my experience which with so much force proved the real construction of these instruments, not now, at the end of three centuries and a half, but then, at the moment, when the rights were to be enjoyed—at the moment the claim was to be made. And for three and a half centuries from that time there has never been any doubt or dispute either on the part of the Crown as to its rights, or on the part of the grantee as claiming adverse to the Crown. Could there be a stronger fact than this, that the Duke having married whilst he was Duke, the Duchess his widow continued after his death to be called the Duchess, and continued to enjoy the dignity of Duchess, whilst the Duke's heir at once submitted to take upon him the lower title of Earl of Crawford. Let it be attempted to be explained as it may, every successor in his turn has taken that, and no other, title, and never set up the slightest pretence to claim the Dukedom of Montrose.

My Lords, it would have required a body of overpowering evidence to countervail the strong preponderating circumstances in favour of the legal construction which I have in common with my noble and learned friend taken the liberty of submitting to your Lordships. In an early state of the case I asked the learned counsel what had become of the estates? because let it be as it may as regards the dignity—and supposing that with respect to it there had been a difficulty—there could be no difficulty as to the estates. By the first grant the estates were granted to the Duke in fee simple. At

(*a*) See the next case, *i.e.* that of the Glencairn Peerage.

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the time of the re-grant the Crown had seized them. That your Lordships know; because the Crown, in re-granting the very same subjects, stated them then to belong to the Crown, which I have shown your Lordships could not have been the case if the original grant had not been annulled by the Act Rescissory. Then what became of the estates? They were re-granted. As I apprehend, re-granted for life, and for life only. What followed? The Duke's successors never put forward the slightest claim to the estates, the Crown disposed of them adversely; and, under such disposal, they have been enjoyed for three centuries and a half, adversely both to the original grant, and adversely also to the re-grant upon which so much reliance has been placed. Yet these estates were intended to form a regality for the Duke, both in 1488 and in 1489, to a limited extent. How then is it possible, with such facts before you, to have any possible doubt as to the construction which we now advise your Lordships to put upon these acts and grants, a construction which all men at all times have adopted from the very first moment down to that at which I am now addressing your Lordships.

My Lords, certain Acts of Parliament were relied upon, as destroying the operation, and as, in fact, repealing the Act of 1488. I am clearly of opinion, after the best attention, that those Acts do not any of them touch the question, but that they rather corroborate the operation of the Act of 1488. The first of those Acts, which requires the parties to bring in their documents, is perfectly conclusive, as it appears to me. My noble and learned friend has called your Lordships' attention to the recital of it (*a*). That Act of Parliament spoke of the grants in question as pretended grants; and the reason was because the

(*a*) *Suprà*, p. 405.

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Parliament chose to treat James III. as having ceased to reign on the 2nd of February. Therefore, of course, those grants were not treated as real grants by the monarch on the throne. That Act of Parliament, therefore, so far from being adverse to the Act of 1488, was actually in confirmation and in extension of the powers of that very Act of Parliament. It did not relate to dignities. Why not? There were but two dignities which had been granted, the Dukedom of Montrose and the Earldom of Glencairn. Both the noble persons to whom those great dignities had been granted had acquiesced in the Act of 1488. The Duke had acquiesced by accepting the re-grant, limiting to him for life the same dignity. How inconsistent would it be to attempt to set up the former grant in fee, when the latter grant for life was accepted. The Earl of Glencairn had died on the field of battle with his master, and his son never claimed the Earldom. It is not clear that there were any patents to bring in in these cases, but, if there had been any, they were clearly struck at, and it was unnecessary to refer to them.

The other statutes have been sufficiently commented upon by my noble and learned friend; and I have only to observe, that the Act of 1503 wholly relates to the Church and its possessions, and has not the slightest bearing upon the Act of 1488, or on the present case.

Then, my Lords, the operation of the Act of 1488 being thus established by plain construction, and proved by contemporaneous usage, I apprehend there can be no difficulty in point of law in disposing of this claim. But, my Lords, two authorities have been relied upon—the case of the Duke of Norfolk in this country, and that of the Earl of Glencairn in Scotland, and your Lordships have had a most unusual difficulty thrown upon you. You have really been for days trying the

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Glencairn Peerage, which was decided by this House in 1797, and not for the purpose of its having the slightest effect upon that Peerage, but in order to see how far the proceedings in that case can be brought forward as a precedent in this.

As regards the Dukedom of Norfolk, your Lordships will see that the creation in question was not by Parliament, but, as clearly as words could make it, by the King, being in Parliament. There is not a single word there of Parliament assisting in the creation. It was not an unusual thing that the King did in Parliament declare his intention, and did in Parliament create those Peerages. The distinction, therefore, was this—they were created *in* Parliament, but they were not created *by* Parliament. That, I think, is a clear answer to the Duke of Norfolk's case.

As regards the case of the Earl of Glencairn, your Lordships will find it exactly tallying in all its circumstances with that of the Duke of Montrose. It is a singular thing, and it only shows the truth of the transaction, that it exactly follows the same fate, barring the different circumstances which were occasioned by the different acts which took place. The Earl of Glencairn, as I said before, died on the field of battle; he was the only other person who had a grant of a dignity which was struck at by the Act of 1488. His son, Lord Kilmaurs (which he really was), sat in that very Parliament of 1488, and he sat by the title of Lord Kilmaurs. Can any man persuade me, that if he was entitled to the Earldom of Glencairn he would not have taken that title? He must have been perfectly persuaded at that time, and everybody who advised him must have known, that he had no right to it. Why did he not take the title if it properly belonged to him, if it had just descended to him? But he sat as Lord Kilmaurs, he executed many deeds, he did many acts,

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and he never affected to assume the title of Earl of Glencairn. That, my Lords, is quite clear.

Then comes the sitting in 1505, and this House, I may say, decided that that sitting was not under the grant of 1488. The House has, in a former case, upon that very dignity, actually and positively decided the question.

Lord Kilmaurs continued to keep his title of Kilmaurs; but in 1505 he sat as Earl of Glencairn. Now we know, historically, some circumstances which occurred at this period, and we have a right here to look at history. We find in Leland (*a*) a most elaborate account of the solemnities upon the Royal marriage. He tells you that the King called three persons to new dignities; one of them was the Earl of Montrose, another the Earl of Glencairn (the former title of Lord Kilmaurs, who seems then to have been very much in favour, for he was one of the parties assisting in the tournament of the Queen's marriage), and the third was Lord Hamilton, who was created Earl of Arran. Now here was a clear creation wanting the patents. Exceptions have been taken to Lord Rosslyn's opinion delivered in this House in 1797 (*b*). It is said that there was great ignorance on the part of that noble and learned Lord, of whom we always speak with reverence; for that he spoke of the creation of those Earldoms by belting. Suppose he did make use of that expression, he was only speaking in common parlance. The King, who created by words these different dignities, in the presence of all his people, upon this grand occasion, finished the ceremony by *belting*, and therefore the Lord Chancellor of the day, when this matter came before the House in 1797, said that they were created by belting. And learned antiquaries affect now

(*a*) Leland's Collectanea. See *infra*, p. 448.

(*b*) *Infra*, pp. 446, 448.

to be shocked that the noble Lord, in 1797, should have described the creation of earls by belting, which, they say, takes away the whole weight which otherwise would have been due to his opinion (*a*). My Lords, I have read more than once or twice that noble Lord's opinion, and I think that it is perfectly right, and I think he was quite justified in the case then before him, in putting an end to that claim.

But let me pursue the Glencairn case a little further. Lord Kilmaurs, when created Earl of Glencairn, at once takes his new title, and he goes on enjoying it for years. He gets into discussion with Lord Eglinton about precedence, and King Charles thinks fit, in 1637, to attempt to give to the Earl the benefit, by confirmation of the original grant of 1488, but that could not be done by law (*b*). It introduced, however, an element into that case which is not to be found here. Therefore to attempt to make that a precedent here would be impossible.

But the way in which I understand it to be put is this, that, in 1648, the Court of Session alone had the right to adjudicate upon peerages in Scotland. That proposition, however, is not made out at all to my satisfaction. Lord Kaimes is against it. It is said that Lord Kaimes (*c*) is no great authority. I am not speaking of him as a lawyer. I am speaking

(*a*) See Mr. Riddell's book on Scotch Peerages. *Belting* is equivalent to *girding*. One of the old ceremonials at the creation of an earl was to belt or gird him with a sword in token of defence, and to adorn him with a cap of honour, a coronet, and a robe, in token of counsel.

(*b*) See note, *suprà*, p. 420.

(*c*) Lord Kaimes's Law Tracts. See the tract "on Courts," where he says, that "to determine a right of peerage is the exclusive privilege of the House of Lords." The weight of Lord Kaimes's authority was attempted to be diminished by citing Baron Hume's remarks upon him in the case of *Dalrymple* v. *Dalrymple*. See the Appendix to Dr. Dodson's Report of Sir W. Scott's judgment.

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of him as knowing what the opinions of the day were. He must have known well what was passing in men's minds generally in regard to that supposed jurisdiction. It was originally in the Lords of Session, who were themselves Members of the Scottish Parliament, and to whom as a Committee of Parliament this matter was referred. Whether there was an appeal or not to the body of the House is now utterly unimportant. But when the Court of Session was created, and that was done by the authority of Parliament, your Lordships will find that it was created with "jurisdiction in civil actions" only.

Now the first question which naturally arises is this, Can it be properly said that a question of dignities, which imports so much to the Crown, to the country, and to the House itself, was a question solely committed to the Court of Session? Was it a "civil action," and was it committed to the Court of Session without the possibility of appeal? For it is said there could be no appeal from the Lords of Session.

The Court of Session was a court of justice, and not the proper forum to refer such matters to. And, my Lords, even if it were the proper forum, there is nothing to show that an appeal did not still remain to Parliament which, from the nature of the case, and from the necessity of the case, would remain, if it had not been excluded by the express words of the Act of Union.

I have asked, and nobody has answered the question, How did this House get any jurisdiction in the matter of Scotch peerage claims? We are told that we are not sitting here as a court of justice; but we are sitting here upon a reference from the Crown. I am perfectly aware of that; but the question is simply this, to what forum was the Crown to refer the matter of peerage claims? I want to know what there is in

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the Act of Union that would take away the right of the Court of Session over Scotch peerages. If it existed before the Act of Union, why should not it exist now? Nobody has answered that question. Why should it not have remained? It has not remained. It has passed away entirely, as it ought to have passed, by the reference of the Crown to this House. In regard as well to Scotch peerages as English peerages, it is much better that it should be so, as I apprehend. I conceive that nothing can take away the right of the Crown to refer such inquiries to the House of Lords, and it has done so ever since the Act of Union.

But I do not myself think that this matter has any important bearing upon the argument, in the present case, either one way or the other. Your Lordships see that exactly as either the one power or the other preponderated, so was the decision. If you will tell me the date of the Parliament, I will tell you what the decision was. The decision always went according to the power which at the moment ruled; and that very resolution of 1648 was upset by a resolution of Parliament in 1649, and that Parliament itself was again struck at by a subsequent resolution. But what does it all amount to? Only that there is a continual uncertainty—a continual fluctuation in the decisions upon the subject, which detracts from the weight which otherwise might be given to any one of them, or to all of them together.

Then the thing remains untouched, until the year 1797, when Sir Adam Fergusson came forward to this House and made a claim as heir general to this very Earldom of Glencairn, and the decision come to was one from which it is of no use attempting to retire; for, according to my apprehension, it is a decision which binds your Lordships.

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My Lords, considering the labour that has been bestowed upon the case now before your Lordships, the mass of evidence produced, and the greatness of the dignity which is claimed, I have looked at it with as much anxiety as I ever bestowed on any case, and with a sincere desire, if there had been any well founded grounds for it, to give every possible effect to them; but, on the other hand, with an equal desire to render fairness and justice to the Crown and to the public, as well as to those persons who think themselves aggrieved by the claim, in order to see that it was not allowed except upon sound legal principles. And, on the whole, my Lords, I have come to a very clear conclusion, that there is no foundation for the claim, and I therefore concur entirely in the resolutions which have been moved by my noble and learned friend.

I ought to state, that my noble and learned friend Lord *Brougham* (a) has authorised me to say, that he concurs entirely in the resolutions which have been just proposed to your Lordships. And my noble and learned friend Lord *Lyndhurst* has desired me to state on his behalf that he entirely concurred upon two points. First, that the Act of 1488 was a revocation of the dignities; and, secondly, that the construction was clearly that which I have suggested to your Lordships. But he desired me to add, that he gave no opinion upon any other part of the case, as he had not heard the whole of the arguments.

RESOLVED:

1. That the Charter bearing date the 18th day of May, 1488, by which James III. of Scotland granted the Dukedom of Montrose to David Earl of Crawford, *et hæredibus suis*, was annulled and made void by the Act of the first year of the reign of King James IV. of Scotland, called the Act Rescissory.

2. That the grant of the Dukedom made by King James IV.

(a) Lord Brougham had been present during the whole of the argument; but was obliged to leave town before the judgment.

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to the said David Earl of Crawford in 1489, was a grant for the term of his life only, and that the Petitioner, James, Earl of Crawford and Balcarres, has not established any title to the Dukedom of Montrose, created in 1488.

[N.B. The elaborate opinions of the Law Lords state so fully the chief points, that it has been found impossible to insert the arguments of counsel, which went over ten days; turning a good deal on details of national and family history—very curious as showing the greatness of the Scotch nobility four centuries ago, and the comparative civilisation of the country notwithstanding its misgovernment. It was stated by the *Lord Advocate* that the ancestor of the noble Claimant was followed to the field by six thousand retainers.

In course of the argument Lord *Lyndhurst* asked: "Were there life peerages in Scotland? In England they were not uncommon formerly." Lord *Brougham* agreed in this; and the point is made certain by the late Sir Harris Nicolas, who in his "Letter to the Duke of Wellington" collects the cases, with arguments on their "propriety and legality."

The *Attorney-General*, in answering Lord *Lyndhurst's* question, said "he believed that life peerages did anciently exist in Scotland. The present case indeed he apprehended showed this. And Mr. Riddell's book proved it."]

(*a*) Published 1830.