BEFORE THE COMMITTEE FOR PRIVILEGES.

AUGUST 5, 1853.

JAMES EARL of CRAWFORD and BALCARRES, *Claimant:* THE CROWN, and THE DUKE of MONTROSE, *Objectors.*

Peerage, Title to—Royal Charter—Clause—Construction—Prescription: RESOLVED, *That the dukedom of Montrose, granted by King James III. on 18th May* 1488 *to David Earl of Crawford* et heredibus suis, *was annulled and made void by the Act of the first year of the reign of King James IV., called the Rescissory Act: That the grant of the dukedom made by James IV., to the said David Earl of Crawford in* 1489, *was a grant for the term of his life only: and that the claimant had not established any title to the dukedom of Montrose created in* 1488.

The Act rescissory 17th Oct. 1488 (*James IV.*), *is best construed by* contemporanea expositio; *being a statute, it required no consent on the part of those whose dignities it extinguished.*

In the original and supplemental cases lodged by the claimant, and in relative "abstracts," he set forth, that, upon the 18th of May 1488, David Fifth Earl of Crawford obtained a charter or patent from James III., King of Scotland, changing and elevating his earldom of Crawford into the hereditary dukedom of Montrose, and conveying certain territorial subjects, to be held "in libera regalitate," and under a general limitation to himself "et heredibus suis." This was on account of the Duke's steady loyalty and eminent services hitherto, and especially, as the sovereign stated in the preamble of the patent, "quod liberaliter, ut debebat personam suam, suosque nobiles et vassallos, pro persone nostre et corone tutamine et defensione, nostro etiam honore conservando, frequenter exposuit periculis cum effectu, et precipue ac novissime contra nostros infideles ligeos, qui se contra nostram majestatem et vexillum in campo bellico apud Blaknes opponebant, et pro suo servitio nobis in futurum impendendo." The king was then at war with his nobility, headed by his eldest son, the Prince of Scotland, afterwards James IV. In this war the king was slain on the 11th of June, or less than a month after the date of the patent of the dukedom.

The claimant undertook to establish three propositions:—I. That the patent of the dukedom, 18th May 1488, still subsisted, and was valid and effectual in law. II. That the limitation in that patent to "heirs," a term of confessed flexibility in Scotch law and practice, in the said patent denoted and signified "heirs male." III. That the claimant was the heir male of the first grantee.

The summary of his entire argument was thus set forth in his cases:—(1) The dukedom belongs to him as the heir male of the patentee, unless it has been resigned, or forfeited by attainder, or otherwise determined by act of parliament. (2) No resignation or forfeiture can be alleged; and the only act of parliament which can be contended to affect it—the Act Rescissory—has no legal operation upon it, because the act being penal, must be strictly construed, and it does not mention the dukedom of Montrose: The duke was recognized as such, and held the lands of the dukedom after the act; and the act did not take "proper effect." (3) Even if the Act Rescissory did apply, the royal recognition of the Duke of Montrose by James IV. after the act, and the remission of the royal displeasure against him, would do away with its effect. (4) So also would the Act Revocatory of 1503—4. (5) No legal argument can arise upon a claim to a dignity from mere lapse of time. (6) The *litera*, or supposed second grant of the dukedom, dated 19th September 1489, cannot affect the merits of the case, because neither the original nor a copy of it exists. It is only known by an imperfect abridgment, or analysis, irregularly interpolated in the Great Seal Register. This interpolation must, under the circumstances, be looked upon with the utmost suspicion; and may be presumed to have been thus inserted with the view of misrepresenting the tenor of the original instrument (if ever fully extended), and thus excluding the duke's heirs from taking up a title which none of the nobility could brook. The act of parliament, on the contrary, of the preceding day, on which the "*litera*" proceeds as on its warrant, exists *in extenso*. Had a restriction been contemplated, it would have been set forth therein as in similar royal grants. Even if the "*litera*" had been regular and beyond question, and even viewing it apart from the act on which it proceeded, it would not follow that

it was a re-grant or new creation for life only, inasmuch as the words "*pro toto tempore vite sue*," occurring in the notice, do often, by Scottish practice, preface grants in fee or subsequent limitations, and are in this instance accompanied by other words which include the limitation to heirs in the original patent of 1488, and thus make the "*litera*" harmonize with the act, in connection with which it falls to be construed. As the act is the sole ground and warrant of the "*litera*," and the former is not restricted to the duke's life, the latter, if it can be supposed to have contained such restriction, would *to that extent* be null, as disconform to its warrant, and the limitation of the original patent of the dukedom, and of the older earldom, which merged into it, would apply and operate in the new grant. The *litera* may thus resolve simply into a royal confirmation or grant "*de novo*," which frequently obtained in the case of original grants, quite valid *ab initio*. And this is corroborated by the high eulogy passed upon the duke as a loyal subject, not only to the king's predecessors, but to the king himself, in the parliamentary act alluded to, of 18th September 1489, the day preceding the "*litera*." At any rate, as it is clearly proved from the previous act of parliament, 18th September 1489, and the abstract of the *litera*, even such as it is, that the latter did not proceed upon any surrender or resignation, the original patent in 1488 cannot be affected thereby; and the "*litera*," even holding it to be a creation for life only, must be viewed as yet another arbitrary and oppressive measure against Duke David, in addition to the deprivation of the sheriffdom, instigated by the rebellious faction, his natural enemies, on account of his loyalty—an attempt, however, in this instance, from the want of a resignation, as futile as unjustifiable.

The Duke of Montrose (11th June 1850) presented a petition to the House, praying for leave to be heard before the Committee for Privileges "in opposition to the claim of James Earl of Crawford and Balcarres; and that he might also have leave to lodge a case, and reasonable time for researches and investigations." This petition was opposed on the part of the claimant; and upon the preliminary question thus raised of the right of the Duke of Montrose to interpose as an objector, cases were lodged for the claimant and His Grace.

After a discussion before the Committee for Privileges on 14th April 1851, it was resolved, that so much of the petition for James Duke of Montrose as sought leave to lodge a printed case, in opposition to the Earl of Crawford's claim upon the merits, should be granted, without prejudice to His Grace being afterwards heard by counsel, if their Lordships, on inspecting the case, should think fit so to order.

In terms of this resolution a case was lodged for the Duke of Montrose, in which he maintained, in opposition to the propositions of the claimant, in reference to the validity of the original patent,—1. That the charter or patent of King James III., of the dukedom of Montrose, 18th May 1488, if it was ever executed, and really existed as a valid patent of nobility, was annulled by the Act Rescissory of the parliament of King James IV., in October of the same year. 2. That David Earl of Crawford was never royally, legally, nor even popularly recognized as Duke, by virtue of that charter or patent. 3. That he did not hold any of the lands and revenues contained in that charter by virtue of it. 4. That the same David Earl of Crawford, still only earl, had a grant of the dukedom of Montrose, with the same lands, revenues, and privileges as were contained in the former charter, on the 18th and 19th of September 1489. That that re-grant was not a confirmation of a previously existing and operative patent, but an independent parliamentary grant of a dukedom, and for life only. 5. That David Duke of Montrose enjoyed his title and the estates that accompanied it, precisely according to the provisions of the parliamentary grant of 1489, and not at all according to the terms of the previous charter of 1488. 6. That the tenure of his ducal honour and estates, both legally and actually, terminated with his life.

A supplemental case was lodged for the Duke of Montrose, in answer to the supplemental case of the claimant, in which he maintained the following propositions:—1. That the alleged charter or patent by James III. to David Earl of Crawford of the hereditary dukedom of Montrose, dated 18th May 1488, if it was completed, was annulled by the royal proclamation issued by James IV., on 12th June, and the Act Rescissory passed on the 17th of October 1488. 2. That James IV., on 18th—19th September 1489, made a new grant of the dukedom of Montrose to the said David Earl of Crawford, but for his life only, and the ducal title accordingly became extinct on his death, in 1495, when also the whole territorial subjects included in the dukedom reverted to the Crown. 3. That even if the charter or patent of the hereditary dukedom were still subsisting, the noble claimant is not the heir of the patentee under its limitations.

The Committee met for the consideration of the claim on the 18th July 1853. *Sir Fitzroy Kelly* was heard to open the case of the claimant. He was further heard on the 19th, 21st, and 22d of July, when he concluded his opening, so far as related to the operation of the Rescissory Act. The members of the Committee, after consulting together, intimated that they had determined, as the question of the continued existence of the dignity was entirely distinct from the question of its descent under the limitations of the patent, to divide the case into two parts, and to call upon the counsel for the claimant to conclude their case, both as to evidence and argument, upon the first branch of the case, with respect to the existence of the patent, after

which the counsel for the Crown would be heard upon that part of the case, before entering upon the second, with respect to the descent under the patent.

Documentary evidence was then adduced on the part of the claimant.

The Solicitor-General (*Bethell*) was also heard for the claimant.[1]

The Attorney-General (*Cockburn*) was heard for the Crown.

Documentary evidence was then adduced on behalf of the Crown, to prove the statements of fact contained in the cases for the Duke of Montrose.

The Lord Advocate (*Moncreiff*) was also heard on behalf of the Crown.

Sir Fitzroy Kelly replied on behalf of the claimant.

The arguments maintained by the respective counsel were mainly those contained in the several printed cases for the claimant and the Duke of Montrose.

Cur. adv. vult.

The LORD CHANCELLOR (CRANWORTH) moved the resolution of the Committee:—My Lords, this case, which has occupied so much time, is a claim by the Earl of Crawford to the title and dignity of Duke of Montrose; and his claim arises under an alleged grant by King James the Third of Scotland, bearing date the 18th of May 1488. The matter has been so long before your Lordships, and so often mentioned, that I am afraid, in mentioning any of the circumstances, I shall be apparently calling your Lordships' attention to matters which must be so fresh in your memory that you hardly need even to be reminded upon the subject. But, at the same time, in order to make clear to myself, as well as to your Lordships, that I do understand the case, I will venture to call your Lordships' attention, as shortly as possible, to the different documents and facts which are important, in order to enable your Lordships to arrive at a correct conclusion.

With regard to the original charter, some doubts were raised as to whether any such charter ever existed. But for the purpose of the motion which I am now about to submit to your Lordships, I shall assume that it did exist; and that, on the 18th of May 1488, King James the Third of Scotland did execute a charter, the outline of which I will now state to your Lordships. It begins by saying, that "it contributes to the glory and honour of kings when persons of illustrious race, their illustrious merits exacting this, are preferred to exalted dignities," and so on. "Hence it is, that we, reflecting upon the actual obedience and the grateful and commendable promptitude which our faithful and most dear cousin, David Earl of Crawford and Lord Lindsay, has exhibited towards us, with unwearied zeal and in many modes; and especially considering, that he has freely, frequently, and effectually exposed his own person, his nobles, and his vassals, to perils for the protection and defence of our person and crown, also preserving our honour, and chiefly, and most recently, against our faithless lieges who opposed themselves against our Majesty and standard in the field of battle at Blackness, as well as for his service to be paid unto us in future; we, [therefore] willing that the said David, our cousin, should shine with ampler dignity, and changing the foresaid title of earl into a greater and loftier one, have, from our certain knowledge, plenitude of power, and special grace, exalted, made, and created, and by the tenor of our present charter, we do exalt, make, and create, the said David, our cousin, a duke, to be entitled and called in all future times, Duke, hereditarily, of Montrose. And we give and grant to the same David hereditarily, the capital messuage and place of the castle of Montrose, called the castle stead, with the burgh and town of Montrose, and the port and haven of the same burgh, with its pertinents, with the water rights and fishing appertaining to us, for ever; and we have given the great and small customs for ever; we have given and granted, and by the tenor of this present charter, we give and grant, hereditarily, to the same duke, the capital messuage and lands of our lordship of Kinclevin, and the dominical lands of the same; which said capital messuage, and other lands, we create into a dukedom." Then it states the lands of Kinclevin to be the same "which the spouse of the late William Haket now has for her life"—"which said capital messuage and place of the castle of Montrose, and the burgh and town of Montrose, with the liberties of the same, also the capital messuage and castle stead of Kinclevin, and the dominical lands of the same, and the other lands of the lordship of Kinclevin," and so on, "are now created and incorporated into a real and free dukedom, to be called the dukedom of Montrose, to be held and had by the same David and his heirs," in the Latin, "dicto David et heredibus suis." "The said David and his heirs rendering

[1] In the course of his speech, the Solicitor-General referred to the claimant's case as "a great repository of learning." LORD BROUGHAM.—"I quite agree with you that this case is a great repository of most curious and important learning. Whatever may be the decision, no one can doubt that it does the greatest credit to the learning, as well as to the industry of those who prepared it." *Solicitor-General.*—"That is applicable in a remarkable way to the case on both sides. I think, my Lords, the supplemental case, which we have produced on the part of the claimant, does to the knowledge, industry, and talent of my learned friend, Mr. Riddell, who has been the author of it, the greatest possible credit. And I am the mere mouthpiece of a very small portion only of the materials that are collected here." The supplemental case here referred to, with the addenda, &c., extends to about 270 large and closely printed pages.

from thence annually to us and our successors, Kings of Scotland, a red rose at the said capital messuage of Montrose, on the feast of St. John the Baptist, in Summer, in name of blanchferm, if only it be demanded." That was the original grant.

My Lords, two questions arise upon this. First of all, is the grant, which we will assume for the present was clearly made, now a valid grant, and in force? If it is, has the noble claimant made out that he is the party entitled under that grant? The case branching out to a very great length, it was the opinion of your Lordships that the more convenient course to take would be to have these two matters decided separately. Of course, in order to entitle the Earl of Crawford to the title of duke, he must make out both propositions; and it appeared the most convenient course that they should be separated into two propositions, and that one should be decided before the other was entered upon. Of course the decision of that in one way, might render any further inquiry unnecessary. Now, my Lords, the only point which has been considered is the first, viz., whether or not, upon the evidence, the acts and the documents which have been before your Lordships, 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 "heredibus" of the original grantee. A peerage, it was said, can only be lost by attainder, or some other acts, none of which, it is said, have been shewn to be applicable to the present case, and therefore that grant must remain in force. But, on the other hand, it is said, that although by no ordinary course can a peerage end except by attainder, or some other mode, in Scotland, yet there must be one exception to the rule so defining the mode in which a peerage may become alienated, for it may be put an end to by what we sometimes call the omnipotence of parliament. Parliament can destroy a peerage, or take a person's property, or do anything else. Then, it is said, that this dukedom, almost immediately after it was granted, (having been granted in the month of May,) in the following October, was destroyed 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 revert to what has been so often mentioned, namely, the circumstances of the times. The grant was made by King James the Third on the 18th of May, at a time when he was at war with his nobles, and had had a battle with them at Blackness, in which he had worsted them. Those nobles had on their side his son, who afterwards became James the Fourth. How far he took an active part is a matter left for further inquiry, and we need not go into it; but undoubtedly we may treat his son as at that time in league with the nobles who were opposed to his father, King James the Third. In that state of things, King James the Third granted this dukedom on the 18th of May. On the 11th of June following, James the Third, with those nobles who adhered to him, including amongst them the Earl of Crawford, then Duke of Montrose, had a battle with the other nobles who took the part of the young king, and who had secured the young king on their side, and the result was the total defeat of James the Third. He was himself killed in the battle, and many of his nobles perished, but not amongst them the Duke of Montrose. Of course what followed, as might naturally be anticipated, was confiscation, and all those terrible events that always follow civil broils of this sort. James the Fourth met his parliament, or rather his parliament assembled, in the following month of October, and on the 17th day of October an act of that parliament was passed, which is what gives rise to the present question. It is the act which in the course of this argument has been called the Act Rescissory.

My Lords, in this case I will read the original, because it is almost as easy to understand as the translation put into mere modern language: "*Item* anent the proclamacione maid at Scone" —that was the proclamation made by James IV., who afterwards became king, in favour of the lords who adhered to him, and against those who had taken part against him—"It is statut and ordanit that all alienacions of landis heretage 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 by past be umquhile our Soverane Lordis faider quham God assoilze quhilk mycht be preiudiciale to our Soverane Lord and to the Crowne that now is be cassit and annullit and of nane effect nor force in ony tyme to cum becaus that sic alienacion giftis and privilegis war grantit sene the said tyme for the assistance to the perverst counsale that war contrar the comon gud of the realme and cause of the slauchter of oure Soverane Lordis fader."

Now, the question is, did or not that act of parliament, or whatever it was, 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 that can admit of no controversy, that if it was an act of parliament, and if the "creation of new dignities" is an expression properly referring to the creation of the dukedom of Montrose, the effect of it was to destroy that creation. It was not necessary that there should be any attainder or any other act of parliament. As I have already stated, parliament was omnipotent.

Now, *primâ facie*, I think it must strike everybody, that not only it may point to that creation, or any other creation of a similar sort, but that it is impossible for language to do 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 what is the meaning of that? Does it mean, as was 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, whether it was or was not prejudicial; or is it merely an inaccurate (if it be inaccurate) way of explaining the motive that induced the Legislature to annihilate those gifts? Does it mean that such of the alienations of lands and grants of new dignities as may be prejudicial to his successor, shall be "cassit and annullit"? or does it mean that all those alienations and creations of new dignities shall be annulled, because they are, or might be, prejudicial to the successor? My Lords, I must confess that the latter appears to me to be the clear meaning of the words. And if there were any doubt upon that subject, I think all possible doubt is removed by the statute to which both parties before your Lordships, that is, both the claimant and the Crown, have referred, but which seems to me to put beyond doubt the proper interpretation of this part of the prior statute.

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 hold at Edinburgh, on Wednesday the 8th day of October, the year of God 1488 years, declaring all alienations of land, heritages, long lease, feu-ferms, officez, tailzies, blench-firms, lands made of ward, of none 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 father of most noble mind, made of none avail, force, nor effect, for certain causes, contained in the said Act and Statute; that, therefore, all they which got the pretended gifts of alienation of heritage, long leases, feu-firms, officez, tailzies, giving of blench-firm of wardlands, should bring their letters and evidence granted hereupon to our Sovereign Lord within forty days," that they might be cancelled.

It appears to me that the legislature there have put their own construction upon the former statute; because they have here said that there has been a statute passed declaring all these alienations of lands of none avail, and they therefore called upon the persons to surrender their title deeds; clearly shewing that it was not to be a question in any case whether it 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 of lands 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 titles and dignities; but I do not think that that signifies at all. Probably every creation of a dignity contained (as I think we certainly see in this case) a grant of lands. There might have been a creation of a dignity without lands. In that case the surrendering the title did not signify at all, but the surrendering the titles to lands might be very important, because they might get into the hands of other persons, and questions might arise as to the title afterwards, but no such difficulty could exist with respect to a mere title of honour, and that affords a very good reason for the legislature not having mentioned the creation of dignities in the second act.

Therefore, putting, as I said, upon that first statute, the clear interpretation, that all new dignities that had been created by King James the Third since the day mentioned, namely, the preceding 2nd of February, were struck at by that act, called the Act Rescissory, if I had any doubt about it, it seems to me that that doubt is removed by the subsequent statute; but independently of that subsequent statute, I should have had no doubt. If that is so, my Lords, in truth, if we could be quite certain about it, if that admits of no possible doubt, there is an end of the case; because I certainly feel that the exact question, and the only question that we can be called upon to decide, is, Did that act of parliament destroy this dignity, or did it not? As I have already stated to your Lordships, construing the act of parliament in the way in which I construe it, confirmed by the subsequent act of parliament, I think it clearly did. But although that is the view I take of the subject in construing these very ancient acts of parliament, undoubtedly the principle has been often acted upon, and not unwisely or improperly, that matters of this sort being in very great obscurity, may sometimes be elucidated by what has been called *contemporanea expositio*, seeing how they were understood at the time; and if such a principle is in any case admissible, I think it is pre-eminently so in a case of this sort, where all is in great obscurity, not only from the lapse of three centuries and a half and more, but from the troubles of the times, and from other causes. Therefore it is, that great attention has been directed to see how far contemporaneous exposition would enable us to come to a conclusion one way or the other, as to what was understood to be the effect of the Act Rescissory.

Now, my Lords, I must confess that it appears to me that there is a body of evidence shewing that it was understood by everybody at the time to have annihilated the dukedom, and that it was so acted upon at the time, and acted upon afterwards, down to the time at which I have the honour of addressing your Lordships, though it was exceedingly improbable that in a case involving all the difficulties of antiquity which attend this case, such a body of evidence should

be found. It is rarely, indeed, that you can, by diving into the past, have a matter brought out so clearly as to what was the interpretation at the time.

Now, my Lords, if the dignity was annihilated, what would you expect to happen? I should state, that it is not very improbable that there was a sort of pardon granted to everybody, or almost everybody, for having been in arms against the party of the new king. It would have been inconvenient to have acted upon any other principle. What, therefore, would you expect? Why, you would expect 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 title. That is exactly what happens, as I think you will see presently. What happened further, was also what was exceedingly likely to happen. The Duke of Montrose made his peace to a certain extent with the successor of King James the Third; the successor took from him, either by force or by fraud, at all events made him surrender, some of his valuable possessions; and these were granted away by the successor elsewhere. Having done that, however, having stripped him of a good deal of what he had before, he allowed him to make his peace, and then he granted him anew the dukedom, but granted it to him only for the term of his life. What, my Lords, would you expect to see happen in respect to that transaction? Why, you would expect to see the dukedom, and that property which was granted with the dukedom, enjoyed from the time of that grant by the grantee for the term of his life. That is exactly what happened. 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, he sat in parliament as Duke of Montrose. After the grant of the dukedom he enjoyed, during his life, the rents of the property granted to him with the dukedom, the customs of Montrose, the burgh 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 thirty or forty years afterwards. His son succeeded him, and sat in parliament, not as Duke of Montrose, which, if the former grant was available, he would be, but he sat in parliament on two occasions as Earl of Crawford. The rents which, as I have stated to your Lordships, were enjoyed by the duke, the property granted with the dukedom, was held and enjoyed by him during his life, the lordship of Kinclevin, the customs of Montrose, and the burgh rents of Montrose. But the Exchequer officers still kept these properties in their books, which they would do in a case where the property has been enjoyed by the grantee only for a limited time, but which they would not do, had it been given away in perpetuity. They would then have had nothing more to do with it. But they kept it on their books, and at the time of the death of the Duke of Montrose they again put themselves in charge, and charged themselves with the receipt of the rents of Kinclevin, and the customs and burgh rents of Montrose, and they stated that they had not charged themselves with them previously, because they had been granted to the Duke of Montrose for life, but that he being dead, they now accounted for them again, and the property remained in the hands of the Crown. What became of the customs of Montrose, whether they remained in the Crown perpetually afterwards, I do not know, but the lordship of Kinclevin remained in the Crown till about fifteen or twenty years afterwards, when it was given away by the Crown to a family of the name of Wardroper, who had collected the rents.

Now, my Lords, if these propositions are made out, I do not think that I am wrong in stating that it is a most wonderful confirmation of the interpretation that I put upon that statute, shewing the interpretation that was put upon it at the time—because everything is in exact conformity with such a state of things, and inconsistent with any other hypothesis. The question, therefore, is, Whether these propositions are or are not made out?

Now, with respect to the dukedom being re-granted, how is that made out? 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 actual obedience, and the grateful and commendable promptitude which his faithful cousin David Earl of Crawford," (the person who, upon the hypothesis of the claimant, was Duke of Montrose at this time,) "David Earl of Crawford, and Lord Lindsay, and his illustrious predecessors, have exhibited towards the predecessors of the said our Lord the King, Kings of Scotland, and towards the same our supreme Lord the King unweariedly, and in many modes—on account of which and other his condign merits and his services to be rendered in future times, same our supreme Lord the King, being willing, from the debt of his regal magnificence, to pursue the said David with still ampler favors of grace and honor;—and since, moreover, the previous Earls of Crawford, his predecessors, worthily to be held in worship, have held their foresaid lordships from ancient times by the title of Earldom—hence is it, that our supreme Lord the King, willing that the said David his cousin should shine with ampler dignity, and changing the foresaid title of earl into a greater and higher one, has, by his certain wisdom, 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 the said our

Lord the King, to be executed in favor of the said Duke of Montrose upon the terms premised" —the act of parliament indicating that the king was anxious that he should be a duke, by the title of the Duke of Montrose, in the terms of the grant—" Secundam formam et tenorem carte dicti domini nostri regis dicto David Duci de Montrose super premissa conficiende."

Now what was the charter that was thus made pursuant to that act of parliament? My Lords, the charter itself is not forthcoming, and it is not to be wondered at. The wonder is that so many documents of those days are forthcoming; but the register book of the Great Seal has been produced to your Lordships, in which all documents under the Great Seal were then, and still are, I suppose, registered. And persons conversant with these books tell you, that in looking through them they find this distinction, that in the case of grants which were made to parties of fee simple property (and probably the same thing would apply to a title), they are entered at full length very often, and when a life interest is given they are entered shortly—a mere sort of abstract—although that is not perhaps as an absolute and universal rule. I think one gentleman said that there was one case of a grant in fee simple in which that did not appear, but that that was the general rule, so general as to be very nearly universal. Now, my Lords, on the very day on which you would expect this charter to be made, the day after the passing of that act, which was on the 18th of September, on the next day, the 19th of September, you find this entry in the register. I will read 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 and place of the castle of Montrose and Kinclevin"—the same property which was annexed to the dukedom granted under James III. in fee.

Now, my Lords, can anybody entertain a rational doubt that it was under that grant that the duke held the property which he did hold, and all that was connected with it? As I have already remarked, if you want to see whether that was so or not, consider what you would expect to be the state of circumstances if that was the truth, and what you would expect to be the state of circumstances if that was contrary to the truth. You find that everything harmonizes with the supposition that it was under that grant, and that alone, that the Duke held his honours and his estates, (the estates were coupled with the honours,) and it is quite inconsistent with the hypothesis that he held it under anything else. The *litera* expressly says that there had been a grant made to him for his 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 the Duchess of Montrose (not his mother, for there was a second marriage) for nearly forty years afterwards.

But, my Lords, is it true that he received these rents in the way I have stated? Yes; and it is made out with a degree of certainty which was hardly to be expected. I am referring now to the statement in the supplemental case of the claimant. This appears from the Exchequer Rolls, that the collector of the Crown rents rendered an account on the 4th of July 1491 for a year. Now it is necessary to understand that the Exchequer accounts were rendered about the month of July in every year. The rents of all the property were payable apparently at Whitsuntide, on the 15th of May, and at Martinmas, on the 11th of November. Therefore, the accounts which were rendered in July would always include the rents of the preceding Martinmas and the preceding Whitsuntide. On the 4th of July 1491 the collector rendered his account, and he shewed that Kinclevin was still in charge, and he was still charged with those rents. Now if the theory of the claimant is right, from Whitsuntide 1488 the receiver of the Crown had nothing to do with Kinclevin. So he goes on, from year to year, but always returning, that though it was in charge to him, he had no money forthcoming; because, he stated, that the Duke of Montrose had taken to his own use all the rents and the fines. This went on for two or three years, but finally he renders an account in July 1492, which would include the accounts for 1491, 1490, 1489, and 1488; the accounts therefore are from July 1488 for four years, during all which time the duke, under the original grant, would have been entitled to those rents, and he charges himself with the rents for all those four years. If the original grant had been in operation the duke would have been entitled to have kept all these rents. But if, on the other hand, the duke was only entitled from the date of the re-grant in the next year, he would have been entitled to three years only. Now it appears that there were disputes and doubts as to what was to be done on this subject. The times were not very quiet; and what was done by the order of the king was this—$3\frac{1}{3}$ years were paid to the Duke of Montrose, or rather allowed, not paid, because he had received them himself. It is suggested in some of the papers before me, and I cannot help thinking with some degree of probability, that this was a sort of compromise. The duke at that time had become reconciled to the Court; and the question arose,—Was he to be charged with this, or was he not? He was clearly entitled to it from September 1489, when his new grant was made, and he had received it during the whole time during which the receiver of the rents had charged himself with the amount. Then, what is to be done? Let him take $3\frac{1}{2}$ years.

It appears to me that that obviously was a sort of compromise. But whether it was or not seems to me quite immaterial. The important point is this, that after his death none of those that came after him had a farthing. Whether he was allowed to take the whole, or was only allowed to take, by way of compromise, a portion of the rents of that year which accrued due between the original grant and the second grant, certainly, that, after the second grant, those who came after him had no interest in this property after his death, is abundantly clear. And that is the only important point. It was just the same thing with regard to the customs of Montrose, and the burgh rents of Montrose. During those years there are no returns in the Exchequer; the customer made no return at all. It is supposed that, they having all been granted to the Duke of Montrose, he (the customer) took no interest about it until his (the duke's) death, and after his death he charges himself again just upon the same principle, namely, that that property had now become in charge again to the Crown.

Then, my Lords, another course of argument was adopted. It was endeavoured to be shewn that, although this Act Rescissory had, as it was alleged, destroyed the dignity, that was a proposition, in the truth of which the original duke had never acquiesced. Now, if it was an act of parliament, whether he acquiesced or not was totally immaterial. If it was destroyed by act of parliament, his protesting or his saying that he would still call himself Duke of Montrose is utterly immaterial. 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 signally illustrate 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. What are the instances? First of all, on the 2d of August 1489, just before the re-creation, when, by the way, it might well be that he had been told that he should be created Duke of Montrose anew, and when, therefore, he might have done it with reference to what he was about to be, and not to what he then was—but certainly, on the 2d of August 1489, he made a grant to the monks of Inverkeithing, to institute a mass to pray for the souls of himself and his family, or some superstitious use of that sort. He made a grant of that sort; and in that he describes himself as "the high and mighty prince the Duke of Montrose." The grant was to institute a mass, for which I think £20 Scots were to be paid annually, and it was to be called "The Duke's Mass." No doubt he did that; and one can easily suppose that he very likely would resist, as far as he could, what had been done by the Act Rescissory. It shews that he wished to get rid of the effect of it, and he so called himself.

Then there was another act that he did. He married only three days after the passing of the Act Rescissory, in the very same month of October, when, undoubtedly, he had become Earl of Crawford only, according to the view which I take of the case, and he executed a grant to his second wife, whom he was then about to marry, of a certain charge upon some customs in which he had an interest,—the customs of Aberdeen, the customs of Linlithgow, and some customs of Montrose, which belonged to him, not by virtue of the grant with his dukedom, but by a prior title, and in that he styles himself "Duke of Montrose." But that grant required the confirmation of the Crown in order to be valid, and reliance was placed on this, that the Crown did confirm it. No doubt the Crown did confirm it, but it confirmed it to him by his title of "Earl of Crawford." So that the most that it amounts to is this, that an instrument having, in all human probability, been prepared before the passing of the Act Rescissory, for it bears date only three days after, and he in that calling himself Duke of Montrose, the Crown confirms it to him by an instrument describing him as "Earl of Crawford." What is that but an intimation in the strongest way that the Crown, though it did not mean to question the grant he was making in favour of his wife, in effect said—we confirm it to you not in the title which you have chosen to appropriate to yourself, but in your true title of Earl of Crawford.

But there was also another transaction, which marks this distinction between what he called himself and what the Crown chose to call him, much more strongly. Amongst the possessions of the Duke of Montrose was the valuable sheriffdom of Forfar, which he held in fee, and which, I suppose, was in those days a valuable possession. Of course James the Fourth had a number of hungry followers, whom it was necessary to satisfy by giving them something for the services they had rendered to him, or else they chose to have it themselves. Amongst these was Lord Gray, and it was arranged between Lord Gray and the Crown that this sheriffdom of Forfar should be taken away from the Duke of Montrose and conferred upon Lord Gray. How was that to be accomplished? Why, the king agreed that he would give a sort of pardon to the Duke of Montrose, as the price for which he was to surrender this sheriffdom. It was quite clear that he had no discretion in the matter. He was in the hands of his enemies, and he was obliged to do it. Therefore what he did was this:—He made, first of all, a solemn protest that what he was doing he was doing by compulsion—preserving, so far as he could, to himself the right to question afterwards what he was then doing. Undoubtedly he came before the notary (for so it appears) by the title of "Duke of Montrose," and he protested against the arbitrary act that was being forced upon him. Nevertheless, however, he makes the surrender, and this is the nature of the transaction. Having already stated the protest, I do not know that I need trouble your Lordships

by calling your attention to the precise words in which it was made; but the course to be adopted was this:—The party surrendering the property executes a procuratory of resignation (a power of attorney, as we should say in this country) to some other persons to make the necessary surrender—he might do it in person, but he does it ordinarily by means of a procuratory of resignation. Now in that procuratory of resignation, which was also an instrument made behind the back of the Crown, he calls himself "David Dux de Montross." It is in this form —"Excellentissimo principi ac domino nostro metuendissimo Dei Gratia Regi Scotorum illustrissimo vestre serentati si placeat humilis ligius David Dux de Montross ac Comes Crawfurdie reverentias omnimodas cum honore ad sursum reddendum resignandum ac pro nobis et heredibus nostris pro perpetuo pure et simpliciter quiete clamandum totum et integrum officium vicecomitatus de Fforfar," &c. "In manus vestre celsitudinis tanquam in manibus domini mei superioris eiusdem nobiles et potentes ac honorabiles viros Patricium Comitem de Bothwell ac Dominum Halis Alexandrum Hume," and certain other persons, "et eorum quemlibet conjunctim et divisim, meos veros legitimos et indubitatos procuratores irrevocabiliter facio et constituo," for the purpose of surrendering up the "Vicecomitatus de Fforfar." In that, my Lords, he calls himself Duke of Montrose.

Then the next document that is put in is a sort of *procès verbal* (as the French would call it), stating what was done on that procuratory of resignation—and a good deal of reliance was placed upon this. It is an account of what is alleged to have taken place, drawn up by the notary, in which it is stated—"Per hoc presens publicum instrumentum cunctis pateat evidenter quod anno incarnationis dominice millesimo quadringentesimo octuagesimo octavo die vero mensis Novembris sexto, &c., coram excellentissimo serenissimoque principi ac domino nostro Domino Jacobo Quarto dei gratiâ Scotorum Regi illustrissimo, &c., ac mei notarii publici subscripti, &c., comparuit nobilis et potens dominus Alexander Home de eodem procurator irrevocabilis ad infra, scripta magnifici et potentis domini David Ducis de Montrose." Then he delivers up into the hands of the king—the king himself being present—the sheriffdom of Forfar—"Quibus quidem donatione resignatione, &c., sic factis receptis et admissis præfatus dominus noster Rex totum et integrum dictum officium vicecomitatus de Forfar," &c. granted to some other person.

Now, my Lords, great reliance has been placed upon this—that this memorial states that Alexander Home, as the procurator of David Duke of Montrose, came and surrendered into the hands of the Lords; but that, again, is not an instrument drawn up by the Crown. And it is not very likely that when the Crown had got the sheriffdom surrendered, the Crown would be very particular as to the title by which the party chose to designate himself who made the surrender. But when you come to the act that the Crown itself has to do, you observe upon that how very differently the party is designated. You have now a protest in which he calls himself "Duke of Montrose." You have the document constituting the attorney, in which he calls himself "Duke of Montrose," and a memorandum, drawn up by the notary, of what took place, in which he is called "Duke of Montrose." Then it appears, accordingly, that the surrender was made upon a particular day, I think the 6th of November, at Hailes, Lord Bothwell's place. There is some inaccuracy somewhere or other; whether it was an intended deception at the time, or whether it was an inaccuracy, is a matter we cannot now solve, but certain it is that the surrender was made somewhere. According to that document it appeared to have been made at Hailes, the seat of Lord Bothwell, but according to what followed it would seem to have been made on a different day, and to have been made at Perth. I do not think it is material where the event really happened. Made it certainly was. The surrender having been made into the hands of the Crown, What is the next process? Why, the Crown, reciting what has been done, makes the grant to Lord Gray, for whose benefit the surrender was intended. And what is the representation of that transaction when the Crown is the person to speak? It is this:—"Jacobus dei gratia Rex Scotorum omnibus probis hominibus totius terre sue clericis et laicis salutem, sciatis quod dedimus et concessimus ac tenore presentis carte nostre damus et concedimus dilecto consanguineo et consiliario nostro Andree Domino Gray officium vicecomitatus nostri de Forfare quod quidem officium vicecomitatus fuit dilecti nostri consanguinei David Comitus Craufurdie Domini Lindesay hereditare. Et quod officium cum pertinentiis dictus David non vi aut metu ductus"—(Now it is quite plain that the *non* ought to have been left out—that he was compelled to do this)—"nec errore lapsus sed sua mera et spontanea voluntate in manus nostras apud Perth per fustem et baculum et suos procuratores ad hoc legitime constitutos sursum reddidit pureque simpliciter resignauit." Then, after granting it into his hands, it goes on to say—"Ac cum consimilibus feodis sicut alii vicecomites prius de eodem officio habuerunt. Et adeo libere quiete plenarie integre honorifice bene et in pace sicut dictus David Comes Craufurdie" or his predecessors. Upon that there is a precept granted of seisin by the king to Lord Gray, in which, again, he is described as "Dilecti consanguinei nostri David Comitis Craufurdie Domini Lindsay;" and Lord Gray is to hold it "hereditarie."

Now, my Lords, this 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 it was possible to resist, 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 it—not thereby ratifying the dukedom, but ratifying the grant that he had made for the benefit of his wife, be he duke or earl, and 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, and that the result was that the dukedom was annihilated. But, my Lords, a suggestion was made, that even if this were a valid act of parliament, and even if the effect of it were such as I have represented it to be, namely, to destroy the dukedom, still a doubt might arise whether it was an act of parliament at all. My Lords, I confess that this is an argument to which I can attribute no sort of weight, because it was one of the acts of parliament— it is enrolled among the acts of parliament, and it purports to be an act of parliament. I forget whether the king is stated to have been present or not; but whether he was or not is immaterial. The king was only 15 or 16 years of age. I think in some of the acts passed during the same year he is stated to have been present; but whether he was or not is utterly immaterial. It has been treated as an act of parliament, and it is called an act of parliament in the subsequent act to which I have adverted. Therefore, I cannot think (and indeed it was not very much insisted upon) that any great weight can be given to that suggestion.

But then it was said, supposing this Rescissory Act was an act of parliament, was not it afterwards revoked? That, it was said, was a conclusion at which your Lordships might safely arrive, because on the 15th of March 1503, at the time of the king's marriage, or just subsequently to it, an Act of Parliament was passed, on which day, it was said, "Our Sovereign Lord revoked, with consent of the three estates of the Parliament, all donations, gifts, Acts, Statutes of Parliament or General Council, and all other things done by him in times bygone, either hurting his soul, his crown, or holy kirk." Now it is said that this Act Rescissory was an act of parliament that did hurt, or that ought to have hurt, his soul—taking away something that had been granted by his father to a loyal subject. My Lords, there I apply the argument that was addressed to us as to the words "which may be prejudicial," that were found in the first act. Whatever the meaning was, it clearly was only to revoke something as to which you were to establish that it was "hurtful to his soul, his crown, or holy kirk." It was clearly a sort of flourish of trumpets that meant nothing at all. It is impossible to say from this that grants under which parties had acted, or title deeds, could possibly be in any way affected by language so loose as that. Then, again, I call *contemporanea expositio* in aid. If that had been the construction put upon it at the time, why did not the parties 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? Upon these grounds alone, supposing there had been no authority upon the subject, and nothing to guide your Lordships but the Act Rescissory itself, and the light we obtain from the documents that have been searched for and found after great labour and diligence, I should have said, my Lords, that the construction of this act is a matter that admits of no possible doubt.

But then it is said, that, whatever opinion we might form, still there are authorities that lead to a contrary conclusion, and two have been mainly relied upon—one authority taken from our own history, and the other from that of Scotland. The one from our own history is this:—In the last parliament of the reign of King Richard the Second, the king created a number of new Peers, and he created them in rather an unusual way—what was exactly the effect of it may be matter for an antiquarian; but doubts and difficulties were raised. It appears from the Rolls of Parliament, that on "Saturday, the feast of St. Michael, in the year 1397, the King shewed openly in Parliament that he wished that certain honourable persons in his kingdom should be raised to greater honour and estate; that is to say, certain counts and earls to the estate of dukes, one count to the estate of marquis, and certain other barons and baronets to be counts; and for three reasons—*first*, because the great support of every kingdom is in worthy persons of state; *secondly*, that the same persons are cousins of the king, and of his own blood, whom the king therefore ought to honour; and, *thirdly*, that the said persons had done great honour to the kingdom in divers works beyond the seas, and many other places, for which reasons, it is natural that each benefit should be duly recompensed. And it is said that the king, sitting in parliament, "coronez en sa roiale Majeste teignant en sa mayne la verge roiale ad fait et creez son cousyn sire Henry de Lancaster Conte Derby en Duk," and gave him the name and title of the Duke of Hereford. He gave to him his royal charter of the same creation, which was read in parliament, and the king girded the duke with a sword, and so on. The same day he created a number of persons, and amongst others he created the Earl of Nottingham—"*Item*, mesme le

jour et mesme la fourme et mannere Sire Thomas Moubray Cont de Notyngham feuist fait et creez en Duk de Norffolc."

Now that was the last parliament of Richard the Second. By the first parliament of Henry IV. all the acts of that parliament, and with it all its dependencies, were revoked. After a great deal of recital—"Nostre Seignour le Roi, &c., ad adjuggez le dit Parlement tenuz le dit an vingt primer et l'auctoritee eut donc come desuis est dit ove toutes les circumstances et dependances dicell destre de null force ou value et qe mesme le Parlement ove l'auctoritee susdite et touz les circumstances et dependences dicelles soient de tout reversez revokez irritez cassez reppellez et annullez."

Now, my Lords, what was argued was this—that although that 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 was said that that was a precedent for saying that exactly the same rule ought to be applied to the present case.

Now, my Lords, I think there are several answers to that. 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., who, we know, according to history, was exceeding fond of shew and pomp, sat with his royal crown on in parliament, and girded them with the sword, and created them, in the presence of the parliament; but it was an act of the king, and not of the parliament. Whether that be right or wrong is not material now to consider, because this is quite clear, that that was the interpretation put upon it at the time. But this happened:—The Duke of Norfolk, as I collect from these papers, thought that he was struck at, and did not take the title of Duke of Norfolk afterwards, but took the title of Earl of Nottingham, or some other title. Then some 25 years afterwards, very early in the reign of Henry VI., a dispute arose as to the precedency of the Earl of Nottingham and the Earl of Warwick. The Earl of Nottingham, as I collect, 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 in reconciling these conflicting great men. Then 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 is superior or not, is not important; 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 on the subject, and they came to this resolution:—"Quâ quidem Petitione in Parliamento predicto lectâ plenius et intellectâ ac habetâ inde cum Justiciario et servientibus Domini Regis ad Legem ac aliis Peritis de consilio, ipsius Domini Regis maturâ et diligenti deliberatione; consideratoque quod licet prefatus nuper Rex Ricardus in dicto Parliamento suo Thomam nuper Comitem Notyngham in Ducem Norffolk in formâ predictâ creaverit ac idem Parliamentum cum suis circumstantiis et dependentiis quibuscunque postmodum in Parliamento Domini Henrici nuper Regis Anglie avi Domini Regis nunc apud Westminster in festo Sancte Fides Virginis anno Regni sui primo tento generaliter revocatum extiterit et penitus adnullatum. Pro eo tamen quod hujusmodi creatio Ducum sive Comitum aut aliorum Dignitatum ad solum Regem pertinet et non ad Parliamentum prefatusque nuper Dux," and so on. "Revocatio dicti Parliamenti ipsius nuper Regis Ricardi prefatum nuper Ducem aut Heredes suos absque speciali mentione de eis facta in eadem nullatenus ledere potuit," because the creation of dignities belongs, not to parliament, but to the Crown; and because the act that abolished the acts of the parliament did not abolish by name the creation of the dukedom: And therefore they come 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 the Third, but that is not the case. The Act Rescissory has abolished the title of the Duke of Montrose, not because it abolished any prior act of parliament, but because it abolished all new dignities that had been created by James the Third.

But, my Lords, I do not think that was very much relied upon; but the main reliance, in

short, the only thing which appeared to me to raise the semblance of any fair doubt upon the subject, was the decision in what has been called the *Glencairn case.* But I think that 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, ten days afterwards, the then Lord Kilmaurs was, by the same king, and for the same cause, created Earl of Glencairn. Now the argument which was pressed with regard to this case is this. It has been established, they say, that the earldom of Glencairn was not destroyed by the Act Rescissory ; therefore it follows that the dukedom of Montrose was not destroyed.

My Lords, in the first place, I do not think that the two do stand necessarily 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 it can at all bind your Lordships.

The circumstances were these :—First of all, as to the *contemporanea expositio* as to Lord Glencairn, exactly the same series of facts occurred 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. Now this, I think, is a most extraordinary confirmation of the suggestion that everybody understood that the earldom of Glencairn was annihilated by that act of parliament. The first earl, who was killed at the same battle at which James the Third fell, was succeeded by his son Robert, who lived only two or three years afterwards, and then Robert was succeeded by his son Cuthbert. Some years elapsed and things were getting a little quiet ; but Cuthbert executes a great quantity of instruments, always describing himself as Lord Kilmaurs. Why was that, if it was not understood that the earldom of Glencairn had been abolished and annulled? "cassez et annullez." 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.*" So that he had a seal engraved by that title,—it could not have been his ancestors' seal, for Robert was his father, and Alexander his grandfather ; but he must himself have had a seal engraved with the title "Sigillum Cuthberti Domini Kilmaurs." Under that title he sat in parliament, executed deeds, and, in short, did every act that could be done.

Then, again, it appears that the property included in the grant to the Earl of Glencairn, consisting of the property of Drummond and Duchray, 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 the Fourth, married in the year 1503, and it is natural to expect that upon that 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 know that there is a charter. 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 another was created, namely, that the ancestor of the present Duke of Montrose was then created Earl of Montrose. 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 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 give him back his title of Earl of Glencairn, and create 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 important. 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 just 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 is always designated "Lord Kilmaurs"—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 hear him called the Earl of Glencairn. Is not the 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 books. 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 which did not make 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 custom prevailing among foreign nobility, who often take not the highest title, but their oldest or some other title; and that, 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. I cannot think, therefore, that that is entitled to very great weight.

Another observation which I would make, and which I had almost forgotten, relative to those past times is this, that I cannot conceive anything in the world so excessively improbable as that, if there were in 1503, at the time of the king's marriage, a Duke of Montrose in existence, the king wishing to confer a favour upon Lord Graham should create him Earl of Montrose. That of itself, I think, irresistibly shews that it was not understood at that time that there was any dukedom of Montrose existing. That, however, is rather out of the course of the present argument.

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 the Sixth—James the First of England—to the Crown of this realm, there seems to have arisen a dispute in the Scotch parliament as to precedence. A decree 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 way—the Earl of Eglinton, the Earl of Montrose, the Earl of Cassilis, the Earl of Caithness, and the Earl of Glencairn. That was the way in which they were ranked, putting Lord Glencairn below Lord Eglinton and the others. In 1610, Lord Glencairn being dissatisfied with this, instituted a proceeding in the Court of Session to have it corrected, alleging that he took precedence of those other nobleman. 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, that 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; because Lord Eglinton and Lord Cassilis were put down at the bottom, they could not affect the Earl of Montrose nor the Earl of Caithness; but after the Earl of Caithness there 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, 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 things, there having been first a decreet of ranking in one way, corrected afterwards by the Court of Session in another way, it appears that the Earl of Glencairn had made great favour with King Charles the First, and in the year 1637 King Charles the First 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 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. Charles the First did that; and in consequence of that Lord Glencairn again applied, by a summons of reduction, I think, 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 the First, 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, who had only been created (the exact date is not material) some time after the original grant had been made to the Earl of Glencairn. Well, what happened upon that? Why, 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—but that the Court of Session, being a competent tribunal, decided in 1648 something which necessarily shews that the Act Rescissory had not the effect of destroying dignities, and that if that was so, if it did not destroy the one, it could not have destroyed the other.

Now, my Lords, in the first place, I must observe,—not that I attribute much weight to the argument—that in the course of the discussion upon the hearing of that case before the Court of Session, I see 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. Now, 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 to have been, that it meant to strike at dignities which had been newly given to the persons to whom they had been granted.

My Lords, the Court of Session came to the conclusion 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. I have looked through the proceedings with all the attention that I could give to them, and it appears to me, that there was before the Court of Session no evidence of sittings in parliament, except sittings which shewed that the Earl of Eglinton never sat as Earl of Eglinton until after the time when, it is admitted on all hands, that Lord Glencairn sat as Earl of Glencairn. Lord Glencairn certainly sat as Earl of Glencairn in 1505. There is an instrument granted to him, under which the Crown grants him something, in 1504, and he sat as Earl of Glencairn in 1505. Now, if the Court of Session thought there was no evidence that ought to satisfy them that Lord Montgomery had been anything but Lord Montgomery until a period later than 1504, it was not necessary for the justice of their decision that they should have said a word about the Act Rescissory. No doubt the Act Rescissory was pressed upon them in argument, but there is nothing in the judgment which shews that they acted upon the Act Rescissory at all. It may be that they said, we can only see in what order these parties have sat in parliament, and we see that the Earl of Glencairn sat as earl in parliament at a time which must have given him precedence. That might have been the ground upon which they decided. But, my Lords, it is idle not to see, that to derive any precedent to guide your Lordships from the transactions of those troublous times, would be really to shut your eyes to what must have been the truth of the case. 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, especially in matters of this special nature, relating to the precedence of persons no doubt taking a great part in the troubled affairs of those times. I must, however, remark this, although it may seem like a paradox:—I believe we have much better means of judging of the truth of the case after the lapse of 350 years, than they had after the lapse of 150 years. That seems, I say, paradoxical, but there is nothing like a paradox in it when the matter is looked at calmly. 150 years is a space of time just as completely annihilating everything like oral testimony, or even traditionary testimony, of the transactions which had preceded it, as 350 years. I was going to say that we know no more, or little more, of transactions 150 years back, than of those which occurred 350 years back; but perhaps it would not be quite correct to say that, because the altered state of society, and the multiplication of printing, and the great facilities for transmitting knowledge, render our position very different in that respect from that of our ancestors; but I very much doubt whether, in the reign of Charles the First, even independently of the troubles of the times, they were in the least better position to investigate the truth of a case which happened in the reign of James the Third than we are in the reign of Queen Victoria. I am the more borne out in saying that by this circumstance, that I observe that there are a great quantity of documents now before your Lordships, illustrating and throwing light upon this subject, which were not before the Court of Session; because all the documents

which they had are referred to your Lordships, and you have now many which they had not the advantage of consulting. Therefore, I am of opinion that that which can only be looked at as a precedent, is not a precedent which 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 a precedent against, and not for, the claimant. The grant in the Glencairn case was an original grant to Lord Kilmaurs, "et hæredibus suis"—that is, in the immediate line of the Earls 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. That line thus becoming extinct, the party, who would not be the heir male of the first Earl of Glencairn, but who would be the 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,—that the House held that the earldom of Glencairn had been granted, not under that patent of 1488, but under some lost 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 was the judgment of my Lord Loughborough, who entered into the case in a very elaborate manner. I do not feel it necessary to advert further to the arguments upon which that noble and learned Lord came to the conclusion that the original grant had been annihilated; but he was distinctly of that opinion. And for myself, I think that that is a precedent upon which your Lordships may rely with infinitely more satisfaction, than upon what took place in the Court of Session and in parliament in the troublous times which occurred at the end of the reign of Charles the First.

My Lords, for the reasons I have stated, I think that these precedents do not at all touch the case, or impugn the conclusion at which I have arrived. It seems to me to be abundantly made out that the Act Rescissory, even if there had been no authority upon the subject, must have annihilated these dignities. All contemporaneous usage shews that it was so understood. Everything that has been done since has been done upon the assumption and upon the footing of these having been annihilated. Three centuries and a half have elapsed without any claim to this dukedom being made; which is at least a strong argument to shew that there was some reason why the claim has not sooner been made. And for the reasons I have stated, I am of opinion that this claim has not been made out.

I shall therefore take the liberty of moving your Lordships to come to this resolution:—"That the charter, bearing date the 18th of May 1488, by which James the Third 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 the Fourth of Scotland, called the Act Rescissory;" and "that the grant of the dukedom made by King James the Fourth 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)."

LORD ST. LEONARDS.—My Lords, my noble and learned friend has gone so very much at length into the facts of this case, which facts have also been so recently before your Lordships, that I shall trouble you very little by a recapitulation of those facts.

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. Independently of any nice questions arising, the case lies in the smallest possible compass. The dukedom was created in May 1488, and created in most express terms, so as to give the estate of inheritance to all the heirs. I am not now entering into the question, whether it might or ought not to be confined to heirs male; but, generally, the words conveyed it to heirs. The king who granted it died within a few weeks of the grant. 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 2d of February, which date overreached 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 the Third was considered by his successors and by parliament to have ended really upon the 2d of February, although he did not die till the latter end of that year.

Now, my Lords, under these 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 construction which has now been put upon it, namely, that it struck at this newly created

dignity, and annulled that dignity. We find that that construction was acted upon—if not acted upon by the duke himself, it was certainly acted upon by the Crown. The duke ceasing then to be duke, and being Earl of Crawford, not being in favour, of course, with the successor, was put under terms very onerous to himself, but ultimately, in the very next year, was received into favour. What was the favour? A re-grant of the dukedom to him for life. I am not now talking of the property which, with the dukedom, had been granted a few months before—less than twelve months—to him and his heirs general. A re-grant of the same dukedom was made to him for life. The duke enjoyed the dukedom 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, what difficulties the claimant must have had to contend with to establish his claim to the dukedom. *Primâ facie* upon half a dozen facts, it seemed almost impossible that such a claim could be substantiated.

I wish to say one word about time. Time, as time, in regard to dignities, goes, I may say, for nothing. The great title which is possessed by a noble and learned friend of mine, now present (the Earl of Devon), had certainly not been claimed for a very long time; but then, observe, there was nothing striking at that dignity. The title, if it were good, remained just as good as it was the moment after the grant was made. But it was a question of construction of the limitation, no question arising as to the annulling or destruction of the title which had been granted. But, my Lords, it may well deserve consideration, whether it would not be wise to put some limit of time upon a claim to peerage, in order to prevent such enormous expense and such consumption of time, as must very often take place in regard to claims of ancient peerages. In the case which is before your Lordships at this moment, look at what you have had to travel through, look at the mass of evidence before you, more or less bearing upon the case. And if the investigation of the case had been left to the Crown alone, and 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. But then that claim has aroused another of your Lordships. Naturally enough, the noble duke (of Montrose) 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 willing, 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 great mass of evidence being produced, no doubt at great expense, not by the Crown, but by the noble duke, who is now in the House, which, having been produced by him, has been made use of by the Crown, and which has elucidated this case in a manner in which it never could have been without that evidence.

My Lords, there are a few questions of law and some other matters arising, upon which I shall detain your Lordships for as short a time as I possibly can, after the ample discussion which this case has undergone by my noble and learned friend. 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, which I have no doubt were then of considerable importance, which were erected into a regality, and which would constitute the dukedom, and would descend to the heirs general.

Then, my Lords, when James the Fourth ascended the throne, as I have already stated, he, by a proclamation, annulled all the previous grants of his father, his predecessor, from the preceding 2d 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 shews 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 or to others had been resumed by the Crown, and had been granted away before the Act Rescissory. That was considered as impugning the authority of that act, and 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 intention of the Crown, and 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, a question has been raised upon the meaning and effect of this act of parliament. Your Lordships have heard a great deal about a rebel act of parliament, and about loyal, dutiful, and excellent subjects, and so on. Those are subjects which have occupied a great deal of time at the bar, but which cannot receive the slightest attention from your Lordships in disposing of this matter. It signifies not whether they were loyal or disloyal. 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 the Third, was disloyal to James the Fourth. It would have been just the reverse if the other party had succeeded, and every step in these proceedings shews that that was the principle that was acted upon.

My Lords, I now come, first, to the construction of this act. The learned counsel at the bar, dwelling upon the supposed merits of the Duke of Montrose as a loyal subject, said, How can it be possible to construe these words as striking at the dignity conferred upon so loyal and excellent a subject?—that is, a loyal and excellent subject to James the Third, but not so esteemed by James the Fourth, till he restored him partly again to his favour. The original grant of the dukedom set forth expressly that one consideration for that grant was the duke's services upon the field of Blackness. Why, of course, there was nothing that could have operated so strongly against the duke with James the Fourth, as that very act which had caused this special favour to be shewn to him by James the Third.

Then comes this act of parliament, upon which 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 is in these words:—"*Item*, regarding the proclamation made at Scone, it is statute and ordained, that all alienations of lands, heritage, long leases, feufirms, offices, tailzies, blenchfirms, creation of 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 2d day of February last by past." Your Lordships will recollect that that is the date which, beyond all possibility of doubt, they had assigned as the real termination of the reign of James the Third. By whom? not "by our late Sovereign James the Third," but "by late our Sovereign Lord's father." 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. Then it proceeds—"by late our Sovereign Lord's father, whom God assoil, which might be prejudicial to our Sovereign Lord, and to the Crown that now is, be cassed and annulled, and of none effect nor force in any time to come, because that such alienations, gifts, and privileges, were granted since the said time, for the assistance to the perverse council that were contrary (to) the common good of the realm, and cause of the realm, and cause of the slaughter of our Sovereign Lord's father."

Now, the true construction of this, I submit to your Lordships, admits of no doubt. All grants are struck at "which might be prejudicial to our Sovereign Lord, and the Crown that now is," —all are to "be cassed and annulled." The expression is not all "which may be prejudicial," but the expression is all "which *might* be prejudicial,"—that is to say, "which" but for this act, but for what we are now doing, "might be prejudicial," because they were granted from bad motives against the Crown "that now is." It would have been a totally different thing if they had said "which may be prejudicial;" then there might have been some opening for the argument that has been attempted to be founded upon these words, but there is no possibility of arguing the thing, as it appears to me, when you take the words as they actually are. All grants are struck at "which might be prejudicial." Therefore they are struck at; because so they might have been if they had not been struck at. It clearly means "which," but for this provision, "might be prejudicial," because they were granted to persons who had been acting adversely to the king "that now is," who by their evil counsels caused the slaughter of the late king—that is to say, we are not to be answerable for killing the king, but they are to be held responsible for the death of the king, who gave him bad counsels, and induced him to go into the field against the true rights of his subjects, and against his son, whom the nobles had selected as their future sovereign, and had set him at their head. I apprehend, therefore, my Lords, that with respect to this act of parliament there is no room for any doubt or question. But if there could have been a question at the time, what are we to say after three centuries and a half of acquiescence in the construction which I am now stating to your Lordships to be in my apprehension clearly the right construction, and with every act which is entitled to any weight that has taken place during that long course of time, being, as it appears to me, when properly considered, consistent with the construction which I now submit to your Lordships, to be the true construction. It is clear that the duke never sat in parliament upon that title, and he had no opportunity of doing so. It is shewn that there might be a question (which I will not enter into) whether letters patent had been granted. I will assume that there was a patent granted.

Now, as regards this 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 this 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 in question—looking forward to better times, in order to save his rights, if by law they could be saved. I will read these few words in answer to the argument which was urged so much at length. It was asked, over and over again, How could James IV. possibly consider this subject as a person who fell within the former act of parliament, when he himself treated him with so much kindness? Now the kindness was this :—He wishes all men to know this. He "very lamentably set forth, from his certain knowledge, how, after the great displeasure which our most illustrious and serene prince, James king of Scots the Fourth, had conceived against his person, and against his kinsmen, friends and men, because that he had stood and constantly adhered to the last, his most excellent king, of revered memory, James the Third, at Stirling, and elsewhere, where he closed his last day, to whose soul the Most High God be propitious, in which place he sustained many blows, captures, detentions, injuries, wounds, and was ransomed by his followers"—and then the king, by his letters patent, indulged and remitted to him "his displeasure of every sort, in this manner conceived against him." In short he was pardoned, provided he renounced and resigned the sheriffdom in favour of Lord Gray, who was to hold that pardon in his own possession until the former duke had resigned this hereditary office—and then the duke "solemnly protested for remedy of law at a fitting season, that whatever he may do respecting the donation of his office foresaid, or of his lands, or other goods or things, shall not prejudice him or his heirs in time to come, since truly he is constrained to do this through such fear of death as may befal a constant man, and of the loss of his heritage," and so on.

Your Lordships see there what the feelings of James IV. were towards this nobleman, and the steps which he took. And what follows upon that? 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.

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 its re-grant to Lord Gray, refers not 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 as 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 his title as duke; because he never set up his title as duke in the presence of the Crown, with the exception of that charter, for example, in which it might have passed without observation, and it amounts in reality to nothing. The duke 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. In the very case to which I have just referred, the Crown called him by his proper title of Earl of Crawford, and in effect rejected his title as Duke of Montrose. Therefore I think that in itself is a thousand times more strong than any assertion of his title by the duke himself, which he could not maintain. If you look at the grant to his wife—that required the confirmation of the Crown. There he called himself duke—and what does the Crown do? The Crown, in confirming the charter, takes care to prefix to it his proper title, calling him Earl of Crawford, and confirming the grant by that title. Surely, therefore, all these acts are quite conclusive as regards the question.

Then we come to a matter that is enough to startle anybody, and to make any one doubt whether it is possible to maintain this claim. 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 he had that reasonable fear of death which a brave man might fairly feel. He desires not to be considered in mere cowardice to have yielded it, 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—you find it wholly silent as to any sort or kind beyond the grantee's own life. 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 created a regality, and constituted a dukedom, to go with the dignity, are re-granted with the same dignity; and the same title is re-granted without the former words of limitation which I have stated to your Lordships. 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 the estates of the Crown if that grant of 1488 had been annulled. If that had been annulled, they would have still been the estates of the duke, (he would still have been duke,) and therefore not the estates of the Crown. Therefore, that of itself would go a great way. But what does the re-grant state? The services and considerations which induced James the Fourth to make this grant nearly the same, *mutatis mutandis*, as in the original grant, which is almost copied here. It was, then, services which were to be performed, not to the dead monarch, of course, but to the living monarch. To whom is the grant? To the Earl of Crawford. Why, what a mockery it is to talk of that being a confirmation to the duke. How is it possible for any man living, 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? Could there be any question about it? When King Charles, in 1637, 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 that grant which can be twisted into anything or made like a confirmation. But the whole points to a new grant, and it re-grants to the Earl of Crawford the title of duke.

Then, my Lords, it is said, first of all, upon this instrument, that you are to 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 affects to tell you what the contents of the grant were. It begins by telling you, 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 cetera*." Now, as to these words *et cetera*, your Lordships are probably not quite so conversant as my noble and learned friend and myself are with those words. Perhaps you are not aware that Lord Coke, in his work upon Littleton, speaks of the extreme importance of *et cetera*, and he actually collects every instance of an *et cetera* which he can find; and he tells you you will find all these *et ceteras* at such and such places. Now, I never before knew so much weight laid upon an *et cetera* as there has been at your Lordships' bar. It is said that that *et cetera* is to import, contrary to the very words of the *litera*, that there is some limitation beyond a limitation for life; and we have had produced, and referred to, documents of all sorts, to shew 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 continue 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 quantity 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 shews it to be so,—and that it is impossible to feel any doubt upon that point; that the re-grant was not beyond an estate for life. But even supposing there were a question about its contemporaneous usage, as my noble and learned friend said must guide, and always has guided, in these cases, particularly if you are called upon to supply certain words in an ancient grant which are not found there, you must then look at the acts; or in the case of a peerage, you must look at the sitting. If you find a constant sitting on the part of male heirs, you do not let in heirs general? Why? Because you find the act of the parties indicating that which you cannot discover from the patent itself (the patent being lost,) what the original grant was. And the continued sitting of heirs male, to the exclusion of heirs general, shews that it must have been a grant to heirs male. 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 to claiming rights 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 to enjoy the dignity of duchess, whilst the duke's heir at once took 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 evidence, and it would have required an overpowering case, such as one can hardly suppose could have been produced in any case, in order 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 stage 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, with respect to that, 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, as we should call it—at 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 shewn your Lordships could not have been the case, if that former 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 took possession of the estates, and disposed adversely of them, and they have been enjoyed for three centuries and a half by the grantees of the Crown, 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 I could give to those acts, that they 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 what the recital is there, which shews clearly that the parliament treated the act of 1488 as an act of parliament which had annulled and destroyed all the grants. That act of parliament did not refer to dignities, but it required the persons to whom the property had been granted to bring in their deeds, speaking of the grants as pretended grants, as they were spoken of in several instances; and the reason of that was, because they chose to treat James the Third as having ceased to reign on the 2d of February, therefore, of course those grants were not allowed to continue as real grants, and were not treated as real grants by the monarch on the throne. The result was that, no doubt, they were struck at. That act of parliament, in truth, aided and assisted the former act of parliament. So far from being adverse to the act of 1488, it was actually in aid, in confirmation, in corroboration, 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—one, the dukedom of Montrose, which we are now discussing; and the other, 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 it would be to attempt to set up the former grant in fee, when the latter grant was accepted by the same man, from the successor of the king who granted the first dignity, limited only for life. The Earl of Glencairn had not claimed; he died on the field of battle with his master, and his son had not claimed the dignity, and therefore there was no claimant. It is not clear that there were any patents to bring in these cases; but if there had been, they were clearly struck at, and it was unnecessary to refer particularly to them. That act of parliament, therefore, was confined to grants, bonds and heritages, and so on, and did not refer to dignities.

And, my Lords, when you come to look at the other acts of parliament, they really have no bearing upon the case. The act of parliament of 1493 is for further annulling grants and referring to resignations, and it evidently does not at all touch the question. Then the act of 1503 has been relied upon. But if you look at that act, you will see that it is wholly dealing with the affairs of his own soul and of his church. It begins by dissolving "the annexation of the kirk of Kirkandrews from the Lord of Galway (? Galloway) and his crown, to the priory of Whitehorn." It then revokes all donations, gifts, acts, Statutes of parliament or General Council, and all other things done by him—that is, the king—"in times bygone, either hurting his soul, his crown, or holy kirk." It is quite clear that to bring any former act within the operation of these words, you must shew that the act had one of these effects. Then it ratifies, in the third part, "the foundation and infeftments made to the college of Stirling, called his chapel royal, both of kirks, prebends, canonries, and lands," &c. It is clear, therefore, that the act of parliament, as it is on the Statute-book, wholly relates to the church and its possessions,

and that it is to be confined to those matters, and has not the slightest bearing upon the act of 1488.

Then, my Lords, the operation of the act of 1488 being thus proved by contemporaneous usage, and being what I have stated to your Lordships, I apprehend there can be no difficulty in point of law in this case. If it remained there, without going further into the case, I should consider that it admitted of no doubt. But 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 Glencairn peerage, which was decided in this House in 1797; you have been trying the Glencairn peerage day after day, travelling through a great mass of evidence, in order to see who was entitled to the Glencairn peerage; and that 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. Now, I think both of those precedents are easily disposed of.

As regards the *case of the Duke of Norfolk*, your Lordships have only to refer to the Rolls of Parliament. You will see there, in the third volume, that the creations in question were not by parliament, but they are, as clearly as words can make them, by the king, being in parliament. In the third volume, page 355, your Lordships will see this entry—"On the feast of Saint Michael, in the same Parliament, the king announced openly, and shewed his Parliament, that he wished that certain honourable persons of his kingdom should be honoured and enhanced, and changed to greater honour and estate." That is to say, some should be made counts and so on. Then it goes on and states what they are to have—"On which the king, sitting in Parliament crowned," and so on, "holding in his hand the royal sceptre, made and created his cousin," and so on. He makes the creation—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.*

Now, as regards the case of the Earl of Glencairn, your Lordships will find it exactly tallying in all its circumstances with the dukedom of Montrose. It is a singular thing, and it only shews 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 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 did many acts—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 that; and it would have been impossible to have decided it otherwise. How does it stand in 1797? You find the Earl of Glencairn sitting in 1505, and you have to ascertain how these sittings took place, in order to do what? To draw a presumption as to what must have been the limitation in a patent which cannot be found. You would have wanted no such presumption to be drawn, if you had had the actual grant of 1488 before you, which granted the dignity to the man and to his heirs general. That would at once have given Sir Adam Fergusson a right to the dignity if it could have been substantiated.

My Lords, I will, just for a moment, go on with the acts of these parties—Lord Kilmaurs continued to keep his title till 1505, and 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 most elaborate account of the solemnities upon the marriage. He tells you that the king called three persons to new dignities—one of them was the Earl of Montrose, another was the Earl of Glencairn, the former title of Lord Kilmaurs—he seems then to have been very much in favour, for he was one of the parties assisting in the tournament on the queen's marriage;—and the other 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. It is said that there was great ignorance on the part of that noble and learned Lord, of whom we always speak with great 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 them; and therefore, the Lord Chancellor of the day, when this matter came before the House in 1797, said they were created by belting. And antiquaries are now perfectly shocked to think

that the noble Lord, in 1797, should have described the creation of earls by belting, and they say that it takes away the whole weight which otherwise would have been due to that decision.[1] My Lords, I have read more than once or twice that noble Lord's judgment, and I think that it is perfectly right. I think he was perfectly 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 title, and he goes on enjoying it for years. He gets into great discussions 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, if there was such a thing; but that could not be done by law. 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 in Scotland alone had the right to adjudicate upon peerages. That proposition, however, is not made out at all to my satisfaction. It is said that Lord Kaimes, to whom I referred in the course of the argument, is no great authority. I am not speaking of Lord Kaimes as a lawyer. I am speaking of him as knowing what the opinions of the day were. He must have known thoroughly well what was passing in men's minds generally, in regard to that supposed jurisdiction. We know perfectly well how the jurisdiction arose. It was originally in the Lords of Session. They were themselves members of parliament, and, therefore, it was a committee of parliament to whom the matter was referred. Whether there was an appeal or not to the body of the House is now utterly unimportant. But when the courts of justice were created—and that was done by the authority of parliament—your Lordships will find that they were created only with jurisdiction in civil actions. The words are, "jurisdiction in all civil actions." 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; and committed to the Court of Session without the possibility of appeal? But it is said there could be no appeal, because there was no appeal from the Lords of Session. But the Lords of Session were a part of the parliament, and the Court of Session was a court of justice, and not the proper forum to refer such matters to. But, my Lords, if it were a proper forum, there is nothing to shew that an appeal did not still remain to parliament itself, which, from the necessity of the case, and from the nature of the case, would remain, if it had not been excluded by the express words of the act of parliament. I have asked, and nobody has answered the question, How did this House get any jurisdiction in the matter of 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? I want to know what there is in 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 it not exist now? Nobody has answered that question. Why should it not have remained? It has not remained. It has passed entirely, as it ought to have passed, by the authority 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. Whether it was a usurped jurisdiction by the Court of Session I do not stop to inquire. I conceive that nothing can take away the right of the Crown to refer it to the House of Lords, and it has been so ever since the Act of Union. But there is nothing in the Act of Union to disturb the right and power of the Court of Session, if that Court really had the exclusive jurisdiction. Then, my Lords, the exclusive jurisdiction of the Court of Session falls to the ground. But I do not myself see that this matter has any important bearing upon the argument 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, and want to know the decision, I will tell you what it was, because, knowing who was in power, I should know 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 those decisions, or to all of them taken together.

Then, the thing remains untouched, and what happens then? In 1797, Sir Adam Fergusson, who seems to have been a gentleman highly competent to consider this case, and who was highly complimented for his knowledge upon such subjects by the then Lord Chancellor, came forward to this House and made a claim, which he set up as heir general to this very earldom of Glencairn

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[1] In the course of Sir Fitzroy Kelly's argument, he alluded to the case of the Dukedom of Norfolk. LORD BROUGHAM remarked—"The dukedom may have been created without the assent of the Prelates, Lords, and Commons. It may have been created in Parliament by the ceremony of Belting."

(decided 13th July 1797). What was the decision? It is of no use attempting to retire from that decision, for, according to my apprehension, it is a decision which binds your Lordships. The decision distinctly was, first of all, that the patent of 1488 was struck at and destroyed by the act of 1488. And the decision further was, that, finding a sitting of the Earl of Glencairn in 1505, you must not refer that sitting to the patent of 1488, for it did not exist, and that therefore you cannot infer a limitation to heirs general, but you must refer it to some other patent which you have not got. And then, on looking to see how the sitting was, and finding that it was always in the succession of heirs male to the exclusion of heirs general, the presumption of law is, that the last grant must have been to heirs male. And the claimant was therefore held not to have made out his title. It would indeed require a strong case to have persuaded your Lordships that you have now the power to come to a different conclusion upon this case. This is brought forward simply as a precedent, and your Lordships have had to travel, day after day, through the case of the Earldom of Glencairn as if you really were re-trying that very case, when it is only quoted as a precedent; and if precedents that are quoted are to occupy so large a portion of time, there is no reason why a claim of this sort should not last as many months instead of so many days.

Disposing then, my Lords, of these two precedents, the case appears to me to be perfectly clear. After all the labour that has been bestowed upon it, and the great mass of evidence which has been produced, and its importance to the claimant of the title, considering the great dignity claimed, I have looked at it with as much anxiety as I ever looked at any case, and with a sincere desire, if there had been any well-founded grounds for the claim, to give every possible effect to those grounds. On the other hand, with an equal desire to render fairness and justice towards the Crown and the public, and towards those persons who think themselves aggrieved by the claim, to see that the claim was not allowed, except upon solemn, legal grounds; and I have come to a very clear conclusion, never more clear upon any point in my life, that there is no foundation for the claim which has been set up, and I entirely concur in the resolutions which have been moved by my noble and learned friend. I ought to state to your Lordships, that my noble and learned friend, LORD BROUGHAM, authorized 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, desired me to state, on his behalf, that he entirely concurred upon these two points: First of all, that the act of 1488 was a revocation of the dignities; and secondly, that he thought that the construction was clearly that which I have just pointed out 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, and had not sufficiently followed the case in its subsequent bearings. Therefore he begged me to confine his concurrence to those two grounds, namely, as to the general effect of the act as rescinding or annulling the grant which had been made, and as to the true construction of the act.

The Committee resolved—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: That the grant of the dukedom made by King James IV. 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, had not established any title to the dukedom of Montrose (created in 1488).

Agents for the Claimant.—Law, Holmes, Anton and Turnbull, London; and Alexander Smith and James Carnegie, Jun., W.S.—*Crown Agent*, John Richardson.—*Agents for the Duke of Montrose*, Maitland and Graham, London; and Dundas and Wilson, C.S.

FEBRUARY 13, 1854.

THE EDINBURGH WATER COMPANY, and ALEXANDER RAMSAY, their Manager, *Appellants*, *v.* JOHN HAY, Inspector of the Poor of the City Parish of Edinburgh, *Respondent*.

Poor Law Amendment Act (1845)—Assessment—Water pipes under streets—
HELD (affirming judgment), *in terms of the Poor Law Amendment Act, which provides—"That one-half of such assessment shall be imposed upon the owners, and the other half upon the tenants or occupants, of all lands and heritages within the parish or combination, rateably, according to the annual value of such lands and heritages,"—that the Edinburgh Water*