1705. *February* 7.

EARL of SUTHERLAND *against* The EARLS of CRAWFURD, ERROL, & MARISCHAL,

No 464.
In matters of precedency, protestations in Parliament are an effectual interruption.

LORD PHILIPHAUGH reported the Earl of Sutherland *contra* Earls of Crawfurd, Errol, and Marischal, for precedency in the rolls of Parliament and otherwise. *Alleged*, That there having been an old process, depending betwixt their fathers, on this same gronud, no process now, in so far as concerns the transferring and wakening of that old summons, because the copy of the execution given to them by the messenger, and likewise the execution given out in the process, bear only to answer in a declarator of precedency, without mentioning either transferring and wakening; and therefore being a new declarator, it could not be summarily called among the acts, but ought to come in by the course of the roll. *Answered*, The summons concludes not only a declarator, but likewise a transferring and wakening; and the execution mentioning any of them is sufficient, there being no law obliging a messenger, in his execution, to mention all the conclusions of the libel; and though the 6th act, Parl. 1672, requires, that the execution express the designations of both the pursuer and defender, yet it speaks nothing of the name of the action; and it being then moved in Parliament, that the *genus actionis* should be likewise inserted in the execution, it was refused on this ground, That summonses are often blank, and messengers might mistake; and many actions with us arising *ex facto* had not special names; and if the copy had borne to answer "to the within written summons," it would have been sufficient. THE LORDS repelled the dilator, so as they would not cast the process; but found the defenders ought to have allowance of those *induciæ legales* that any of the processes cumulated together did afford them; so that though the transferring was summary, yet the declarator was not, and therefore they behoved to have the space allowed to declarators for answering thereto.

1706. *January* 23, *et dieb. sequent.*—THE LORDS advised the famous declarator pursued by the Earl of Sutherland *contra* The Earls of Crawford, Errol, and Marischal, for precedency, wherein the debate resolved into these two general points; 1*mo*, The antiquity of their titles of honour, and the connecting the progress downward. The *second* was, If titles of honour were a subject capable of prescription; and if the Earl of Crawford had prescribed the right of precedency before Sutherland by an immemorial possession, at least by a forty years peaceable possession uninterrupted.

As to the *first*, The Earl of Sutherland made four remarkable periods in his genealogy; the first began at the year 1275, where, in an authentic contract betwixt his predecessor and the then bishop of Caithness, about some lands in controversy betwixt them, he is designed William Earl of Sutherland, and bears that his father, likewise Earl, contended with Bishop Gilbert for these lands, which Gilbert died in 1245, as Spottiswood, in his church history, tells us; so

No 464. this narrative draws back the existence of the Earls of Sutherland to the 1245, and before. Then Prynne, in his Collections, names them in 1296, in Edward Longshank's reign. Next, in the year 1320, he is a subscriber of the letter to the Pope, under the title of the Earl of Sutherland, where Crawford, Errol, and Marischal, are but designed Knights.

The *second* period is from the 1347, or 1364, to 1514, which begins with William Earl of Sutherland, who married Lady Margaret, sister to King David Bruce, the second of that name, from whom he has a charter, erecting the earldom of Sutherland into a regality; and, in this interval, Mr Rymer, Prynne, Dugdal, Fordon, and the other historians, frequently mention the Earls of Sutherland.

The *third* remarkable period is, from the year 1514 to 1601, which begins with the service and retour of Elisabeth Countess of Sutherland to John last Earl, her brother; which is the first time that the heir-male failed, and it descended on a daughter, and who was married to Adam Gordon, second son to the Earl of Huntly, and who assumed the title of Earl of Sutherland; and both of them resigned the lands and Earldom in favour of Alexander Gordon their son; and he dying before he was infeft, John his son is served heir to Elisabeth his grandmother, under the title of Earl of Sutherland.

The *fourth* and last period is from 1601 to the intenting of this process in 1693, wherein we have a charter granted by King James VI. in 1601 to the Earl of Sutherland, ratifying the old infeftments, and particularly King David's charter, and all his ancient rights; and in 1630, there are three retours, cognoscing him heir to his fore-grandsire's grandsire's grandsire, and his fore-grandsire's goodsire, who was Earl in King Alexander II.'s reign in 1245, near fourteen or fifteen generations back; see 3d January 1667, Earl of Sutherland *contra* Earls of Errol and Marischal, No 48. p. 6642. This being a short account of the Earl's of Sutherland's progress, he *alleged*, That the Earls of Crawford were 150 years posterior to him, they not being created Earls till 1399, by King Robert III. when he made his two brothers, Robert and Murdoch, Dukes, the said first Earl of Crawford being the said King Robert's nephew, (his mother being his sister, as Fordon shews;) and that they were not sooner Earls, Sutherland contended to prove; because, in 1397, they are designed *David Lindsay de Crawfuird, miles*, only, which imports they were not then nobilitated, but only knights. And for this, both Buchanan and Leslie were cited.

Against this declarator of precedency, it was *alleged* for the Earl of Crawford, That *esto* there were Earls of Sutherland in the 13th century, in the reigns of Alexander II. and III. yet it does not follow that this present Earl is lineally descended of them; and as Livius speaks, *Lib* 1. *Quis rem tam veterem pro certo affirmet?* Who can say but in 500 years time there was some gap in the succession, and that some family of another blood got the title, as we see fall out in a much shorter course of time? And though the members of inquest in 1630 have retoured him as heir of blood to these ancient Earls of Suther-

land, yet how could they, upon oath, *magno sacramento interveniente*, serve him upon any other evidences than fame, tradition, and the writs now produced? And Sir Thomas Urquhart of Cromarty (who was chancellor to that inquest) might as well have retoured him up to Noah, as he has deduced his own genealogy from Adam. And to descend to a special condescendence, the line of the old Earls of Sutherland was clearly interrupted, broke off, and cut, by Lady Elisabeth's succession in 1514; and by Adam Gordon's marrying her, there begins a new race of the Earls of Sutherland, so that the present Earl can go no farther up, but must count his dignity and precedency only from that year, which makes Crawford 115 years an Earl anterior to him, according to that calculation. *2do*, Whatever antiquity the Earls of Sutherland can shew, it can never compete with the Earls of Crawford, because the case is *res hactenus judicata*, in so far as, on a commission granted by King James VI. there is a decreet of ranking, preferring the Earl of Crawford to Sutherland; and *esto* it had not the force of a decreet *in foro*, yet it is a sufficient title for prescription; but so it is, the Earls of Crawford have been in the immemorial possession of the precedency before Sutherland, not only since the decreet of ranking, but likewise by 100 years possession before, as appears from the rolls and sederunts of Parliament, extracted from the records, where it is clear, that if the two Earls are both present, Crawford is constantly ranked before Sutherland. And lawyers determine, that titles of honour may be acquired by possession, especially if conjoined *cum scientia principis*, or of his magistrates and officers, who ought to look to these preparatives. And Craig, *lib.* 1. *dieg.* 12. says, *Non tamen negarem nobilitatem aliquando concedi ex usu et possessione, modo sit tanti temporis cujus memoria non extat*. And to require a constitution in writ, would introduce a vast confusion, our old nobility having nothing to shew but possession, patents beginning only in King James III.'s time; and Hepburn, Earl of Bothwell, got his in Parliament, with the nobility's seals appended, on the forfeiture of Ramsay in 1488, the first year of King James IV.'s reign; and it is among the first patents, so that the ancient noblesse amongst us have nothing to shew for themselves but constant immemorial possession of sitting in Parliament, and being called there, and their titles inserted in the Parliament-rolls, as peers of the realm; and if writ were required besides possession, it would cut off our noblest and most ancient families, and set the later created nobility in their room, whose instalments are by patent, which the former were not, but only by the *balteus militaris*, or girding about them a sword, as the old symbols of nobility. *Answered* for the Earl of Sutherland, That to assert in so long a tract of time there might be a gap, *hiatus*, and defect in the family of Sutherland, is a most groundless supposition; seeing law and reason presumes it to be the same lineal descent in blood, still retaining the same name, title, and style, unless Crawford, or the other competing Lords can shew where it failed, and that another sirname or family came in; for *mutatio non præsumitur*; and

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without reflection or derogation to any, it is thought there are few in the kingdom can shew such a progress, and give such evidences and documents as the antiquity of the case will allow; and the retours produced must certainly make faith, that being the habile way for cognoscing the blood in Scotland; and the remoteness of time is no impediment, as appears in the Earl of Strathern's service to Melisse Græme, some hundreds of years back, in 1633; and that of the Earl of Cassillis, 22d July 1629, *voce* SERVICE of HEIRS, where he is served to his fore-grandsire's grandsire, living in the reign of King James III.; and by many acts of Parliament, retours cannot be questioned after twenty years. And as to that principal objection, That the male line faileth in Elisabeth, *anno* 1514, the title and dignity ceased, and must be reckoned as a new original of Sutherland's family; it is *answered*, That, by the principles of the feudal law, in its infancy, feus were only designed for soldiers to the exclusion of the female sex, that law having taken its rise from the inundation of the Goths and other northern nations, who over-ran Italy in the 6th and 7th centuries, and divided their conquests among their officers and soldiers, taking them obliged to military services, and attendance on them in all their warlike expeditions; but this rigour in process of time softened, and the distinction of feus into masculine and feminine sprung up, which came in use with us about the 11th and 12th centuries, whereof our histories afford many examples, in the families of Mar, Angus, Athol, Buchan, Abernethy, Maxwell; and particularly King Robert the Bruce's father got the Earldom of Carrick, by marrying Martha Countess of Carrick, heiress thereof; and our old laws, and books of *Regiam Majestatem*, are full of this, as lib. 2. cap. 25. 27. 28. 41. 42. &c. where the succession of heirs-female is fully handled, and where Skene, OBSERV. Notes, that the heiress *præstabat fidelitatem* to the superior and her husband, *ratione curialitatis*, paid the homage. And by King David's charter to the then Earl of Sutherland, and Margaret his sister, it is provided hæredibus matrimonii inter ipsos procreandis; which though, by the old practice of feus, was interpreted only of males, yet by our customs is extended to daughters; as Craig acknowledged, lib. 2. dieg. 14. and is equipollent to the clause *hæredibus quibuscunque;* and that titles of dignity descended to heirs-female, was decided by the Lords in the case of Sir James Douglas of Mordington and the Lord Oliphant, recorded by Durie, 11th July 1633, No 1. p. 10207, where King Charles I. was present. And has not the Crown of Scotland gone by daughters to the Bruce, and from them to the present regnant family of the Stuarts? And though the Earls of Sutherland, after that marriage of Elisabeth to Adam Gordon, brother to the Earl of Huntley, used the sirname of Gordon, yet that does not derogate from their former right, no more than a senator adopted by a plebeian loses his former dignity and honour, l. 35. D. De adopt. As to the next argument, That Crawford is preferred to Sutherland by the decreet of ranking in 1606, it is *answered* by the Earl of Sutherland, That though this was urged under a double head, yet neither of the ways did it conclude. *First*, It was adduced

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as a *res judicata*, and next as a title to prescription. In the first notion it can never be used; for it is evident from the said decreet itself, that it was never designed as a definitive sentence, but as an interim settlement of the heats and animosities which arose among the nobility for their place and precedency in Parliament, ay and while ancienter evidents were produced, and a decreet before the Judge-ordinary obtained in the contrary; now, Sutherland, in the terms of that reservation, has tabled his cause before the Lords, and appealed to them to do him right as to his precedency, on his production of writs 150 years prior to my Lord Crawford's; so it can never be obtruded as *res judicata*. 2*do*, It is as little serviceable as a title for prescription, for these reasons; 1*mo*, That titles of honour are not *materia præscriptibiles*, neither by the positive nor by the negative prescription, the law saying, that jura sanguinis nullo jure civili dirimi possunt; and, therefore, though a party forbear to claim his title for never so long a time, yet he does not lose it *non utendo*, as was instanced in Somerville of Drum for Lord Cammethan's style, and Bothwell of Glencorse, for the dignity of the Lord Holyroodhouse. And as to the positive, it is declared sacrilege by a law of Gratian and Valentinian, l. 1. C. Ut dignitatum ordo servetur, if any shall presume to take up a title of dignity, unless it be conferred on him by the Sovereign, who is the fountain of honour. And by the law of the Twelve Tables, Rei furtivæ æterna auctoritas esto, which makes such a possession only an usurpation, and no legal title for prescription. But, in the next place, neither can the Earl of Crawford, nor the Earls joining with him, found on any such peaceable and uninterrupted possession of precedency, because there was no prescription of heritable titles in Scotland till the act of Parliament 1617, and where thirteen years were allowed to interrupt the prescription if formerly run; but so it is, the Earl of Sutherland, within those thirteen years, did raise a summons of declarator against the Earl of Crawford in 1630, and executed it, which was a sufficient interruption; likeas, for preserving his right, he interposed protestations against him in Parliament, *anno* 1641, 1647, 1661, and so downward till the raising of this new process in 1693; so that my Lord Crawford cannot found upon 40 years peaceable possession, but he is always within that time encountered either with protestations or citations in processes. And as to the rolls of Parliament, bearing Crawford to be always ranked and called before him, he has extracted them for near 300 years back, and it is evident they are set down without any regard to their creation, but younger Earls are preferred to those uncontrovertedly elder; by which it appears, that *hoc non agebatur*, to clear their priority, but they have been marked *ut intraverunt*, as they came to the Parliament, some later and others sooner; so no rule and standard of priority can be taken from these rolls and sederunts; but the principle of law must take place, l. 1. C. De Consul. Quis in uno eodemque genere dignitatis prior esse debet, nisi is qui prior meruit dignitatem? And to shew that these rolls are not uniform, but varying, in the sederunt of council; 26th May 1572, the Earl of Sutherland is set down before the Earl of Craw-

No 464. ford. *Replied* for the Earl of Crawford, That he does not grudge my Lord Sutherland's antiquity, but must likewise say the line was cut and interrupted by Elisabeth's succeeding in 1514, who was indeed served heir as to the blood and lands, but nowise to the dignity, but is simply designed Elisabeth Sutherland in the retour, and never called Countess till Adam is designed Earl; which could only be by one of these three ways; either by the courtesy, or by his lady's resignation in his favour, or by a new creation. The first is unintelligible; for, though the *curialitas Scotiæ* gives an heiress's husband right to the rents, where a child is heard cry and brayand (as the old word is,) yet it was never pretended to convey the title and dignity, as is plain by many instances of gentlemen marrying heiresses of nobility; they either continue in their own rank, as Mr William Dalrymple, married to the Countess of Dumfries, and others; or they are dignified by another title, as Sir James Wemyss, marrying the Countess of Wemyss, was created Lord Burntisland, but not Earl of Wemyss; and Abercrombie of Fetternier, marrying the heiress of Lord Sempill, was created Lord Glassford, and his son became Lord Sempill; and though the Earl of Selkirk, marrying the Duchess of Hamilton, was created Duke of Hamilton, yet that was only a temporary title during his life; and yet drew this inconvenience with it, that if the Duchess had died first, there would have been two Dukes of Hamilton at one time, viz. both the father and the son. So this notion of Adam Gordon's being Earl by courtesy, is a plain chimera. Next, that he had the title by his lady's resignation, is not pretended; neither could she give him what she had not herself. So there only remains the third way of his being Earl, by a new creation, which begins the family, and makes that this present Earl can go no higher; and for an evidence thereof, ever after this marriage Sutherland ceded the place to the Earls of Huntley, who never pretended to it before; which is demonstration that they counted their dignity only from Earl Adam, who could never compete with Crawford, an Earl 115 years before the said Earl Adam's marriage. Likeas, they then changed their name to Gordon, and failing heirs, tailzied it to the Earls of Huntley; and the retours founded on are not probative, nor prescribed, the twenty years being only introduced to exclude any pretence of a nearer heir, or more propinquity of blood; but not as to others competing for the like dignity; and wherever an estate is provided *hæredibus alicujus*, without adding the word *quibuscunque*, (as King David's charter to the Earl of Sutherland runs,) it must always be understood of the heirs male, and no others; and so it failed in Elisabeth. And as to the pretence, that titles of honour cannot prescribe, the law has distinguished inter jura corporea et incorporea, of which last kind titles of honour are, and so may be acquired diutina possessione sine alio titulo nisi principis patientia, like servitudes, l. 10 D. Si servit. vindicet. And it is a downright mistake to fix the commencement of the prescription only at the act of Parliament 1617; for it is evident by some clauses in the act, that prescription then running, though not perfected, is to be allowed *in computo* of the 40 years;

and so the Earl of Crawford may very well begin his prescription at the decreet of ranking in 1606, though he was immemorially in possession before, as the rolls of Parliament prove; and though they seem to be irregular in classing others, yet in six several sederunts, where Crawford and Sutherland are together, Crawford is ever placed before him; and though, in a clandestine council held at Leith in 1572, Sutherland be first named, yet that is but *una hirundo*, which does not make the spring. And *quoad* Sutherland's interruptions, *that* in 1630 is null on many accounts; *1mo*, Being only a citation for the first diet, never insisted in, prosecuted, nor followed. *2do*, By the act 1669, and act 1685, all interruptions are ordained to be renewed within seven years after that date, which this was not, and so it expired. And as to the protestations in Parliament, they cannot be legal interruptions, seeing the act of Parliament 1617 speaks only of interruptions by way of action and pursuit. Next, *that* in 1641 is only for his place in general, without naming any person, much less the Earl of Crawford. And *that* in 1647 seems to have no warrant, being an extract under Sir Alexander Gibson the then Clerk Register's hand, but cannot be found in the records. And these protestations being laid aside, Crawford has clearly prescribed his precedency; counting from the decreet of ranking in 1606 to 1647, it is more than 40 years, abstracting from his immemorial possession preceding the said decreet, which conjoined with the interruption of the line by Elisabeth and Earl Adam her husband, has been certainly the two motives on which the Commissioners have adjudged the precedency to Crawford in the said decreet in 1606. And what can be probative of priority if the rolls of Parliament do it not? And it is a much more authentic proof than the private evidents adduced by Sutherland to instruct his antiquity, as the contract betwixt the Bishop of Caithness and his predecessor, which being but *instrumenta privata*, are not probative in this case. *Duplied* for the Earl of Sutherland, That it was denied they ever ceded to the Earls of Huntley; and in 1599 *that* question ended, Huntley being then created a Marquis; and *esto* it had been so, Sir George Mackenzie, in his Tractate of Precedency, Quest. 7. gives a reason for it by the customs in Germany. Adam, as a cadet of Huntley, yielded to his own chief; but this argument is one of that kind which proves too much; for if Huntley had the precedency of Sutherland, then it opens a door to Cassillis, Eglinton, Glencairn, and ten other Earls, to claim the door of Sutherland, and yet they never pretended to it. And the objections made by Crawford against Sutherland's interruptions are of no moment; for *esto* his summons in 1630 had never been executed for the second diet, yet the first citation is a sufficient interruption in law; yea, the LORDS have gone a greater length, though the executions have been defective and null, so as to sustain process, yet the LORDS have found them sufficient interruptions, as was decided, 25th November 1665, White, No 44. p. 10646.; 4th March 1630, Lord Leslie, No 469. p. 11320.; 17th February 1665, Butter, No 363. p. 11183.; 9th January 1675, Macintosh, No 418. p. 11239.; and 26th July 1637, Lawers,

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No 31. p. 10719. And whereas it is *alleged*, That the act of Parliament 1617, anent prescriptions, speaks only of interruptions by processes, that is nowise exclusive of other sorts, but only set down *exempli gratia*; and can there be a more natural and effectual declaration of my descent, than by a protest in Parliament, taken in presence of the King or his Commissioner, and the whole kingdom there present by their representatives? And it is a more public deed than a messenger's execution, done in a corner before two obscure witnesses.

These being the heads and substance of the debate, the Lords entered upon advising the several points, and began with the prescription and interruptions; and found that citation used in 1630, though only for the first diet, was sufficient for an interruption; but found *that* citation and summons were fallen and extinct, because not renewed within seven years after the date of the act 1685, and that it was not to be counted from the date of its publication and proclamation over the cross of Edinburgh, as the 128th act 1581 appoints, because this act expressly derogates therefrom, by declaring the seven years shall commence from the date of the act; and when the time was calculated, and the eleven months and a half of surcease of justice at the Revolution were subducted, his act and remit in May 1693 were about fifteen days past the seven years; and therefore the Lords found his interruption fallen.

Next, the Lords determined, that protestations in Parliament were a valid and effectual interruption, though the decreet of ranking postponed him, and he should have raised a reduction of it. Then it was found, that 40 years possession of precedency before the act of Parliament 1617, was sufficient to prefer the Earl of Crawford; but found the rolls of Parliament, being so disorderly and irregular, did not prove that he had that precedency. Then the question arose, If the years of possession run before the act 1617 can enter *in computo*, to be conjoined with the years after the act, to make up 40 years possession, and particularly if the years from the date of the decreet of ranking in 1606, to the act of prescription in 1617, (being eleven years,) can be reckoned to make up my Lord Crawford's prescription, which would make it to be perfected in 1646? But the Lords found, that the *terminus a quo*, at which his prescription ought to commence, must be counted only from the act of Parliament in 1617, and not from the decreet of ranking in 1606; and that the clause allowing thirteen years to interrupt, related only to a 40 years full prescription run before the act 1617; otherwise this absurdity would follow, that he who had possessed 39 years before that act, would be in a better condition, than he who had possessed 40, 50, or 60 years quietly before the making of that act; for his prescription was suspended for thirteen years, and he exposed to the hazard of any interruption during that space, whereas the other had no bar nor stop, but only the running of one year more, to make his right prescribe. On the other hand, it was urged, that one who at the date of that act was within a few years of prescription, was just to begin his 40 years again, which seemed very hard; and there is a decision in Stair, 28th November

1665, Younger, No 164. p. 10925. where a prescription is sustained from 1608, which is nine years before the act of Parliament; only it seems to be of a retour, which by prior acts were allowed to prescribe. The next point the Lords proceeded to was, If that period of Sutherland's descent from 1347, of David Bruce's charter, to Elisabeth's retour in 1514, was sufficiently connected? And the Lords sustained it, unless Crawford instructed the intervention of any other family betwixt them, and so presumed the family continued in the same blood. At last the Lords came to that objection, that the old dignity of Sutherland failed in Elisabeth; and the Lords found, there was no evidence that she succeeded to the title and dignity, so as to continue or transmit it to her posterity; and found her retour cognosced her blood, and gave her right to the lands, earldom, and regality, but not to the title and dignity; seeing it was not proved that the said style was provided to the heirs whatsomever, so as it might belong to her, and by her descend to her posterity. There were five of the Lords clear in this last point, two voted against it, and five or six were *non liquet*, whether the estate devolving on Elisabeth made the dignity cease and expire, so that it began as it were a new family, having no claim to the precedency of the former Earls of Sutherland; so the Lords found the dignity of the old Earls ended in Elisabeth, unless my Lord Sutherland could prove, that, before her succession, the title and dignity was provided to the heirs whatsomever, which the Lords would not presume, but rather that it was only provided to the heirs-male, and so it failed with them; and if females succeeded however, why do many of the greatest and ancient families resign for new infeftment, both of their lands and honours, in favour of their heirs whatsomever; if the law gave the females a right to succeed before, this were needless and superfluous expense, which no lawyer would advise. On the other hand, my Lord Sutherland *alleged*, That there was nothing more ordinary at that time, than for honours and dignities to descend to women, and by them to be conveyed to their posterity; that the Crown went so, and many estates of the greatest subjects in Scotland; which moved some of the Lords to be for an act before answer to try what was the general custom at that time; but the vote did go as above. In some places in France and England there is a territorial dignity annexed to some manors and honours, (as they call them,) that he who purchases the lands, has right to the dignity; but the Sovereigns order it so, that they admit none of their vassals in such feus, but those who may well merit the title, though not of the former blood; but there are no such dignities following lands with us. It is true, if a tradesman buys a barony of land, he gets the title of Laird; but any who buys an Earl's or Lord's estate erected in a lordship or earldom, gets indeed the lands, but not the title and hereditary dignity belonging to the blood; and all the designation he can assume, is that of laird, baron, and heritor of that land, and no more.

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Both the Earls gave in reclaiming bills. Crawford complained of that part of the interlocutor, finding, that the 40 years prescription commenced only,

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from the date of the act of Parliament 1617, and not from the decreet of ranking preferring him to Sutherland in 1606, and adduced several arguments to prove the act had a retrospect, and was so decided by the Lords, when the case was recent and fresh, as on the 18th December 1623, Monimusk, No 78. p. 10783.; 7th December 1633, Parishioners of Abershelder about a church-bell, No 179. p. 10972.; 28th November 1665, Younger, No 164. p. 10925. where the prescription ran from 1608; and 14th July 1675, The Old College of Aberdeen *contra* The Earl of Northesk, No 63. p. 7230. It was *answered* for Sutherland, If there was a prescription in heritable rights by our custom prior to the act 1617, then what need was there of a statutory law to introduce it? And Craig writing before that act, regrets the want of it, which proves there was no such thing in his time; and all the decisions adduced are in cases of personal rights and moveables, whereof there was a prescription in Scotland long before, viz. since the acts of King James III. which is not to be confounded with the heritable prescription, never known nor owned by us till the year 1617.

The Earl of Sutherland's reclaiming bill was against that part of the interlocutor, whereby they did not find it instructed, that the dignity and title of honour of John Earl of Sutherland was conveyed and transmitted to Elisabeth his sister, who was served heir to him in the estate in 1514; which service, though it carried the lands, earldom, and estate, yet not the precedency; and he gave many instances of feminine succession even as to the honour and style. The Lords continued the affair till June.—*See* Appendix.

Fol. Dic. v. 2. p. 130. Fountainhall, v. 2. p. 265. & 315.

*** Forbes reports this case:

1706. *January* 23. 24. & 25.—In the action at the instance of the Earl of Sutherland against the Earl of Crawford, for declaring the lineal descent of his dignity from William Earl of Sutherland, who lived in the year 1275, and, consequently, his right of precedency to Crawford, whose predecessors were not Earls till about the year 1399, as appears from Fordon, Buchannan, and Leslie. The pursuer instructed the conclusion of his summons in manner after mentioned. He produced an agreement betwixt William Earl of Sutherland and Archibald Bishop of Caithness, *anno* 1275, of a controversy about the property of some lands betwixt that Earl's father, and Gilbert, William, and Walter, three preceding Bishops of Caithness; which Gilbert (as Spottiswood observes) died at Scrabster, in the 1245; and some of these controverted lands are presently possessed by the pursuer. The Earl of Sutherland is mentioned by Prynne, in his History of Edward Longshanks, in the year 1296; is a conjunct signer with Gilbert de Hay, Constable, and Robert de Keith, Marischal of Scotland, and David de Lindsay, of that famous letter written to the Pope

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in the year 1320, by the Scottish Nobility and Gentry. There is an agreement betwixt Kenneth Earl of Sutherland, son to Earl William, and Rynold de Moravia, son to Aydan de Moravia of Colbin, in the year 1330; which Kenneth, according to Fordon, was slain in the battle of Halydownhill, in the year 1333. King David the Bruce, in the year 1347, granted a charter, erecting the earldom of Sutherland into a regality, in favour of William Earl of Sutherland, and the Lady Margaret, his spouse, the King's sister, *et hæredum inter ipsos*. Mr Rymer, in his Letters to the Bishop of Carlisle, wherein the extracts from the records in the Tower of London are published, tells us, that, in the treaties 1351 and 1357, betwixt the two kingdoms, John, son and heir to William Earl of Sutherland, was given as one of the hostages, who, in law, is presumed to have survived his father. He was succeeded by Earl Nicolas, who had many unfortunate quarrels with his neighbours; and of whom the Sutherlands of Dilrite are descended. In an agreement 1389, betwixt Euphan Countess of Ross, and Alexander Earl of Buchan, her husband, at the interposition of the Bishops of Murray and Ross, Robert Earl of Sutherland is surety for the Earl of Buchan's performance. Buchannan mentions, that the Earl of Sutherland was one of the leaders of the army that went into England about the year 1388. John Earl of Sutherland succeeded to Robert, who resigned the earldom in favour of John, his son, and his heirs simply, reserving his frank-tenement, by a charter, 24th February 1455, in which the Lord Keith, predecessor to the Earl of Marishall, is witness. To this John Earl of Sutherland, another Earl John, succeeded in the year 1512, whose sasine, proceeding upon a retour and precept, is produced Elizabeth Countess of Sutherland, in the year 1514, was served heir to the said John, her brother-german; and being married to Adam Gordon, a son of the family of Huntly, she, with consent of her said husband, designed Earl of Sutherland, resigned the earldom of Sutherland to Alexander Gordon, their son, to be held as honourably of the King as the Countess herself, and her predecessors, had held it, reserving the frank-tenement, &c. to herself and Adam Gordon, her spouse, *ratione curialitatis Scotiæ*. Whereupon there followed a charter of resignation under the Great Seal, dated the 1st of December 1557. John Earl of Sutherland is served heir to his grandmother, the Countess Elizabeth, 23d June 1567, to whom Alexander, his son, is retoured Earl of Sutherland, 18th July 1573; who resigned in favour of John Master of Sutherland, his son, and upon the resignation, there is a charter by King James VI. dated 23d March 1580, who granted another charter in April 1601, to John, then Earl of Sutherland, upon his own and some others' resignation, erecting the lands resigned with those formerly belonging to the Earl in a free regality. This Earl, in order to declare his precedency, did cognosce his propinquity to the old Earls of Sutherland, by three several services and retours, expede at Inverness 1630; where the inquest consisted of persons of undoubted credit, and best known to the matter, who might have had good information from old men and writs, which

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Answered for the Earl of Crawford; 1*mo*, *Esto* the descent of the dignity from the old Earls of Sutherland to the pursuer were instructed by a connected progress, as it is not, the same is prescribed, in so far as the Earl of Crawford has now for 100 years possessed the precedency before the pursuer, conform to a solemn decreet of ranking, in the year 1606, pronounced by Commissioners appointed by the King and Council for that effect, where the Earls of Crawford and Sutherland were cited and compearing, which is *res judicata;* 2*do*, The defender's precedency is established by immemorial possession, antecedent to the decreet of ranking, which is the sovereign rule to determine all questions of dignity and precedency; especially when the same can be referred to antecedent titles, and no doubt one of the grounds the Commissioners proceeded upon. The reason why dignity and precedency must stand by possession is, because it goes by the blood, and can hardly be verified by express constitutions. Upon which account, Craig, Lib. 1. Dieg. 12. says, Non negarem nobilitatem concedi aliquando ex usu et possessione tanti temporis cujus memoria non extat. And Tyraquellus de Nobilitate, Cap. 14. and many other Lawyers are clear, that Nobilitas præscribitur ex usu et quasi possessione for the space of 40 years, or immemorial possession; and that sufficit scientia magistratuum aut officiariorum principis, aut alterius adversus quem hæc jura incorporalia præscribentur. 3*tio*, The old dignity of the Earls of Sutherland was interrupted by Elizabeth's marrying Adam Gordon, a younger son of Huntly, and a new creation made, above which the pursuer cannot ascend: For though feus, baronies, and earldoms, might with us, about that time, have been transmitted to heirs whatsoever, the dignity was never then carried with the estate to an heiress. Nor did an estate pass to females, unless provided *hæredibus quibuscunque;* males being only understood by heirs simply, or *hæredes inter ipsos*. And where the provision was to heirs whatsoever, the heir-male was still preferred, and the females succeeded only *æquis portionibus*. It was yet much later that an heir-female was allowed to succeed to a dignity with jurisdiction, upon the account of personal unfitness, and the absurdity of possessing the indivisible title with a part of the divided estate. The dignity in this case was not rendered feminine by King David's charter to William Earl of Sutherland and the Lady Margaret his spouse; for that neither conveyed the estate nor the dignity, but only added a regality to it, in favour of William and his spouse, *et eorum hæredibus*, which must be understood of heirs-male, the ad-

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jection of *quibuscunque* being omitted. That the dignity did not descend to Elizabeth is cleared thus: In her service as heiress she is not designed Countess, but only by her name; and her husband, Adam Gordon, in the charter of resignation in favour of Alexander their son, is called Earl of Sutherland, which he could not be by the marriage, but only by a new creation; seeing it is evident, from many recent examples, that a person is not dignified by his marrying an heiress to a dignity, without a new patent. And if Adam was Earl by a new creation, the old title infallibly ceased and was extinguished. For it was no less incompatible in law and heraldry, for Adam's Lady to be Countess in the right of succession, and himself Earl by new creation, than *duo domini ejusdem rei in solidum*. Now, for further evincing that Adam was Earl by new creation, and the title and precedency descends to the pursuer from him; all the Earls of Sutherland since his time, till of late, have borne the name of Gordon, and not the ancient name of Sutherland; and have given place to the Earls of Huntly, who yielded to the Earls of Crawford. *4to*, As to the writs and documents produced by the pursuer, the defender takes liberty to make the following remarks: These, from the 1275 to the 1347, are not authentic writs, but private deeds, of which we may say, *Quis rem tam veterem pro certo affirmet?* King David's charter 1347 to William Earl of Sutherland and his spouse, and their heirs, carries neither the estate nor the title; for it bears that William was Earl before; and only erects the earldom in a free regality, in favour of heirs-male, who, according to the construction of these times in succession to dignity and jurisdiction, were meant by heirs simply expressed; and the Earl of Crawford was preferred upon the account of his possession, notwithstanding of the said charter produced in the ranking 1606. The service of Elizabeth, spouse to Adam Gordon, Earl of Sutherland, and the charter of resignation, in their own and their son Alexander's favour, were already spoken to. As to the services expede in the year 1630, they are little better verifications of the progress and descent they assert, than Sir Thomas Urquhart, chancellor of the inquest, his fanciful derivation of his own pedigree from Adam and Noah. For the members of inquest seem to have sworn *temere* upon matters of greater antiquity than they could certainly know, or taken their evidence from the instructions now produced, in which case, the verdict makes no more faith than the writs themselves. And in a former process, at the instance of the pursuer's father against the defender's father, 3d January 1667, No 48. p. 6642. the Lords took exception at the said retour, for the reasons foresaid; upon which the then pursuer thought fit to withdraw his process. So that the declarator upon the pursuer's titles, though they could be drawn as far back as Adam, and the progress were ten times better connected than it is, is sufficiently excluded, by the visible breach of the old dignity of Sutherland, and the new creation of Adam Gordon, and the descent of the Gordons of Sutherland from him, joined with the foresaid defences of prescription upon the decreet of ranking 1606, and immemorial possession; which the Earl of

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Crawford shall make out by any rule the Lords shall think fit, particularly by the rolls of Parliament, and sederunts of Council, as far back as any records can be found.

Replied for the Earl of Sutherland; The pursuer's precedency ought to be declared conform to the antiquity of his connected title, without respect to the defender's usurped possession; whatever other rule hath been pretended by competing Princes; Quis enim in uno eodemque genere dignitatis prior esse debuerat, nisi qui prior meruit dignitatem? L. 1. Cod. De Consulibus. The decreet of ranking is not *res judicata*, or a final sentence, pronounced by an ordinary Judge, at the instance of either of the parties concerned; but only an interdict of possession, or *interim* regulation, pronounced by the King's Commissioners, to preserve the peace, till the point of right should be determined in law. For, by a clause in the commission, the determination thereon is declared to stand in full force till a decreet in the contrary were recovered before the Judge Ordinary. The prescription urged for the defender is a novelty; for the Earl of Crawford cannot pretend to have acquired a title to the Earl of Sutherland's precedency, otherways than by prescribing a right to be Earl of Sutherland; the precedency of the dignity of Sutherland being *proprium quarto modo*, agreeing to the Earl of Sutherland *soli et semper*, as inseparably as the shadow is inseparable from the body. Titles of honour cannot be acquired by prescription; because, they are *jura sanguinis, extra commercium*, which cannot be disponed; 11th July 1633, Oliphant *contra* Oliphant, No 1. p. 10027.; as an immunity from teinds is not acquirable by possession. Prescription takes no place in our law without express statute; nor doth the act of Parliament 1617 relate to *jura sanguinis, quæ nullo jure civili dirimi possunt*, but only to real rights. The said act requires also a title by charter and sasine before the 40 years; and the Earl of Crawford can produce none for his precedency older than his own most ancient documents; for the decreet of ranking is neither charter nor sasine: Besides, it were ridiculous to fancy the dignity prescribed by one title, and the accessory order of precedency by another. Nor is it very conceivable, how prescription should be founded upon such a decreet, where the *salvo*, like a reversion, qualifies the right perpetually. And as a man having *agrum limitatum*, cannot prescribe beyond the bounds of his charter; so neither could the Earl of Crawford prescribe precedency beyond the antiquity of his evidents, which do regulate precedency, as bounded charters confine property. But granting the decreet of ranking were a competent title of prescription, that could only run forward from the 1617, there being no ancienter law for prescription of heritable rights in Scotland. And in these 40 years reckoned from the act 1617, interruption was used by a summons in the year 1630, protestations in the Parliaments 1641, 1647, and 1661; since which time, prescription cannot be pretended. Yea, in the Parliaments from the 1640 to the 1648, the Earl of

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Sutherland sat and took the place of the Earl of Marishall, one of the Lords set before him in the decreet of ranking, which was an asserting of his right against the said decreet. *2do*, It is a mistake that the titles of honour in this kingdom are only founded upon use and custom. For nobility was conferred by some particular vestiture, as may be inferred from the Earl of Crawford's predecessors being designed in charters *milites* about the year 1399, and Earls very quickly thereafter; the Earl of Errol's predecessor designed *miles* about the 1450, and Earl in the year 1455, at which time also the Earl of Marishall's predecessor is called Lord Keith, who lately before had been designed *miles*: Which titles of nobility could not have been acquired *usu* in so short a time: And history acquaints us, that new dignities were conferred at the coronation of our kings. True, where families have been long in possession of titles of honour, our custom doth not oblige them to the impossibility of producing their patents, or the minutes of Parliament where they had been received and invested; but still requires instruction in writ that they were dignified with such titles, according to the antiquity of which evidents the precedency is determined. The authorities of Craig and Tyraquellus (who rather do not deny than affirm that titles of honour may be acquired by immemorial possession) concern not this case; for though the Earl of Crawford might claim the title of an Earl by simple possession, the lawyers cited never dreamed that possession could entitle to precedency in a competition with other Earls demonstrating more ancient rights. And the defender cannot pretend to immemorial possession, because the pursuer can tell when the dignity of Earl of Crawford commenced. *3tio*, The distinction that a female did not succeed by virtue of a provision *hæredibus inter ipsos*, but only by provisions *hæredibus quibuscunque*, is redargued by the decision, July 11. 1633, Oliphant against Oliphant, No 1. p. 10027. and the Books of the Majesty, lib. 2. cap. 25, 27, 41, 42, 48, 57, 58, and 59, where no mention is of *quibuscunque*, nor indeed was the word in use in charters till much later, when the different kinds of heirs began to multiply. It is true heiresses in fees with jurisdiction and dignity owed only fidelity, and did no homage, which was performed by their husbands for the land and honour belonging to them *ratione curialitatis*; but if heirs-female had no title to dignities, their husbands could have nothing to do homage for. The exception against Countess Elizabeth's succession, from her not being styled *Comitissa* in the service, but only Elizabeth Sutherland, is of no import, because she might have forborn the title for some years, and assumed it when she pleased. Nor was it necessary to design her Countess in the service, seeing her immediate predecessor John Earl of Sutherland is designed in his service John Sutherland heir to John Earl of Sutherland his father; and the style in these matters varied, for the Countess assumes her title in the charter of resignation to Alexander Gordon her son; and Adam Gordon her husband is in one part of the charter designed *Comes Sutherlandiæ*, and in another part *Adæ Gordon Sponso suo*. But further, it appears that the dignity descended to Elibabeth from this,

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that John her grandchild was served heir to her. The reasons alleged for Adam Gordon's being an Earl by new creation are of no weight, for there are abundance of instances where a person marrying an heiress to a dignity did assume the dignity without a patent. Did not the Earl of Douglas upon his marriage with the Countess of Marr, assume the title of Marr? Did not John Maxwell, second son to the Lord Maxwell, assume the title of Lord Harries, which came by his lady? Doth not the family of Athol enjoy the title and precedency of Athol by marriage, although the surname is altered, &c.? But the defender is in a fundamental error, for there were no patents of honour distinct from charters in the 1514, which only began under Queen Mary: Nor does the modern use disprove the ancient practice two hundred years ago, whereby the husband did partake of the wife's fee and dignity, and did homage for her upon that account. The pretence that there cannot be two *ejusdem rei in solidum domini*, is weak and constrained, and sufficiently redargued by the resignation *in anno* 1527, where Adam Gordon's title is expressed to be *ratione curialitatis*. Can any man imagine that Adam Gordon would, for the vanity of being called an Earl, have taken upon him a new title to prejudge his heir's precedency? or that heirs would have acquiesced in any innovation of the ancient titles? Here there is no place for such a conceit. And if the Earl of Sutherland's antiquity were to be computed from Countess Elizabeth and her husband, then his precedency should be regulated conform to that date, whereas he enjoys without dispute the precedency to a matter of ten more ancient Earls. The assuming of the name of Gordon doth not alter the case; for how often have our great families changed their surname, retaining the dignity? As by the civil law, one of the Senatorian Order adopted by a plebeian, acquired the name and right of a son in the family he was adopted in, without losing any honour belonging him *jure Sanguinis l.* 35. *D. De Adoptionibus*; so *a pari*, the descendants of Countess Elizabeth might have enjoyed any accession of honour from their father without prejudice to their ancient dignity. And *esto* the Earl of Sutherland had ceded out of respect to the Earl of Huntly, will that give the Earl of Crawford a title of precedency? *Nullo modo*. 4*to*, How can the writs produced between the 1275 and 1347, be only private deeds, when in the sense of the law, they are authentic and solemn *instrumenta publica*, making faith that there was a series of Earls of Sutherland of the same blood; especially when this period is attested by Fordun, Prynne, Dugdale, and some other English writers? Are not the documents either writs under the Great Seal, extracts of Chancery, solemn attests of notaries, or principal charters granted by, or agreements made with the Earl of Sutherland, concerning third parties as well as themselves, wherein creditable witnesses are inserted? And the defender has not the least ground to quarrel the same, since his predecessors cannot pretend to be Earls for many a long year after. The retours are of unquestionable authority by the law of Scotland, as being the most ancient known way for the cognition of the propinquity of blood; and retours not quarrelled

within 20 years, are by express statute irreducible. Nor do any retours deserve greater credit than those produced for the pursuer, the members of the inquest being gentlemen of quality in the neighbouring country, of undoubted fame reputation and knowledge, who might have proceeded upon the documents of private families deriving rights by charter or contract from the Earls of Sutherland, upon the constant fame of the country, the genealogies of neighbouring families, and the acquiescence of all who had any title by nearness of relation to quarrel. It is true, the defender in his gaiety objects against Sir Thomas Urquhart as an ill genealogist; and it is owned that his derivation from Adam and Noah was fatastic enough, and indeed but *lusus ingenii*; but, after all, the defender's criticism will not hinder him to pass for a most knowing gentleman. The great distance of time intervening betwixt John Earl of Sutherland, served heir in the 1630, and his predecessors who died about the middle of the 13th century, doth not diminish the authority of the verdict, whether examined according to the rules of history or law; for the inquest, in a matter of that antiquity, no doubt proceeded upon such evidence as the common sense of mankind requires; and propinquity may be cognosced at any time, since no course of time takes away the right of blood. The Earl of Strathern was served at near as great a distance to his predecessors then as John Earl of Sutherland was, and yet his service was not reduced on that ground, No 116. p. 6690. And in a general service of the Earl of Cassillis, the LORDS found it might be put to the trial of an inquest, if the predecessor to whom he desired to be served died at the faith of King James III. or any of his successors in the royal dignity. And if the line of William Earl of Sutherland should now fail, the Lord Duffus, as descending of Nicolas, owned his brother, in the year 1364, would exclude an *ultimus hæres*. The rolls of Parliament can be no rule to determine precedency, because the nobility were not therein ranked according to the order of antiquity, but in the order they came up to the Parliament, or *intraverunt*; Earls being sometimes ranked before Dukes, sometimes even before the Chancellor, an Earl for the time. Sometimes again younger noblemen are ranked before those of the same dignity that are more ancient. Nor are the sederunts in the Council records of any greater force, these being as irregular. But then in a sederunt of Council, May 26. 1572, the Earl of Sutherland was ranked before the Earl of Crawford.

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Duplied for the Earl of Crawford: Not to contend about names, or whether the decreet of ranking ought to be called *res judicata* or not, it is a sovereign and solemn decreet ratified by King and Council, and nothing therein determined can be quarrelled for iniquity. The qualifications thereof, ay and while, &c. and but prejudice, &c. are to be civilly understood, so as those who found themselves aggrieved might in the terms and within the legal space of 40 years have remedy by obtaining declarator upon better rights than were then produced, and not by reduction upon the head of iniquity, which is consistent with a *res judicata*. *Esto*, a dignity running in the blood could not prescribe simply *non utendo*; yet one person may exclude another ne-

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glecting his right by the positive prescription. The case of the Earl of Strathern is not to the purpose; for he was not objected against on the account of a *non utendo*, but on this ground, that the King was nearer in blood to the defunct. And there is the same if not more reason for the positive prescription of precedency in titles of honour, as in any other case, viz. *ut aliquando sit finis litium*, which in points of honour are ordinarily warm and dangerous. The meaning of the *Brocard Jura Sanguinis nullo Jure civili dirimi possunt* is only this, that natural relation cannot be dissolved by civil relation; and not that any thing founded *in Jure Sanguinis* cannot be lost by prescription, or other legal ways. Precedency being an heritable right, falls clearly within the compass of the act 1617; which statute clears that the 40 years prescription had been formerly in use in Scotland, by allowing 13 years after for making interruption by those against whom prescription had run, and so was but a declaratory act, determining more distinctly the grounds of prescription. No respect can be had to the pursuer's interruptions; because the summons 1630, without act and letters of continuation, or citation thereon, could not interrupt; nor was the interruption renewed every seven years in the terms of law. Protestations in Parliament are not in a habile way of interruption; nor was any protestation taken till the year 1647, after prescription had run upon the decreet of ranking 1606; which must be computed from the date of the said decreet, and not from the date of the act 1617, which was only a declaratory law. And although a protestation in Parliament might pass for an inchoate, it cannot be reckoned a complete interruption without an executed summons, more than a minor's revocation *intra annos utiles*, without an executed reduction could be termed such. 2*do*, *Homagium* being the proper *reddendo* and recognizance of a dignity, if an heir-female (as the pursuer acknowledges) could not *præstare homagium*, she could not succeed to the dignity, whereof *homagium* was the proper badge. John's service as heir to his grandmother Elizabeth was in order to transmit the estate, and not the dignity, which goes by the blood without a service. And the grandfather being Earl, it is presumed in law, That the title rather flowed from him as *persona dignior* than from the grandmother. The argument against the new creation of Earl Adam, that it would put the pursuer after several Earls who give the *pas* to him, doth not concern the defender, seeing others' neglect to claim their right of precedency, cannot hinder him to plead his grounds of preference. It is directly contrary to the rules of law and honour, that an heiress of a dignity should transmit the same to her husband by marriage; and if any instance be adduced, the conveyance has been by resignation; and since it is not alleged, that Adam, Elizabeth's husband, became Earl by resignation, he must owe his title to a new creation; so that the muster or parade the pursuer makes with his ancient writs and documents, and the schemes and trees he forms thereon, to demonstrate the antiquity of his dignity, is to no purpose against the defender, whose precedency is invincibly founded upon the three grounds above-mentioned. 3*tio*, If we are to believe

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that the inquest 1630, (whose verdict is at most to be regarded but as a *clare constat*) might have had good information from ancient men and writs, which the course of time and accidents have deprived us of; must it not be confessed, that the judges in the decreet of ranking, 1606, twenty-four years before, had far greater advantages to know the truth and grounds they proceeded on? and though retours after 20 years are not quarrellable by the heirs of those to whom the persons retoured are served, they make not a full proof against third parties; so that whatever the pursuer may found upon the retours 1630, against any pretending to the nearest of kin to the Earls of Sutherland; they signify nothing to establish a precedency in his favours against the defender.

Triplied for the Earl of Sutherland; The defender industriously suppresseth one half of the reason of prescription, viz. *ne dominia manerent in incerto*, because, it cannot congruously comprehend *jura sanguinis*, or any thing but what is *in commercio*. If prescription obtained before the act 1617, then what need was there to prorogue it for 13 years after. Laws indeed sometimes take place from the date, and sometimes have a retrospect; but it requires a great disposition to believe, that a profitable act should be made, confirming an established custom, and yet suspending the effect thereof for 13 years. The noble families of the nation are strangely deluded, if a protestation in Parliament do not import interruption of prescription, after it hath been so frequently used for that effect, by the advice of the best lawyers. Who ever denied, that interruptions might be made *via facti*, or that judicial acts are more effectual interruptions than citations, though never so often renewed? and is not the Parliament the supreme judicatory where precedency of all things may most competently be interrupted? and what time more proper for such interruptions than at the calling of the rolls, when all parties concerned are present, or bound to be present? The objection against interruption by the summons 1630, that it was only executed to the first diet is frivolous; for prescription may be effectually interrupted by a citation upon the last day of the 40 years, which could not be, but by an execution to the first diet; yea a null execution of a summons, was sustained sufficient to interrupt, 25th November 1665, White *contra* Horn, No 44. p. 10646.; so a process at the instance of an apparent heir dying before his service was sustained as an interruption, and 4th March 1630, Lord Lesley *contra* , No 469. p. 11320.; 17th February 1665, Butter *contra* Gray, No 363. p. 11183.; 9th January 1675, Macintosh *contra* Fraser, No 418. p. 11239.; a citation to the first diet was found a legal interruption. The acts 1669, and 1685, anent the renewing of interruptions, concern real or personal rights, and *jura sanguinis*, which are rights of families called *jura gentilitatis*: The foresaid acts again, did only take place where prescription was interrupted by a naked citation; but here interruption is both by citation, and protestations in Parliament, the interruption by the summons 1630 being continued by the subsequent protestations; nor can the foresaid acts of Parliament regulate the present case, upon this ground, that

No 464. the act 1669 is adapted only to posterior citations for interruption; and the seven years from the promulgation of the laws made in the Parliament 1685 did not expire till June 1693, deducting the year of the surcease of justice, and the adjournment of the session from June 6th to July 2d 1690; and the pursuer's father tabled this process before the Parliament *per modum querelæ*, and obtained a remit to the Lords of Session 23d May 1693. There is an evident disparity betwixt protestations taken in face of King and Parliament against a competitor, in the hands of the clerk-register, and inserted in the records of Parliament, and a minor's extrajudicial revocation, which perhaps never goes further than the revoker's cabinet: But this debate concerning interruptions may seem superfluous, seeing the Earl of Sutherland did by possession of his title, preserve the precedency as an accessory, as well as the receiving of annualrent from a principal doth interrupt as to the cautioner, 18th December 1667, Nicolson *contra* Philorth, No 412. p. 11233.; and the possession of an annualrent out of a tenement, hindered the right to prescribe as to another tenement, though possessed more than 40 years by a singular successor, 22d June 1671, Lord Balmerino *contra* Little-Prestoun, No 6. p. 3350. It is hoped upon the whole, the Lords will not regard the constrained exceptions against the documents of the pursuer's descent from the ancient Earls of Sutherland, nor the defender's vain pretence to long possession; since a decision in this matter will in the example concern the precedency of our princes (whose descent from their ancient and illustrious ancestors hath been injuriously contested by strangers); the Royal Family having changed their names, and the sending of public ministers from our kingdom to treat with foreign states and princes, having for many years been intromitted.

The Lords found, That the citation at the Earl of Sutherland's instance, against the Earl of Crawford, in the year 1630, was not renewed in terms of the act 15th Parl. 1685, by the remit of Parliament 1693, in respect the same is not within seven years of the date of that act, the 13th of May 1685, and 11 months and 15 days more allowed to be deducted in short prescriptions, conform to the act 40, Parliament 1690; and therefore the said citation can import no interruption of prescription: But found, that protestation made in Parliament are legal interruptions of prescription of precedency; and the prescription of 40 years doth commence from the act of Parliament 1617, and not from the date of the ranking, *in anno* 1606; and found the rolls of sederunts of Parliament, not to be a sufficient document of the Earl of Crawford's possession of precedency to the Earl of Sutherland, when both were marked present. And found, that the descent of the dignity by propinquity of blood from William Earl of Sutherland, who married King David's sister, to Earl John who succeeded in the year 1512, is sufficiently instructed, but that the dignity was not conveyed from him with the estate to his sister Elizabeth.

Forbes, p. 77.