

tration not necessary of a tailzie completed by infeftment before the act, thought the tailzie in question was to be taken as a tailzie made after the act. as being to be considered as no earlier made than it was completed by sasine: on the vote put, in general, whether the tailzie in question needed to be recorded, it, by a considerable majority, carried as above, against the opinion of the President."—*Vide* Brown Supp. Kilkerran, p. 366.

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SIR THOMAS KENNEDY, Claiming the Title, }
Honour, and Dignity of EARL of CASSILS, } *Appellant;*
EARL of RUGLEN and MARCH also Claimant, } *Respondent.*

House of Lords, 26th January 1762.

PEERAGE—SUCCESSION TO.—When the dignity of the Earldom of Cassils was first created, (1509), written patents of nobility were not introduced, containing special limitations of the descent. The Cassils' family estates, according to the investiture, bore at this time to be in favour of heirs general, or heirs of line. Afterwards, and in the year 1671, resignation was made into the hands of the Crown, and a new charter procured, bearing to be in favour of heirs male, whom failing, to heirs female of his body "cum armis et dignitate familiæ de Cassils."—Held, 1st, Where no express limitation, or descent of the grant appears, the dignity is always presumed to descend to the heir male. 2d, That the resignation and new charter 1671 did not comprise, or extend to the honours, but only to the estate.

THE first creation of the Cassils peerage was in 1459, in favour of Gilbert Kennedy, who was grandson of Robert III. King of Scotland, (by Mary Stewart his daughter), by the title of Lord Kennedy. David Kennedy, Gilbert's grandson, was afterwards created *Earl of Cassils* by King James IV. in 1509.

At this time, written patents of honour had not been introduced, these dignities being conferred by the sovereign himself, in parliament, without any writ, limiting the descent of the honour in any particular way, or on any particular heirs; and, as service in parliament, fidelity and homage were due in consequence of the dignity so conferred; these were always understood to descend, according to the rules of the feudal law, to the heir male of the person first ennobled, unless *heirs whatsoever*, or *heirs female*, had been particularly called to the succession.

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Previous to the creation of the peerage, the estates were destined to heirs male. In 1540, after the creation, the *third* Earl of Cassils obtained a charter from King James V. granting the whole estate and barony of Cassils, and other lands therein mentioned, to him and the heirs male of his body; which failing, to Thomas his brother, and the heirs male of his body; which failing, to David, Quintin, Archibald, Hugh, and James Kennedy, his brothers successively, and the heirs male of their bodies; which failing, to James and Thomas Kennedy his uncles, successively, and the heirs male of their bodies; which failing, to Hugh Kennedy of Girvin Mains and others, and the heirs male of their bodies; which failing, to the lawful and nearest heirs male of the said Gilbert Earl of Cassils; whom all failing, to his nearest and lawful heirs female whatsoever.

The estate and barony, and the title and dignity of Earl of Cassils, descended in the male line, from the said Gilbert, the third Earl, to John, the eighth Earl of Cassils, who died the 8th of August 1759 without issue. And upon his death the claimant, Sir Thomas Kennedy, being the nearest heir to him, as lineally descended from Sir Thomas Kennedy of Culzean, the second son of Gilbert, the third Earl of Cassils, who was grandson of David, first created Earl of Cassils in 1509.

The Earl of Ruglen again claimed, as being nearest heir general, or of line, of David, the first Earl of Cassils, being the great grandson of John the seventh Earl of Cassils, by Anne Countess of March, the daughter of Anne Countess of Ruglen, who was the oldest daughter of said John Earl of Cassils.

He insisted that where no patent exists, the descent of the title of honour must be regulated by the descent of the family estate; and upon this principle, the investiture of the family estate, as it stood at the time of the creation of the earldom, must give the rule for the descent of the dignity and honour; and being in favour of heirs general, or heirs of line, as appeared from several charters of the lands, conceived in the terms "*hæredibus suis*," he had best right to succeed. To this it was answered, That the respondent was an heir female; and the dignities and honours, unless limited by writ, descend to heirs male. That these charters could be of no avail, as they bore reference to the ancient title, and expressly specified, that the estate is to be holden by his heirs *secundum tenorem antiquarum infeodationum*

eis desuper confect; which simply meant the heirs of the former investiture.

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Pleaded for Sir Thomas Kennedy:—Feus of lands anciently, before charters or grants in writing were introduced, were conferred by investiture, in presence of the *pares curiæ*, until the reign of James the Sixth, when patents were first introduced. Before then the dignity of earl was conferred by the sovereign himself in parliament, by Cincture, or Girding the person ennobled with a sword, and by proclamation made by heralds. As in feus of lands military service was due by the vassal to the over-lord, or superior; so in dignities, the person ennobled was bound to perform service in parliament, and to give fidelity and homage. As feus of lands, before the descent was limited by grants in writing, descended to heirs male, so dignities descended to heirs male, and could not be aliened, or transferred, in any way but by resignation into the hands of the sovereign. Heirs male were the parties to whom both descended, until, in process of time, the feudal law was so relaxed, as to admit of a conveyance to heirs whatsoever, under which denomination female heirs were included. But, in order to this effect, it required an express grant to heirs female, or to heirs whatsoever. No doubt the Earl of March founds upon the resignation to the Crown, for a new charter, and upon the charters 1642 and 1671, whereby, he contends that both the title and dignity were conveyed expressly to heirs general; yet several objections occur to this, *1st*, These charters, and ratifications thereof, can have no effect to alter the legal descent of the title of honour and dignity, from the heir male of the family, because, from the procuratory of resignation, upon which the charter 1642 proceeded, it clearly appears, that the title of honour and dignity was not resigned by the Earl of Cassils, into the hands of the Crown, and, of consequence, no new limitation could be made by this grant. *2d*, It appears from the signature or warrant of the charter, that it was not superscribed by the King, which was indisputably necessary; and, accordingly, the charter was only granted by the Lords of Exchequer, who had no power to receive resignations, or make new grants of titles of honour. *3d*, The charter 1671 proceeds upon the procuratory of resignation, contained in the marriage settlement between John Earl of Cassils, (the son of the former Earl John, who obtained the charter 1642), and Lady Susan Hamilton. And as there is no warrant for resigning the dignity, nor is it once mentioned

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in the marriage settlement, most certainly no alteration could be made of the descent of the title of honour. For although resignations of this kind are peculiar to Scotland, yet no instance ever occurred of a new limitation made of honours *without a special* resignation. 4th, As the *lands and estate* were only resigned by the Earl of Cassils, so the doquet subjoined to the original signature, contains only a special description of the whole lands, without any mention of the title of honour or dignity. 5th, The words of the charter 1642 cannot by the most strained construction, import the grant of a title of honour. The creation of the lands into a *lordship and earldom*, to be possessed by the earl of Cassils, and his heirs, “according to the precedency and priority of place, “due and competent to them by their rights, and the laws “and practice of Scotland,” can confer nothing more than the common territorial jurisdiction belonging to lands so distinguished, but no more; and the ratifications of these charters by Parliament were mere matters of form. It was therefore clear that the claimant, Sir Thomas Kennedy, is the undoubted heir male of the family of Cassils, lineally descended from the person first ennobled in 1509; because the descent of titles of honour conferred without patent, must be regulated by the feudal law, which always preferred the succession of heirs male, so long as any existed. It also appears from a variety of instances, in many noble families in Scotland, that peerages without patent, did in fact descend to a distant heir male, where a nearer heir female existed. As it appears that female heirs were never entitled to such dignities, but upon a resignation, and a new express grant thereof by the sovereign, which was the only method of defeating the legal succession of the heir male, in this case, there arises the strongest presumption in favour of such heir, from the continued succession in favour of heir male, and no grant appearing in favour of an heir female.

Pleaded for the Earl of Ruglen and March.—That the state of the investiture, at the time when the creation of the earldom took place, must be looked to. That at this time, it was conceived in favour of heirs general. That in 1671 a charter of resignation was granted by the crown to “the Earl of Cassils, and the heirs male of his body, whom failing, to the *heirs female* of his body, giving the estates “*cum armis et dignitate familie de Cassils.*” Which charter was ratified in Parliament in 1672. This charter opened the dignity and honours to the female line. John, Earl of Cas-

sils, had issue a son, Lord John Kennedy, who died in his father's life, leaving issue a son, John, the last Earl of Cassils; and a daughter, Lady Anne, married to John, Earl of March and Ruglen, by whom she had issue a son and daughters.

By the last Earl of Cassils' death in 1759, the Earl of Ruglen and March became entitled to the honours and dignities, as descended from the eldest daughter of John, the seventh Earl of Cassils, to whom the honours were limited. The Earl of Ruglen's claim, therefore, is founded, in the first place, upon the charter 1671; for if that charter operated as a new grant from the crown of the title and dignity of Earl of Cassils, with the ancient precedency, there was no room for any question as to the Earl of Ruglen's right to be preferred. But even if this charter should be held, not to operate as a grant of the title of honour, then the Earl of Ruglen and March claims the titles as descended upon him the lineal heir, by the law of descent, because it clearly appears from Stair (B. 3. T. 5. § 12), and Sir Geo. M'Kenzie, (B. 3. T. 9. § 25), that heirs portioners are *heirs* of line; and it is beyond all question, that heirs females have been in the practice of succeeding to peerages.

Further, by the ancient usage of Scotland, the dignities of Earldom and Lordships were territorial, and the title was annexed to the land. In course of time they became personal, and inherent in the blood of the person ennobled; and there were two ways in which the dignity was conferred;—the one, by charter granting lands erected into an earldom or lordship, with the dignity of earl or lord to the grantee, with such limitations of heirs as the king pleased. The other was by a solemnity of creation, performed in full parliament, *per cincturam gladii*, and other ceremonies. This being the case, it clearly appears that this dignity of Cassils was originally created without any patent, or grant, expressing or containing any limitations whatever, of its descent. The creation gave an estate of inheritance *in* the honour, which is descendible according to the ordinary course by which every other right of inheritance descends, and, therefore, will descend to daughters and their issue, and to the claimant, as the issue of one of these daughters.

After hearing counsel upon the report from the Lords' Committee of Privileges, appointed to consider of the petition of William Earl of March and Ruglen, claiming the titles and honours of the Earl of Cassils and Lord Kennedy;

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and also the petition of Sir Thomas Kennedy, Bart., claiming the said titles and honours, with his Majesty's reference thereof to this House.

It is resolved and adjudged, that Sir Thomas Kennedy has a right and title to the honour and dignity of Earl of Cassils, as heir male of the body of David, the first Earl of Cassils, and that he also has a right and title to the honour and dignity of Lord Kennedy, as heir male of the body of Gilbert the first Lord Kennedy.

For Sir Thomas Kennedy, *C. Yorke, Ch. Hamilton Gordon*

For Earl of Ruglen, *Al. Forrester, Al. Wedderburn.*

Note.—The following letter was written by Lord Mansfield, in regard to this case, and found inside the appeal case of Lord Hardwicke, along with his notes of the grounds of his decision.

“Friday Morning, 18th December 1761.

“My Dear Lord,—I am very sorry your cold is worse. You are much in the right not to come out. In talking to my Lord Chancellor and me last night, Lord Marchmont seemed very strong for supporting the charter 1671. What he said has set me a thinking again upon that point; and, upon looking into a very full brief of instructions, which I read in the case of Stair, drawn by the Scotch lawyers, particularly Lockhart; and a volume of charters thought applicable to the points then in question, several things occur worth consideration—I won't trouble your Lordship with them at present—I will only say, in general.

“That all resignations of honours seem to be in the hands of the Commissioners of Exchequer and Treasurer, as this is. *That of Stair is so.*

“The form of grants of territorial honours. is to erect the lands into an earldom; and to grant it *cum pertinentibus*, &c. The form after the reformation, was to erect church lands into an earldom, barony, &c.

“An Act of Parliament in 1592, gave rise to the express erection of them to be Lords in Parliament, that the grant of the lands might be good.

“In numberless instances, the limitations of the honour are to follow the limitations of the land, which introduced the absurd clauses of assigning, appointment, revocation, &c.

“The only use of the King's signature for the charter 1671 seems to be pressed in regard to the honours. As to every thing else, it would have been valid without it.

“If the construction of the charter be to grant the earldom with the dignity of an earl, Lord Marchmont mentioned to us several answers to the objections, arising from the recital of the resignation, worth

considering. Both points, therefore, are of difficulty, and the consequence too great to be determined without your Lordship, but I would be very loth to give your Lordship the uneasiness of putting the parties to expense, much less to lay you under any temptation to come out too soon, or to look into very disagreeable lumber, when you are not well.

“ What I would propose, therefore, is to hear the counsel to day, (probably nothing new will be said, if there should, your Lordship may be apprized of it), and then to adjourn judgment until after the recess, the first Committee day. I believe my Lord Chancellor has not much attended to it, and if I am to open the opinion, I am not clear upon either point to be able to do it so soon as Monday next. In truth, I am very unwilling to fix my own judgment without first communicating with your Lordship, and knowing your sentiments. I am,

“ MANSFIELD.”

Adjourned accordingly.

Lord Hardwicke's Note.

“ After time taken for consideration, on debate, but without any division, the Lords resolved, That Sir Thomas Kennedy, as heir male, was entitled to the titles and honours of Lord Kennedy and Earl of Cassils; and so reported it to the King.

“ The grounds were two :—

“ 1st, That no particular limitation or constitution of the fief appearing, it ought to be presumed to be a male fief; that being the most usual and customary limitation in those ancient times, especially in the case of an earldom, which was originally an office.

“ 2d, That the resignations and new charters of 1642 and 1671 did not comprise or extend to the dignities and honours of the estate.”—

“ Lord Marchmont differed.”*

Unreported in Court of Session.

[M. 14070.]

JOHN GORDON of Auchanachy, and ALEXANDER	}	<i>Appellants;</i>
GORDON, his Trustee, - - -		
MISS GRIZEL OGILVIE, - - -		<i>Respondent.</i>

House of Lords, 22d March 1762.

REDUCTION—TRANSACTION—*RES JUDICATA*—REPRESENTATION—PRESCRIPTION.—Circumstances in which transaction with predecessor, was held to bar the challenge of the heir, though the deed of renunciation embodying this transaction was also sought to be reduced; and the heir insisted that he was not bound by his mother's

* In Lord Hardwicke's handwriting.