BEFORE THE LORDS' COMMITTEE FOR PRIVILEGES.

PEERAGE OF GLENCAIRN.

SIR ADAM FERGUSSON, . . CLAIMANT.

1796. 1st *November.* 1st *December.* 1797. 13th *July.*

In the absence of the original limitation, the Law presumes that a Scotch Peerage descends to the heirs male of the body of the original Grantee.

If there be anything certain in the Law of Scotch Peerages, it is this presumption in favour of heirs male.

In the Cassilis Peerage case, the Judgment of the House was penned expressly to mark the presumption of Law against the heir general in favour of the heir male.

Held—That the Rescissory Act of 17th October, 1488, annulled the Earldom of Glencairn, created by James III.; and that the Crown could not give effect to a Patent which had been done away by Statute.

In Peerage questions contemporaneous historians may be referred to.

The ordinary marking of the Peers present on the Rolls of Parliament has little regard to precedency; but in a Commission from the Crown for holding a Parliament, the names would, most probably, have been set down in their proper places.

THE petition of Sir Adam Fergusson, claiming the Earldom of Glencairn, was presented to King George III., on the 1st November, 1796; and was referred to the House of Peers.

On the 1st December, 1796, the House referred it to the Committee for Privileges.

Before the Committee witnesses were examined, and counsel heard; and the *Attorney-General* (*Scott*, afterwards Lord Eldon) attended on behalf of the Crown.

At the close of their deliberations, on the 13th July, 1797, the following opinion was delivered by

The LORD CHANCELLOR (*a*):

Lord Chancellor's opinion.

My Lords, it has been fixed by repeated determinations of this House, (and I know of no other authority competent to decide in matters of this nature,) that where the limitation of a peerage cannot be discovered, the presumption is, that it descends to the heirs male of the body of the original grantee.

In the case of the peerage of Lovat, where there was a competition between the heir general and the heir male, it was determined by the Court of Session in favour of the latter, and on the ground of that decision, Lord Lovat (*b*) was tried as a Peer.

The judgment of this House, in the case of the peerage of Cassilis, was penned expressly to mark the opinion of their Lordships, that the presumption of law was against the heir general, in favour of the heir male (*c*). The judgment in that case was followed in several other instances by this House, down to the cases of Sutherland (*d*) and Spynie (*e*).

In the case of the peerage of Sutherland, the heir general indeed obtained the title by a judgment of your Lordships; but the reason was, because, in the middle

(*a*) Lord LOUGHBOROUGH. The speech here given is considerably abridged from the valuable Report of Mr. Robertson, corrected by Lord Loughborough. Mr. Robertson has had the kindness to correct some mistakes. The full report is in the printed papers before the House, and in Mr. Maidment's interesting Tracts.

(*b*) This would seem to show a recognition by the House of the jurisdiction of the Court of Session in peerage questions. The decision of the *Lovat case* before the Court of Session was in 1730. The trial of Simon Lord Lovat before the House of Peers was in 1747. But see *supra*, pp. 439, 440, 441.

(*c*) 27th January, 1762, Lords' Journals, vol. 30, p. 144.

(*d*) 21st March, 1771, Lords' Journals, vol. 33, p. 128.

(*e*) 18th April, 1785, Lords' Journals, vol. 37, p. 238.

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of the sixteenth century, the title had been taken up and enjoyed by the heir general, and transmitted to her descendants. So that the ground of the decision there was, that the general presumption of law was done away by the facts in that particular case.

The peerage of Spynie turned upon the same question. In that case several charters and instruments were referred to as creating the title; but all attempts to prove the limitations by collateral evidence were fruitless; the creation of the title was by the form of *belting* (*a*), after which the person so created sat in Parliament, and his son sat also. And this House decided, that the presumption of law carried the title to heirs-male. I recollect not only the speech of Lord Mansfield upon this occasion, but also a consultation I had with his Lordship previous to the decision, I then having a seat in this House (*b*).

If there be anything certain in the law of peerage, it is this presumption in favour of heirs male.

The other question, however, must determine the right of the Claimant in the present case. If the creation of the Earldom of Glencairn is referable to the patent of 1488, we must take the limitation from the construction of that instrument.

In 1505 we find Cuthbert sitting in Parliament as Earl of Glencairn; and this is the first time that an Earl of Glencairn is to be found sitting in Parliament. The question therefore is, whether this Cuthbert sat in Parliament as Earl of Glencairn by descent from Alexander the grantee in the patent of 1488, or whether his sitting was to be attributed to some other, and what mode of creation?

In examining this patent of 1488, it must have

(*a*) *Suprà*, p. 438.

(*b*) Lord Mansfield and Lord Loughborough were the Chief Justices of the day.

occurred to your Lordships, that it received existence under very particular circumstances, and at a turbulent period, respecting which there is a good deal of confusion among historians. What however I am to state to your Lordships on this subject, I have collected not so much from history as from Acts of Parliament.

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A great part of the Scottish nobles had rebelled against James III., and on the second of February, 1488, the Prince, his son, then about sixteen years of age, joined the rebellious party. With them he set up his standard, and the Government was usurped. An action took place soon after at Blackness, in which the advantage appears to have been on the side of the King.

About this time many grants were made by King James III., and this patent of 1488 has an evident relation to the circumstances of those times.

This scene closed upon the 10th of June, 1488. The King was killed in an action with the opposite party, and with him fell Alexander, the grantee in this patent. The only period, therefore, when this instrument could have had any effect was from its date, 28th May, 1488, till the death of the grantee; for, on the 12th June, two days after the action, the young King made a proclamation, which was followed up by an Act of Parliament (*a*), annulling every grant made by his father from the 2nd of February preceding.

Against this Act it would certainly have been difficult to set up any claim.

Accordingly, in that first Parliament of King James IV., on the 17th October, 1488, we find Robert, the son of Alexander, the grantee in the said instrument, sitting in Parliament under the title of Lord Kilmaurs, and not as Earl of Glencairn.

In the next Parliament, on the 14th of February,

(*a*) The "Rescissory Act." See *supra*, p. 404.

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1489, this Robert is also present, and he is also marked as sitting as Robert Lord Kilmaurs. He died soon after.

There is a charter in 1498 by King James to Cuthbert *Lord Kilmaurs*, and Marieta, his wife, and another charter to William, son to Cuthbert *Lord Kilmaurs*, also dated in 1498. Till this period, therefore, Cuthbert was treated as only Lord Kilmaurs.

In 1505 it appears clearly that he was Earl of Glencairn. On the part of the Claimant, it was argued as probable, that the title had been somehow or other continued since the date of the patent, 1488. His counsel had some difficulty how to account for this. They say, there may have been an Act of Parliament for that purpose, but no such Act appears.

Accidentally an historical account comes to our aid in this difficulty, the account of the marriage of James IV., given by Mr. Young, Somerset Herald. This is but historical, it is true, but the Herald appears to have taken down the occurrences with accuracy, and from day to day. It is found in Leland's Collectanea (*a*). In this account Cuthbert Lord Kilmaurs was a principal figure, and the Lord Hamilton another. The author describes a tournament where Cuthbert was a challenger, and Lord Hamilton a defender. He afterwards describes the creation of three Earls by *belting* (*a*). Marchmont Herald proclaims Largesse—1st, Of James Lord Hamilton, as Earl of Arran; 2nd, Of William Lord Graham, as Earl of Montrose; and 3rd, Of Cuthbert Lord Kilmaurs, as Earl of Glencairn.

The Earl of Arran took his seat in the Parliament 1503, but neither the Earl of Montrose nor the Earl of Glencairn sat till 1505. The Parliament of that year was held by a commission. In this commission

(*a*) Vol. 4, p. 284. (*b*) See *suprà*, p. 438.

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Cuthbert Earl of Glencairn is stated the last in order of all the Earls, though, if he had come in upon the old title (*a*), he would have had precedency of some of the Earls mentioned in it. In the ordinary sittings in Parliament, the marking of the Peers present on the rolls has little regard to precedency: I suppose their names were taken down as they came in, without regard to that point. But in a commission a due precedency would probably be given to the several noblemen. In it the Earl of Bothwell, so created in 1490, takes place of the Earl of Glencairn; therefore the latter did not sit in virtue of the patent 1488.

It was therefore impossible to found upon this patent by itself. The Claimant called in aid of it a charter granted by King Charles I. to William Earl of Glencairn, in July 1637, which professes to confirm the former patent; but the King could not give effect to the former patent, which had been done away by Act of Parliament (*b*).

The creation, therefore, of the Earldom of Glencairn cannot be referred to the patent 1488, but to Young's account of its origin.

In 1614, (the succession had always hitherto gone to heirs male,) the then Earl of Glencairn makes an entail of his estates, calling to the succession many persons of the name of Cuningham, and the heirs male of their bodies.

His son, in 1642, but five years after he had attained the charter 1637 from King Charles I., instead of altering the succession of his estates, and limiting them to heirs general, as a man thinking that his title went to heirs general would naturally do, still continues them to the heirs male, and passes a new charter under the entail of 1614. And thus things went on till

(*a*) The Patent of 1844.

(*b*) *Suprà*, p. 420.

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1670, when the second son of this Earl took up the title in prejudice of his grand-daughter.

My Lords, I have come to this opinion with regret on account of my respect for the learning and judgment of Sir Adam Fergusson, the Claimant. I am sure he was convinced that he had a right to this peerage, and this had much weight with me when I came first to consider the subject.

The proposition, therefore, which I have to submit to your Lordships is that Sir Adam Fergusson has shown himself to be the heir general of Alexander Earl of Glencairn who died in 1670, but that he has not made out the right of such heir general to the Earldom of Glencairn.

The Committee resolved accordingly; and the judgment of the House pursuant to their report was duly submitted to His Majesty King George III. by Lords with white staves.