

# BEFORE THE LORDS' COMMITTEE FOR PRIVILEGES.

## EARLDOM OF PERTH.



THE DUKE OF MELFORT, . . . CLAIMANT (*a*).

1853.  
20th July.

*Creation of a Scotch Peerage: Proof.*—In the absence of the original patent or charter of creation, a certified copy of an enrolment of a Commission under the Great Seal of Scotland and Royal Sign Manual, directing a Baron to be created an Earl, with confirmatory entries in the Journals of the Scottish Parliament, held sufficient evidence of the creation of an Earldom.

*Attainder of a Scotch Peerage: Semble*—Under the 7th Anne, c. 21, the effect of Attainder upon a Scotch Peerage is the same as the effect of Attainder upon an English or British Peerage.

Course of proceeding, when it appeared that a Claimant's pedigree was proved, but that Attainders stood in the way.

Motives and limits of the Royal interposition in sanctioning the restitution of a Scotch peerage.

A Bill to remove Attainder must have the Royal signature.

THE Petition of George Drummond, Duke de Melfort and Count de Lussan in France, claiming the Earldom of Perth, in the peerage of Scotland, and praying the Queen to adjudge and declare him to be entitled to that dignity, had been by her Majesty in due course referred to the House of Peers (*b*); and

(*a*) For a report of the earlier stage of this claim, see 2 Ho. of L. Ca., p. 865.

(*b*) As to the practice in such matters, see *suprà*, p. 58, note (*a*).

came before the Committee for Privileges on the 23rd of July 1846.

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The *Attorney-General* and the *Lord Advocate* attended on behalf of the Crown (a); Mr. *Fleming* stated the case of the Claimant.

There was no patent or charter of creation forthcoming; but there was produced an ancient certified copy of an enrolment of a Commission under the Great Seal of Scotland and Royal Sign Manual, dated February 1605, and purporting to direct the Commissioners therein named to create James Lord Drummond Earl of Perth. And this document, with confirmatory entries in the Journals of the Scottish Parliament, was held to be a sufficient proof of the creation of the Earldom.

The pedigree of the Claimant was also satisfactorily established; so that this Earldom would by law have descended upon him beyond all controversy, but for certain impediments which were thus adverted to by the noble and learned Lords who advised on the occasion. The following were their opinions.

The LORD CHANCELLOR (b):

The document creating this peerage not being forthcoming, the limitation must be taken from usage to have been to the grantee and to his heirs male (c). It appears that James, the fourth Earl, held under that limitation, and that he died in 1716. James, his eldest son, was alive at the time, not having died until the year 1720; but in 1715, living his father, he had been attainted. By his father's death the title would have descended upon him, had he not been attainted; but it did, in fact,—if it can be said to have descended at all,—descend upon an attainted person, and it

*Lord Chancellor's  
opinion.*

(a) See *suprà*, p. 59, note (a).

(b) Lord Cottenham.

(c) See the *Glencairn case*, *suprà*, p. 444.

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became as much forfeited as if he had been a Peer at the time of his attainder. The *Airlie Peerage case* seems decisive as to this.

The Claimant says that he is heir male of the grantee, and entitled, upon failure of the line of the attainted party. But, my Lords, if that party had the whole estate in him, the whole was forfeited.

It is said, however, that by the law of Scotland each party may be considered as coming in by way of substitution, and that the party attainted forfeits only what was in him. The case of *Gordon of Park* (a) and *Lord Bolingbroke's case* (b) are relied upon. But in those cases there were substantive substitutions, which there are not here; and Lord *Hardwicke's* object was to assimilate the law of Scotland as nearly as possible with that of England in pursuance of the provisions of the statute of Anne (c).

The Lord LYNDHURST:

*Lord Lyndhurst's  
opinion.*

My Lords, I am of opinion that this claim is barred. There are two attainders and a decree of forfeiture; but it is only necessary to consider one of those, namely, the attainder of James Lord Drummond, in the year 1715. He was the eldest son of the fourth Earl: he was attainted in the life-time of his father: his father died in 1716: he survived, and died in 1720. Now if this had been the case of an English peerage, there is no doubt whatever that it would have become extinct by the attainder of James Lord Drummond.

Now by the statute of Anne the corruption of blood, forfeiture, and other penalties arising from attainder are applied to Scotland precisely as in England. It follows therefore that if the peerage would in the case before us be extinguished were it an English peerage,

(a) Foster's Cro. Ca. 95.

(b) 3 Cru. 180.

(c) 7 Anne, c. 21.

it would be equally extinguished in the case of a Scotch peerage; and not for the life only of the party attainted, or during the continuance of his issue, but it would terminate entirely.

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I think however that I may without impropriety say that this is a case deserving the serious consideration of my noble and learned friend as to the adoption of some proceedings on the part of the Crown to do away with the effect of the attainder. This has been done in several cases; and I think there is as strong a claim for this in the present case as in any that have preceded it.

In these circumstances the Committee resolved that the claim was not established.

But in 1853, upon the suggestion thrown out by Lord *Lyndhurst*, a Bill was brought in, signed by the Queen, to relieve the Claimant from the effect of the decree of forfeiture, and to relieve him and the heirs male of James first Earl of Perth from the effect of the attainders. This Bill stood for the second reading on the 7th of June, when the following speeches were delivered.

The LORD CHANCELLOR (*a*):

My Lords, the object of this bill is to reverse the attainder of the Earls of Perth, who had been attainted for the part they took in the Rebellions of 1715 and 1745.

Lord Chancellor's  
opinion.

James I., my Lords, in the year of his accession to the English throne (*b*), created a member of the Drummond family (James, fourth Lord Drummond) Earl of Perth, to him and to his heirs male. The first person so created died without male issue, and his next brother succeeded to the title. The second Earl was succeeded by his son, the third Earl,

(*a*) Lord Cranworth.

(*b*) 1603.

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who had two sons, the eldest of whom was James, who consequently became fourth Earl, and the youngest was John (created Earl of Melfort in 1686, and Duc de Melfort in France in 1695), of whom I shall speak presently. This fourth Earl (James) was Chancellor of Scotland, and had several sons; the eldest, James (Lord Drummond), was engaged in the Rebellion of 1715, and was by Act of Parliament attainted. James (Lord Drummond) had two sons, both of whom adhered to the Stuarts, and were engaged in the Rebellion of 1745. They were attainted, but the eldest son died before the attainder came into effect, and the youngest son only was in fact attainted; but this line became extinct without issue male. The descendants of John Earl of Melfort, the next brother of the fourth Earl of Perth, then became heirs to the Earldom. John had adhered to the Stuarts, but had not been engaged in the Rebellion. He quitted Scotland, and a decree of forfeiture was passed in 1695, which attainted him for having migrated to France, and there he was created Duke de Melfort. He was twice married, and the male line of his first marriage became extinct in 1800. The present heir to and Claimant of the Earldom of Perth, George sixth Duke de Melfort, who claimed the dignity of Earl of Perth, was an officer who had served with great distinction in our army for many years. In 1840 he presented a petition setting forth his claims to the dignity. The petition alleged that the effect of the attainder in Scotland was different from that of an attainder in England; and that in Scotland no one was affected by the attainder but the very person to whom the Act of Parliament applied. The case came before the House of Lords when Lord *Cottenham* was *Lord Chancellor*. It was very carefully investigated, and much doubt was entertained whether the view which was taken of the law on

behalf of the Duke de Melfort, namely, that the attainder did not affect any one besides the very person to whom it was made to apply, was not correct. The question was argued at the bar (by Mr. *Fleming* in 1847) very ably, but unsuccessfully. The Duke de Melfort succeeded fully in proving his descent and title; but the House of Lords were of opinion that attainder was a complete bar to succession; just as it would have been in an English case. His noble and learned friend (Lord *Lyndhurst*) suggested, however, at the time, whether this might not be a case in which it might be fitting to ask her Majesty to give her consent to the removal of the bar created by the attainder. This was in 1848, and the subject then dropped, but it has since been revived; and her Majesty having graciously consented that the attainder should be reversed, he (the LORD CHANCELLOR) had laid the present bill on the table with that object. Of course the measure would not restore the Duke de Melfort to any of the estates of his ancestors, for his right to them would be barred by lapse of time over and over again, but it would enable him to claim the honours and dignities of the Earldom of Perth.

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opinion.

The Lord LYNDHURST:

My Lords, when the claim of the Duke de Melfort was before the Committee for Privileges, I was requested by the then *Lord Chancellor* (a) to be present at the hearing of the case. I accordingly attended it throughout, and was perfectly satisfied with the proof of the pedigree, which was established by strict legal evidence. The *Lord Chancellor* expressed himself to be of the same opinion. The case was attended, on the part of the Crown, according to the usual course, by the *Lord Advocate*, whose duty it was to observe and

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opinion.

(a) Lord Cottenham.

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criticise the proof. He declared himself to be perfectly satisfied. The only question therefore that remained to be considered was, as to the effect of the attainders. It was supposed that, by some peculiarity of the Scotch law, they would not extend to the Claimant; and a decision by Lord *Hardwicke* (a) was referred to in support of the argument. We were of opinion that the case did not apply to the one before us, and that the claim was barred by the attainders. After the judgment was pronounced, I expressed to the *Lord Chancellor* my opinion that the case was as deserving the interposition of the Crown to relieve the Claimant from the effect of the attainders as any of those which had preceded it. I have reason to believe, from what passed on that occasion, that the *Lord Chancellor* concurred in that opinion; and here, for the time, the matter rested. It was with great satisfaction, therefore, that I learnt that her Majesty had, with the advice of the noble Earl (b), with her accustomed benevolence and love of justice, consented to restore the honours of this family.

I need hardly remind your Lordships, that this is one of the most ancient and illustrious houses in the annals of Scotland. It has been fruitful in brave, loyal, and eminent men. One of its chiefs was so distinguished for military skill and valour, that having accidentally been taken prisoner in the time of Edward I., that monarch considered the event of so much importance, that he directed public thanksgivings to be offered in the cathedral of Glasgow in consequence of his capture. He was afterwards released, and was present at the great battle of Bannockburn; and signally contributed to the event of that memorable day. He received from the Scottish King, on the

(a) Case of *Gordon of Park*, Foster's Crown Cases, 95.

(b) Lord Aberdeen.

field of battle, an additional device to his shield, as a perpetual memorial of his services on that occasion. The first member of the family who bore the title of the Earl of Perth was distinguished for his varied accomplishments. He was sent to Spain to negotiate a treaty of peace between the two countries; which he accomplished with such talent, and so much to the satisfaction of his Sovereign, that the Earldom of Perth was conferred upon him as the reward of his services. In the civil war between Charles I. and the Parliament, the family adhered steadfastly to the Royal cause. One of them accompanied the gallant Marquis of Montrose in his daring and chivalrous enterprises; and both he and his son were severally persecuted for their continued resistance to the usurpation of Cromwell.

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It is not to be supposed that a family so distinguished for its loyalty, could at the period of the Revolution have deserted their King in his misfortunes. They accompanied or followed him in his exile, sacrificing their honours and their estates, and encountering the greatest personal hazards in his cause. Two of them fought at Culloden—the elder of whom died on his passage to France in consequence of the wounds received in that battle. If these were political crimes, they were, at least, allied to great virtues, and cannot fail to awaken our sympathy and command our respect.

Upwards of a hundred years, my Lords, have elapsed since the occurrence of these events. The passions and prejudices that then prevailed, happily, have been long since forgotten. The line of Princes to whom these loyal men devoted themselves has become extinct, and the principles which they professed must now direct their allegiance to our most gracious Sovereign, descended as she is from the ancient Kings both of England and Scotland. Their past history is the best



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guarantee for their future loyalty, and for that faithful and steadfast obedience due to our most gracious Queen and her successors. I feel assured that your Lordships will, without a dissenting voice, concur in the second reading of this bill, recommended as it is by the enlightened clemency of our Sovereign.

The Lord BROUGHAM :

*Lord Brougham's  
opinion.*

I entirely approve of this bill. I approve of it on this ground, among others—that in doing an act of justice to the noble Claimant, it does no injustice to any other person. I use the word justice, because, although it is true it is an act of kindness and grace on the part of her Majesty, I think, at the same time, that it is nothing less than justice to that noble individual, as the pedigree and title were most clearly established.

The Lord CAMPBELL :

*Lord Campbell's  
opinion.*

I rejoice exceedingly in being able to give my support to this bill; but I must protest against the Jacobite tone of the speech of the noble and learned Lord (Lord *Lyndhurst*). I admire, as much as my noble and learned friend, the chivalry of those who adhered to the Stuarts; but I can never forget that that family was rightly dethroned; and I hope my noble and learned friend, in his admiration of the clans who supported the Stuarts, did not mean to throw any slur on other no less gallant clans who bled for civil and religious liberty, and helped to place the House of Hanover on the throne.

The Earl of ABERDEEN :

The present Claimant has served her Majesty for many years with great credit to himself, and has therefore given a practical proof of his personal loyalty,

in addition to that traditional loyalty which my noble and learned friend has so eloquently ascribed to his House.

The bill was then read a second time; and having gone through the other stages in the Upper House, was carried down to the Commons, who passed it and sent it back to the House of Lords, where on the 28th of June it received the Royal Assent.

On the 19th of July 1853, a fresh petition having been presented by the Claimant to the Queen, and referred to the House of Lords, the Committee for Privileges met.

The *Attorney-General* and *Lord Advocate* appeared again for the Crown. Mr. *Fleming* for the Claimant.

After briefly stating the position of the case, Mr. *Fleming* submitted that as the pedigree had been already established, and as the Act of Parliament had removed the other difficulties, their Lordships might now report that the claim was made out. The Act of Parliament recited that the Claimant was the heir male of the first Earl of Perth.

The Lord LYNDHURST: My Lords, Mr. *Fleming* is quite correct. On the former occasion the then *Lord Chancellor* (a) held that the pedigree was proved. And I was of the same opinion. The *Lord Advocate*, too, admitted it.

The *Lord Advocate*: My Lords, I am quite satisfied with the pedigree.

Mr. *Fleming*: Then, my Lords, I submit that as the evidence already taken is before your Lordships, I need not go through the pedigree, but merely draw your Lordships' attention to the limitation of the two Earldoms (b).

(a) Lord Cottenham.

(b) The Act of Restoration extended to the Earldom of Melfort as well as to the Earldom of Perth.

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The Lord LYNDHURST: You must sum up in the regular manner.

Mr. *Fleming* did so.

The Committee Resolved, That the claim was made out; and a report to that effect having been made to the House, their Lordships gave judgment accordingly; and the same was with all due formality submitted to her Gracious Majesty by two Peers with white staves.

The next step, had this been an English or a British peerage, would have been to issue a writ of summons, requiring the attendance of the Claimant in Parliament. But as it was only a Scotch peerage, the following Order respecting the Earldom of Perth was entered on the 9th of August, 1853, in the Journals of the House:

ORDERED, That at the future meetings of the Peers of Scotland, assembled under any Royal proclamation for the election of a Peer or Peers to represent the Peerage of Scotland in Parliament, the Lord Clerk Register, or Clerk of Session officiating thereat, in his name, do call the title of the Earl of Perth according to its place in the Roll of Peers of Scotland called at such election, and do administer the oaths to the said Earl of Perth, claiming to vote in right of the said Earldom, and do receive and count his vote, and do permit him to take part in the proceedings in such election.

With reference to the remark of Lord *Lyndhurst*, that the Crown had "in several cases" sanctioned the removal of attainders affecting Scotch peerages, the following Paper drawn up by Sir Walter Scott may be cited as admirably expressing the motives and the limits of the Royal interposition. The illustrious writer had evidently in view a general act, but the practice has been to legislate in each case; thereby occasioning an oppressive, I do not say an unnecessary, expense to parties seeking the restitution of their blood.

Sept. 1822.

"A good many years ago Mr. Erskine of Mar, and other representatives of those noble persons who were attainted for their acces-

sion to the Rebellions of 1715 and 1745, drew up a humble petition to the King, praying that his Majesty, taking into his Royal consideration the long time which had since elapsed, and the services and loyalty of the posterity of the attainted Peers, would be graciously pleased to recommend to Parliament an Act for reversing all attainders passed against those who were engaged in 1715 and 1745, so as to place their descendants in the same situation, as to rank, which they would have held, had such attainders never taken place. This petition, it is believed, was proposed about the time that an Act was passed for restoring the forfeited estates still in possession of the Crown ; and it was imagined that this gracious Act afforded a better opportunity for requesting a reversal of the attainders than had hitherto occurred, especially as it was supposed that the late Lord Melville, the great adviser of the one measure, was equally friendly to the other. The petition in question, however, it is believed, never was presented to the King ; it having been understood that the Chancellor, Lord Thurlow, was hostile to it, and that, therefore, it would be more prudent not to press it then. It is thought by some, that looking to his Majesty's late paternal and most gracious visit to his ancient kingdom of Scotland, in which he seemed anxious to revive and encourage all the proud recollections of its former renown, and to cherish all associations connected with the events of the olden times, a fit time has now arrived for most humbly soliciting the Royal attention to the state of those individuals, who, but for the conscientious, though mistaken loyalty of their ancestors, would now have been in the enjoyment of ancient and illustrious honours.

“Two objections might, perhaps, occur ; but it is hoped that a short statement may be sufficient to remove them. It may be thought, that if the attainders of 1715 and 1745 were reversed, it would be unjust not to reverse all attainders which had ever passed in any period of the English History,—a measure which might give birth to such a multiplicity of claims for ancient English peerages, forfeited at different times, as might affect seriously the House of Lords, so as both to render that assembly improperly numerous, and to lower the precedency of many Peers who now sit there. To this it is submitted, as a sufficient answer, that there is no occasion for reversing any attainders previous to the accession of the present Royal family, and that the proposed Act might be founded on a gracious declaration of the King, expressive simply of his wish to have all attainders reversed for offences against his own Royal House of Hanover. This limitation would at once give ample room for the display of the greatest magnanimity on the part of the King, and avoid the bad consequences indicated in the objection ; for, with the exception of Lords Derwentwater and Widdrington, who joined in the Rebellion of 1715, the only Peers who ever joined in any

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insurrection against the Hanover family were Peers of Scotland, who, by their restoration, in so far as the families are not extinct, could not add to the number of the House of Lords, but would only occasion a small addition to the number of those already entitled to vote at the election of Sixteen Representative Peers. And it seems plain, that in such a limitation, there would be no more injustice than might have been alleged against the Act by which the forfeited estates, still in the hands of Government, were restored ; while no compensation was given for such estates as had been already sold by Government. The same argument might have been stated, with equal force, against the last reversal of the attainder of Lord Edward Fitzgerald ; it might have been asked with what sort of justice can you reverse the attainder, and refuse to reverse all attainders that ever took place in England or Ireland ? But no such objection was made, and the recommendation of the King to Parliament was received almost with acclamation. And now that the family of Lord E. Fitzgerald have been restored to the rights which he had forfeited, the petition in the present case will, it is hoped, naturally strike His Majesty with greater force, when he is pleased to recollect that his lordship's attainder took place on account of accession to a rebellion, of which the object was to introduce a foreign force into Ireland to overturn the Constitution, and to produce universal misery ; while the older attainders now in question were the results of rebellions, undertaken from views of conscientious, though mistaken loyalty, in many individuals, who were much attached to their country, and to those principles of hereditary succession to the Throne in which they had been educated, and which, in almost every instance, ought to be held sacred.

“ A second objection, perhaps, might be raised, on the ground that the reversal of the attainders in question would imply a censure against the conduct of that Government by which they were passed, and consequently an approval, in some measure, of those persons who were so attainted. But it might as well be said that the reversal of Lord E. Fitzgerald's attainder implied a censure on the Parliament of Ireland, and on the King, by whom that Act had been passed ; or that the restoration of an officer to the rank from which he had been dismissed by the sentence of court-martial, approved of by the King, would imply a censure on that Court or on that King. Such implication might, at all events, be completely guarded against by the preamble of the proposed Act—which might condemn the Rebellion in strong terms—but reverse the attainders, from the unanimous wish of the King to obliterate the memory of all former discord, so far as his own House had been the object of attack, and from a just sense of the meritorious conduct and undoubted loyalty of the descendants of those unfortunate, though criminal individuals. And it is humbly submitted, that as there is no longer any Pre-

tender to His Majesty's crown, and as all classes of his subjects now regard him as both de jure and de facto the only true representative of our English race of Princes, now is the time for such an act of Royal magnanimity, and of Parliamentary munificence, by which the honour of so many noble houses would be fully restored; while, at the same time, the station of the representatives of certain other noble houses, who have assumed titles, their right to which is, under the present law, much more than doubtful, would be fully confirmed and placed beyond the reach of objection" (a).

The following Restorations have taken place in compliance with the above representation.

The Earldom of Mar in 1824.

The Viscounty of Strathallan in 1824.

The Viscounty of Kenmure in 1824.

The Barony of Nairne in 1824.

The Earldom of Carnwath in 1826, and

The Barony of Duffus in 1826.

In 1826 Acts were also passed relieving the heir to the Earldom of Airlie from the effects of the attainder of James Lord Ogilvy, and relieving the heir to the Earldom of Wemyss from the effect of the attainder of David Lord Elcho, and in 1824 an Act was passed reversing the attainder of William Viscount Stafford.

In 1848 an Act was passed for the restoration in blood of William Constable Maxwell, Esq., and to enable him to claim the Barony of Herries which had been forfeited by the attainder of his ancestor William Earl of Nithsdale.

In 1853 the Act was passed for the restoration in blood of the Duke de Melfort, and to enable him to claim the Earldoms of Perth and Melfort, notwithstanding the attainders of his ancestors.

1854 an Act was passed to enable Lord Lovat to claim the Scotch Barony of Lovat, notwithstanding the attainder of Simon Lord Lovat.

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(a) Lockhart's Life of Scott.