Trinity Term
[2016] UKPC 16
Privy Council Reference No 0079 of 2015

JUDGMENT

In the matter of the Baronetcy of Pringle of Stichill

REFERRAL UNDER SECTION 4 OF THE JUDICIAL COMMITTEE ACT 1833

before

Lord Neuberger
Lady Hale
Lord Mance
Lord Clarke
Lord Reed
Lord Hughes
Lord Hodge

JUDGMENT GIVEN ON

20 June 2016

Heard on 25 and 26 November 2015 and 25 January 2016

The First Claimant
James Guthrie QC
Sir Crispin Agnew of
Lochnaw Bt QC
(Instructed by M A Law)

The Second Claimant
Timothy Scott QC
Ken Collins
Emily Page
(Instructed by Batchelors
Solicitors)

LORD HODGE:

1. In this reference under section 4 of the Judicial Committee Act 1833, Her Majesty requires the Board to advise as to (i) who is now entitled to be entered on the Official Roll of the Baronetage as the Baronet of Pringle of Stichill and (ii) whether the evidence resulting from the obtaining of a DNA sample from Sir Steuart Robert Pringle in late 2009 or early 2010 should be admitted in order to determine the first question.

2. There are two claimants. One is Simon Robert Pringle ("Simon"), the son of Sir Steuart Robert Pringle, who was enrolled as the tenth baronet and who died on 18 April 2013. The other is his cousin, Norman Murray Archibald MacGregor Pringle ("Murray"). The questions on which Her Majesty requires the advice of the Board raise more general questions as to whether a person's right to claim a title of honour can be lost by the passage of time or excluded by the acknowledgement by parents of another child's status as heir, by enrolment of that child on the Official Roll of Baronetage, or otherwise. In this reference the question relates to a title of honour. No land or other property is in issue. But the questions may be more generally relevant to property rights, if, for example, land is held in trust for the heir male of a deceased person, or for the rightful holder of a title of honour, whether a dukedom, earldom or otherwise.

3. In giving its advice the Board also discusses questions of breach of confidence and data protection which counsel for the claimants have raised in their submissions.

The circumstances giving rise to the reference

4. On 5 January 1683 His Majesty King Charles II granted the Baronetcy of Stichill to Robert Pringle of Stichill "ac heredibus masculis de suo corpore", which translates as "and the male heirs of his body".

5. No question has been raised as to who were the male heirs of the first baronet of Stichill until events which occurred in the early 20th century. The eighth baronet was Sir Norman Robert Pringle, who lived from 1871 till 1919. On 16 October 1902 the eighth baronet married Florence Madge Vaughan. She gave birth to a son, Norman Hamilton Pringle, on 13 May 1903. She later gave birth to two further sons, Ronald Steuart Pringle, who was born on 26 April 1905 and was the father of the claimant, Murray, and James Drummond Pringle who was born on 12 April 1906. She also gave birth to a daughter, Mary Elizabeth Pringle, in 1916.

6. The claimant, Murray, has asserted that Norman Hamilton Pringle was not the son of the eighth baronet and that accordingly the second son, Ronald Steuart Pringle, (Murray's father) was the male heir of the first baronet. Ronald Steuart Pringle died on 24 July 1968. Murray claims that as a result he then became and now is the male heir of the first baronet.

7. Simon is the grandson of Norman Hamilton Pringle, who married Winifred Olive Curran on 15 September 1927. Winifred Olive Pringle gave birth to Simon's father, Steuart Robert Pringle on 21 July 1928.

8. Norman Hamilton Pringle was enrolled without opposition as the ninth baronet. He died on 8 February 1961. After the death of his father, Steuart Robert Pringle was enrolled without opposition as the tenth baronet in 1961. He had a distinguished military career and was awarded the honour of KCB in 1982. The Board refers to him hereafter as "Sir Steuart Pringle".

9. Murray's challenge to Simon's entitlement to be enrolled as the 11th baronet rests principally on DNA evidence, which the Board discusses below, but among the papers which the parties have made available to the Board, there are suggestions that there was controversy within the Pringle family in the past as to the entitlement of Norman Hamilton Pringle to become the ninth baronet. Margaret Caroline Underwood recently produced a statutory declaration in support of the alteration of the Roll of Baronets. In it she stated that Murray's father, Ronald Steuart Pringle, had told her and her sister, Rosemary Jean Pringle, who had married his second son (Murray's younger brother) in 1965, that he believed that Norman Hamilton Pringle was illegitimate and that he (Ronald) was the first born son of the eighth baronet.

10. Mrs Underwood also stated that the eighth baronet's executors implemented his testamentary instructions to deliver to his eldest son who attained 21 years of age his furniture, pictures and other heirlooms by giving them to Murray's father, Ronald Steuart Pringle, who in turn had left them to Murray. Mrs Underwood produced evidence that Florence Madge Vaughan had given birth to an illegitimate son in December 1901 and had given him up for adoption. She also produced evidence in the form of a transcript of the private ledger of the eighth baronet between May 1918 and March 1919 which sadly narrated the breakdown of his marriage at that time and his regrets, but which did not suggest that he had doubts as to the paternity of Norman Hamilton Pringle. The eighth baronet, who was a serving Army officer, died in a military hospital on 18 April 1919 of tuberculosis, which he had contracted while on active duty in France.

11. On 10 January 1920 Lady (Florence Madge) Pringle signed a statutory declaration in support of the application of her son, Norman Hamilton Pringle, to be

enrolled as the ninth baronet in which she stated that he was the son of the eighth baronet. Mrs Underwood suggested that this, and also his birth certificate which she had also signed, were perjured documents.

12. The principal evidence which Murray advances in support of his claim to have the Roll of Baronetage corrected and to be entered as baronet of Stichill is evidence of deoxyribonucleic acid (DNA) which arose in this way. In about 2009 Murray established "the Pringle Surname Project" which sought to determine the chieftainship of the clan Pringle. On 8 October 2009 Murray wrote a letter to Simon in which he introduced himself. He explained that he was administrator of the project to identify the clan chief, that the last clan chief had died without a male heir in 1738 and that the project sought to identify the rightful current chief by tracing the male family branch lines of the Pringle family using Y-STR genetic testing. He urged Simon and his father to join the project by providing a mouth swab for the DNA test. Murray sent Simon an email reminder on 30 November 2009. On 13 December 2009, after discussing the matter with Simon, Sir Steuart Pringle, the tenth baronet, wrote to Murray stating that he was interested in the project but questioned whether, as he was 81, the rightful claimant would be identified within his lifetime. He stated that "In the meantime I will be happy to do whatever I can to help". In a prescient postscript he said "your faith in DNA is touching, but what happens when (if?) a male cuckoo enters the nest?"

13. Murray replied on 21 December 2009 to intimate that he was arranging for a test kit to be sent to Sir Steuart Pringle's home. He also emailed Simon to ask him to ignore the invoice for the test, which he would receive, as the cost had already been met.

14. On 8 July 2010 Murray wrote to Sir Steuart Pringle to tell him of the results of the Pringle Surname Project and enclosed an analysis of fifteen Y-chromosome DNA results as at 1 July 2010. He stated that he had spoken to Simon several days earlier. Murray explained that he, his brother, James B Pringle, and his (Murray's) son, Alastair S Pringle, had identical Y-chromosome DNA haplotype test results and formed the core. Three other Pringles were conclusively related to the core and to each other. He continued:

> "However, there are 12 differences between your results and mine and therefore we are not related through the male line. The analysis shows yours to be a separate lineage not related to any of the other participants.
>
> I had hoped that the Project would underpin your nomination as Chief of the Clan, but this course is obviously no longer feasible in the circumstances. More importantly, the issue of lineage has a direct impact on the Stichill baronetcy. After a great deal of

> thought, I believe that it is my duty to do what I can to restore the baronetcy to its rightful lineage. This is why I am sending you the enclosed 'Caveat to be entered on the Official Roll of the Baronetage' dated 8 July 2010."

Murray then quoted from advice which he had received from the Assistant Registrar of the Peerage and Baronetage on the effect of the caveat and his suggestion that the appropriate time for showing that the title had passed down the wrong line would be on the decease of the tenth baronet. The caveat gave notice that Murray had a claim to the baronetcy of Pringle of Stichill and requested notice be given of any claim lodged in respect of the baronetcy. Murray copied his letter to Simon, Alastair S R Pringle, the Lord Lyon King of Arms and the Registrar of the Peerage & Baronetage.

15. Sir Steuart Pringle replied on 3 August with a terse acknowledgement of receipt of this letter. Murray thereafter received the assistance of Sir Simon Watson Bt in gathering evidence in pursuit of his claim. Sir Simon Watson corresponded with Sir Steuart Pringle in 2011 and 2012 but there was no meeting of minds.

16. Murray pursued an application in the Family Division of the High Court for a declaration of parentage under section 55A of the Family Law Act 1986, in which he sought to have the birth certificate of the ninth baronet corrected. Sir Steuart Pringle defended that application and, on the basis of an asserted breach of confidence, sought an injunction preventing the use of the DNA evidence for any purpose other than establishing the chieftainship of the clan Pringle. The proceedings were dismissed by consent on 23 April 2013, shortly after the death of Sir Steuart Pringle. Thereafter, both Simon and Murray registered their claims to be entitled to succeed to the baronetcy of Pringle of Stichill with the Registrar of the Peerage and Baronetage.

The DNA evidence

17. Murray as administrator of the Pringle Surname Project engaged an organisation called DNA Heritage to organise the Y-chromosome DNA test and they in turn used a laboratory, Sorenson Genomics. Sir Simon Watson, in pursuing Murray's claim, obtained a statement from Professor James Dewey Watson dated 12 March 2011 in which he stated that he had studied the Pringle family tree and examined the analysis of the Y-chromosome results by Sorenson Genomics. Professor Watson expressed the professional opinion that Sir Steuart Pringle and his half-brother by his father's second marriage, William James Bruce Pringle ("Bruce"), were not related through any male line to Murray or Murray's younger brother, James Bruce Pringle. Sir Simon Watson also engaged Dr Tim Clayton, a consultant forensic scientist, to advise on the accuracy of the work of Sorenson Genomics. Acting on his advice, Sir Simon Watson arranged that eight of the people tested by Sorenson Genomics be re-tested by Genetic Testing

Laboratories Ltd (GTL). Sir Steuart Pringle declined further involvement, but his half-brother, Bruce, the child of Norman Hamilton Pringle's second marriage, submitted to the re-test.

18. Murray's solicitors also obtained an expert report dated 15 May 2013 from Dr Susan Pope, a forensic consultant with DNA Principal Forensics Ltd, in which she explained the nature of DNA and the various types of DNA testing. She stated that Y-chromosome analysis looks at a set of markers on the male-determining Y-chromosome, which forms a pattern called a haplotype. Those markers are inherited only by males directly from the father. The results of Y chromosome testing can be used to show paternity and inheritance through a male line. She explained that Sorenson Genomics had carried out a test using 43 markers and expressed the view that that was a very discriminating test because it used so many markers. GTL had carried out a test using 11 markers, which was a test used in the United Kingdom in both civil and criminal casework, which backed up the results obtained by Sorenson Genomics. Dr Pope explained that the 43 marker profiles of two closely related men who were directly descended from the same male line within a few generations would be expected to be the same or very close, with 42 of the 43 markers matching.

19. Dr Pope explained the test results. She said that Sir Steuart Pringle and his half-brother, Bruce, shared the same Y-chromosome profile (which she called "Profile B") and were descended from the same paternal line. The male descendants of the second and third sons of the eighth baronet who were tested (a group that included Murray) all shared the same Y-chromosome profile (which she called "Profile A"). She stated that the two profiles, A and B, differed from each other to the extent that there was no support for the view that they had a common male origin in the last 1,000 years. Dr Pope pointed out that only one instance of non-paternity was required if the ninth baronet was not the son of the eighth baronet whereas two instances of non-paternity by the same man or two closely related men would be required if the second and third sons of the eighth baronet were not his true sons. Further, she observed that six other men who were part of the Pringle family tree and were descended from other male relatives in the same patrilineal group, such as brothers of earlier Pringles, shared similar Y-chromosome profiles with Profile A. No other instance of Profile B was observed in any of the wider family who had been tested. She concluded that the Y-chromosome tests and the family tree provided "very strong support for the view that Sir Norman Robert Pringle [the eighth baronet] is the grandfather of Norman Murray Pringle [Murray] and James Bruce Pringle, and the great-grandfather of Robin Alastair Pringle but is not the grandfather of Steuart Robert Pringle [Sir Steuart Pringle] and William James Bruce Pringle [Bruce]."

20. Simon has not disputed the results of the DNA testing or advanced an alternative interpretation of those results but has argued that the evidence should not be admitted on the grounds of public policy. He asserted (i) that the evidence affected the status of individuals who were dead, (ii) that it overturned a well-established lineage on the basis

of which successive generations had conducted their affairs and (iii) that its use was not consistent with the purpose for which Sir Steuart Pringle had provided his DNA sample to Murray. As a result of the dispute on the admissibility of the DNA evidence, the Lord Chancellor sought the advice of the Advocate General for Scotland and the Lord Advocate. The reference to the Board was the result.

21. In support of the view that the ninth baronet was the son of the eighth baronet, Mr Timothy Scott QC proponed what he described as a powerful body of evidence. First, common sense and legal presumption dictated that the eighth baronet and his wife had had sexual relations from the day of their marriage (if not before). Secondly, the period of 30 weeks from the date of the marriage until the birth of Norman Hamilton Pringle was short of full term but was sufficient for a healthy baby to have been born. Thirdly, the child was registered as the son of the eighth baronet and given the same first name as his father. Fourthly, the eighth baronet treated his first son with love and affection to the end of his life. Fifthly, Madge Pringle signed a formal statutory declaration that the child was the son of the eighth baronet and was entitled to succeed him. The ninth baronet had lived his life in the belief that he was entitled to the honour. Sir Steuart Pringle's entitlement was similarly unchallenged until late in his life. Simon himself was over 50 years old before he became aware of the challenge.

22. Mr Scott did not dispute that DNA evidence and evidence of blood tests may be admissible in cases of this kind and referred the Board to *In re Moynihan* [2000] 1 FLR 113. But he argued that the evidence should not be admitted if it bastardises the child of a mother who was in a sexual relationship with her husband at the relevant time, or if it bastardises a dead person. He recognised that in mainstream society today illegitimacy does not carry the stigma it once did. But there were many ethnic and religious groups which regarded legitimacy as a very serious matter. It was also highly important to the inheritance of titles of honour. The courts had frequently recognised that delayed challenges could disrupt legitimate expectations. He also drew attention to the capacity of DNA evidence to mislead as to the legitimacy of children born as a result of modern reproductive technology, if the records of clinics were inadequate.

23. Mr Scott also made the cogent point that if a challenge had been made to his legitimacy during his lifetime, the ninth baronet would have been able to apply for a declaration of legitimacy under section 1 of the Legitimacy Declaration Act 1858 or its successor statutes and would in all probability have obtained the declaration. He was dead; technology had developed since his death; and the court was being asked to admit in evidence the product of that technology which was not available to be used against him while he lived.

Discussion

(i) Governing law

24. The baronetcy of Stichill is a Scottish baronetcy. Stichill is a village in the historical county of Roxburghshire in the Scottish Borders. In Scots law titles of honour are incorporeal heritable property. Questions as to entitlement to succeed to the baronetcy are governed by Scots law. When the Board first heard submissions on this reference Mr James Guthrie QC and Mr Scott both sought to argue their cases under English law. The Board invited them to obtain legal advice on Scots law but heard their submissions in relation to data protection and some potentially relevant aspects of English law before continuing the hearing to allow them to present their cases by reference to the governing law. At the continued hearing the Board had the benefit of written and oral submissions from Sir Crispin Agnew of Lochnaw Bt QC and written submissions from Mr David Johnston QC, both of the Scottish Bar, for which it is very grateful.

25. The parties have reached no agreement on the domicile of the eighth baronet and his wife at the date of birth of Norman Hamilton Pringle in 1903, by which one could identify the law which governed the legitimacy of the ninth baronet. In the absence of agreement, the Board proceeds on the basis that the relevant domicile was Scotland. But the Board does not see the question of domicile as an important question in this case because it is of the opinion (a) that the central issue is not one of legitimacy but paternity (which is a question of fact), and, in any event, (b) that, unless the DNA evidence falls to be excluded on the basis of prescription or another ground of delay, it is of sufficient cogency to rebut an evidential presumption under either Scots law or English law.

26. In this advice the Board refers to English law as well as Scots law not only as there is considerable similarity in approach to the subject of titles of honour, which is relevant as a matter of comparative law, but also to illustrate the historical approach to the social problems within families created by delayed challenges to a person's right to inherit a title of honour or property. But the Board stresses that its advice ultimately rests on Scots law as the governing law.

(ii) The ius sanguinis

27. A title of honour vests iure sanguinis, by right of blood, in the heir specified in the grant. The heir needs to take no step to acquire the title. Scots institutional writers are clear on this. Thus *Erskine, An Institute of the Law of Scotland* (Nicholson ed) III.8.77 stated:

> "Neither titles of honour, nor offices of the highest dignity, require service: for they descend jure sanguinis to the heir limited in the grant."

Bell's Principles (10th ed) (1899) made the same point at sections 1679 and 1825. More recently, in *Dunbar of Kilconzie v Lord Advocate* 1986 SC (HL) 1, the Lord President (Lord Emslie) stated (p 13) that:

> "it is common ground that the right to a title, such as a baronetcy title, arises jure sanguinis in the person entitled to succeed in accordance with the terms of the particular destination."

In the House of Lords the judgment of the First Division was affirmed. Lord Keith of Kinkel, who gave the leading speech, corrected part of the reasoning of the Lord President who had suggested that it was a necessary condition of succeeding as heir male of the body of an institute that the successor should be the heir male of the immediately preceding heir male of the body. Lord Keith referred to the submissions of the appellant's counsel who

> "cited a number of powerful authorities to the effect that on every occasion where the succession opened under a destination such as this one to a title of nobility, or indeed to any other species of heritable property, it was propinquity to the institute, as being descended of his body exclusively through males, which alone was relevant to the ascertainment of the person entitled to succeed. In the normal case the successor was indeed, as a matter of fact, the heir male of his predecessor, but that was not a circumstance which determined his right to succeed. I am of opinion that the proposition embodied in this argument is sound in law …"

The true question on the death of the eighth baronet in 1919 was "who was then the male heir of the first baronet of Stichill?" The question now is the same, substituting only the present for the past tense.

28. In English law the rule is essentially the same. A baronetcy is an incorporeal hereditament which descends in accordance with the terms of the original grant and each successive heir takes under the original grant: *In re Sir J Rivett-Carnac's Will* (1885) 30 Ch D 136; *Halsbury's Laws of England* (5th ed) (2008), vol 79, para 808. The same question would therefore have to be asked and answered.

29. When answering that question, the court looks to the facts available to it at the time the succession opened up on the death of a rightful baronet. But the posthumous birth of a child in the senior stirps (ie the family branch or line of descent from a common ancestor with a superior claim to be the male heir) who was in utero at that time (in accordance with the maxim nasciturus pro iam nato habetur), or the subsequent reappearance of a missing heir long believed to be dead, or the appearance of a hitherto unknown heir who had been prevented from taking the succession by some extraneous circumstance, would supplant the person otherwise identified as the heir. See the opinions of ten of the consulted judges in the Bargany case, *Fullarton v Hamilton* (1825) 1 W & S 410, p 424, of Lord Glenlee at p 439 and of Lord Pitmilly at pp 474-475.

(iii) Protection from challenge:

(a) Protection against a finding of illegitimacy

30. Scots common law has long had a strong presumption of paternity to protect the legitimacy a child who is born during the marriage of his apparent parents. The presumption was based on the Roman law maxim (*Digest* II.4.5): pater est quem nuptiae demonstrant (literally, the father is he whom the marriage points out). Thus the child born to a married woman during the subsistence of a marriage, if the child could have been conceived during the marriage, is presumed to be the child of the woman's husband and therefore legitimate. A similar inference that the husband is the father extends to a child conceived before and born shortly after the marriage of the parties: *Gardner v Gardner* (1877) 4 R (HL) 56; *Imre v Mitchell* 1958 SC 439. In the latter case the Lord President (Lord Clyde) opined (p 464) that evidence of the parents to prove illegitimacy might be excluded where they had acknowledged the legitimacy of the child, but other evidence is not excluded. At a time when illegitimacy carried a strong social stigma, Scots law required very cogent evidence (proof beyond reasonable doubt) to rebut the presumption.

31. That has now changed. The Law Reform (Parent and Child) (Scotland) Act 1986, section 5(1)(a) now provides that a man is presumed to be the father of a child (a) if he was married to the mother at any time beginning with the conception of the child and ending with the birth of the child or (b) if both he and the mother of the child have acknowledged that he is the father and he has been registered as such in a register of births in the United Kingdom. The presumption of paternity may now be rebutted by proof on a balance of probabilities (section 5(4)). In civil proceedings, a party may be requested to provide a sample of blood or other bodily fluid, or body tissue, for testing. The court may draw such inference, if any, as may be appropriate, if such a request is refused: Law Reform (Miscellaneous Provisions) (Scotland) Act 1990, section 70.

(b) Protection of a family's honour and a child's inheritance

32. In the past, when many, if not most, large landed estates were entailed, there was a strong social policy of ensuring social stability by keeping together titles of honour and land. Similarly, it is easy to detect in older case law an anxiety to protect the reputation of noble families. In Scots law challenges to a person's right to inherit were decided on the evidence but a heavy onus lay on the challenger.

33. Thus in the celebrated case, *Douglas v Duke of Hamilton* (1769) 2 Pat 143, the House of Lords held that the Duke of Hamilton had failed in his challenge that Archibald Douglas was not the legitimate son of Lady Jane Douglas, the sister of the late Duke of Douglas. Lady Jane had secretly married a Jacobite, Colonel Sir John Stewart, in 1746 when she was 48 years old. Both she and her husband gave dying depositions that she had given birth to twins, Archibald and Sholto, in Paris in 1748. Sholto and his mother died in poverty in 1753. Archibald survived. After the death of the Duke of Douglas without issue, Archibald Douglas served and retoured as his next male heir (a process for establishing one's right of succession: see para 45 below) in 1761, having previously served and retoured as the son of Lady Jane Douglas. The Duke of Hamilton later claimed to be the male heir of the late Duke of Douglas and raised an action of reduction to nullify Archibald's service as heir. He asserted that Archibald was a child whom Lady Jane Douglas and her husband had purchased from a poor person in Paris in order to perpetrate a fraud on the family and led evidence from agents in support of his assertions. While the Duke succeeded before the Inner House of the Court of Session, the House of Lords reversed their judgment. Lord Mansfield (p 173) was very critical of the Duke's delay in challenging Archibald's status until nine years after his mother's death. But he considered and rejected the challenge based on his assessment of the evidence. He analysed the evidence of events in France, and attached weight both to the likeness of Archibald Douglas to his father and of Sholto to his mother, which made it improbable that the children had been provided by a third party, and to Lady Jane Douglas's honour, but little to her age as a primagravida.

34. The advocate, James Boswell, who is remembered more for his authorship of the Life of Samuel Johnson than for his legal practice, attended the hearing in the Inner House, and wrote a pamphlet, "The Essence of the Douglas Cause" in 1767. On p 3 of the pamphlet he emphasised the heavy burden which the law placed on a challenger:

> "A wife may be unfaithful; a nurse may be unfaithful; and various other methods may be figured by which supposititious children may be introduced into families. There is no doubt but a variety of such cases have actually happened; and therefore, in a strict philosophical sense, there is no certainty in filiation. But it is the spirit of law to disregard such possible cases, and not to look for certainty in the abstract, but a legal certainty. For law … hath

> established such solid rules as may check the uneasy waverings of scepticism and make mankind pass through life with tranquillity and satisfaction."

Mr Boswell's view that the law then required certainty may involve a slight overstatement, but the circumstances of the case demonstrated the very heavy onus which Scots law placed on the challenger. Unusually, the case concerned a question of maternity, which is normally an easily demonstrated fact, as well as a question of paternity, which historically was not.

35. In that case and in the later case of *Bosville v Lord Macdonald* 1910 SC 597 judges stated that long delay increased the onus on the challenger to make out his case. Having regard to the nature of the evidence then available to the courts, which was in the main evidence relating to the circumstances at the time of the child's conception and birth, those comments can readily be understood. Since then developments in science have made it much easier to establish the fact of paternity. Blood tests have been used in challenges to paternity and more recently DNA evidence has become available to establish or undermine claims of paternity to a high degree of probability. Such evidence, if admissible, can readily rebut evidential presumptions.

(c) English law

36. In English law, as in Scots law, there is a presumption that a child born during a marriage is legitimate: *Banbury Peerage Case* (1811) 1 Sim & St 153. Such was the state of scientific evidence at that time that it required evidence that sexual intercourse between man and wife had not taken place or the physical fact of impotency to rebut the presumption: *Banbury Peerage Case*, pp 155-157; *Morris v Davies* (1837) V Clark & Finnelly 163, 242-244; *Gordon v Gordon* [1903] P 141. In *Morris*, the parents' acknowledgement of a child as legitimate in the face of a challenge was seen as strong evidence of legitimacy (p 242). Moreover, there was a rule of English law based on public policy that neither a husband nor a wife could give evidence as to whether marital intercourse had taken place between them: *Goodright v Moss* (1777) 2 Cowp 591; *Russell v Russell* [1924] AC 687. In the latter case, the Earl of Birkenhead described such evidence as "unbecoming and indecorous" (p 699). But Parliament abolished that rule when it enacted section 7 of the Law Reform (Miscellaneous Provisions) Act 1949.

37. Further, in the *Ampthill Peerage* case [1977] AC 547 the House of Lords held that a declaration of legitimacy, that he was the lawful heir of a peer of the realm, which a claimant had obtained under the Legitimacy Declaration Act 1858, excluded the reception of any evidence that tended to negative his entitlement to succeed to the peerage. Declarations of legitimacy operated in rem. This turned on the wording of the statute, which does not apply in Scotland. But the Board considers that a plea of res

judicata in Scots law might have similar effect against the parties to the prior action and those deriving title from them. It is not, however, necessary to decide the point as the ninth baronet never obtained a declaration of legitimacy in any action to which his siblings were parties.

38. The presumption of legitimacy remains part of English law: *In re Moynihan* [2000] 1 FLR 113, 119 per Lord Jauncey of Tullichettle, 123 per Lord Slynn of Hadley. But, as in Scots law, the presumption of legitimacy is only an evidential presumption. The Family Law Reform Act 1969, section 26, provides that in civil proceedings a presumption of legitimacy may be rebutted by evidence which shows that it is more probable than not that the person was illegitimate. The Court of Appeal in *Serio v Serio* (1983) 4 FLR 756 held that while the 1969 Act introduced the balance of probabilities as a standard, it had to be a standard commensurate with the seriousness of the issue involved. Lord Jauncey and Lord Slynn accepted that approach in *In re Moynihan* (pp 119-120 and 123 respectively). It is not necessary for the Board to consider whether the speeches of Lord Hoffmann and Lady Hale in the House of Lords in *In re B (Children) (Care Proceedings: Standard of Proof) (CAFCASS intervening)* [2009] AC 11 have qualified that approach by calling into question dicta about a heightened civil standard of proof. This is because, in the Board's view, the DNA evidence in this case would be sufficient to overcome a presumption which could be rebutted only by evidence which established the contrary to the criminal standard of beyond reasonable doubt.

39. Mr Scott submitted that delay in the pursuit of a claim could enhance the strength of the presumption. It is clear from the longer report of the *Banbury Peerage Case* which is contained in Sir Harris Nicolas's *Treatise on the Law of Adulterine Bastardy* (1836), that in that case Lord Redesdale and Lord Ellenborough expressed the view in the Committee for Privileges that the long delay in mounting a challenge added to the strength of the presumption (pp 485-486 and 488 respectively). But, in the Board's view, this was a view expressed at a time when there was no reliable scientific evidence to cast light on paternity, it was only an argument by analogy, and there was and is no relevant statutory rule of limitation in English law.

40. Mr Scott also referred the Board to *Viscount Purbeck's Case* which took place in the 17th century and is cited in Sir Harris Nicolas's *Treatise* (p 90ff) in support of a proposition that a person could not be bastardised posthumously. There is a dictum in the opinion of the Lord Chancellor, Lord Finch in *Viscount Purbeck's Case*, which may support the proposition (pp 115-116) where he cited a text, "Litts Descents", which, he said, suggested that a failure to challenge a man's legitimacy while he lived allowed his issue to carry the land away from the legitimate heir. Counsel advanced no further authority to support such a general proposition. In the Board's view, the proposition in the dictum runs counter to the nature of the ius sanguinis. It appears that "Litts Descents" is a reference to the chapter on descents in the 15th century *Treatise on Tenures* by Sir Thomas de Littleton (Book III, ch VI), which is concerned with how rights to land could be acquired and lost. The 1841 edition of the treatise (pp 426, 435-

436) suggests that there was a preferred view that Littleton's proposition was confined to cases where a father, after the birth of an illegitimate son, married the mother, a circumstance which in English law did not legitimate the child but may in ancient law have given the illegitimate child's heirs the right to the land which he had inherited. In the absence of other support, the Board does not accept that there is a common law limitation on a challenge to a person's legitimacy after that person has died. Lord Finch recognised that the question of paternity in the legitimate succession to an honour was a question of fact (p 115); in the Board's view his comments should be read having regard to the limited nature of the evidence then available to establish the relevant facts. The comments are, as Mr Guthrie submitted, only of historical interest.

41. Accordingly, in the Board's view English law (like Scots law) has a rebuttable evidential presumption of legitimacy, but English common law has no general bar on the receipt of evidence of paternity, such as DNA evidence, as a result of a delay in the pursuit of a claim. In the Board's view, the application of English law to the referred question would not give rise to a different answer from that which Scots law gives.

(iv) The admissibility of the DNA evidence

42. The courts have accepted DNA evidence in both civil and criminal cases as a reliable means of ascertaining a person's identity. In this case no challenge was made to the DNA evidence itself. But four arguments have been advanced for its exclusion. First, it was submitted that under the Scots law of prescription, Murray's claim has been extinguished through the passage of time and accordingly he has no legal interest to pursue which requires the consideration of this evidence. Secondly, it was argued that Murray's claim was barred by the defence of mora, taciturnity and acquiescence. Thirdly, it was submitted that Murray had breached an obligation of confidentiality or misused private information in his use of Sir Steuart Pringle's DNA to advance his claim to the baronetcy. Fourthly, it was submitted that in so using the DNA Murray had acted in breach of section 4(4) of the Data Protection Act 1998. The Board considers each in turn.

(a) Prescription

(i) Before 1973

43. In 1973 Parliament enacted the Prescription and Limitation (Scotland) Act which amended and codified of Scots law of prescription. In large measure the 1973 Act followed the recommendations of the report of the Scottish Law Commission "Reform of the Law relating to Prescription and Limitation of Actions" (1970 Scot Law Com No 15) by creating a comprehensive statutory statement of the law of prescription. But

because it was submitted that the claim of Murray's father had prescribed before then, it is necessary to examine the prior law.

44. Under the pre-1973 law of prescription, an heir required to take no steps to assert his title (para 27 above) and the ius sanguinis did not prescribe. But protection was given against a delayed challenge to an heir's assertion of his right to succeed to his predecessor's lands and estates. The process by which the heir established his right to such lands was known as "service of heirs".

45. On the death of the proprietor of heritable property, the person who was the heir in terms of the destination in the title to the heritable property was required to establish his status as heir initially by obtaining a verdict of the jury which was returned or "retoured" to the Sheriff of Chancery. After the role of the jury was removed by the Service of Heirs (Scotland) Act 1847, which was later consolidated in the Titles to Land Consolidation (Scotland) Act 1868 ("the 1868 Act"), the heir applied to the Sheriff of Chancery for an order, which declared his status as heir. If he established his claim to be heir, he received the order, formerly called "a retour" and later a "decree of service", which was recorded in the records of the Chancery and an extract of the decree could be used to complete his heritable title. There were two types of service. One was "general service" which carried rights that did not require to be completed by sasine. The other, "special service", was required to transfer heritable property of which the ancestor had a recorded title in the Register of Sasines. The retour or service could be challenged by an action of reduction, which, if it succeeded, nullified the court's order. The Scottish Parliament addressed the mischief of delayed challenges to retours initially by enacting a three-year period for a challenge (Act 1494 c 57). That was seen as too restrictive and was replaced by the Reduction Act 1617 (Act 1617 c 13), which provided that if a summons of reduction were not pursued within 20 years of the date of the retour, "that said action of reduction of the said retour and service shall prescribe in the self and no party to be heard thereafter to pursue the same reduction."

46. Case law subsequently established that the protection conferred by the Act 1617 c 13 covered not only the person who had served as heir but also his singular successors: *Neilson v Cochrane* (1840) 1 Rob App 82 (HL); *Campbell v Campbell* (1848) 10 D 461; and *Rocca v Catto's Trustees* (1876) 4 R 70, the Lord Justice Clerk (Lord Moncreiff) at 73. Thus the Act 1617 c 13 protected a party who had served as heir of a deceased, and his singular successors (ie purchasers from him), from having to produce again proof of his propinquity in blood to the deceased on the expiry of 20 years after he obtained the retour or order. But where a person had not obtained service as heir, the Act did not apply. The Act also did not apply to protect heirs of the protected party. This was because at each succession, the person who claimed to be the male heir of the institute (ie the original grantee) had to prove his propinquity to the original grantee and not just to his immediate predecessor: see *Dunbar of Kilconzie* para 27 above. In this case neither the ninth baronet nor the tenth baronet served as heir of his predecessor and so

were not able to claim the benefit of this Act. Even if either of them had so served, that would not have protected their heirs.

47. Nor, if challenged, would either of them have been able to plead a case of positive prescription under the Prescription Act 1617 (Act 1617 c 12) for two reasons. First, the Act protected from challenge only titles to land which had been possessed under an unchallenged title for 40 years after infeftment (which, after the reforms of conveyancing law in the 19th century, required the recording of the document which conveyed the land in the Register of Sasines). Titles of honour did not pass by infeftment and were not so recorded. Secondly, in contrast to other heritable rights, titles of honour and heritable offices are not alienable and cannot be attached by diligence (ie seized by a creditor). In *Earl of Lauderdale v Scrymgeour Wedderburn* 1910 SC (HL) 35, which concerned the entitlement to the heritable office of Standard Bearer to the King of Scotland, the House of Lords reversed a judgment of the First Division and held that, unlike other heritable property, an office or dignity held iure sanguinis was not alienable: Lord Chancellor (Lord Loreburn) pp 41-42, Lord Shaw of Dunfermline p 46. Lord Shaw (p 46) also rejected the contention that a person could acquire a dignity by prescriptive possession under the Act 1617 c 12. In the Board's view he was correct to do so: as the dignity could not be alienated by the person entitled to it or attached by his creditors, another person could not acquire it by adverse possession. As Erskine stated much earlier in *Institutes* III.7.12:

> "as that right [of blood] is proper to him who is vested with the character of heir, no interest can be established in any other to found an opposition."

48. During the hearing, the Board referred counsel to the opinions of the Second Division of the Court of Session in *Officers of State for Scotland v Alexander* (1866) 4 M 741, in which the Lord Justice Clerk (Lord Inglis) stated at p 745:

> "It is a perfectly well known principle of the law of heritable succession in Scotland that a person who is entitled iure sanguinis to take up the heritable succession of a person deceased may do so at any time, provided he is not anticipated by someone else acquiring a right in the meantime, and having the right fortified by prescription. No lapse of time will prevent any person from asserting his ius sanguinis, and taking up the succession to a man who died two or three hundred years ago. Juri sanguinis prescribitur nunquam - no lapse of time will prescribe it."

In the Board's view the Lord Justice Clerk's reference to the other person acquiring a right which is then fortified by prescription must be a reference to the fortification of a

title to land by the Act 1617 c 12 as (a) a person who is not an heir cannot acquire a right of heritable succession but can obtain a recorded title to land which, if ex facie valid can then be fortified by prescription, and (b) there is no suggestion of any Scots common law rule of prescription which could have a wider effect.

49. Section 17 of the Conveyancing (Scotland) Act 1924 reduced the prescriptive period in the Act 1617 c 12 from 40 years to 20 years. But again, it operated only to protect a recorded title to land. Thus, before the enactment of the 1973 Act, the Scottish law of prescription did not protect the titles of the ninth and tenth baronets. The question then becomes: "did the 1973 Act confer further protection?"

(ii) The Prescription and Limitation (Scotland) Act 1973

50. Two connected questions arise under the 1973 Act, namely (i) whether the Act makes the right to claim a baronetcy an imprescriptible right, and (ii) if not, whether the 20-year negative prescription introduced by section 8 of the Act can extinguish that right.

51. Schedule 3 to the 1973 Act lists rights and obligations which are imprescriptible. Two are relevant for consideration; one is "any right exercisable as a res merae facultatis" (paragraph (c)) and the other is "any right to be served as heir to an ancestor or to take any steps necessary for making up or completing title to any real right in land" (paragraph (h)).

52. The Board is satisfied that the right to assert a claim to a baronetcy is not a res merae facultatis, (which can be translated as "a mere facility"). The term refers to "any right the inherent nature of which is that it is intended to continue to subsist whether its possessor chooses to exercise it or not": *Peart v Legge* 2008 SC 93, para 26 per Lord Macfadyen, giving the opinion of an Extra Division. David Johnston QC in his admirable textbook, "Prescription and Limitation" (2nd ed) para 3.16 identified two kinds of res merae facultatis, namely (i) "a right whose exercise implies no claim on anyone else or against their rights", and (ii) "a (normal) incident of ownership which can be lost only as a consequence of the fortification in some other person of a right inconsistent with it". He continued:

> "The common ground between these two categories is that they are rights which are lost only by the establishment of an adverse right, and that can happen, if at all, only by positive prescription."

Examples of the former category include a right to build on your own property or create a burden over your own land: *Erskine, Institute*, III.7.10. *Napier, "Commentaries on*

the Law of Prescription in Scotland" (1854) pp 645-646, quoting Lord Kames, gave as further examples "choosing a spot for a kitchen garden, planting a tree, or building a house at my march". An example of the latter category, as in *Peart v Legge*, is a right of access to land. The examples in Scottish legal literature and case law are of property rights which are incidental to the ownership of land. The Board observes that in *Officers of State v Alexander* Lord Benholme, in a dissenting judgment, (pp 749-750) appeared to suggest that a right of blood was a species of res merae facultatis, but the Board construes the suggestion as an analogy. A title of honour iure sanguinis is not a right which is incidental to the ownership of property of any kind. While the boundaries of the concept of res merae facultatis are not well defined, the Board sees no basis for extending the concept in the 1973 Act to encompass a ius sanguinis.

53. It was submitted on behalf of Murray that his claim was imprescriptible under paragraph (h) because it was a right to "take any steps necessary for making up or completing title to any real right in land." The argument ran thus: in 1910 His Majesty King Edward VII introduced a Warrant regarding the Roll of the Baronetage, which was designed to prevent abuses relating to the status of baronets by providing for an official Roll of Baronets. The warrant provided:

> "II. That no person whose name is not entered on the official Roll of Baronets shall be received as a Baronet, or shall be addressed or mentioned by that title in any civil or military Commission, Letters Patent or other official document."

The Warrant in para III provided that the Roll would be prepared in consultation with one or other of the Kings of Arms (Garter, Lyon, or Ulster) according to their respective heraldic jurisdiction. It also provided for the correction of the Roll from time to time and for a petition to the monarch through the Secretary of State for the Home Department. It required:

> "That every person who shall succeed to the title and degree of Baronet or shall claim to be entitled by right of succession to be placed on the Roll subsequently to its first issue shall exhibit his claim to such succession, with proofs thereof, to one of Our Kings of Arms, according to their respective heraldic jurisdiction, who shall forthwith make a Report thereon, and submit the said claim and Report to Our said Secretary of State."

Section 15(1) of the 1973 Act defines "land" as "including heritable property of any description" unless the context otherwise requires. Because a title of honour is incorporeal heritable property, counsel submitted that a baronetcy fell within the

definition of "land" in the 1973 Act and that establishing a claim for inclusion on the official Roll was completing title to an interest in land in paragraph (h) of Schedule 3.

54. The Board does not accept this argument for three reasons. First, where land is referred to in the Act, in the sections which provide for the positive prescription of real rights in land (sections 1 and 2) and of positive servitudes and public rights of way (section 3), it is concerned with land and heritable rights relating to land, and separate tenements such as salmon fishings or a right to work minerals under the land. Such separate tenements required the wider definition of land. There is nothing to suggest that in those sections Parliament intended "land" to encompass a title of honour or to introduce a positive prescription to render such a title unchallengeable. Similarly, in Schedule 1 paragraph 2, which excludes from the five-year negative prescription "any obligation relating to land", the context does not support a wider view.

55. Secondly, if, as appears, the context of those provisions excludes a wider interpretation of "land", it would be strange for the term to be given a wider interpretation in Schedule 3, paragraph (h). In the Board's view it should not be so construed because the aim of this part of paragraph (h), which is coherent with the Act as a whole, is to protect the unregistered possessor of land against negative prescription while leaving him or her exposed to the loss of the right where someone establishes a contrary right by adverse possession under section 1 of the Act. That rationale does not apply to a title of honour as one cannot acquire a ius sanguinis by contrary possession: see *Earl of Lauderdale v Scrymgeour Wedderburn* and Erskine, *Institutes* III.7.12 (para 47 above).

56. Thirdly, while the Warrant has made it necessary for official recognition of a baronet that a claimant's title be placed on the Roll, the right to the title exists iure sanguinis and the entering of the claimant's name on the Roll is not a step which neatly fits the phrase, "necessary for making up or completing title to any real right in land".

57. But paragraph (h) of Schedule 3 to the 1973 Act also provides that the right to be served as heir to an ancestor is imprescriptible. The right to succeed to a baronetcy or other title of honour did not and does not require such service; but service as heir was a method of establishing propinquity to an ancestor and remains available for that purpose under the 1868 Act: *Sir A Moncrieff v Lord Moncreiff* (1904) 6 F 1021. The provisions relating to the service of heirs in the 1868 Act were repealed by the Succession (Scotland) Act 1964 (section 34 and Schedule 3) and are no longer part of the general law of heritable succession. But the repeals in that Act do not apply to titles and honours transmissible on the death of the holder (sections 34(1) and 37(1)(a)). Thus it remains competent to establish propinquity to an ancestor by service as heir.

58. In the Board's view, the underlying right to succeed to the title of honour, the ius sanguinis, must survive the passage of time because paragraph (h) of Schedule 3 provides that the logically consequential right to be served as heir cannot prescribe. Accordingly, this provision in paragraph (h) of Schedule 3 to the 1973 Act means that, consistently with the prior law, a ius sanguinis does not prescribe.

59. As the Board has reached the view that the right to succeed to an honour is imprescriptible under paragraph (h) of Schedule 3, it comments only briefly on the submission by Simon's counsel that the 20-year negative prescription in section 8 of the 1973 Act has the effect that Murray's right to claim the baronetcy has prescribed. Section 8 provides:

> "(1) If, after the date when any right to which this section applies has become exercisable or enforceable, the right has subsisted for a continuous period of 20 years unexercised or unenforced, and without any relevant claim in relation to it having been made, then as from the expiration of that period the right shall be extinguished.
>
> (2) This section applies to any right relating to property, whether heritable or moveable, not being a right specified in Schedule 3 to this Act as an imprescriptible right or falling within section 6 or 7 of this Act as being a right correlative to an obligation to which either of those sections applies."

60. The Board is not concerned with sections 6 and 7 of the Act, which provide for the extinction of obligations by prescriptive periods of five years and 20 years respectively. Further, for two reasons the Board considers that section 8 cannot apply to a ius sanguinis. First, it observes that section 8(2) expressly excludes from the scope of the section 8 prescription the imprescriptible rights under Schedule 3, which include the paragraph (h) right discussed above. Secondly, the Board notes that the means of avoiding the operation of prescription under section 8(1) is by the making of a "relevant claim", which section 9(2) defines in relation to section 8 as:

> "a claim made in appropriate proceedings by or on behalf of the creditor to establish the right or to contest any claim to a right inconsistent therewith."

Section 9(2), by speaking of a claim by a "creditor" and "appropriate proceedings" (which are defined in section 4 to be proceedings in a court of competent jurisdiction or arbitration), does not appear to apply to a claim to a baronetcy under the Warrant procedure, which involves a procedure by which the Lord Lyon assesses a claim and reports to the Secretary of State. In the Board's view this is an administrative function

and not a judicial function of the Lord Lyon: *Stair Memorial Encyclopaedia*, vol 6, sv "The Court of the Lord Lyon", para 1017.

61. In conclusion, the 1973 Act does not operate as a bar to Murray's claim and thus as a basis for the exclusion of the DNA evidence on which he founds.

(b) Mora, taciturnity and acquiescence

62. Simon's counsel also relied on the defence of mora, taciturnity and acquiescence through the failure of both Murray's father and Murray himself to mount a challenge sooner. Murray's father was born in 1905, came of age in 1926 after the death of the eighth baronet and died in 1968. There was evidence from Mrs Underwood that he questioned the legitimacy of the ninth baronet, but he did nothing about it. Similarly, Murray had a right to challenge the succession since his father's death in 1968 by invoking the procedure to correct the Roll but had not done so.

63. The defence involves three elements. In *Somerville v The Scottish Ministers* 2007 SC 140, the Lord President (Lord Hamilton) gave the opinion of the court. At para 92 he quoted the opinion of the Lord President (Lord Kinross) in *Assets Co Ltd v Bain's Trustees* (1904) 6 F 692, para 705 in which he stated:

> "… in order to lead to such a plea receiving effect, there must, in my judgment, have been excessive or unreasonable delay in asserting a known right, coupled with a material alteration of circumstances, to the detriment of the other party."

Lord Hamilton at para 94 discussed the defence in these terms, calling into question the absolute necessity for an alteration of circumstances:

> "Mora, or delay, is a general term applicable to all undue delay (see Bell, *Dictionary*, sv 'Mora'). Taciturnity connotes a failure to speak out in assertion of one's right or claim. Acquiescence is silence or passive assent to what has taken place. For the plea to be sustained, all three elements must be present."

He went on to state that prejudice or reliance were not necessary elements of the plea but were circumstances from which acquiescence might be inferred. Nevertheless, in the Board's view, it is important to recognise that, as in other forms of personal bar (including acquiescence), the defence requires an element of unfairness specific to the particular facts: *Reid and Blackie, Personal Bar* (2006) para 3.07.

64. The Board is satisfied that the defence cannot establish Simon's claim in this case. First, it is a species of personal bar, a plea which is directed personally against the particular claimant and refers to his or her inaction. Thus the inaction of Murray's father is not relevant to Murray's claim. Simon's counsel did not dispute this. In this regard the Board does not agree with the dictum of the Lord Justice Clerk in *Rocca v Catto's Trustees* at p 72 where he suggested that in that case the taciturnity of the pursuer's father as well as the pursuer supported the plea. That dictum offended against the personal nature of the plea. In *Bosville v Lord Macdonald* 1910 SC 597 the Lord President (Lord Dunedin) giving the opinion of the First Division stated clearly that "a plea of mora as bar is personal bar" (p 609). The Board agrees. Secondly, Murray's position, which was not challenged, was that, whatever his father may have thought, he did not know of the illegitimacy of the ninth baronet and was surprised when he received the DNA results. The Board therefore proceeds on the basis that Murray did not know that he had a claim until he received those results. That excludes the plea. Thirdly, as a species of personal bar, the plea operates as a shield and not as a sword. Even if it succeeded as a defence to Murray's claim, it would not of itself establish Simon's claim: see para 47 above.

(c) Breach of confidentiality

65. Simon's counsel submitted that Sir Steuart Pringle's DNA was wrongfully used to challenge his entitlement to the baronetcy. In a witness statement dated 30 January 2013, Sir Steuart asserted that he consented to Murray's use of the DNA only for establishing the leader of the clan Pringle, that Murray had obtained the DNA on a false premise, and that he had breached his confidence.

66. There can be no dispute that, as Lady Hale stated in *R (S) v Chief Constable of The South Yorkshire Police* [2004] 1 WLR 2196, para 71, "there can be little if anything more private to the individual than the knowledge of his genetic makeup". Simon's counsel founded on the assimilation of breach of confidence with the misuse of private information in *Campbell v MGN Ltd* [2004] 2 AC 457, Lord Nicholls of Birkenhead at paras 14 and 17. In *Imerman v Tchenguiz* [2011] Fam 116, Lord Neuberger MR, giving the judgment of the Court, stated (para 69):

> "In our view, it would be a breach of confidence for a defendant, without the authority of the claimant, to examine, or to make, retain, or supply copies to a third party of, a document whose contents are, or were (or ought to have been) appreciated by the defendant to be, confidential to the claimant. It is of the essence of the claimant's right to confidentiality that he can choose whether, and, if so, to whom and in what circumstances and on what terms, to reveal the information which has the protection of the confidence."

The essence of Simon's claim is that his father provided samples of his DNA only for the purpose of its use in the search for the chief of the clan Pringle. It was submitted that the appropriate relief for the breach of his privacy was that the Board should exclude from its consideration the evidence of his DNA.

67. The Board is not able to accept this submission. The claim of Sir Steuart Pringle to be the clan chief depended on his status as the senior member of the branch of the Pringle family who were entitled to claim the baronetcy of Pringle of Stichill. He was aware that he was contributing to a genealogical record. Sir Steuart in his letter of 13 December 2009 (para 12 above) consented to the use of his DNA to ascertain his entitlement to be clan chief. DNA Heritage had sent a letter to all participants explaining who the project administrator was and that the administrator (ie Murray) would be able to see the status of each individual member of the group. Because Sir Steuart Pringle did not use a computer, DNA Heritage sent an email to Simon dated 6 December 2009, addressed to Sir Steuart, which confirmed that message. In the Board's view, Sir Steuart Pringle must be taken to have been aware that details of his DNA might be submitted to the Lord Lyon and that if his DNA were to exclude him from a claim to be the clan chief, it might also form the basis of a challenge to his entitlement to the baronetcy. The Board was shown no evidence that Murray had obtained Sir Steuart Pringle's DNA on a false premise.

68. The Board is therefore not persuaded that Murray breached a confidence or misused private information. No separate point arises in relation to article 8 of the European Convention on Human Rights.

(d) The Data Protection Act 1998

69. Finally, it was asserted on Simon's behalf that Murray's use of Sir Steuart Pringle's DNA to challenge his entitlement to the baronetcy involved a breach of Murray's statutory duty as a data controller under the Data Protection Act 1998 ("the 1998 Act").

70. It was submitted that Murray was a data controller within the meaning of section 1 of the 1998 Act because, as administrator of the Pringle Surname Project, he determined the purposes for which and the manner in which the personal data were processed.

71. As will appear, it is not necessary for the Board to decide whether Murray was a data controller as well as DNA Heritage, which was registered for the purposes of the 1998 Act. On the assumption that he was, he was required to register with the Information Commissioner (section 17(1) of the 1998 Act). He was also required by

section 4(4) of the 1998 Act to comply with the data protection principles in Part I of Schedule 1 to the Act. The first of those principles is:

> "1. Personal data shall be processed fairly and lawfully, and, in particular, shall not be processed unless -
>
> (a) at least one of the conditions in Schedule 2 is met, and
>
> (b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met."

In determining whether personal data has been fairly processed, regard is had to the method by which the data were obtained, including whether any person from whom the data were obtained was misled as to the purpose or purposes for which they were to be processed (Schedule 1, Part II, paragraph 1(1)).

72. Simon has founded on the interpretative guidance in paragraphs 2 and 3 of Part II of Schedule 1 and has alleged that his father was either misled as to, or at least was not informed of, all of the purposes for which the data were intended to be processed. Paragraph 3 of Part II of Schedule 1 provides:

> "The information referred to in sub-paragraph (1) is as follows, namely -
>
> (c) The purpose or purposes for which the data are intended to be processed, and
>
> (d) Any further information which is necessary, having regard to the specific circumstances in which the data are or are to be processed, to enable processing in respect of the data subject to be fair."

73. Both Schedule 2, relating to personal data, and Schedule 3, relating to sensitive personal data, list as their first condition that the data subject has given consent to the processing; in Schedule 3 the further qualification is added that the consent must be explicit. In the Board's view, the DNA was sensitive personal data as defined in section 2 of the 1998 Act as it contained information as to the data subject's racial or ethnic origin and possibly also his health or condition. Thus explicit consent to the processing was required.

74. This challenge must be assessed against the background that counsel have agreed that Murray did not know of the assertions that the ninth baronet was not the son of the eighth baronet and that he was surprised when the DNA results became available (para 64 above). Thus Murray cannot be criticised for not stating a purpose which he did not have at the outset when he suggested to Sir Steuart Pringle that he provide a DNA sample. But Simon has an arguable case that Murray breached his duty under section 4 of the 1998 Act, when, without obtaining consent, he processed the data by using the DNA to assert his claim to the baronetcy.

75. It is not appropriate that the Board should express a firmer view on the matter (a) as counsel have not explored the relationship between DNA Heritage, others involved in the organisation of the Pringle Surname Project and Murray which might be relevant to a determination whether he was a data controller as defined in section 1 of the 1998 Act and (b) as the factual circumstances which lay behind counsel's agreement as to Murray's state of knowledge are not clear.

76. It is not necessary that the Board should express a firmer view also because it is satisfied that even if Murray has acted in breach of a statutory duty under the 1998 Act, that would not be sufficient to render inadmissible the DNA evidence.

77. In Scots law historically, the prevailing view was that in civil cases evidence that was relevant to the issue before the court was admissible even if it had been irregularly obtained: *Rattray v Rattray* (1897) 25 R 315. But that can hardly have been an unqualified rule so as, for example, to permit the admission of evidence obtained by torture. More recently, judges have asserted a discretion to admit or exclude evidence having regard to whether it is fair in the circumstances to admit it: *Duke of Argyll v Duchess of Argyll* 1963 SLT (Notes) 42; *Martin v McGuinness* 2003 SLT 1424. In *Duke of Argyll v Duchess of Argyll* Lord Wheatley assessed the fairness of admitting evidence from the Duchess's diaries which the Duke had stolen from her by breaking into her house. In assessing fairness in all the circumstances Lord Wheatley looked at the nature of the evidence, the purpose for which it would be used in evidence, and the manner in which it had been obtained. He took into account whether the introduction of the evidence was fair to the party from whom it had been illegally obtained and also whether the admission of the evidence would throw light on disputed facts and enable justice to be done.

78. The Board, adopting that approach in this reference, is not persuaded that it would be unfair to admit the evidence of Sir Steuart Pringle's DNA. On counsel's agreed position (para 64 above), there is no question of dishonesty or deception on Murray's part. Sir Steuart Pringle consented to the ascertainment of his DNA for genealogical purposes which were intimately connected to his entitlement to the baronetcy. The evidence is of central importance to the establishment of an entitlement to an ancient title of honour. If there were breaches of statutory duty under the 1998

Act, it would be a disproportionate response to exclude from consideration evidence of such probative quality.

79. If English law were applicable, the Board considers that a similar result would follow. The English common law does not normally concern itself with the way evidence was obtained; improperly obtained evidence is admissible, although the court has a discretion to refuse to admit such evidence: *Imerman v Tchenguiz*, paras 170 and 171 per Lord Neuberger MR. Standing the agreement of counsel as to Murray's knowledge when he requested Sir Steuart Pringle's DNA sample, the Board cannot characterise the obtaining of the sample as underhand, even if there has been a breach of the 1998 Act. The Board does not consider that in this case a breach of the 1998 Act would be a proper basis for excluding the DNA evidence, which is of central importance to the question which the Board must answer.

Conclusion

80. The Board is satisfied that, in the circumstances which have been presented to it, there is no legal ground for excluding from consideration the evidence of Sir Steuart Pringle's DNA in an assessment of who is the rightful claimant to the baronetcy of Stichill.

81. There is an evidential presumption that Norman Hamilton Pringle, who was born on 13 May 1903, was the legitimate son of the eighth baronet. But that presumption is capable of being rebutted by evidence which shows on the balance of probabilities that the eighth baronet was not his father.

82. The DNA evidence, which was obtained from Sir Steuart Pringle and the other members of the Pringle family who submitted samples, demonstrates to a high degree of probability that Norman Hamilton Pringle, who is Simon Robert Pringle's grandfather, was not the son of the eighth baronet. The Board refers to its discussion in paras 17 to 19 above of the DNA evidence and the report of Dr Susan Pope which explained the import of the evidence. The Board accepts Dr Pope's evidence and concludes that Simon Robert Pringle is not the great grandson of the eighth baronet and is not the heir male of the first baronet. The Board also concludes that Norman Murray Archibald MacGregor Pringle is the grandson of the eighth baronet and is, as the heir male of the first baronet, entitled to succeed to the baronetcy of Pringle of Stichill.

83. The Board humbly advises Her Majesty accordingly.

Afterthoughts

84. The Board cannot conclude without expressing its sympathy for the late Sir Steuart Pringle, a distinguished officer, who faced an unwelcome challenge in his autumnal years, and also Simon Robert Pringle, the heir presumptive, who had grown up in the belief that his father was rightfully the tenth baronet and that he would in time succeed to the baronetcy.

85. In the past, the absence of scientific evidence meant that the presumption of legitimacy could rarely be rebutted and claims based on assertions that irregular procreations had occurred in the distant past were particularly difficult to establish. Not so now. It is not for the Board to express any view on what social policy should be. It notes the ability of DNA evidence to reopen a family succession many generations into the past. Whether this is a good thing and whether legal measures are needed to protect property transactions in the past, the rights of the perceived beneficiary of a trust of property, and the long established expectations of a family, are questions for others to consider.