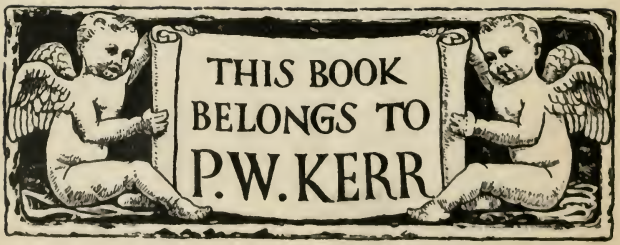
THIS BOOK
BELONGS TO
P.W.KERR

# DISSERTATION

UPON

# "HEIRS MALE,"

WHEN USED AS A CLAUSE OF REMAINDER IN GRANTS OF SCOTCH PEERAGES.

WITH

SOME INCIDENTAL DISCUSSIONS.

BY

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M.DCCC.XXXVII.

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ERRATA.

P. 2, *for* 1330, *read* 1335.
P. 9, *dele* Lord Balvaird.

TO

THE PEERS OF SCOTLAND,

THESE OBSERVATIONS

ON SOME POINTS CONNECTED WITH THE HISTORY AND

DESCENT OF THEIR ANCIENT TITLES,

ARE DEDICATED, WITH THE GREATEST RESPECT,

BY THEIR MOST OBEDIENT AND FAITHFUL SERVANT,

ALEXANDER SINCLAIR.

133, George Street, Edinburgh,
*May*, 1837.

# REMARKS

UPON THE

# DESCENT OF THE SCOTCH PEERAGE.

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There are many points connected with the history of the Peerage of Scotland, which have never been collected so as throw light upon the whole subject of the descent of such hereditary honours. The most able and learned of our antiquarians, Mr Riddell, has, indeed, in his Remarks upon Scotch Peerage Law, given valuable samples of the stores he could produce; but his object having been chiefly special, having been called forth as an advocate of particular views, which were controverted by the speech of the Lord Advocate in the case of the Earldom of Annandale, in 1826, and by the decision in favour of the claim to the Earldom of Devon, in 1831, there is still much curious matter in which a small portion of the public may take an interest. It is, therefore, proposed to attempt a reply to the first part of Mr Riddell's work, which will answer one of the objects of his wish, as to its being the means of leading to further

illustration, and, at a future opportunity, to treat of the subject of heirs in general, and endeavour to classify the whole Peerages of Scotland according to their original destination, with the alterations that were subsequently effected in their limitations. To this plan it may be objected, that one who is not a lawyer ought to hold himself disqualified from such a discussion. Certainly it would be better that a person legally conversant with the subject should take it up; but as no such gifted individual has undertaken the task, the attempt may be deemed the less presumptuous in an amateur, whose want of legal acquirements leaves him free from technical bias, and whose sole view in the enquiry is to do impartial justice to all claims, so that every man may have his own. Another potent obstacle is the difficulty, nay, almost impossibility, of procuring full and correct information; but these observations do not aspire to more than helping to throw light upon an obscure subject.

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# HEIRS-MALE.

In the discussion of the claims to the united Earldoms of Annandale and Hartfell, there has been some controversy as to the exact meaning of the above phrase, in a grant of a Peerage; whether the heirs-male of a specified individual must all be descended from him, or whether, in case of their failure, the unrestricted amplitude of the term does not include all collaterals connected with him, by a series of males, such as brother, father's brother, &c. It being considered to be the duty of the Lord Advocate, on the part of the Crown, to resist all claims of right, as detracting from the royal prerogative, he opposed Mr Hope Johnstone's claim to the above earldoms, and thus had to maintain that the heirs-male of the head of the Johnstones included the whole clan, if they could only prove their male propinquity, or Scotch cousinship. He asserted that, between 1660 and 1707, out of seventy-nine Peerages granted to heirs-male, twenty-eight were actually then held by relations in the male line, not descended, however, from the patentee, and that thus, unless heirs-male included collaterals, twenty-eight unsuspecting Scotch Peers would be deprived of the right to their titles, as if they or their equally loyal ancestors had committed treason. Riddell's Remarks, pp. 8, 9.

Devon case, pp. 12, 13.

This argument was of great service in the subsequent claim to the Earldom of Devon, which required the utmost latitude of which the term admitted, to embrace the widely distant relationship subsisting between Queen Mary's Earl, created in 1553, with whom the title dropped in 1556, when he died unmarried, and the late Viscount Courtenay, who became Earl of Devon, by decree of the House of Lords, in 1831, his forefather in the 16th degree, and the above Earl's progenitor in the 7th degree, having been sons of the second Earl in the reign of King Edward III. Lord Brougham's decision in this case was unexpected by many, and occasioned some surprise at the time, but it appears perfectly just. Sir Edward Courtenay, whom Queen Mary, at her accession, found suffering persecution like too many of his unfortunate predecessors, was only son of the Marquis of Exeter, decapitated by King Henry VIII. He was male representative of an illustrious family, of which nine of the heads had, with interruptions, held the Earldom since (1330) when Edward III. recognised Hugh Lord Courtenay's right to the Earldom, through a female descent, from the family of Redvers, the original Earls of Devon, so created by King Henry I. Although the title was thus inherited through a female, it was limited to male descendants. Indeed the attainder of the sixth Earl would have caused the loss of all claims on the part of his sister. The heir-male was restored when the Lancastrian party finally triumphed with King Henry VIII.; but that Earl's son having obtained the dangerous honour of marrying Princess Catherine, daughter of King Edward IV., her son (the above Marquis of Exeter), became too nearly allied to the throne, and new jealousies and disasters pursued the family.

1335

Thus, in the long series of arbitrary and capricious forfeitures and reversals, the title was again under attainder when Queen Mary succeeded. This, therefore, was not a new creation, but was probably intended as a grant of full restitution to a noble race, many of whom had been beheaded by her predecessors; and it is supposed that, in her great partiality to her cousin, and her desire to recompense him for hereditary oppression (she being then like himself unmarried), had meditated for him much higher honours, as well as a *still nearer connexion.* But to that preferment he showed so much repugnance, while he displayed so impolitic a preference for her sister Elizabeth's society, that her favour quickly passed away, and after having been imprisoned at home he died in exile, not without suspicion of poison.

Mr Riddell considered that the arguments of the Lord Advocate, and the instances which he adduced in support of them, to prove that the most comprehensive meaning should be assigned to the term heirs-male, would lead to novel and dangerous results, as in the decision of the Devon case; and to this feeling the public are indebted for the before-quoted valuable treatise in 1833.*

The first part I shall now attempt to answer, because, though I entertain the highest respect for his abilities, and the greatest admiration for his research,

* Lord Hailes, whose authority Mr R. and every antiquarian must respect, in the discussion of the Sutherland case, has occasion to reply to one of Sir Robert Gordon's innumerable fallacies, "that the collateral heir of the patentee could not take the Peerage, because not of the body of the patentee." As this loose statement referred to collateral heirs-male, Lord Hailes contents himself with averring that "more titles of honour than one are at this moment enjoyed without challenge, in direct opposition to that principle."—Ch. vi. pp. 79 and 83.

I think there are several points and examples bearing upon the question, which have been imperfectly argued and stated, and several cases which have not been brought forward. I am unable to discover all the instances to which the Lord Advocate appealed in support of his argument. As far as my information enables me to judge, there are sixty-four original, and six renewed patents to heirs-male,—there are sixteen to heirs-male of entail and provision, three to heirs-male of the body, whom failing, to other heirs-male, and three to heirs-male and assigns—total, ninety. Of all these, however, the number of cases in which the question has actually arisen, are only fourteen of the first class, five of the second class, and two of the third ; besides several to heirs-male and assigns whatever, to which collaterals succeeded simply as heirs-male, without assignation or any other deed.

I propose now to examine some of these cases, and I shall commence with the Earldom of Kincardine, the last which came before the Parliament of Scotland previous to the Union. Mr Riddell says,

" Upon the death of Alexander, Earl of Kincardine, in 1705, the " last lineal heir-male of the patentee, a competition for the honours " arose between his sister, Lady Mary, and Sir Alexander Bruce, the " collateral heir-male ; but here the Parliament did not go into the " merits of the present case. Wallace informs us that ' they did not " remount to the question, whether peerages were then limited to " males sprung from the person first ennobled ?' The point, which " was referred to the Court of Session, merely involved the effect of " a resignation executed by Earl Alexander, who found it was not " voided by his death, but might still be implemented in favour of " Lady Mary ; against which Sir Alexander appealed. In the mean " time (in 1706) during the tumult of the Union, the Parliament " allowed Sir Alexander to take his seat as Earl of Kincardine, but " ' *reserving Lady Mary's right ;*' which, Wallace adds, was not ' a " definitive sentence, but a temporary resolution on the possession " only.' Nothing further occurred, excepting that Lady Mary conti-

" nued to protest against Sir Alexander's claim; and eventually, the " matter became of little, or no moment to either family; as the one " succeeded in 1747, to the Earldom of Elgin, and the other a few " years after, to that of Dundonald, under different patents. Hence " it is as clear as sunshine that no definitive judgment has been pro- " nounced in the matter."—Pp. 14, 15.

It appears unaccountable that, in the discussion of this instance of succession by collateral heirs-male, it has escaped Mr Riddell's notice, that the person whom he calls Earl Alexander was no Earl at all according to his system. This might have been thought prudent forbearance, but that it is evident, from his styling Alexander Earl of Kincardine in 1705, "the last lineal male-heir of the patentee," that he has mistaken the pedigree of the family, and that his whole argument is founded upon the erroneous supposition, that Earl Alexander was descended from the body of the 1st Earl, whereas their actual relationship was uncle and nephew, which is proved by his service as heir to him under the description " patrui," uncle by his father.

1st Feb. 1683. Inquis. Gen. No. 6443.

Sir Edward Bruce of Carnock, on whom the Earldom was conferred in 1647, with remainder to his heirs-male, died without issue in 1662, and was succeeded by his brother Alexander. The right of this 2d Earl was never questioned, though he was in opposition to the Court in 1674, when the Earl of Lauderdale arbitrarily ruled over Scotland. His son was the Earl Alexander, alluded to above, at whose death, unmarried, in 1705, arose the competition between the collateral heir-male, descended from the uncle of the 1st Earl, and Lady Mary Cochrane, whose claim, as sister of the last Earl, was founded on her brother's having executed procuratories of resignation of his peerage, in order to alter the destination

Wood's Peerage of Scotland, vol. i. pp. 518, 519.

and get a new grant from the Crown to enable her to succeed him, instead of the heir-male. Similar proceedings took effect in a variety of instances, such as in the cases of the Earldoms of Lothian and Rothes, in which the heirs to a title who were on the point of succeeding were cut off, and had their right of inheritance barred, in favour of a new series, who could have no pretensions under the original creation. The Lords of Session, 28th March, 1707, found that it was competent to the Queen to fulfil the intentions of the Earl, although he died before the negotiation was completed; but Parliament had, mean time, admitted the male claimant as Earl of Kincardine, 10th October, 1706, and he and his posterity have enjoyed the title ever since. The important point here is, that, in the pleadings before Parliament,[1] no doubt arose as to the second and third Earls' titles, or Sir Alexander Bruce's right to succeed them, provided the resignation proved abortive, except that Lady Mary, in desperation, in case her other grounds failed to defeat her rival, ventured on an argument, which would have deprived her father and brother of their Peerages, and herself of her pretensions. The Crown did not deny that the title existed in one shape or the other. And I may ask, how could it occur to the Parliament to doubt a right which had been admitted as unquestionable for above forty years, and how could the Earls of Nithsdale and Seaforth, Lord Colville of Ochiltree, &c., whose right to their titles was precisely similar, entertain a suspicion that both parties were fighting for a shadow? Mr Riddell, p. 14, states it to be indubitable, that there is no decision extant to settle the question, and quotes Wallace's work on the nature and descent of ancient Peerages, to show that the main question was never

Vol. xi. App. p. 104 to 109.

touched, and that allowing Sir Alexander to take his seat as an Earl was only a temporary resolution. But I beg leave to observe, that the point was tacitly settled forty years before, by the undisputed succession of the 2d Earl to his brother, and was again by implication admitted, when Parliament assumed that there must be either an Earl or a Countess of Kincardine, for that undoubtedly *one* of the claimants had a right to the Peerage. This therefore proves that the Earldom was again recognised as subsisting, although both parties derived their claims by descent from collaterals of the patentee, under a grant simply to heirs-male; and, notwithstanding the above assertion that it is as clear as sunshine that no definitive judgment has been pronounced in the matter, this proceeding may be claimed as tantamount to a second adjudged case in this one family. It seems an extraordinary step on the part of the Scotch Parliament, to admit one of the parties to the possession of the sole object in dispute. It shows a leaning to the claim of the heir-male, probably founded on the fact, that he had the right, if it were decreed that he had not been deprived of it, and that it would have been unjust to divest him of what he had actually succeeded to, either through the incompleteness of the proceedings, or the alleged absolute incompetency of his predecessor legally to direct the transaction at all. The circumstance that it was during the tumult of the Union that Sir Alexander was admitted as Earl of Kincardine, reserving Lady Mary's right, does not appear to bear much upon the argument, or require much notice, as, from the Appendix to the last volume of the Acts of Parliament, pp. 104, 109, it is evident that the claims of both were fully argued upon the only point that was deemed disputable, but that still it was barely

possible that Lady Mary's right might be made available by a stretch of favour on the part of the Crown. She protested against the decision at the time, and against his voting at the elections in 1708 and 1710, but she did not carry her claim to the House of Lords, a significant acknowledgment that her right was imperfect, not having been sanctioned by the Crown. But whichever was the successful party, Mr Riddell's position is not improved. The triumph of either could only be founded on the right of collaterals to succeed to a title granted to heirs-male. With regard to the subsequent succession by the 8th Earl of Kincardine to the more ancient Earldom of Elgin, which Mr Riddell observes rendered the question as to Kincardine of little or no moment, especially as Lady Mary's seventh son and heir had succeeded as Earl of Dundonald, while it certainly neutralized the interest of these parties in the dispute, it throws light upon the original point, as to the right of all the 1st Earl's successors to hold the Peerage under his patent. This succession took place in 1747, after a second period of above forty years' possession of the Earldom of Kincardine by a collateral heir-male. The patent, and the collateral male relationship to the 1st Earl, are similar to the case of Kincardine, except that the heirs-male are ordained to bear the name and arms of Bruce. With all deference to the illustrious Lord Mansfield, I cannot agree that this addition was intended, or ought to make any difference. Mr Riddell admits, p. 8, that the words "*for ever*" add no significance or latitude to the term heirs-male, because they are used in cases where the patent is to heirs-male of the body for ever. And the same reasoning will apply to this point. There are several cases of remainders to heirs-male

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oceed-
s, pp. 33,

narks, p.

whatsoever, bearing the name and arms.* Indeed it seems no extravagant assumption, that the brother or paternal uncle of a gentleman of old family and of coat armour will not only be of the same surname, but will bear the same arms. But it would be desirable to ascertain the effect of the possible case of the succession to a title, with a patent requiring the name and arms of the patentee, devolving upon an heir-male, who then held an estate with another name and arms attached to the possession. Surely it will not be contended, that his right of succession, according to the order in the patent, is to be forfeited from the casual want of the adjunct qualification, or that his right to the Peerage would even be suspended till he got leave to re-alter his name and arms. I now proceed to explain that there are only fourteen years between the creations of Elgin and Kincardine. But the fashion which prevailed in 1633 of inserting in the patent "bearing the name and arms," was not so general about 1647. The former period was the era of Charles I.'s celebrated, and apparently triumphant visit to Scotland, when, with a view to acquire the goodwill of the higher classes of his countrymen, he advanced or created (including three in preparation for the journey) twenty-one Peers, one of whom was the Earl of Elgin.

Guthrie, in his History of Scotland, vol. ix., p. 214, quotes Balfour's Annals, stating, that to honour his coronation, first Parliament, and place of his birth, he created one marquis, ten earls, two viscounts, and eight lords.

* Earl of Selkirk.
Lord Pitsligo.
Lord Melville.
Viscount of Stormont.
~~Lord Balvaird.~~
Lord Colville of Culross.

od's
rage,
ii. pp.
, 682.

Remainder, adding name and arms.

1. Earl of Lindsay, heirs-male.
2. Viscount of Kenmure, heirs-male.
3. Earl of Loudoun, heirs-male for ever.
5. Earl of Dumfries, heirs-male for ever.
6. Earl of Queensberry, heirs-male.
8. Earl of Stirling, heirs-male for ever.
11. Earl of Elgin, heirs-male for ever.
13. Earl of Traquair, heirs-male for ever.
16. Lord Pitsligo, heirs-male of the body and their heirs, and then heirs-male whatever.
17. Earl of Wemyss, heirs-male for ever.
18. Lord Kirkcudbright, heirs-male.
19. Lord Balcarres, heirs-male.
21. Lord Fraser, heirs-male for ever.

Remainder, without mention of name and arms.

4. Earl of Kinnoull, heirs-male for ever.
7. Marquis of Douglas, heirs-male and successors for ever.
9. Lord Almond, heirs-male for ever.
10. Lord Johnstone, heirs-male for ever.
12. Earl of Southesk, heirs-male for ever.
14. Earl of Anerum, heirs-male for ever.
15. Viscount of Belhaven, heirs-male of the body.
20. Earl of Dalhousie, heirs-male.

Out of these there are thirteen with the stipulation as to name and arms, most of them heads of old houses or clans, one of the least important of whom has the addition of *whatever* to heirs-male. While of the remaining eight there were four chiefs, including the Marquis of Douglas, the most illustrious of the whole, and four junior branches of other families, of which last class one of the least consequence has the limitation to "heirs-male of the body." The distinction in this case shows the omission of this indisputable restriction in the other twenty cases was not accidental or considered insignificant. Of the ten creations between the 1st December, 1646, and the 27th December, 1647, among which was the Earl of Kincardine, I believe there is not one in which the name and arms are mentioned. It may be remarked here that the title of Cochrane, granted on the same day as Kincardine, is limited to heirs-male *of the body*, perhaps because the peer had no less than six brothers, though but two sons.

Earl of Tweeddale, heirs-male for ever.
Earl of Dirleton, heirs-male of the body.
Viscount of Newburgh, heirs-male of the body.
Earl of Ethie, heirs-male for ever.
Lord Abercrombie, heirs-male of the body.
Lord Belhaven, heirs-male of the body, and then heirs-male whatever.
Lord Halkerton, heirs-male whatever.
Earl of Kincardine, heirs-male.
Lord Cochrane, heirs-male of the body.
Lord Carmichael, heirs-male whatever.

Wood's Peerage, vol. ii. p. 686.

Indeed, of the thirty-eight original creations by King Charles I., after leaving Scotland, viz., from the middle of 1633 to the end of 1647, there are only three that have the stipulation as to bearing the name and arms: 1. Lord Banff, the elder branches of whose clan (Ogilvy) obtained the Earldoms of Airley and Finlater within the same period, without this qualification; 2. the Earl of Selkirk, whose ultimate remainder is to heirs-male whatsoever for ever, with the above additional requisition, but who was only the younger son of the Marquis of Douglas, so created in 1633, without the clause, even while its insertion was prevalent; 3. the Duke of Hamilton, who having got the dukedom provided to the male posterity of his daughters, naturally insisted that such heirs should exchange their own for his name and arms.

I beg any person who will take the trouble to examine the contrasted table already given, to say in the case of twenty patents, dated indiscriminately within a few days (but in fact most of them, if not all, arising out of the same occasion), and granted to heirs-male—one simply—six for ever—five bearing the name and arms—seven for ever bearing the name and arms—and one ultimately to heirs-male whatever bearing the name and arms—whether it is fairly presumable that a greater stretch of favour could have been intended for the third class than for the second, and whether the absolute restriction of the twenty-first does not free the rest from a similar limitation. Thus the custom appears

to have died away, and it seems rather a fanciful distinction invented in modern times, with undue weight attached to it, in order to make a point in favour of a theory, which it was considered desirable to support, with a view to cut off claims that were deemed not well-founded. I shall, as I proceed, again allude to this disputed point, but, mean time, from what has been shown, I venture to come to the conclusion that by the requisition as to bearing the name and arms, nothing more is meant than the words themselves convey, and that as a man's heirs-male are understood to continue while the family exists, the phrase is as much an expletive, because relating to matters of course, as the term *for ever*, which, without reference to the line of succession, merely denotes that the title should descend to the end of time, if the family should happen to last so long.

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## GENERAL SUMMARY OF MR RIDDELL'S ARGUMENTS AND CASES.

### I. AS TO HEIRS-MALE SIMPLY.

I have already fully given the history of the Earldom of Kincardine, and shown that the tenor of the statement in the remarks upon this case could not have been supported but from a misapprehension that the second and third earls were the first earl's lineal descendants, instead of being his brother and nephew, as is proved to have been the true state of the case. And the example adduced of the vain attempt of his female competitor to oppose the right of the fourth earl to succeed as heir-male collateral to all his predecessors, is only rendered available to the argument,

by leaving out of view the chief point as to the effect of the simple remainder to heirs-male, and diverting the attention to the dispute as to the validity of the third earl's deed of resignation for a re-grant in favour of females. As Mr Riddell, p. 10, triumphantly anticipates surprise at his statement, that there is not one instance of a peerage destined simply *hæredibus masculis* having ever descended to collateral heirs, I need only admit my surprise, and quote the two examples in this family in 1662 and 1705, to disprove the assertion; but I have many others to produce.

That the first Earl of Seaforth was succeeded, under a patent to heirs-male, by his brother and a long line of collaterals descending from him, was a fact as strongly at variance with the theory of the contracted meaning assigned to that clause as the two successive cases of Kincardine. The remarks, accordingly, are quite at fault, and the surmise of a possible re-grant, or of a tacitly sanctioned usurpation, is all that can be found as leading to the discovery of a mystery which, on the ground that heirs-male includes collaterals, is at once naturally explained.*

Mr Riddell, pp. 16, 17, fairly acknowledges the value of the instance afforded by three successive recognitions of the right of collaterals to the Earldom of Dunbar, under a patent to heirs-male in 1634, 1651, and 1689. But he does not give the final proof in 1703, when Parliament "ordered that the Earl of Dunbar be insert in his place according to the decreet of ranking in 1606." Vol. xi. p. 77.

The case of Nithsdale, which Mr Riddell, pp. 11, 12, endeavours to turn in favour of his own theory, appears

* These cases are fully detailed hereafter, pp. 31, 32.

to be far from giving the aid he expects. It is true that the dignity of an earldom was revived in the family, but under very different circumstances from the grant to the father. Neither the title nor the precedency was the same. And the remainder is essentially altered by the omission of the unlimited clause to assigns whatever. The old Earldom of Morton having been already conveyed by assignation, and having descended through a female, it was natural that such a power should be preserved in its continuation; but the new Peerage of Nithsdale being intended for the head of the potent house of the Lords Maxwell, was strictly attached to that chieftainship. As the new grant does not recite or refer to the limitations of its antecedent, the original can be of no effect in controlling the succession under the latest, *the regulating patent.**

Neither Kinnoull nor Forfar, pp. 12, 13, can properly be claimed as bearing decisively upon the question. In the former the precaution of the Earl, and in the latter the heirs-male being Dukes, prevented the cases being brought to the test. But, from the view of these two instances I have given, it appears that they may both be considered rather as aiding than opposing the latitude of meaning I attribute to the undefined description of heirs-male.*

Mr Riddell must have felt rather at a loss for evidence in the case of Forfar, when he relies upon an assertion of opinion by Sir Robert Douglas, the Peerage writer, whom he accuses of very frequent inaccuracy, and even of dishonesty, so that it might be thought he had hardly left him a feather of weight as an authority.—Pp. 14, 137, 143.

* See the whole cases farther on.

II. AS TO HEIRS-MALE BEARING THE NAME AND ARMS.

Mr Riddell considers it a sufficient answer to the fact of the frequent succession to the Peerages of Kenmure and Kirkcudbright, by more and more distant collateral heirs-male, that the absolute power of the additional clause, bearing the name and arms, was strong enough to bear them through, although but for that help they could have had no right.—Pp. 5, 6, 11. Yet he claims two extinctions, p. 26, in the instances of Melgum, 1630, and Aboyne, 1649, notwithstanding the existence of brothers at both periods, whose pretensions as heirs-male being fortified by the supplementary phrase, he ought to have held were indisputably good. At the same time, I must state, that I dissent from his account of these cases as unsatisfactory. In the former, I have shown the probability of the transaction having taken place, on a misunderstanding of the circumstances at the time. And in the latter I have proved that he argues on an erroneous view of the actual state of the family ever since 1649. The title of Lord Stewart of Ochiltree he has also exhibited, p. 27, as another example of the inefficacy of this otherwise potent adjunct, while it is cited as proof of the Privy Council's interpretation of the King's supposed intention vaguely expressed. I have shown, in my account of this case, that there is not much reason to believe, either that the King willed the imputed limitation, or that the Privy Council ordered the patent to be drawn out on such an understanding of the warrant. To the case of Elgin no objection is stated, p. 15, owing to the supposed protection afforded by the enlarging stipulation as to name and arms.

" The patent of the Barony of Fairfax of Cameron, dated 18th of

" October, 1627, first simply gives the honour to the patentee, 'et hæ-
" redibus suis masculis *de corpore suo* legitime procreatis, cognomen,
" et insignia, de Fairfax gerentibus;' and then adds, 'eumque, suos-
" que *hæredes masculos* barones, et dominos parliamenti per presentes
" creamus.' Both limitations stand independent of each other; there
" is nothing to control either in the patent; the tenendum is only
" hæredibus masculis *predictis*,' which may apply to either; what then
" are we to infer? Nothing else, surely, than that these limitations
" are synonymous, and convertible."—Pp. 23, 24.

The patent of Fairfax, which he quotes as evidence that heirs-male of the body and heirs-male were used synonymously, would, according to his views, not imply the contradiction he infers, because the qualification bearing the name and arms, which is here subjoined to the remainder to heirs-male of the body, is not added to the words heirs-male simply; and, therefore, by his theory, that clause being not so reinforced, means no more than the other phrase heirs-male of the body. Of a deed so carelessly executed, little need be said, but that one part must be explained by another, and after the original remainder is technically given, it is common to refer to it with less fulness of expression. The first lord's male posterity still exists, but no question can ever arise as to this imaginary difficulty.

On this head I beg to offer the following general observations: The use of the phrase, bearing the name and arms, was rare till 1615; and the fashion was not very prevalent till the time of King Charles I., towards the end of whose reign it again fell out of common practice. From the table given of the Peerages created in connexion with his visit to Scotland in 1633, it is shown that the stipulation was then, as it would appear, indiscriminately added or omitted. It was occasionally annexed to heirs-male of the body,

as well as to heirs-male whatsoever, in either of which cases it could have no effect. Although King Charles I. considered Melgum extinct, notwithstanding this saving clause, yet in opposition to this explicable instance, there are various Peerages, such as Nithsdale, Seaforth, Kincardine, Rutherford, and Colvill of Ochiltree, which subsisted without its aid. From all which I infer that the distinction is arbitrary and unfounded, and that all the instances of this settlement are no more than illustrations of the comprehensive meaning of the term " heirs-male."

### AS TO THE TERMS HEIRS-MALE, AND HEIRS-MALE OF THE BODY.

I now come to those cases in which Mr Riddell relies on the use of the terms heirs-male, and heirs-male of the body, as if they were, on some occasions, held to be synonymous.

It is singular that Mr Riddell, who possesses more information upon this subject than any man living, has been unable to produce one decided instance to refute the numerous cases which are ranged against him, or to show that his theory was ever acted upon; as even Melgum, giving it all possible weight, affords such partial support, that it is more adverse than favourable. In all the numerous examples he quotes of the apparently optional or indiscriminate employment of these very different expressions, there is not one in which the right to a title was really involved. The case of Lothian was a mere question of precedency, and "the first patent is at an end, and cannot be founded upon," p. 13, except as regards the date. The *succession* to this Earldom is detailed hereafter.

" Here, then, on a remarkable occasion, 'heirs-male,' for such was " the limitation to the first Earl, was unequivocally held to be only " expressive of heirs-male of the body; but this was not only the im- " pression of the Sovereign, and his advisers, it was also that of Sir " John Nisbet, advocate to Charles II., as from a query upon this " very case of the Earl of Lothian, that he has inserted in his Doubts, " the commencement of which is as follows:—'If *a nobleman* (*the* " *first Earl of Lothian*) having a patent to him and *the heirs-male of* " *his body*, should thereafter resign his title, and obtain a new patent " to him, and his heirs-male of his body, which failzeing, to his eldest " heir-female, and *the heirs-male* should fail, may a *nobleman*' (*the* " *Earl of Roxburgh*,) &c. &c. The thing, therefore, is abundantly " clear, he rendering, in the same way as the Crown, heirs-male in " the first patent by heirs-male of the body; and it further will be " perceived, that he uses '*heirs-male* simply,' as identical with the " very limitation he mentions to 'heirs-male of the body,' obviously " showing that he considered both to be synonymous."—P. 19.

It was perfectly immaterial to the subject, what was the real remainder in the original grant; and whether it be a loose expression, a false quotation or assertion, or a mere misapprehension, there was no occasion for correction, as the fact made no difference, and formed no part of the discussion. It ought not to weigh much in the argument the circumstance of King James II. quoting King Charles II.'s information, with proved inaccuracy, both as to the *words* of the first patent, in which there was no mention *of the body*, and as to the *extinction* of the honour, which had been all along continued by the surrender and re-grant, to the exclusion of even the heirs-male of the body of the first Earl. The looseness of the whole discussion of this dispute between the Earls of Lothian and Roxburgh is remarkable. While the King and his law-officers were debating about the effect of the Earl of Lothian's surrender and re-grant before 1624, they overlooked the important circumstance that the Earl of Roxburgh, whose original patent was ten years subsequent to the

creation of the Earldom of Lothian, had no other right to his own Peerage than by a similar surrender and re-grant in 1648, above twenty-four years posterior to the renewed settlement of the other. Thus, whether the question rested upon the new or the old patents, the Earl of Lothian clearly had the preference, which was confirmed by a fourth patent with the original precedency; and to confine him to the date of a later, and allow his competitor to stand upon the oldest grant, would have been absurd and unjust. 23d Oct. 1678.

Sir John Nisbet, also, whose *Doubts* every one must respect, is not exact in his proposition, and this irregularity is easily explained, because the question did not hinge upon the phraseology. After stating the remainder to heirs-male of the body, *erroneously*, he refers to them below as heirs-male, which is not uncommon in loose writing, especially when it is not in the case of a grant, but of an abstract question. But Sir James Stewart says, "that the case above stated was the case of Roxburgh contra Lothian, is doubted."

A similar observation applies to Sir James Stewart's solution of another of Sir John's *Doubts*.

"Sir John, in another part of his well-known work, puts the case, "'Patents of honour being granted to a person *and his heirs-male of* "*his body, quæritur*,—whether the appearand Heir may sit in Parlia- "ment, and not be lyable as behaving?' To this very query, Sir "James, in his equally celebrated replies, answers, 'A patent of ho- "nour is *ordinarily* granted to a person and *his heirs-male*, yet his "apparent heir is allowed to sit in Parliament; and it is not judged "a behavour.' Sir James here employs heirs-male to express the li- "mitation of Sir John, that is to say, 'to heirs-male of the body;' "and the term '*ordinarily*' is important, as pointing to heirs-male "of the body, the last being the most ordinary limitation in patents, "and thus necessarily rendered by heirs-male."—P. 20.

Nothing is involved in this as to the descent of a Peerage. An incidental point only is discussed, and

Sir James makes an imperfect reference to Sir John's words, instead of quoting them. Possibly, as in his time the term apparent heir included the collaterals, now more correctly styled heirs presumptive, he may have had in view, that Peerages had frequently been granted to heirs-male general, and thus have intended to give the query a wider range. But these careless statements of abstract questions, in which their opinions are not practical, can never impugn the decisive proofs of the undisputed succession of collateral heirs-male to various Peerages, both previous and subsequent to the discussion.

With respect to Sir James Balfour, the Lord Lyon, and the case of the Viscounty of Haddington, which he mentions, Mr Riddell proves him guilty of inaccuracy in the very instance he quotes. Sir James's reputation will not materially suffer from this conviction, though it may rather benefit by the unusual compliment of becoming an authority with him. But the same deduction might be drawn to prove that Sir James considered the terms aires-male, and aires begottin of his body to be equivalent.

" The great antiquary, Selden, refers to the creation of Sir John " Ramsay as Viscount Haddington, in 1606, which, he affirms upon " the authority of the letters patent, to have been only ' hæredibus " masculis *de se*, legitime descendentibus ;' and Sir James Balfour, " Lord Lyon in 1630, while he states that the Viscounty was ex- " tinct, owing to the death of the patentee ' without aires begotten " of his body,' informs us that the dignity had been granted in the " above year to him, and his aires *maile*'—' Sua,' adds Sir James, ' thaise " tytells and honours ceassit, and all returns to the Croune, *according* " *to the patent* of his creatione.' Sir James Balfour, therefore, had " the same notion of the limitation ; and he never could have made " the latter remark, if ' heirs-male ' had comprehended collaterals ; for, " as is well-known, all the Dalhousie family were the Viscount's colla- " teral heirs-male, and, in that event, would have succeeded to his ho- " nours, which could not have become extinct."— P. 21.

Sir Thomas Hope's authority in the case of an actual claim to inherit the Earldom of Dunbar, Remarks, p. 16 and 21, ought to have more weight than the mere inferential views of others on any of these nice points with which lawyers puzzled themselves. See farther on, p. 32.

The proceedings as to the Earldom of Arran, p. 23, are merely an example of inaccuracy, when no question of succession depended. In annulling the patent, the granting of which was a violation of all justice, there was no occasion to go to the original, or to quote it correctly, because its terms did not form the ground of the revocation. See case hereafter.

The case of Fairfax, as I have already shown, for another reason, is only an instance of a subsequent reference to the class of heirs originally particularized, leaving out not only the words "of the body," but the clause as to bearing the name and arms.

The re-grant of the title of Lord Napier, p. 24, contains a mis-quotation from the original, which was of no consequence, *because it was incorrect.* There was no heir-male of the body interested in it except the Peer himself, and the patent itself was abrogated. See afterwards.

In the case of Dysart, there is an inaccurate statement of the origin of the transaction, which in fact was much better grounded; and this, like the example of Napier, leads to no result.

"In the signature or warrant of the re-grant of the Earldom of "Dysart, dated 5th of December, 1670, it is stated that the dignity "had devolved upon the daughter of the Patentee, 'he dying without "*heirs-male;*' 'the latter certainly, had collateral heirs-male, yet in "the patent under the Great Seal, of which this was the warrant, "the terms employed are only 'heirs-male of *the body.*'"

In the reference to the creations of the Earldoms of

Leven and Calender, it did not signify what was the wording of the limitations; the question was not respecting the order of the heirs, but the dates of the patents.

"An Act of Parliament, passed on the 28th of June, 1665, fixing "the question of precedency between the Earl of Findlater, and the "Earls of Airlie, Leven, and Calender, which recites the titles and "interests of the contending parties; and in stating the constitutions "of their honours, in the cases of the Earls of Leven and Calender, "it says, that the first Earl of Leven had been raised to that dignity, "by patent 11th of October, 1641, to him, and '*his airis-male*,' and "that the first Earl of Calender had, in October 1641, obtained his "Peerage in the very same terms. 'Heirs-male,' therefore, are here "descriptive of the respective limitations, but what were the *literal* "words employed in the patents? No others than 'heirs-male *of the* "*body*;' which thus again are proved to be nothing more than the "mere echo of heirs-male."—P. 24, 25.

The example of Primrose, p. 28, is not only explained by the warrant but by the preamble of the patent. Were it not that the clause in favour of heirs-male of the father is thus found to be a mistake, by the words "of the body" being omitted, it would seem to show an instance of a possible constructive limitation to heirs-male. If a remainder to heirs-male of the body is followed by whom failing to another class of heirs-male, it is only necessary, for the purpose of bringing in the whole of the collaterals, to add the other heirs-male, or heirs-male whatsoever, of the patentee. But if the next male relation, or, as in this case, the father be *named* instead, it appears to imply a restriction to his issue, of which the instances are very rare, and merely form exceptions. When, however, as in the case of Rutherford, the heirs-male of the remainder-man are different from those of the patentee, the meaning is as unlimited as if the remainder-man was the patentee himself. I shall postpone the singular

case of Cramond, p. 25, where the supervening clause absolutely rules the first remainder.

Having now concluded the review of the examples adduced by Mr Riddell, I shall give a short abstract of the other cases which tend to refute his proposition.

ABSTRACT OF CASES NOT NOTICED BY MR RIDDELL, IN WHICH HEIRS-MALE SUCCEEDED, OR HAD A RIGHT TO SUCCEED, AS COLLATERALS.

When the first Lord Colvill of Ochiltree died, he was succeeded, without dispute, by his brother, in 1662, when there was a precisely similar succession to the Earldom of Kincardine. In the proceedings regarding this peerage in 1788, the attack was confined to the pretender's alleged pedigree, the proof of which would of itself have established his right to the title, as the refutation of it alone caused his being dispossessed. Robertson Proceedings, p. 4 to 466.

Two Lords Rutherford succeeded, in 1668, and 1685, and were acknowledged under a settlement on their brother and his nearest heirs-male. In all the discussions regarding this dignity, there was no allegation that their right had been improperly admitted; and the claims of the disputants, which began in 1734, and continued through two generations, would have been soon at an end, could the person who came forward as heir-male have proved his propinquity. Again, lately, a claim, as heir-male, has been presented, so that the examination of this case has lasted for above a century, and is not yet concluded. Robertson p. 154, &

The Earldom of Roxburgh affords evidence, cotemporary with the second recognition of Dunbar, of the

right of collaterals to succeed as heirs-male. Had it not been for the change in the destination made by the first Earl of Roxburgh, his peerage and estate would, at his death in 1650, have gone to his collateral heir-male, as is evident from the proceedings of his adopted heir in 1663 and 1664.

The proofs from the creations of the Viscounties of Strathallan in 1686, Dundee in 1688, and Garnock in 1703, independent of the actual succession of collaterals in the two first cases, are quite decisive as to the comprehensive meaning of heirs-male.

The evidence from the charters to the Earl of Caithness, 1545; Earl of Angus, 1547; Lord Yester, 1591; Earl of Murray, 1611; Earl of Buchan, 1625; Earl of Errol, 1674; Lord Sinclair, 1677; Earl of Breadalbane, 1681; Earl of Selkirk, 1688; Earl of March, 1697; and Lord Gray, 1707; is important, as in these cases heirs-male must mean collaterals.

The remarks of Lord Hailes on the case of the Viscounty of Oxfurd in 1735, demonstrate his opinion of the absolute right of heirs-male collateral, which is of great value, as corroborating that of Sir Thomas Hope a century previous.*

The presumption, from the confirmation of the Earldom of Home in 1636, appears also favourable to a liberal interpretation.

To the cases, in which the additional phrase, bearing the name and arms, is used, I have to add the Viscount of Stormont, Lord Jedburgh, Lord Aston, and the Earl of Kellie, which I regard as supporting my views.

I have now reached the main cause of all this discussion,—the question as to the right to the Earldoms of Annandale and Hartfell.

* Sutherland Case, chap. vi. p. 83.

"In the very recent claim to the Earldom of Annandale, it "was most material for the claimant to fix the meaning of the "words; because the first limitation in the patent was simply to "'heirs-male;' and he was only comprehended in subsequent ones to "heirs-female.* It hence followed, if heirs-male were to be inter- "preted heirs-male whatsoever, he would be met *in limini* by extinc- "tions which it might be difficult, nay perhaps impossible, to overcome, "upon the rigorous principles enforced by the House of Lords in such "cases. On the other hand, if the words were only tantamount "to heirs-male of the body, he would at once get into his argument, "for the latter have long ago failed. The claimant maintained that "heirs-male here meant heirs-male of the body; the Crown, on the "other hand, the reverse."—Pp. 7, 8.

James Lord Johnston, the head of a numerous clan in Annandale, was created Earl of Hartfell, with remainder to his heirs-male for ever. His son James, the second Earl, taking advantage of the extinction of the Murrays, Earls of Annandale, in Dec. 1658, applied, on the restoration, to have his title changed from the name of a hill to that of the district, and having made a surrender of his Peerage, had it re-granted to him under the designation of Earl of Annandale and Hartfell, with the former precedency, and with remainder to his heirs-male, whom failing, to the eldest heir-female of his body, and the heirs-male of the body

18th Mar 1643. Mag. Sig lvii. No. 303.

13th Feb 1661. Mag. Sig lx. No.

* It is very remarkable, that there passed a Royal charter, 23d of April, 1662, "under the sign manual, and upon the resignation of the patentee, of the Earldom "or 'comitatus of Annandale—not only carrying the estates, but moreover *the title, "and dignity of Earl, according to the dates of the prior patents*, where the first li- "mitation before the opening to the heirs-female, is to heirs-male of *the body*,' instead "of 'heirs-male.' Judging from what may be afterwards stated, this cannot be over- "looked in construing the Annandale Patent in 1661, supposing it not to be super- "seded by the charter; and, indeed, according to old Scottish practice, it is difficult "to see how this novodamus can be ineffectual. In the case of the Earldom of Mur- "ray, there was nothing but the *mere* grant of a *comitatus* in 1611, together with "assumption and recognition,—but no decision until 1793, to establish the right in "the present family. The inferences in behalf of any other creation, than by con- "veyances of the *comitatus*, were insignificant; and yet the dignity, in the year men- "tioned, was found by the House of Lords to be in the father of the existing Peer. "The decision of Murray may be held an innovation upon 'Lord Mansfield's law' to "be further canvassed in the sequel."—*Note*, pp. 7, 8.

of the said heir-female bearing the name and arms of Johnston ; whom all failing, to his nearest heirs whatever. The heirs-male of the body of the patentee having failed, a vast fund of learning has been put forth by the two principal claimants of the titles, the one as heir-general endeavouring to limit, and the other, who alleges himself to be the heir-male collateral, wishing to expand the meaning of the first remainder to heirs-male. After all that I have shown upon the subject, it would be needless to enlarge on the general interpretation which I consider should be assigned to such a clause standing alone. Mr Riddell may assume that the phrase bearing the name and arms, stamps it in this case with absolute power. It is true that that stipulation is brought in apparently in consequence of admitting female succession ; yet it may be considered as referring also to the heirs-male. But, as I have explained, this appears to me not essentially to alter the interpretation of the clause, which, if, as I contend, it be already unlimited, is not capable of extension.

But, as in the case of Cramond, if a remainder to heirs-male be controlled by other limitations, I trust that it will not affect the actual value of the clause in general, to allow a special case of restrictive meaning. The Earl who got the new patent, had only two sons ; and the first Earl had no brother, uncle, or granduncle in the male line. It cannot be supposed that, when he had interest sufficient to get a new Earldom, with remainders different from those in his father's patent, and ultimately extending even to heirs whatsoever, he had not the power of ordering the intermediate succession according to his own pleasure. To assert, therefore, that he could have intended to bring in the whole clan Johnston before his own family, would seem

an absurdity, even if there were no other evidence. But if the Earl's *meaning* be admitted as a guide, that is most evident from the charter which he got from the Crown immediately afterwards, appointing the heirs to the estates, with the first clause to the heirs-male of his body. This may be considered one transaction, and the apparent discrepancy, in the two grants, may be accounted for from the former being dated at Whitehall, the latter at Edinburgh. Possibly the framer of the deed in England may have thought the limitation to heirs-male meant only the descendants of the patentee, whereas in Scotland the wording is required to be more express.* 3d April, 1662.

As this latest settlement proceeded regularly on the Earl's resignation, and on a warrant under the sign-manual, and as it contains a grant of the title and dignity of Earl, according to the dates of the prior patents, this either supersedes the preceding charters (except as regards the precedency), and is itself now the regulating patent, or it should be admitted as explanatory of the only doubtful clause of its predecessor by a few months, being, in fact, a supplementary part of the same arrangement.

Having now disposed of the first clause, without

* I may here, however, notice a singular instance of a charter, dated 16th October, 1663, granting the lands and Barony of Dowart to Archibald Earl of Argyle, with the remainder usual in that family to heirs-male whatsoever; but adding the clause, "whom failing, to his eldest heir-female," &c.; binding the heirs-male as well as female to bear the surname of Campbell, and arms of the house of Argyle. In the ratification by Parliament, 6th September, 1681, reference is made to the "heirs" and successors of the said Earl of Argyle being served heirs in special, although these heirs, under the above sweeping limitation, could hardly be other than males.

any infringement on the privileges of "heirs-male" for which I plead, the effect of the second limitation in this case becomes an enquiry of immediate importance. After the heirs-male of the body of the patentee, which the first remainder must at least include, are exhausted, the next question would be, who is the eldest heir-female of the Earl's body? With great deference to the able argument of the Dean of Faculty, it does not appear that he has successfully made out that the patentee's grand-daughter is not the heir-female pointed out in the patent.

Had she lived long enough (to the age of 110) she would have succeeded to the estates (and claim to the title), which went to her grandson, in her right, on the extinction of the direct male heirs by the death of her brother, the third Marquis, in 1792. But the casual circumstance of her death being earlier or later could not alter her quality or position, as eldest heir-female of the body, by which character appertaining to her, the succession opened to her male descendant and representative.

I agree that the term "heirs-female," like that of "heirs-male," standing alone, is unlimited; but, as I admit that "heirs-male," even if bearing the name and arms, may, in some instances, be restricted by subsequent clauses, I claim that similar causes may equally control the power of the phrase "heirs-female." The Bargeny case is not a perfect precedent, and the Dean's argument, therefore, is not quite an applicable illustration. The entail was to the eldest heir-female of the body, *and her descendants*, and Sir Hugh Dalrymple took the estate, not as being himself eldest heir-female of the body, but as heir to his mother, who possessed

that character. Her daughter, if she had had no son, or Sir Hugh's daughter, if his heiress, would have had as clear a right as herself to succeed, because descended from her. But there is a distinction between this entail and the Annandale patent. In both cases, the eldest heir-female is an individual; but there is a difference in the remainder of the clause in the two deeds. The Bargeny settlement is to her descendants without restriction, and, therefore, at once gives it to heirs-general; while the Annandale succession is immediately limited to the heirs-male of the *body* of the *said* heir-female, thus destroying any general effect of the preceding part of the clause. Had an interminable line of heirs-female been intended, this emphatic phrase could never have been added; and instead of the singular term heir-female, recourse would have been had to one of the destinations usual in such a view, viz. to heirs, heirs of the body, heirs and assigns, heirs whatever of the body, or heirs whatever—of all which there is more than one instance, and in this very case the last class actually follows, to prove that there was no such intention, till the male issue of the heiress failed.

The object in the patent evidently is, that, in the event of the Peerage passing *to* or *through* a female, the immediate connexion with the Johnstones should be preserved, as directly as possible, by continuing the succession in her male posterity, while any such descendants should exist. And no *second* heir-female can be admitted into the line of inheritance, as long as they last, without stultifying the remaining clauses "to the heirs-male of the body of the *said* heir-female," "whom all failing, to his nearest heirs whatever," thus ultimately making a sweeping provision for heirs-female in general. If these views of the case be correct,

neither of the competitors are entitled to the Earldoms, which would belong to the Earl of Hopetoun, as heir-male of the body of the eldest heir-female of the second Earl.

Such a decision, however, would not interfere with the claim to the Marquisate, to which any collateral, who should prove himself nearest heir-male of the last Marquis, would have a right, unless the unwarrantably subjoined clause, "succeeding to the estates," should be allowed to present a difficulty, in addition to that of proof of propinquity.

Before taking leave of this subject, it may be advisable to allude, by way of illustration, to two patents, which I believe are the only cases that resemble the united Earldoms of Annandale and Hartfell, in their remainders. William Lord Cochrane, who had been so created, with limitation to the heirs-male of his body, 26th December, 1647, was advanced to the title of Earl of Dundonald, with remainders precisely similar to those of Annandale and Hartfell, 13th February, 1661. But as the heirs-male of the body of that Earl have held the Peerage ever since, no question could arise as to the interpretation of the first clause. No certain inference can be drawn from the circumstances of the family. It may be remarked, however, that he had only two sons, but several brothers who had male issue; that his mother was heiress of the family of Cochrane, while his father was third son of Blair of Blair; and that it appears probable, therefore, that the next remainder after his heirs-male being immediately to the eldest heir-female of his body, it was not intended that his cousins, the Blairs, should supersede his own daughter's posterity, or the other heirs-general of his body.

h May, 39.

The other example is the Dukedom of Hamilton, which, however, differs essentially from the two cases above quoted, in the first remainder, as well as in the position of the family. The limitations in the patent are first to the heirs-male of the body of the Duke; whom failing, to William, Earl of Lanark, his (only) brother, and the heirs-male of his body; whom failing, to the eldest heir-female of the Duke's own body, and the heirs-male of the body of such heir-female, they bearing the name and arms of Hamilton; whom also failing, to the said Duke's nearest legitimate heirs whatever. April 12. 1643.

In each of the families of Annandale and Dundonald, at the time of the creation, there were two sons, grown to manhood, so that there was no appearance of a failure of the male line. But the instance of the Hamiltons was different, so that there can be no question as to the meaning of the settlement. The Duke had lost his wife five years before, and apparently had little or no intention of marrying again, although her surviving family were but two daughters. He was willing, therefore, that his only brother should succeed him, and that if *he* should happen to have male issue, though he had none either then or afterwards that lived, the family should be continued in his line; but if he also should leave no son, he preferred that his own daughters should succeed rather than a male cousin descended from his granduncle.

The event justified his arrangements. He was beheaded soon afterwards, in 1649, and was succeeded by his brother, who died of his wounds after the battle of Worcester in 1651. His wife, whom he had married in 1638, the year of his brother's being a widower, having a family who were all daughters, the first

Duke's eldest daughter, Anne, became Duchess of Hamilton, in her own right. At the Restoration, upon her petition, her husband, William, Earl of Selkirk, was created Duke of Hamilton for life, when the first grant was confirmed. Next year, she had another patent upon a resignation by her late uncle, the second Duke, dated at the Hague, which, as it altered the settlement of his brother, was taking an unfair advantage of a possession delivered to him in perfect confidence. He did not, however, carry the breach of trust to the same extent as the Emperor Charles VI., who, on a similar temptation, violated his engagements and defrauded his elder brother Joseph I.'s daughter, in favour of his own child, the celebrated Maria Theresa. He so far followed out the original succession as to get the titles settled upon his niece, Anne, and the heirs-male of her body, but he cut off her heirs-general in favour of the heirs-male of the bodies of her sister, two male cousins, and one of his aunts whom he selected, and ultimately provided it to his own heirs whatever. The male descendants of Duchess Anne have continued to the present time; but it is a singular circumstance, which I believe capable of proof, that none of these interpolated lines of heirs exist at the present day, and that Duchess Anne's representative is heir whatever to her uncle, although his four daughters had seven husbands.

Duchess Anne lived to a great age, and thirty-seven years afterwards (in the 4th year of her widowhood) she surrendered her titles, and got them granted in favour of her son James, who thus became fourth Duke, but was killed in her lifetime in the celebrated duel with Lord Mohun, in 1712; so that his son was the fifth Duke she had seen, and the third who held

the title in her right before she died in 1716, aged 80. To obviate any possible inconvenience from the strange liberty her uncle had taken with his brother's settlements, she seized this opportunity to restore the remainders of the original patent. The present Duke is the heir-male of her body, and the present Earl of Derby is her heir-general; but the claims of the latter, under every settlement, are indisputably postponed, till after the heirs-male of her body shall be exhausted, which I trust is most unlikely soon to happen.

### EARL OF SEAFORTH.

"Seaforth and Kincardine were granted by patents, 3d of Decem-
"ber, 1623, and 26th of December, 1647, to the respective patentees,
"and their 'heirs-male,' and they have been assumed by collateral
"heirs-male. In the Seaforth case, the heir had right, as heir-male
"of the body, to a distinct peerage, the Barony of Kintail, which
"made his claim to the Earldom nominally forfeited in 1715, less
"liable to objection, waving the possibility of a later resignation and
"re-grant. His son, who followed the fortunes of James II., was
"raised by that monarch to the Marquisate of Seaforth, which thus
"eclipsed the previous dignity, and rendered it of little importance."
—P. 13.

The descent of this title appears not to have attracted the share of attention and importance to which, as a precedent, it is fairly entitled. Colin, second Lord Mackenzie of Kintail, was created Earl of Seaforth, to him and his heirs-male, 3d December, 1623, and when he died, 15th April, 1633, leaving only two daughters, he was succeeded by his half-brother and heir-male, George second Earl, in whose descendants the Earldom continued, till it was forfeited in his great-grandson, the fifth Earl, in 1715. To endeavour to account for the fact of this undisputed succes-

sion and long subsequent possession, it is not enough to imagine a resignation and re-grant between 1623 and 1633, or to suppose that Parliament may have acquiesced in a usurpation for above eighty years, because the *soi-disant* Earls had a right to a Barony; or lastly, to dazzle the case with the fictitious glitter of an unacknowledged Marquisate of King James VII., which did not hold good, but at the abdicated Court of St Germains. It is surely a more easy and natural explanation, that the second Earl and his posterity took the Earldom as their rightful inheritance, under the only patent which has ever been produced, and which, therefore, included them all under the unlimited terms "heirs-male."

The Annandale additional case states, that, "the case of Seaforth is one in which, two centuries ago, a title was assumed by the heir of that powerful family, without any claim to the Crown or the Scotch Parliament. The heir of the family was the undoubted heir of the older title of Kintail, and the right to the Seaforth title might very naturally be thought to pass along with the other; at all events, it was merely a case of assumption by a Highland chieftain, whose brother had been created Lord Seaforth a few years before, and cannot be quoted as any authority, even as to the understanding of the Crown or of Parliament. The collateral heir-male, by whom the title was assumed, had succeeded to the estates—had adhered to the fortunes of Charles I. and II., and after the Restoration, the pretensions of his son (who was exempted from Cromwell's amnesty, in consequence of his activity and zeal for Charles II.) were not likely to be disturbed, especially as he was a Peer at any rate, under the former title of Kintail."

In this curious piece of special pleading, it is *assumed*, that the second Earl of Seaforth, and his successors for 85 years, had no right to their Earldom, and that the Barony of Kintail was limited to males,* and therefore did not descend to the daughters of the first Earl, but to his brother. Referring to this Earl as a "Highland chieftain," who might call himself what he pleased, either because nobody would care, or dare to interfere, conveys a most erroneous representation of his position. He was not a barbarian, who secluded himself in his own fastnesses, but a nobleman who took a most active and important part in public life, and the records of Parliament are full of references to him and his services. He got five charters under the Great Seal, the chief of which was ratified by Parliament in 1641. He "contracted near a million of debt through his adherence to King Charles the First his service, for which he nor his sone Earl Kenneth, father to the said Earle of Seaforth, got little or no recompense." Proc. in Parliament, 1695. The fortune of the family never recovered this unrequited expenditure. An indictment for high treason, in 1693, was threatened against the fourth Earl for following King James VII., but it was dropped. The complaint of one of the successive Countess Dowagers, in 1704, shows that, from 1680 to 1704, the affairs of the family continued as disordered as they were from 1649 to 1695. Yet, notwithstanding these disadvantages, their right to the Earldom was never questioned, although they were parties in the great contest for precedency, the Earl of Lothian against the Earls of Abercorne, Roxburghe, Kellie, Haddington, Galloway, Seaforth,

* The patent is not recorded, and there are contemporary Baronies with remainders to heirs-general.

and Lauderdale. The point was, whether he could remount to the original patent in 1606, or whether he was not restricted to a new grant in 1631, by which they had ever since been placed below Lauderdale. After 12 years' protesting, &c., the Earl of Lothian got a decreet, 14th May, 1690, entitling him to have "place and precedence before the saids Earles, and to be ranked and called in the rolls of Parliament, "conform to the date of the patent" to the first Earl, and "therefore did take his seat upon the Earles' bench, and was called in the rolls of Parliament accordingly." The rolls were called daily, but it was only at the opening of a session that protests for precedency were recorded. This decision, after five years' farther discussion, was reversed, but the frequent questions as to precedency prove how jealously the Peers guarded their rights, and how readily they would have disputed the *assumption* of an Earldom even by a Highland chieftain. The Earldom of Seaforth, throughout the enquiry, when every possible objection must have occurred, being always recognised according to the creation of 1623, establishes the right of succession under that patent.

### EARL OF DUNBAR.

"On the 3d of July, 1605, Sir George Hume, Lord Hume of Ber-
"wick was created Earl of Dunbar, the dignity being conferred upon
"him 'et hæredes suos masculos.' The Earl died in 1611, leaving
"two daughters, his co-heirs, and no one assumed the honours. On
"the 6th of August, 1634, however, it appears that Sir Thomas Hope,
"Lord Advocate, had certified to Charles I., that the dignity 'law-
"fully descended' to Sir George Home, the collateral heir-male; and
"failing him, that it would devolve upon Sir Alexander Home, in
"the service of the Princess of Orange at the Hague. On the 6th
"of May, 1651, Charles II., on a recital of these facts, as well as that

" Sir Alexander, (now the heir-male), out of respect to his Majesty,
" and from the length of time that had elapsed, would not assume the
" title without proper sanction and authority, confirmed it to him ac-
" cordingly by a warrant under the sign-manual of the above date.
" What happened in consequence does not transpire; but long after-
" wards, on the 14th of October, 1689, there is another confirmation
" in similar terms by William III., in favour of Alexander Hume,
" nephew and heir-male of Sir Alexander, exemplifying also the pre-
" vious one by Charles II. Whether the latter person ever took his
" seat in Parliament is uncertain; the family principally resided in
" Holland, where they failed in the male line during the course of the
" seventeenth century."

Mr Riddell candidly admits, that this would seem a strong case in favour of the enlarged explanation of " heirs-male," were it not met by weighty authorities of a directly opposite nature. But it may with equal propriety be said, that it is supported by instances of even greater force. The title, created on the 3d July, 1605, in favour of George Lord Home of Berwick, and his heirs-male, became dormant, 29th January, 1611, on the death of that Earl, leaving only two daughters. In 1622 and 1623, John Home of Steill, son and heir of James Home of Steill, who was immediate younger brother of the said Earl, was served heir-male in general to him. These steps were probably taken with a view to the succession to the title, as, from the estate having been settled on the daughters in 1606, nothing else was to be got, but his fortune was probably small, and nothing further seems to have been done. Indeed, he appears soon after to have died issueless, as on the 6th August, 1634, Sir Thomas Hope, Lord Advocate, certified to King Charles I., that the dignity had lawfully descended to Sir George Home, as collateral heir-male, who was son of the Earl's elder brother, and who, in giving a wadset of his paternal estate of Manderston, includes Steill. This also dis-

poses of an intermediate brother, John Home of Slegden, who was alive 30th September, 1624, when he made a settlement on his natural daughter. Sir George's property being encumbered, and soon afterwards alienated, all proceedings appear to have been again dropped, till King Charles II., on the 6th May, 1651, by warrant under the sign manual, confirmed the honours to his eldest son, Sir Alexander Home, Master of the Household to the Princess Royal of Orange at the Hague. Still the transaction appears incomplete; at all events, he did not assume the title, as, under the name of Sir Alexander Home, he was admitted a Privy Councillor, by letter from the King, 1st July, 1663, and he died without issue in 1675. His nephew and heir-male, Captain Alexander Home, was recognised by King William as rightful Earl of Dunbar, 14th October, 1689; and Parliament, 30th August, 1703, ordered that the Lord Register cause the Earl of Dunbar be insert in his place, according to the decreet of ranking in the year 1606. He had a son, Alexander, an ensign, and a brother, George; but the line of Manderston appears to have soon after failed. The ruined fortune of the family, and their foreign domiciliation, account for their not have followed up their rights, although acknowledged in three different generations. Some attempts have since been made by more distant collateral male relations, but hitherto without any success, owing to the difficulty of accounting satisfactorily for so many prior branches.

EARL OF NITHSDALE.

"The regulating patent of their Earldom in the Nithsdale family

" is not to heirs-male, but 'hæredibus masculis, et assignatis *quibus-*
" *cunque,*' as is instructed by the original creation, which is by act of
" Parliament in 1581. They then held it under the title of Earl of
" Morton; but, on the 29th of August, 1621, the King, wishing that
" the family should exchange the style of Morton, for Nithsdale, is-
" sued a charter accordingly, but solely for that purpose; for it, at
" the same time, expressly '*continues*' and '*confirms*' the old dignity,
" without prejudice to the grantee (the son of the first Earl) 'de an-
" tiquitate dignitatis, quondam suo patri concesse; neque putabitur,
" aut supponetur,' adds the charter, 'quod *mutatio* dicti tituli *ullam*
" *novam creationem efficiat,* sed e contrario, dignitatem prius conces-
" sam *corroboravit.*'"

There is here no notice of the cessation of the Earldom from 1585 to 1620! I am constrained to differ from Mr Riddell in his assertion that the regulating patent is that of 1581, and not that of 1620. The former was suspended, and only revived by the latter, with a change in every essential point.

During the banishment of the Douglasses, which followed the execution of the Regent Earl of Morton, the rank of Earl, with the title of Morton, was conferred on the seventh Lord Maxwell in 1581, as being, through his mother, Beatrix Douglas,* one of the heirs to his grandfather, the third Earl of Morton, with remainder to his heirs-male and assignees whatsoever, and with the precedency of his ancestor the first Earl, so created as the King's brother-in-law, in 1457-8. One of those sudden revolutions, however, which then so frequently occurred among the parties who ruled Scotland, brought back the Douglasses to power in 1585, and the rehabilitation of the

* Of Beatrix's two sisters, the eldest was wife to the Regent Duke of Chatelherault, with whom she joined in renouncing her claims in favour of the youngest sister, the wife of the Regent, Earl of Morton, who by this marriage had the title transferred to him by a capricious settlement, but who had no children.

Regent Morton, and the reversal of the Earl of Angus's attainder, had the effect of reviving the older settlement, stripping Lord Maxwell of his Earldom, and conveying it to the Earl of Angus, whose sister he had married, and who was nephew to the Regent, but not connected with the Regent's wife or the Morton blood. On the death of the infant Earl of Angus and Morton in 1589, the latter Earldom went to another stranger Douglas, who was heir only through the arbitrary deed before-mentioned.

After this transitory gleam of greatness for about four years, the family were reduced to their ancient title of Lord Maxwell for thirty-five years, during which they were occupied with the old feud with the Johnstons. This Lord, the short-lived Earl, being defeated, and killed afterwards in 1593, by the wife of Johnston of Lockerby with a bunch of keys, according to tradition, his son and heir revenged himself on the chief of the Johnstons by slaughter under trust; and having fled, he was betrayed by the Earl of Caithness, and executed in 1613. His brother, the ninth lord, was created Earl of Nithsdale in 1620, with the precedency of the patent of 1581; but, of course, not with the constructive precedency given in that deed with the title of Morton. I believe it is invariably the rule, that the latest valid patent regulates the descent of the title, although the precedency of the former creation be preserved as was usual in Scotland. As the original remainder to heirs-male and assignees whatsoever in 1581 is no where mentioned in the new grant in 1620, but is altered to "heirs-male" alone; and as there is no reason to suppose any important restriction to have been intended in continuing and confirming the dignity of Earl, I come to a con-

clusion contrary to Mr Riddell's, and am impressed with a conviction that this phrase, by which alone the succession can be settled, was understood to be equivalent to heirs-male whatsoever. At all events, on the death of this new Earl's only son unmarried, in 1667, the earldom, by virtue of the patent of 1620, went, without dispute, to Lord Herries, a collateral heir-male so remote that he was not even descended from the original deprived Earl, but from his uncle. This appears to me a very strong case in favour of the ample meaning of the simple term heirs-male, without aid from the name and arms. This is a boon reviving a title after a long intermission; but though it has the same dignity, it has not the same name or precedence, or the same remainder as given by the older patent.

EARL OF KINNOULL.

"On the 25th of May, 1633, George Viscount Duplin was created "Earl of Kinnoull, &c., to him, 'et hæredibus ejus masculis in perpe-"tuum.' In terms of this limitation, the honours devolved upon his "great grandson, William Earl of Kinnoull, who, having no issue, "resigned them in favour of Thomas Hay of Balhousie, collateral "heir-male both of himself, and the patentee, who was confirmed in "the dignities *nominatim* by a *new* patent, dated 29th of February, "1704, carrying the old precedency, and containing a limitation to "Thomas, and the heirs-male of his body, under which they have "descended to the present Earl of Kinnoull.

"How this instance could serve the argument of the Crown, it is "certainly impossible to discover; nay, it obviously makes against "them, inasmuch as it shows that Earl William did not trust to the "first patent, in favour of heirs-male, to include Thomas the collate-"ral, which, upon their plea, should have been quite enough, but was "obliged to resort to another of a much more explicit nature, for the "purpose. Indeed, by the resignation, the first patent is at an end, "and cannot be founded upon."

Mr Riddell thinks this instance is against the argu-

ment of the Lord Advocate; but I shall attempt an explanation of the case, to show that it is not decisive either way. The Chancellor, Viscount Duplin (so created, with remainder to heirs-male of the body, in 1627) was advanced to the higher honour of Earl of Kinnoull in 1633, with remainder to his heirs-male for ever. His great-grandson, the fifth Earl (the last male descendant of the Chancellor), having no intention of marrying, and being favourably disposed towards his distant cousin, who had lately been created Viscount of Duplin (in 1697), made a surrender of his peerage to the Crown in 1704, and got it re-granted to him and his heirs of entail and provision succeeding to him in his lands and barony of Duplin. It is evident, from his having allowed his cousin to be created a peer by his own title of Viscount of Duplin, and by his having already secured the estates to him, that he wished to obviate any question that might arise at his death. But his desire to settle the immediate succession does not prove that he thought the title would be extinct. It is a point now clearly ascertained, that when the second of three brothers has a peerage, with remainder to his heirs-male whatever, and there are descendants, both of the elder and of the younger, the latter succeeds in preference to the former,—as decided in the case of Lord Belhaven, in 1799. But the fifth Earl of Kinnoull, who went to France with King James II. soon after his succession to the title, may not have known the law so well as it is now understood; and it has to be stated, that the first Earl not only had a *younger* brother (the ancestor of the new Viscount of Duplin), but an *elder* brother, from whom descended the Hays of Megginch, and failing them, the Hays of Pitfour and Seggyden who exist to the present day.

This would account for what appears over-caution in the devoted loyalist, who also appears to have had another motive—the desire, according to the fashion of the day, to alter the ultimate series of heirs according to the fancy of his own entail.

### EARL OF FORFAR.

"We now come to the last of the Crown's *specified* authorities, "the Earldom of Forfar. On the 20th of October, 1661, Archibald "Douglas was created Earl of Forfar, to him and his 'heirs-male;' "he was succeeded by his son Archibald, the second Earl, who, dying "in 1715, without issue, the dignity appears to have sunk with him. "As far as yet discovered, no one since has assumed it; and Sir Ro- "bert Douglas, an undoubted collateral heir-male, explicitly states "that, by his death, '*his honours became extinct.*'"

Mr Riddell claims this case as so entirely in his favour, that it balances the strong adverse instance of Seaforth. But it wears to me a very different aspect. Archibald Earl of Ormond having succeeded his father, got a new patent, changing the title to Forfar, and (as I should contend) enlarging the remainder from heirs-male of his father's second marriage, of which he was the only son, to heirs-male without restriction. On the death of his only son, of wounds received at the battle of Sheriffmuir, in support of the ancient dynasty, in 1715, the Duke of Douglas was his heir-male; and if he, who was a recluse already loaded with titles, did not take an opportunity to assume the honours of Forfar, Wandale, and Hartside, it would only, at the utmost, show his own opinion either that he had no right to them; that the forfeiture was complete, instead of invalid; that they were not worth the trouble of claiming, or that they were superfluous incumbrances to a

Dukedom and three Marquisates. The claim to these titles having, since 1715, been inseparable from the Dukedom of Douglas, till 1761, and from the Dukedom of Hamilton ever since, this title cannot be quoted as an instance of limits having been put to heirs-male. When the second Earl died, the dignity, no doubt, sunk with him; but if no one since has assumed it (as in the case of Aboyne), perhaps it is a sufficient explanation, that it could have been taken by no one who was not already a Duke; and that it might have been objected, that its being arranged with such superior titles would not have proved the case, unless one of these five Dukes had made out a formal claim (which was not likely to occur to him), and had his right acknowledged. Although the Duke of Douglas, in his deed of settlement, was lavish of his titles, he omits the Marquisates of Douglas and Abernethy, and therefore, having already called himself Earl of *Angus*, he might not deem it necessary to use the synonymous or duplicate title of the same county of *Forfar*.

This explanation shows what weight should be attached to the statement in the Annandale additional case, in treating of these titles of Forfar, Wandall, and Hartside, p. 20, that "none has ever attempted to assume them, although numerous collateral heirs-male existed, and even do exist at the present moment, comprehending the entire clan of Douglas and Angus." Yet the fact could not be overlooked by a lawyer or a genealogist, that none of this tribe, however multiplied, could even have a claim to these titles, except the successive Dukes at its head, to whom it was no object. The Lords of Session, in 1740, report, that as "the Duke of Douglas is served and retoured nearest heir-male to the deceased Earl, this Peerage, so far as they

can discover, is at present in the Duke of Douglas." —Wallace, p. 207.

LORD KIRKCUDBRIGHT, AND VISCOUNT OF KENMURE.

"The first authority, or precedent, that in this view would attract "our notice, is the case of the Peerage of Kirkcudbright, which was "discussed by the House of Lords, and adjudged to a collateral heir-"male, on the 3d of May, 1772. With all submission, however, "it cannot be received as a fair illustration of the question at issue; "because a specialty was here taken from the limitation being not "simply to 'heirs-male,' but to heirs-male *bearing the name and arms* "of the family—which adjunct was held to operate in favour of the "claimant, as pointing at *all* male representatives, inasmuch as they "might clearly bear the name and arms, and if so, necessarily including "them.

"With respect to Kirkcudbright, it has been already discussed; "and as the Viscounty of Kenmure is not simply to heirs-male, but "to heirs-male *bearing the name* and arms, it is exactly in *pari casu* "with Kirkcudbright, and, therefore, requires no farther consideration."

These two Peerages afford the strongest evidence of the full power of the general remainder to heirs-male, bearing the name and arms. The first Lord Kirkcudbright having only a daughter, he was succeeded by his next brother's son; and he by his first cousin, another nephew of the first peer, who was ruined in the cause of King Charles II. On the death, in minority, of his only son, the fourth Lord, in 1669, the now impoverished Peerage was suffered to drop by his uncle's eldest son (the next in succession), but his brother revived it in 1721, and voted at four elections till he died in 1730. The honour was then assumed by the nearest collateral heir-male,—sixth in descent from the first Lord's great great granduncle, and fourteenth in consanguinity to his predecessor; he being then a glover in Edinburgh, as appears from the protest of

another of the name, who was son of Sir Samuel Maclellan, merchant, and provost of Edinburgh. After much annoyance from his opponent, whose claim, on reference, was not made out, and after voting at many elections, he died before the examination of his own case by the House of Lords. But in 1773, his right was ascertained by a final decree in favour of his son, the eighth Lord, whose two sons, the ninth and tenth Lords, having no issue, the title again became dormant in 1832.

The first Viscount of Kenmure's only son having had no issue, the title went to the first cousin of the patentee and his brother in succession, and afterwards devolved on the male descendant of the granduncle of the first peer, who thus became fifth Viscount. His son was attainted and beheaded in 1716, but his grandson was restored in 1824.

### VISCOUNT OF ABOYNE.

" Nothing can be conceived stronger than the patent of the Vis-
" county of Aboyne, dated 20th of April, 1632. It bears, that the
" King had been graciously pleased by Letters Patent, to confer the
" title of Viscount Melgum upon the deceased John Viscount Mel-
" gum, ' et hæredes suos masculos, nomen, et insignia de Gordon
" gerentes ;' and after a further preamble, states, that the said Viscount
" had died ' absque *hæredibus masculis de corpore suo legitime pro-*
" *creatis*'—' *in* QUOS'—be it observed, the patent adds, ' dictus titu-
" lus conferendus fuit,'—thus clearly proving that the dignity, though
" granted as above, was only descendible to heirs-male of the body :
" ' Ac volentes (continues the patent)—ut prior titulus REVIVAT, et par-
" maneat in persone Domini Gordon' (the eldest brother of the deceased
" Viscount), therefore it creates him, during the lifetime of his father
" the Marquis of Huntly, of whom he was heir, Viscount of Aboyne ;
" with remainder to James his son, ' Hæredesque suos masculos, cog-
" nomen et insignia de Gordon gerentes'—a limitation that is several

" times afterwards repeated at full length, but without any addition. " James, the son, accordingly succeeded, in terms of the limitation, " to the Viscounty of Aboyne, the design obviously being to keep " matters, as much as was expedient, in the same channel; but dy- " ing without issue, although innumerable collateral heirs-male ex- " isted, the title appears to have become extinct,—for besides never " having been assumed, it was granted under the higher rank of Earl " of Aboyne, to another member of the family of Gordon by patent, " dated 10th September, 1660."

The patent of the Viscounty of Aboyne, which Mr Riddell quotes as a decisive case, cuts both ways. If it be adverse to the extended meaning of "heirs-male" simply, it equally militates against the boundless virtue of the talismanic words "bearing the name and arms," as added to "heirs-male," in the original creation of the Viscounty of Melgum. In supporting the royal dictum, that the title, though granted to heirs-male bearing the name and arms, was extinct, because the patentee himself had no issue-male, Mr Riddell seems to give up his own theory of the effect to be ascribed to these words. The proposition, that the supplementary phrase extends the meaning of the otherwise limited term "heirs-male," from lineal to collateral, from the individual himself to the clan, is at an end. But, in explanation of this case, I have some circumstances to plead which require to be considered. It seems that when the Viscount of Melgum (Lord Aboyne) perished by the firing of the tower of Frendraught in October, 1630, an infant daughter was his only child. As I have shown, in the instance of Kinnoull, the succession of collaterals in such peculiar cases may not have been understood in former times so well as now, by the decision of the claims to the title of Belhaven in 1799, when, after some years' discussion, the descendant of the *younger* brother succeeded in preference

to the representative of the *elder*. It would have facilitated the explanation of the case, had there been information to account for the Viscount's younger brothers, Laurence and Adam, who, soon after, disappear from the stage of life, seemingly without posterity. But it is certain that Adam was alive till 1636, as he was then chief mourner at his father's splendid funeral. It is easy now, by paying a small fee at the Register Office, to see the recorded copy of a deed, or by employing an eminent lawyer, to discover its exact bearings; and we know that, in our time, justice cannot be perverted, though it *may be delayed*.

But in those ignorant and arbitrary days we cannot be sure that parties had opportunities of knowing their rights, or that they were respected when ascertained. Whether the respective conflicting claims of collateral heirs-male were not then uncertain; whether the younger brother ever saw the patent, knew its meaning, or enquired into the possibility of its affecting him; or whether the supposed preferable right of the elder brother or his superior interest was decisive, may be a matter of conjecture. It is certain, however, that the elder brother got the estate of Aboyne on the death of Lady Melgum in 1642, with 12,000 marks burden to her only daughter. If it were thus considered that the succession had devolved upon the deceased Viscount's elder brother, Lord Gordon, he being immediate heir to his father the Marquis of Huntly, had no motive for wishing to get the title for himself; and it appears that from 1632, the date of his creation, till 1636, when he became Marquis, he was still called Lord Gordon. But being desirous to transmit a Peerage to his own second son, it was necessary in the re-grant to assert and admit that the previous

Viscounty was extinct. Many such mistaken assertions were made by King Charles I., for instance, regarding the Earldoms of Strathern, Menteith, and Glencairn. In this case it is at least inaccurate to use two phrases, one narrow and distinct, the other vague and unlimited, with the same meaning attached. On the occasion of this renewal, perhaps from dislike to the unfortunate name of Melgum, or a scruple as to its extinction, he chose that the Lordship of Aboyne should be transformed into the Viscounty, with special remainder, either at his father's or his own death, to his second son James, and his heirs-male bearing the name and arms of Gordon. Accordingly in 1636, at the same time that his father succeeded to the Marquisate, the Viscounty devolved upon him. In 1645, his elder brother being slain at the battle of Alford, under Montrose, he became heir-apparent to his father; and in 1649 he died of grief for his Royal Master's death, a very short time before his father was executed for his loyalty. Mr Riddell triumphantly states that, although innumerable collateral heirs-male existed, the title appears to have become extinct, for, besides never having been assumed, it was granted, under the higher rank of Earl, to another member of the family. But the explanation of this is so simple, that it is surprising it should not have occurred to so good a genealogist. By a glance at the state of the family of Gordon at that period, it is evident that the heir of the Viscount of Aboyne (he having, before his death, become eldest son of his father), was his next younger brother, who thereby succeeded, about the same time, as Marquis of Huntly and, I maintain also, as Viscount of Aboyne. Since then, of all the innumerable heirs-male, every individual who could claim the Viscounty has been

either Marquis of Huntly or Duke of Gordon. This instance, therefore, Mr Riddell is not entitled to quote against his own theory of the virtue of the clause as to name and arms. That in the minority of the fourth Marquis (afterwards first Duke of Gordon), his uncle, Lord Charles, should have been created Earl of Aboyne, only shows the irregularity of the proceedings of that period in cases not fully considered, or deemed of no material consequence.

LORD STEWART OF OCHILTREE.

" On the 27th of May, 1615, the King wrote to the Privy Coun-
" cil to prepare a patent of the Barony of Uchiltree in favour of Sir
" James Stewart of Killeith, which honour, his Majesty added, was
" to continue with him, and '*his posteritie*'—that is, obviously only,
" in the persons of his *lineal* heirs. In conformity therewith, the
" Privy Council ordered a patent to be made out 'according to the
" tenour of his Majestie's lettre'—But how was this effected? By a
" grant of the dignity that passed on the 9th of June, in the same
" year, with a limitation to Sir James, ' et *suis* hæredibus *masculis* ge-
" rentibus et arma de Stewart, et ejusdem arma observantibus.' It can-
" not be a question that the Privy Council, obeying the King's in-
" structions, could only have in view lineal issue; to express which,
" however, they merely use heirs-male without the qualification.
" Here also is another instance of the adjunct, ' bearing name and
" arms,' in a case only of lineal descent."

The circumstances, under which this Peerage was conferred, render it not so clear, as is claimed in the remarks, that it was only intended to descend lineally. Had it been an honour granted to a family for the first time, such an inference might have more readily followed:—but this was the singular case of a transference of the title by sale to a junior branch of the family, when the ancient possessors, on emigrating to Ireland, were anxious, like the Jews, that their name

should not perish. It does not appear that the meaning of "posteritie" is so strictly defined as to prove that the royal favour was intentionally narrowed, or to control a destination to heirs-male without any restriction, unless, indeed, it be held that bearing the name and arms of Stewart gives a contracted signification, the contrary of which Mr Riddell maintains. Successors and succeeding are clearly applicable to collaterals, for instance, in the patents of the Marquis of Douglas, the Marquis of Annandale, and Lord Jedburgh; and it seems fair to presume, as the Privy Council, in obedience to the Royal warrant, omitted to limit the grant specifically to descendants, that they did not interpret the single word "posteritie" to signify the King's will that his boon should now be confined to this branch, to the utter exclusion of the eventual rights of the whole other members of the family, whom he is plainly regarding as a house to be cherished for ever. The King evidently sympathizes with Lord Ochiltree in his "desiring exceedinglie that his place and estate in our Kingdom of Scotland may continew with the ancient familie in the person of Sir James Stewart of Killeith, Knight, his cousin-german, as the next of the raice to succeed him, he comeing in by a kind of successioune alsueele as by purchase." Sir James is therefore to enjoy all the "honnouris, &c., in als large and ampill manner as the said Lord might have done befoir his demission." In 1675 the issue male of the new Lord failed in his grandson, while the old line continued in Ireland, where the ex-Lord was created Lord Castle-Stewart in 1619. His male descendant made an ineffectual attempt to get himself recognised as Lord Ochiltree in 1768, but he was more successful with regard to the Irish title of Castle-Stewart, which

had also been long dormant, viz. from 1684 to 1774, when his right was admitted. In 1790 he again tried to establish his claim in Scotland, but in 1793 the House of Lords declared that he had not made out his right. His pedigree from the old Lords being thus clearly proved, and the patent to heirs-male bearing the name and arms undeniably including him, this decision is unaccountable. He was created Earl of Castle-Stewart in 1800, and his son, the second Earl, is now the male representative of the ancient Lords Avandale and Ochiltree.

### EARL OF ELGIN.

Thomas, third Lord Bruce of Kinloss, was created Earl of Elgin, with remainder to his heirs-male for ever, bearing the name and arms of Bruce. His son, the second Earl, obtained the additional honour of Earl of Aylesbury in England. When Charles, fourth Earl of Elgin, died in 1747, leaving only female issue, the whole male posterity of the patentee failed—and the title went to the male descendant of the uncle of the first Earl, who was eighth Earl of Kincardine by the similar succession of his ancestor as collateral heir-male to his predecessor.

Mr Riddell views this case as a mere illustration of the power of the clause as to name and arms, while I consider it as an additional instance, like the Earldom of Kincardine itself, of the undisputed right of collaterals to succeed as heirs-male without reference to redundant phrases.

EARL OF LOTHIAN.

" On the 10th of July, 1606, James VI. created Mark, Lord New-
" bottle, Earl of Lothian, the honour being conferred upon him ' *et*
" *hæredes suos masculos.*' He was succeeded, in terms of the patent,
" by his son Robert, the second Earl of Lothian, who obtained, upon
" his resignation, a re-grant of the honours to him, and the heirs-male
" of his body; whom failing, to his eldest heir-female without divi-
" sion. Dying without male issue, he was succeeded accordingly, by
" his daughter Lady Anne, who left issue Robert, Earl of Lothian.
" Earl Robert, in the reigns of Charles II. and James II., had a con-
" test in Parliament with the Earl of Roxburgh for precedency, the
" point exclusively turning upon this, whether, or not, by the se-
" cond patent, the precedence of the first was carried? James II.,
" desirous that the matter should be fairly tried by the courts of law,
" prohibited the Crown officers from objecting the Royal prerogative,
" in a letter dated 11th May, 1685; and where he further observed,
" in reference to the case of the Earl of Lothian, that according to the
" information of Charles II., ' the title and dignity of the *first* Earl of
" Lothian was, *by his patent,* provided to *heirs-male of his body,*
" and that those heirs-male had failed, WHEREBY THE HONOUR WAS
" EXTINCT.' "

I have already (p. 18) noticed these two erroneous assertions of King James VII. But I must here remark, that the second Earl's eldest daughter, Lady Anne Ker, by virtue of the new patent, upon the surrender made by her father, became, at his death in 1624, Countess of Lothian in her own right, in preference to her uncles, the original heirs. She afterwards married one of her own name, William, only son, by the first wife, of Sir Robert Ker, who was made Earl of Ancrum two years afterwards, with remainder first to the issue-male of his second marriage with Lady Anne Stanley. The old privilege of husbands' assuming titles when they married Peeresses, appears about that time to have fallen into desuetude; but after his marriage he was created Earl of Lothian, 31st October, 1631. The Countess's uncle, Sir William, second son, but heir-

male of the first Earl, resisted her accession to the title, which he had himself assumed; but he was interdicted, as his rights had been legally taken away. Robert, the next Earl, who succeeded in 1675, disliking that the place from which he was called in the rolls, and his seat on the Earl's bench should be according to the grant of 1631, instead of that of 1606, to which *he* had a right through his mother, procured another patent, 23d October, 1678, with the original precedency. But it was not till after a dispute of twelve years that he obtained a confirmation of the old precedency, by decreet of Parliament, 14th May, 1690. The seven Earls, whom he superseded, however, headed by the Earl of Roxburgh, the heir of the rival branch of the Kers, were so powerful, that after five years they got this decision reversed, 1st July, 1695. His remonstrances for five years further being ineffectual, he could only gain his point by getting himself created Marquis of Lothian, 23d June, 1701; but the Earl of Roxburgh, after twenty-eight years' contest, gained a final victory over him, by being advanced to the Dukedom in 1707. In this instance, the heirs-male being cut off, no precedent is established either way.

### EARL OF ARRAN.

" We trace it even as far back as 1586. In that year, an action " was formally instituted by the Crown, and Hamilton family, against " Captain James Stewart, for reducing 'the auld erection and creation " of the Earldom of Arran, Lordship of Aven, and Hamilton, wyt " the landis and baronies pertening thereto, and *ordaining* ye saide " Capitane James, and his *aires maill, to be callit Erlis of Arran,* " Lords of Aven and Hamilton, and to have the honours, place, and " dignitie of ye said Erldome and Lordship, of ye dait the 27th of " October, 1581.' In a process of so much importance, every thing " material would be technically stated; and the advocates of the broad

" interpretation would maintain that the Peerages, thus created, were " descendible to heirs-male general; against which conclusion, how- " ever, we have the best evidence, for the patent of creation (of the " same date) is entered at full length in the register of the Great " Seal, and is only in favour of the Captain, 'et ejus hæredes mascu- " los *de corpore suo*.'"

During the eclipse of the house of Hamilton, when all the brothers were forfeited, though the eldest was insane, the reigning favourite, Captain James Stewart, under a false pretence of the illegitimacy of their father, and of the consequent rights of heirship in his grandmother, eldest daughter of the first Earl of Arran (who was represented by his elder brother, Lord Ochiltree, not by him), got himself created Earl of Arran, &c., with remainder to the heirs-male of his body. When the banished Lords returned, and in a manner took the Court by storm, the unjust proceedings of those whom they displaced from power were reversed. The unconscious Earl was restored, and the arrogant usurper was degraded; but when his patent was abrogated, it did not signify what heirs it had provided, and therefore a looseness of expression proves nothing.

### LORD NAPIER.

" In the re-grant of the Barony of Napier, 17th of February, 1677, " it is stated that, by the first patent, the honour had been limited to " the patentee, 'suisque hæredibus masculis successive;' from which " the Crown lawyers, in 1826, might have argued, that it was des- " tined to heirs-male collateral; but no such thing, for it is subse- " quently mentioned, that the cause of the re-grant was the failure of " heirs-male of the body, and the first patent is only limited to heirs " of the body."

Archibald, third Lord Napier, being unmarried, and seeing that his only brother had been cut off in battle in 1672, made interest at Court to prevent the

impending extinction of his title, which had been granted to the heirs-male of the body of his grandfather. But that when he got an extension of the Peerage in favour of his sisters, a mistake should have been made in a preliminary reference to a clause in a patent which was thereby annulled, and under which there was no one to claim, was immaterial, as no consequence could follow.

LORD CRAMOND.

" The patent, dated last of February, 1628, limits the honour to Sir " Thomas Richardson, son and heir of Sir Thomas Richardson, Chief " Justice of the Court of Common Pleas, 'suisque *heredibus maculis*, " quibus deficientibus hæredibus masculis *de corpore* dicti Domini " Thomæ Richardson patris.' It is quite evident that 'heirs-male' " here, can only denote heirs-male of the body, owing to the restric- " tion imposed by means of the limitation that follows."

This is one of the six Peerages which were conferred upon connexions of the favourite Duke of Buckingham. Elizabeth Beaumont, a relation both of the father and mother of the Duke, was created Baroness of Cramond for life, with remainder to Sir Thomas Richardson, son and heir of Sir Thomas Richardson, Chief Justice of the Common Pleas, and his heirs-male; whom failing, to the heirs-male of the body of the said Sir Thomas Richardson, the father, who was her second husband. The first clause here loses its general character, being controlled by what follows. Perhaps, this being an English family, the phraseology may have been dictated in England, where the necessity of adding the words *of the body*, for the purpose of limitation, was not then understood as in Scotland. It is singular that this lady,

being only stepmother to her appointed heir, whose son became Lord Cramond, had a family of her own by her first husband, Sir John Ashburnham, Knight, and her great-grandson and representative was not ennobled till 60 years afterwards, by the title of Lord Ashburnham.

### VISCOUNT PRIMROSE.

" The Viscounty of Primrose is limited by patent, 30th November, " 1703, to Sir James Primrose, and the heirs-male of his body, whom " failing to ' the *heirs-male* of Sir William his father'—the last limi- " tation therefore stands quite alone, and uncontrolled, but in the war- " rant, or signature, the words are not heirs-male, but heirs male of " the body."

The preamble of the patent explicitly states the meaning to be assigned to this limitation to the heirs-male of the father, by declaring the intention to confer the Peerage with remainder to the heirs-male of the body of the latter. The title, therefore, appears to be extinct, the Earl of Roseberry being not descended from the father, but from his half-brother.

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## ADDITIONAL CASES, IN WHICH HEIRS-MALE INCLUDE COLLATERALS.

### LORD COLVILLE OF OCHILTREE.

Robert, first Lord Colville of Ochiltree, was so created, 4th January, 1651, by patent to him and his heirs-male. He died on the 25th of August, 1662,

and was succeeded without dispute by his nephew and heir-male, Robert, second Lord, who was married suddenly, six days before, to prevent wardship. On the death of his only son, Robert, third Lord, soon after the Union, without issue, the title became dormant, till it was assumed by a Robert Colville in 1784, whose vote, being questioned in 1788, his right was disallowed on proving the falsehood of his alleged descent from an imaginary brother of the second Lord. But during the elaborate discussion that ensued, it was not pretended, that, if his pedigree had been true, still he would have no claim to the title, because he could only inherit it as a collateral under a patent to heirs-male. This course would have saved much trouble could it have been adopted; but the fact of the succession of the second Lord to his uncle was too strong to be overcome,—and therefore this is almost equal to an adjudged case in favour of heirs-male including collaterals.

### LORD RUTHERFORD.

Andrew Rutherford, a distinguished general, recommended by the King of France to King Charles II., was created Lord Rutherford in 1661, and having no family, the King gave him power to nominate his successors, even on his deathbed. He was soon afterwards advanced to be Earl of Tiviot in 1663, but only with remainder to heirs-male of the body. Being chosen Governor of Tangier the same year, he, before departing, executed a settlement, which is probably the most curious patent of honour extant, as his title, lands, legacies, debts, and executry are all inter-

mingled in his appointment of heirs, who were Sir Thomas Rutherford of Hunthill,—then to the eldest son of Sir Thomas,—and failing thereof, to the nearest heirs-male of the said Sir Thomas. This deed, in connexion with the above patent, was quite sufficient, on his being slain by the Moors next year, to convey the Peerage to his nominee and distant cousin, who thus became second Lord Rutherford. Upon his death, without issue, in 1668, his nearest heir-male was his brother Archibald, who accordingly took his place in Parliament. He also dying without issue, in 1685, the next brother, Robert, succeeded, and sat as a Peer in 1698, and voted in 1715. He died, without issue, in 1724,—so that the first four Lords Rutherford had none of them any family. Since then claimants have repeatedly come forward as heirs-male to the last Lord, and others as heirs-general of the first Lord, so that, from 1734, for two generations, the rival parties continued voting at elections, each protesting that the other had no right, the alleged heir-male stating that the Peerage was granted first to heirs-male, and that no provision whatever had been made for the succession of the first Lord's female relations, and the undoubted heir-general asserting that the other could not prove any male connexion with his pretended cousins, either the first or the last Peer. There was no settlement of these conflicting claims when they dropt in 1762; but, in 1788, the House of Lords resolved that the vote of the heir-general should have been rejected, and assuredly he could have no right whatever. The original destination to Sir Thomas and his heirs-male having been admitted to include collaterals in general, the succession could not open to heirs-general while any male branch of the Hunthill

family existed; and if they did fail, the ultimate clause in favour of females was to the second Lord's daughter, and not to the first Lord's sister, whom her brother had cut off probably from her inferior status. The fourth Lord appointed Thomas Rutherford, one of the family of Edgerston, to succeed him; but this could not affect the settlement of the Peerage. This is a case of the admission of collateral succession under a settlement on heirs-male, simply;—as the proviso, regarding the name and arms, refers to the case of Sir Thomas's daughter becoming the heir, and her husband and issue not being Rutherfords by birth.

### EARL OF ROXBURGHE.

Robert, first Earl of Roxburghe, was so created 18th September, 1616, with remainder to "heirs-male." In February, 1643, his only son by his second wife, "my Lord Ker, depairted this life in Edinburgh, in the night-time, after an great drink." He left behind him only two children, and his lady great with a third, who were all daughters. The Earl thereupon made interest at Court to have the title settled upon the heirs-male born of these ladies, and got a promise that any persons he might choose, at any period of his life, to nominate as his successors, should be so recognised by the Crown. A most whimsical arrangement was the result. His three granddaughters above were still infants, but he had a numerous posterity by his daughters, born of the first wife; and he ordained that a grandson (or, failing him, a great-grandson), by the first wife, should be his heir, provided he should marry one of their cousins, the daughters of his late son and

heir, taking them in their turns, according to their fulfilment of his chief object, that both the Earl and Countess should be descended from him. Upon his death, accordingly, in 1650, he was immediately succeeded in the Earldom by his selected 'grandson, Sir William Drummond, youngest son of his daughter, the Countess of Perth, and the only one whose age had not appeared utterly disproportionate to his bride's. The most remarkable point of the case comes now into view. He was acknowledged as Earl of Roxburghe upon a deed, the main condition of which he had not then fulfilled, on account of the extreme youth of his intended; and it was not till five years afterwards that the marriage which secured him was effected. Had he, in the mean time, been smitten by other charms, and committed matrimony with any other fair one, such a failure of allegiance would have irretrievably forfeited the Peerage and estate; or had the eldest daughter disliked her cousin and appointed husband, he still had a remedy in her sisters,—while she might, after all, have succeeded, by the failure of the old Earl's matrimonial schemes, provided she married a gentleman of honourable and lawful descent. Apparently, the only event unforeseen by the agent of Hymen was, that there might have been no children of the first marriage he appointed. This, however, did not happen: the Earldom descended exactly as he wished, and the Dukedom was, seventy years afterwards, attached to it, so as to follow the intricacies of the first Earl's settlement. After this digression, I return now to the debated point. The Earl, in the case of the failure of the male posterity of his granddaughters, called to the succession "our narrest and lau$^{ll}$ aires-maill q$^{t}$somever." I should urge that this

provision in favour of collateral heirs-male, in preference to all his own descendants, except the male issue of his granddaughters, arose from compunction at having postponed their immediate right to succeed him under the original patent to heirs-male ; and this will strongly appear from the transactions of his successor. Almost immediately upon the restoration of King Charles II. and of regular government, the second Earl took measures to obtain a ratification of his rights from Sir Walter Ker, sometime of Faudonside, knight, then the nearest collateral heir-male of the first Earl, descended from his great-granduncle.

From these proceedings, it is evident that Sir Walter, then a ruined man, was recognised as heir-male and of entail to Earl Robert, according to the old settlements, and would have inherited the title, as well as the estate, but for the powers granted by the Crown to alter the succession. As the Earl wished to remedy any possible defect in his position, it may be presumed that Sir Walter was glad to oblige him, and get any compensation for pretensions which, having been destroyed by anticipation, he could not otherwise turn to account. He therefore disponed to William, Earl of Roxburghe, and the heirs of entail the whole lands which had belonged to the first Earl, and stood destined to his heirs-male with the title and dignity of an Earl, still the Earl was not satisfied. He raised an inhibition against Sir Walter as heir-male and of entail, Feb. 11, 1663, and got an assignation, Jan. 1, 1664, in terms of Earl Robert's deed. Thus the evidence of Sir Walter's original rights as heir-male collateral is very strong.

### EARL OF LOTHIAN.

It is a curious instance of the uncertainty, in that age, of succeeding to rights apparently secure, that Sir Walter Ker, who had been thus prevented inheriting the Earldom and valuable estates of Roxburghe, had similar pretensions to the Earldom of Lothian, according to the original creation to heirs-male in 1606. In this case also there was a surrender of the title, and alteration of the settlements, in favour of the daughters of the second Earl, who, like their cousins before-mentioned, were granddaughters of the patentee. The validity of the transaction had been ineffectually disputed by a previous heir-male, who was second son to the first, and brother to the second Earl, but whose death, without issue, and that of his brothers, left Sir Walter the collateral heir-male in 1663.

The case of Lothian is more fully discussed elsewhere, in stating the question of precedency which arose between the heirs of the two noblemen, who had severally been enabled to supplant the unfortunate Sir Walter.

### VISCOUNT OF STRATHALLAN.

Of this Peerage, it is sufficient to state that General Drummond was so created in 1686, with remainders to the heirs-male of his body; whom failing, to his *other* heirs-male; and that, on the death of his grandson, the third Viscount, in 1711, the title went to the descendant of the *uncle of the first Viscount*, who was

forfeited in 1746, but whose grandson, the present Peer, was restored in 1824.

### VISCOUNT OF DUNDEE.

This title was distinguished by being conferred on the celebrated General Graham, of Claverhouse, in November, 1688, with the same limitations as Strathallan. This heroic Dundee, or bloody Clavers, being killed at Killiecrankie in June next year, and his only son dying an infant in December, also in 1689, he was succeeded by his uncle, the third Viscount, who, adhering to King James, was outlawed in 1690, and died, without issue, in 1700. The next collateral heir-male, descended from his granduncle, died in 1706, and his son assumed the dignity, and was forfeited in 1715; and another, calling himself Viscount of Dundee, was attainted in 1746. There still are heirs-male, as these are all branches of the old family of the Grahams of Fintry, which yet exists.

### VISCOUNT OF GARNOCK.

John Crawford of Kilbirny, grandson of John Earl of Crawford and Lindsay by his father, and of Sir John Crawford of Kilbirny, Bart., by his mother, was created Viscount of Mount Crawford, 10th April, 1703, which he changed to Garnock, 26th November, same year. The remainders are to the heirs-male of his body; whom failing, to his other nearest heirs-male. The fourth Viscount became Earl of Crawford, on the death of the great Earl, in 1749; and his son, the twentieth

Earl, dying without issue in 1808, the title has been suspended during the discussion of the pretensions of a multitude of claimants to the Earldom, chiefly from Ireland, the most prominent of whom was transported for forgery in *making* out a case, and his eldest son was banished for horse-stealing. Should these and the other Irish pretenders fail in convincing the House of Lords, upon suspicious documents and *hearsay* traditions, that they are of this family, there are several undoubted branches of the Lindsays in Fife, the nearest of whom, as collateral heir-male of the first Viscount, would have a right to this Peerage.

### EARL OF MORAY.

James Stewart, natural brother of Queen Mary, was, by her, created Earl of Moray, 30th January, 1561-2, with remainder to the heirs-male of his body; and, a week afterwards, she also gave him the Earldom of Mar, and ordained that he should be called by that title. The latter Peerage, however, was claimed soon afterwards by Lord Erskine; and his right was admitted, 23d June, 1565, after an interruption of the course of justice during five generations, and for one hundred and thirty years. The title of Moray was thereupon reassumed; and he had two other charters of that Earldom (22d January, 1563-4, and 1st June, 1566), the latter of which was to heirs-general: but it was the former which Parliament ratified, 19th April, 1567. He was afterwards Regent of Scotland, and was notorious for the blackest ingratitude to his sister, whose ruin was chiefly effected through his energy, prompted by inordinate ambition. The cruelty

of his myrmidons, in taking possession of a house he had bestowed on the forfeiture of the husband of the heiress, turning her out sick and naked, in a cold night, which drove her to distraction, led to the Regent's assassination, 23d January, 1570-1. The concentrated spirit of vengeance alone could have so deliberately and successfully executed a plan which excited so much admiration in France, that he was offered any terms to murder Admiral de Coligny; but he rejected the proposal with scorn, saying he repented of having given way to revenge. The Regent's eldest daughter being afterwards married to the eldest son of Lord Doun, in 1580, he thereby became Earl of Moray, apparently by virtue of the charter of 1566, though the ratification, in 1567, of the previous grant of 1563-4 might be considered to have superseded it. He was the bonnie Earl, who was assassinated, 7th February, 1591-2, and his house of Dunibirsel burnt by the Earl of Huntly, out of revenge for his family having been deprived of the Earldom of Moray, which had led to his grandfather's rebellion and death at Cornichy in 1562, and probably instigated by the jealousy of the King, on whose warrant for all he had done the Earl openly justified himself. The bonnie Earl's son, the third Earl, in his minority, had a ratification from the King and Parliament, in 1592, of the charter of 1st June, 1566, which admitted of female succession, and of all other charters he had obtained, some of which were contradictory. As this, however, was the latest charter, it was a complete recognition; but he again, 17th April, 1611, got the destiny altered, and confined to heirs-male, which alone kept the succession in the present Earl's family since 1700.

In the grant of the Comitatus, in 1611, which of itself carried the dignity (see note in p. 25), after the heirs-male of the body of the Earl and his brother, there is an ultimate remainder to the heirs-male of the said Earl, and to his assigns whatever. It would be superfluous to say more than that all these heirs-male must evidently be collaterals.

### LORD SINCLAIR.

It is remarkable, that in the *petition* for the title of Lord Sinclair, in 1780, the claim which was preferred by a collateral heir-male of the grantee of 1677, rested upon the phrase "nearest lawful heir-male," and was admitted in 1782. I know not how the case was pleaded; but certainly the words of the patent itself, calling the claimant's direct male ancestor to the succession by name, afforded a more indisputable statement of his right, with a similar escape from the effect of the attainder. It is a singular oversight, even if the meaning of heirs-male were understood to be as comprehensive and significant as I contend. But for the nomination clause in the patent, which may have simplified the question, this, on the ground of the petition, would have been an adjudged case in favour of collaterals succeeding under the head of heirs-male. This patent, however, is quite adverse to Mr Riddell's doctrine, that the rights of collaterals to inherit under such a clause are either valid or inadmissible, according to the addition or omission of the phrase as to name and arms; because, after the heirs-male of the body of the patentee himself, of his brother, and of his uncles, the remainder is to his nearest lawful heirs-

male, who must be still more remote; and yet there is no further stipulation, either on that or on any other score.

I propose hereafter making some remarks on this and other instances of the inverted succession to an old title by a stranger whose right is derived from a capricious, arbitrary alteration in its destination in favour of those who were "not a drop's blood to the first Peer." But, mean time, I shall shortly notice that this family were originally Earls of Orkney from 1379,—that the third Earl was also created Earl of Caithness, 1455,—that King James III. deprived him of his former Earldom, and allowed him to disinherit his eldest son William, the spendthrift, in favour of a younger William, who thus became second Earl of Caithness, and of another son, Oliver, who got the original estates in the South,—that the elder William, who had been styled Master of Orkney and Caithness, as heir to these two Earldoms, was thus deprived of both, but had the title of Lord Sinclair, which Parliament confirmed to his son,—that this Peerage descended for five generations to John, Lord Sinclair, by whose only daughter it passed to his grandson, of a totally different family, Henry St Clair of Hermanston. He got the above patent in 1677, cutting off his own female posterity and his mother's kindred in favour of his paternal relations, who have no connexion with the original Peers, but who have now succeeded in prejudice of his own heir-general, Anstruther Thomson of Charlton.

EARL OF BREADALBANE AND HOLLAND.

The first Earl of this family having had two patents within four years, the case requires a particular explanation:—George, sixth Earl of Caithness, being so much embarrassed that his debts were calculated at a million of merks, and having no issue by his wife, Lady Mary Campbell, made over the succession, both to his estates and titles, to Sir John Campbell of Glenorchy, Bart., his principal creditor, who thereupon got a charter of them under the Great Seal; and the Earl dying in 1676, he took possession accordingly. He was soon afterwards created Earl of Caithness, with remainder to the heirs-male of his body, or, in his option, whichever of his younger sons he might choose to appoint even on his deathbed and his heirs-male, whom failing, his nearest legitimate heirs-male whatever, who were bound to assume the name of Sinclair, and the arms of the House of Caithness, as their chief coat, with those of Glenorchy inserted.

8th Oct. 1672. 11th Jan. 1673. 28th June 1677.

But the Privy Council, on petition from George Sinclair, the last Earl's collateral heir-male, who had the interest of the Duke of York, adjudged the title to him, who took his seat as Earl of Caithness; and the ex-Peer was re-created, Earl of Breadalbane and Holland, with the precedency of his former patent, and with remainder to whichever of his sons by his first marriage (with Lady Mary Rich) he might choose to appoint, and the heirs-male of his body, which failing, to the heirs-male of his own body, which failing, to his nearest legitimate heirs-male, which failing, to his nearest legitimate heirs whatever. Breadalbane was the district in which his own paternal estates lay, and Holland was the title of his deceased first wife's father,

15th July 1681. 13th Aug. 1681.

who had been beheaded for his loyalty in 1649, and was perhaps chosen as an odd species of compliment to his brother-in-law, who had also the older title of Earl of Warwick from 1673. The Earl, after long conflicts, was enabled to maintain possession of the lands, on which, however, the burden of 12,000 merks jointure was so heavy, that he married his predecessor's widow, and had also a son by her. He caused the massacre of Glenco, but was suffered to escape trial after a short imprisonment, and he pocketed the money intrusted to him for pacifying the Highlanders, refusing to give any account of its expenditure. He was, undoubtedly, possessed of great abilities, and was represented to the Electress Sophia to be cunning as a fox, wise as a serpent, and slippery as an eel. He was created a Marquis by the heir of the exiled family, to which he was a strong adherent; but on the failure of the expedition in 1715, in which he had 500 men engaged, he contrived to avoid all enquiry, probably from his wife being grand-aunt to the great Duke of Argyle.

The Earl and his successor sold all the estate in Caithness, which they had found it troublesome to maintain so far from their own country. The cause of his obtaining the power to nominate which of his family should succeed him was, that he was unfortunate in his eldest son, who was an idiot,* but was styled Lord Ormelie (from a place in Caithness), as heir apparent to his father, even after the Earl died in 1716, leaving the title by will to his second son. The validity of this deed was disputed at the election in

* He was perfectly harmless, and his chief pursuit is said to have been that of superintending the Scotch system of washing clothes.—A striking contrast to the above character of his father!

1721, but it was sustained, though the elder brother was still living. It will be observed that in the first patent there is a power of appointing which of his sons was to succeed to the title, with remainder to his heirs-male, which is the only instance I can trace of any sort of resemblance to the primary limitation of Cramond. But this instance is still more easily explained: The heirs-male of the younger son are clearly included in the first clause to heirs-male of the body, and are shortly expressed as having such a special reference of the part to the whole, and thus the conclusion to heirs-male whatever rightly follows. The second patent is still more explicit in confining the first limitation to the heirs-male of the body of the selected son, and is an indisputable example of heirs-male having exactly the same meaning as heirs-male whatever. The late Marquis succeeded his cousin in the Earldom simply as heir-male, being descended from the first Earl's uncle; and when he was created a Marquis he took Ormelie as his second title, ignorant or regardless of all painful reminiscences.

### LORD GRAY.

The last re-grant of this ancient Peerage in 1707, immediately before the Union, is very voluminously worded, and is a very singular patent. Patrick, then Lord Gray, and his only brother Charles, being very far advanced in life, without prospect of male issue, agreed to the settlement of the title on John Gray, their cousin, husband of the Peer's deceased daughter and only child, so that he actually sat in Parliament as Lord Gray, although his wife was dead, and his father-in-law alive. After exhausting all possible descend-

ants of the above marriage, female as well as male, the series of remainders is to the nearest heir-male of the said Patrick Lord Gray, and the heirs-male of the body of such heir, whom failing, to the heir-male of the body of the said John Gray of any other marriage, whom also failing, to his other heirs-male whatever. As the phrase nearest heir-male of the said Patrick Lord Gray could never have been used to mean a son, even if, when approaching to eighty, he had not abandoned all expectations on that score, as is evident from the immediate settlement on his son-in-law, this may be claimed as a clear case of the words heirs-male without qualification, including collaterals.

I shall here mention a circumstance connected with the earlier history of this Peerage, which seems to have been misunderstood. Andrew, third Lord Gray, having been twice married, had by his first wife a son, Patrick, and two daughters; the first married Alexander Straiton of Laurenston; the second married John, fourth Lord Glammis; and by his second a large family of both sexes. His eldest son Patrick, fourth Lord, succeeded him in 1514, and died in April, 1541. It is commonly stated that he had several lawful daughters, but it is proved that the only daughters he had were illegitimate; because his two sisters of the whole blood were recognised as his heirs-at-law in preference to the son and heir of his next brother by the half blood. The fourth Lord, foreseeing that he was to have no son of his own, got a charter, 16th April, 1524, settling the succession in that event upon his brother and heirs-male generally. In 1537, however, doubts arose as to the validity of this arrangement on the allegation that it had been granted by the Regent, Duke of Albany, in the King's minority, in hurt and

prejudice of our Sovereign Lord's conscience to the distressing of the righteous heirs—who were Andrew Straiton, the nephew, and Lord Glammis, the grand-nephew of the fourth Lord. On the marriage of his nephew, Patrick Gray, to the daughter of Lord Ogilvy of Airley, an increase of dowry is stipulated, if a confirmation of the charter of 1524 be obtained. King James V.'s hatred of the Douglasses, and his unjust and cruel conduct to Lady Glammis, who was one of that family, and whom he got executed under pretence of witchcraft, when her son, the young Lord Glammis, was also condemned, seems to have paved the way for the claims of the heir-male of the Gray family. At the death of Patrick, Lord Gray, the right to one half of his lands fell to the King by Lord Glammis's forfeiture, and of the other half he had acquired the chief portion by an arrangement with Andrew Straiton of Laurenston, who was recognised as the eldest co-heir, 15th July, 1541, and to whom he gave a charter of Kinneff next day. Accordingly, under the name of Patrick Gray of Buttergask, the late Lord's nephew had a charter of his uncle's baronial estate, one half on the resignation of Andrew Straiton, purchased on payment of 3000 merks, part of a large sum still due, and the other by the King's gift, 28th April, 1541 ; and he had another, styling him now Lord Gray, and confirming the entail of 1524 upon heirs-male. It appears from this transaction that a year after his uncle's death, the heir-male was not styled Lord Gray, but that the Peerage was in suspension till seventeen months after that event, when having got possession of the baronial estate, he also was admitted to the title. This strongly supports Lord

Hailes's theory of the indispensable connexion between the Peerage and the dignified fief.

### EARL OF HOME.

Alexander, sixth Lord Home, was created Earl of Home, 4th March, 1605, with remainder to heirs-male whatsoever. On the death of his only son, James, the second Earl, without issue, in 1633, he was succeeded by a very remote cousin, in the fifth and seventh degree to him, who became third Earl by service as heir-male in general, and he obtained a patent from King Charles I., 22d May, 1636, allowing and confirming the honours to him and his heirs-male with the ancient precedency. He also had a ratification by Parliament, 17th November, 1641, as nearest heir-male to his predecessor. As this was not a case of re-grant upon a resignation, but was merely a recognition of an already existing right, no new limitation could have been intended by the use of the simple term "heirs-male," and therefore it would seem to indicate that that phrase was held to signify the same as the original clause heirs-male whatsoever.

### LORD JEDBURGH.

This title was conferred upon Sir Andrew Ker, the head of the Fernihurst branch of that Border clan, 2d February, 1622, with remainder to his heirs-male and successors in the family of Fernihurst, bearing the name and arms of Ker. His only son deceased before

himself, and when he died in 1631, the Peerage became dormant. In 1654, John, son of Alexander Ker, was served heir-male of his granduncle Andrew, Lord Jedburgh; but he does not appear to have assumed the title, and he must have died without issue-male soon after, as his cousin Robert (son of Sir James, who was brother of Andrew) became Lord Jedburgh, and was so recognised by King Charles II. in 1670, when he got a new grant, with the old precedency, to himself, and the heirs-male of his body, with special remainder to William Master of Newbottle (son of Robert Lord Newbottle, and grandson of his then nearest heir-male, Robert, fourth Earl of Lothian), and the heirs-male of his body, whom failing, to the said William by heirs-male whatever. This William accordingly succeeded his cousin as Lord Jedburgh in 1692, and got his right ratified by Parliament, 18th April, 1693. In the patent, there is a singular proviso, by which, whenever William should become Earl of Lothian, his eldest son, and the eldest son of the family always, should have the dignity, with a vote in Parliament, and the old precedency. Thus, after he succeeded his father as Marquis of Lothian, his eldest son voted as Lord Jedburgh in 1712, and the right exists now as fully as ever. The entry in the record, in 1693, refers to the patent as being in favour of Robert Lord Jedburgh and his heirs-male, which failing, to William Lord Jedburgh and his heirs-male, thus loosely describing both heirs-male of the body, and heirs-male whatever.

### LORD ASTON.

Of the twelve instances in which Scotch titles

had been conferred on natives of England, this is the only Peerage which has been assumed by a collateral under a destination to heirs-male bearing the name and arms. Indeed, the usual remainder in these grants, as in the contemporary cases of Barrett and Fairfax, having been to heirs-male of the body, bearing the name and arms, there is no other case, excepting the Viscounty of Dunbar, in the family of Constable, in which such a succession has opened, and ignorance of their claims has probably been the cause of their not having come forward.

Since the death of James, fifth Lord Aston, without male issue, in 1751, the title has been held by four descendants of the uncle of the first Lord; but their perpetual residence in England, and their poverty, owing to the estates of the family having gone to the female descendants of the fifth Lord, has prevented their making above one ineffectual attempt to get their rights acknowledged, in 1768, when the chief difficulty was that, during the period of 124 years, in which the elder branch had held the title, not one of them had ever been at the trouble to take his seat, or even get the title put on the roll.

### EARL OF KELLIE.

It gives me great satisfaction to find that, in the recent decision of the Earldom of Kellie, which Mr Riddell's able advocacy has achieved since his work appeared, the Earl of Mar's right has been acknowledged, although he is not a descendant, but a collateral male relation of the first Peer, the patent being only to heirs-male bearing the name and arms of Erskine. The

first Earl was Sir Thomas Erskine, who had the good fortune to be with the King at Perth, at the time of the famous Gowrie conspiracy, and having assisted at the rescue, was ever afterwards in high favour. He was immediately created Lord Dirleton, and afterwards the title of Viscount of Fenton, the first instance of that dignity in Scotland, was conferred upon him, 18th March, 1606, with remainder to the heirs-male of his body, whom failing, to his heirs-male whatever. This double clause of remainder was consolidated into one, when he was further advanced to the Earldom of Kellie. The King was evidently anxious that his favourite, whom he had made a Knight of the Garter, should always have a male heir, direct or collateral, to bear the honours and the arms he had acquired by his services.

# HEIRS-MALE AND ASSIGNS.

THERE can be no dispute as to the meaning of the term *assigns* when legally brought into operation; but there are only a very few cases of the exercise of the privilege, if indeed a general power be thus conveyed. Under the head of the Earldom of Nithsdale is mentioned the patent transferring the title of Morton to the Lords Maxwell and their assignees; but in that instance there was no proceeding in consequence. The same may be said of the contemporary Earldom of Gowrie. In the instance of the Earldom of Caithness there was an attempt to assign the title to a stranger, but it did not prove effectual. There are, however, three cases which may be worth noticing somewhat in detail, as remarkable instances of the use of this power. Andrew Keith Lord Dingwall's second patent, 24th November, 1591, to heirs-male and assigns whatever, enabled him to assign his honours to Sir William Keith of Delny, who had a charter accordingly, 22d January, 1592-3, with limitation to heirs-male whatever, bearing the name and arms of Keith, with the title of Lord Dingwall, after the death of Andrew Lord Dingwall. The succession was thus secured to his adopted heir, who soon afterwards alienated the lands, which constituted the Lordship to Lord Balmerinoch, 24th

September, 1608. He transferred them, 26th February, 1609, to a great favourite of King James VI., Sir Richard Preston, K.B., who was immediately, 8th June, 1609, created Lord Dingwall, with remainder to his heirs and assigns whatever, which was ratified by Parliament 17th June, 1609. The King also provided for him an illustrious marriage with the heiress of the tenth Earl of Ormond, widow of her cousin Theobald Viscount Tulleophelim, who died without issue in January, 1613, and refused on their account to admit the settlement of the estates upon her cousin, the heir-male, who had succeeded to the title. He had by her only one daughter, whom the Duke of Buckingham intended for his nephew, George Fielding, second son of the Earl of Denbigh, and with a view to this marriage Lord Dingwall was created Earl of Desmond in Ireland, with remainder to his projected son-in-law, 22d November, 1622. The assassination of the Duke seems to have frustrated this scheme of aggrandizement, at the expense of the Ormond family. The Earl of Desmond was drowned in coming from Ireland; his daughter was married to her father's ward, the grandson of his competitor, who paid L.15,000 for her, and was afterwards the great Duke of Ormond; and her intended succeeded to the empty title of Desmond, as in the also Irish contemporary case of the Viscounty of Valentia, to which a stranger had been created with reversion after the death of the possessor. The second Duke of Ormond, after the Union, voted at two elections, and afterwards got his right to the Peerage of Dingwall acknowledged, 8th July, 1714, as heir to his grandmother, but was soon after forfeited, and died without issue, in 1745, aged ninety-four. As the attainder has been found not to affect his Irish honours, and they

are revived so far as they are not also extinct, the heirs to his grandmother's Scotch Peerage, and his father's English Barony of Butler of Moor Park, have a strong claim to be restored. The representation of the family is now vested in the descendants of his sister, the Countess of Grantham, who had two daughters, Lady Francis D'Auverquerque, who married Captain Elliot, and Lady Henrietta, who married William second Earl Cowper, ancestor by her of the present Earl.

The second example is the creation of the Barony of Cardross, granted to John, twenty-third Earl of Mar, K.G., and his heirs-male and assignees. He settled it upon his third son, Henry, the second son of his second marriage, and the heirs-male of his body, but reserving his own life-rent, and he dying before him, his son succeeded his grandfather, and got a new patent to the heirs-male of his body, under certain conditions, and with similar powers, which, however, were never exercised; and his descendant, who is also Earl of Buchan, has the Peerage. The late Earl of Buchan, perhaps misled by Grose's Antiquities, supposed that every Lord Cardross had the right of nominating any person to succeed; and one day, after a jovial dinner, taking a great liking to one of the company, he made known his fancied privilege and intention, accordingly, to create his favourite a Peer. The party followed up the hint, got a paper signed on the spot, and treated the new Lord Cardross with all the respect due to so exalted a personage. Next day, still believing in his powers, his Lordship was so distressed at the loss he conceived himself and the family to have sustained, that the patent was surrendered with less unwillingness than he expected.

The third example is the erection of the lands of the

Abbacy of Melrose into a temporal Lordship, in favour of John Viscount of Haddington, afterwards Earl of Holderness in England, by Act of Parliament, 17th June, 1609, followed by a charter under the Great Seal, 25th August, 1615, to heirs male and assigns. Sir John Ramsay was deservedly a great favourite of King James VI., having, on the occasion of the royal visit to the Earl of Gowrie, stabbed both Alexander Ruthven, and his brother the Earl, in his Majesty's presence. He was created Viscount of Haddington, and Lord Ramsay of Barns, with limitation, according to Selden, to heirs male legitimately descending from him, 11th June, 1606. Having struck an English favourite, the Earl of Montgomery, across the face, with a horse-whip, at the race-course at Croydon, in 1607, he was forbid the Court; but his eclipse was only temporary, as is proved by the gift of the Barony of Melrose, with the above liberal remainder. He assigned this latter Peerage to his elder brother, Sir George Ramsay of Dalhousie, who thus had the title, during the life of his brother, by charter, 25th August, 1618, to him and his heirs male and successors in the said Barony. But on the 5th January, 1619, he got the style changed to Ramsay of Dalhousie, with remainder to his heirs male for ever, and the present Earl of Dalhousie is his male descendant. In 1618, the interest of two rival Scotch courtiers (one of whom, Viscount Fenton, had also assisted in despatching the Earl of Gowrie) prevailed, and he went abroad; but the King's remembrance of his services and character led to his speedy restoration to favour, and promotion to the higher honours of Earl of Holderness, &c. His children died young; and at

his death, in 1625, all the titles in his own person became extinct.

### EARL OF CAITHNESS.

William Sinclair, third Earl of Orkney, Chancellor and Admiral of Scotland, in lieu of his claim through his mother to the Lordship of Nithsdale, was created Earl of Caithness, 28th August, 1455, to him and his heirs. In 1470, the King compelled him to surrender the Earldom of Orkney, which was annexed to the Crown, and he got, by way of compensation, the lands of Ravenscraig, Dysart, &c. in Fife. Whether the King still thought him too powerful, and insisted on his dividing his estates, or whether he was induced, by the extravagance of William the Waster, his only son by the first wife, or his partiality for the offspring of his second marriage, he disinherited the eldest son, who had only got Newburgh, in Aberdeenshire,—settled his only remaining Earldom of Caithness on another son, William, and his heirs, 7th December, 1476,—and gave Roslin, and all his estates south of the Tay, to a third son, Sir Oliver, by charter, 10th December, 1476. The Earl died soon after, and William, senior, after having been designed Master of Orkney and Caithness, as heir apparent to both Earldoms, succeeded neither to title nor to any more land; but he was styled Lord Sinclair, and extorted redress from his brother Oliver, by decree, in 1481, and his son was formally acknowledged as Lord Sinclair, in Parliament, in 1489, as "heir to his grauntshir and faider, Lordis Sinclair for the tyme."

William, junior, who became second Earl of Caithness, as above mentioned, was grandfather of George, fourth Earl, and also Chancellor, who, on his own resignation, got the succession altered, by charter, 2d October, 1545, in favour of his eldest son, John Sinclair, and his heirs male and assigns; whom failing, to himself and his heirs whatever. The Earldom thus, for the future, became primarily, the inheritance of male heirs, in preference to females though nearer. George, sixth Earl, who (like King Louis XVI., had succeeded his great-grandfather, and he his grandfather), was also, like him, a very bad manager of his affairs. Having got into debt to the amount of a million of merks, he ruined the family, and, having no issue, tried to alienate the title, as well as the estate, to his own chief creditor, and his wife's cousin and future husband, Sir John Campbell of Glenurchy, who, after his death in 1676, was created Earl of Caithness in 1677. But George, cousin and heir male of the late Earl, ousted him, and became seventh Earl; and he was obliged to get a new patent, as Earl of Breadalbane, in 1681. This is, therefore, not only an instance of the inefficacy of the word assigns, which appears to be a dead letter, unless more formal powers or sanction be given, but of the force of the term heirs male. The seventh Earl died in 1698, also without children, and the title of Caithness has never, since 1676, been more than two generations in the same line, but has gone to four successive male branches, passing over females; and the proceedings show that the claims were always made as heirs male. The late and twelfth Earl was a collateral heir male of the grantee in 1545; so that this is a case of heirs male, without any specification, including collaterals. This

Peerage also affords a refutation of Lord Mansfield's law regarding the charters of the lands of the Earldom not affecting the title. The charters which originally conferred the Earldom, and which afterwards transferred it to a younger son, were both to heirs, admitting therefore of female succession. Yet, since 1698, three several times, have collateral heirs-male succeeded in preference to nearer females by virtue of a subsequent settlement upon heirs-male.

### EARL OF ANGUS.

The succession to this ancient title exhibits a point somewhat similar to that of Caithness. In 1547, the Earldom, which had hitherto been inheritable by females, was restricted to males. The then Earl having only one son, a boy, and one daughter, the Countess of Lennox, and being much attached to his brother, Sir George Douglas, he preferred maintaining his own family, in the male line, to letting it sink in the already great house of Lennox. The new settlement was to his son and the heirs male of his body; whom failing, to the heirs male of the Earl and his assigns whatever. Ten days afterwards his brother fell at Pinkie, and his own son dying before him, he was succeeded, in 1556, by his nephew, David, and he, in 1558, by his son, Archibald, then a minor. His uncle and guardian, the Earl of Morton, took every precaution to secure his right. In 1564, he got Queen Mary to grant a charter of confirmation of the deeds of 1547, as heir male and of tailzie to his granduncle's son; in 1565, he prevailed on the Countess of Lennox, with consent of her husband and eldest son, Henry Lord

Darnley, to renounce any pretensions she or they might have; and, in 1567, he obtained an act of Parliament, ratifying the whole transaction. In 1584, he was forfeited; in 1585, he was restored, and became also Earl of Morton; and, in 1588, he died, leaving a son, an infant, who survived only a few months, and a daughter, called his heir in 1590.

The succession now opened to a distant cousin, grandson of the uncle of the grantee, in 1547. But his claims were disputed by an unexpected competitor, most formidable in those days of royal prerogative—King James, who had succeeded to the throne of Scotland through his mother, and who expected the Crown of England by the same channel, very naturally thought it "expressly against the law of God, the law human, and of nature," that he should not, as heir general also, inherit the Earldom of Angus. He brought an action to set aside the charters of 1547; and it is to the honour of the Scotch Courts at the time that, nevertheless, judgment went for the heir male against the King, in respect of Queen Mary's confirmation of the charters 1547, and of the renunciation by the Countess of Lennox, his Majesty's grandmother; and the successful candidate extorted from his royal rival a contract or charter (7th March, 1588-9) to himself and his heirs male and of tailzie, which was ratified to his son by Parliament, 5th June, 1592.

In all the discussions of these disputes, and in Lord Hailes' history of the transactions, it is as heirs male that the claims of the collaterals are stated, because the entail was *general*, not special. It is stated in the ratification of the services and other deeds, which the Earl procured in 1592 to himself, "his aris and assigneys," that they "presentlie ar, have bene sen the

first making thairof, and sal be, in all tyme cuming, effectual, guid, valide, and sufficient in them selffis to the said Williame, now Erll of Angus, his aris, and assignais, mentionat in the said contract, and to quhome he sal happin to tailzie or prouide the foirsaid leving and Erldome of Angus in tyme cuming."

To show the high value attached to precedence, I should add, that the Earls of Angus claimed the "right of having the first place in sitting and votting in Parliament;" and it is declared, 5th June, 1592, that this Earl having "yielded, at the King's desire, to the Duke of Lennox," shall nowise "prejudge the said Earl's right in tyme coming." The Marquisses and Duke of Douglas maintained this claim down to the Union.

His descendant, the second Marquis of Douglas, shortly before the Union, obtained power from Queen Anne to restore female succession in his own line, failing heirs male of the body of his son (afterwards Duke of Douglas), as well as his own male descendants.

### LORD HAY OF YESTER.

This Lordship appears to have continued descendible to females till William, sixth Lord, having six daughters, but no son, and thinking the consequence of the family better maintained in the male line, got a charter, on his own resignation, to himself and the heirs male of his body, whom failing, to his brother, James Hay, and the heirs male of his body, &c., in 1590; and to exonerate the conscience of the King and the Peer, his brother is bound to provide for William's daughters. He died 10th March, 1590-1, before taking infeftment

upon this charter, but the King granted a new charter of the estates, *honours*, dignities, and pre-eminences, with a vote in Parliament, to James, as if his late brother had died infeft, and he had been regularly retoured and entered as his heir male and of entail. His son was created Earl of Tweeddale in 1646, to his heirs male forever, and his grandson, in 1694, was advanced to the Marquisate, with remainder to heirs male whatever. The present Marquis, who represents him as heir male, but not as heir general, yet has the old Barony also, the last conveyance having fixed the succession in males alone.

### EARL OF BUCHAN.

Having alluded to this Earldom, I shall give an abstract of its singular history:—James Stewart, younger son of Joan Beaufort, the heroic Queen of James I., by her second husband, the Black Knight of Lorn, was created Earl of Buchan by his nephew, King James III., with remainder to the heirs male of his body. His grandson John, third Earl, got a new charter to his eldest son, John Stewart, and "*his heirs*," reserving his own liferent, 4th August, 1547. This alteration admitting of female succession was made immediately after his son's second marriage in April; and on the 10th September following, he fell at Pinkie. His only child was an infant (apparently posthumous) daughter, Christian, who, while her grandfather was still alive, succeeded according to the feudal law, and was infeft upon the above charter as heir to her father, John Master of Buchan, 14th July, 1551. Her uncle, James Stewart, second son of the Earl, who was styled

Master of Buchan as heir apparent to her, acted as her guardian, and contracted her, in 1549, to James Stewart, natural brother to Queen Mary, afterwards notorious as the Regent Moray. But he not waiting for her puberty, she was married before 20th December, 1563, to his half brother, Robert Douglas, who, thereby, in her right, became fourth Earl of Buchan, and they had a charter to the heirs male of their bodies, then to their eldest heir female, then to the heirs of the body of the Countess, and then to the heirs whatever of the Earl, 7th April, 1574. They had one son, James, who succeeded his mother in 1588, and became fifth Earl, but he had only a daughter, Mary, who was second Countess in her own right. She married James Erskine, eldest son of John, twenty-third Earl of Mar, K.G., by his second wife, Lady Mary Stewart, daughter of Esme, first Duke of Lennox. She was prevailed upon, whether willingly or not does not appear, to resign the Earldom, and alter the destination to the heirs male of the marriage, whom failing, to her husband's heirs male and assignees whatever, all such heirs to enjoy the old precedency, 22d March, 1617. They got another charter with similar remainders in 1625, and her husband obtained a decreet in 1628, giving them place, according to the original creation, which had been unjustly withheld from her, in the decreet of ranking, during her minority in 1606, and by which they again superseded the Earls of Eglinton, Montrose, Cassilis, Caithness, and Glencairn. Their grandson, William, eighth Earl of Buchan, made a new settlement in 1677, which he confirmed in 1678, after heirs male of his own body to Henry, Lord Cardross, and various other collateral heirs male, and the heirs male of their bodies, whom failing, to heirs

male whatever, whom all failing, to heirs and assigns whatever. He died, unmarried, in 1695, and the Peerage went to David, fourth Lord Cardross, who was the heir under the deeds of 1617, 1625, and 1677. Yet he was not connected by blood with James Stewart, the original Earl, or in any way heir to Mary Douglas, Countess of Buchan. He was only collateral heir male to James Erskine, the husband of that heiress. It is singular that James, sixth Earl, should have preferred collateral male relations to his own posterity through females, and that William, eighth Earl, when he had the power, should have confirmed the succession to a male cousin in the second degree, although he had sisters, who, and their children, were heirs according to the settlements of 1547 and 1574. Lady Margaret, the eldest sister, married, first, Simon Fraser of Inverallachy, by whom she had children; and, second, Charles, fourth Lord Fraser, who, though of the same name, was of a totally distinct family. Having no children by Lord Fraser, she induced him to disinherit his own nieces in favour of his step-son, Alexander Fraser, the rightful heir to Buchan, on whom he settled his estate, with its magnificent baronial residence, Castle Fraser. His niece, and ultimate heiress, again cut off the heir of line, Charles Mackenzie of Kilcoy (father of the present Sir Evan), and left the estate to the second son, Alexander Mackenzie Fraser of Inverallachy and Castle Fraser, father of the present proprietor. Thus the compensation, which the disinherited Lady Margaret acquired for *her* children by prevailing on her husband to cut off *his* brother's family, though still in her posterity, is no longer enjoyed by her twice ill-used representative.

# HEIRS MALE OF TAILZIE AND PROVISION.

Most of the ancient Peerages of Scotland may be said to have gone to heirs of entail, because they accompanied the charters to the dignified fiefs according to *their* destinations. The Earldoms of Angus and Morton had been held by the same individual from 1585 till he died, 4th August, 1588, leaving an infant son, who lived at least till March, 1588-9, but was dead a few months afterwards. On that event the two Earldoms separated, and each went to a William Douglas. The Earldom of Morton was ratified to one as heir male and of tailzie, 20th June, 1589, although he certainly was not heir male to his predecessor, but of a quite different family. The last charter of entail, however, dated 17th October, 1564, and ratified by Parliament in 1567, had made him next heir *by name*, and he succeeded accordingly as a male and an heir of entail. The Earldom of Angus being claimed by the King, was not finally allowed to the other, who had died in the mean time in 1591, but his son was recognised in 1592 as heir male and of tailzie, and was indeed the nearest male relation to the last Earl, as I have already fully shown. I shall here give two more of these ancient instances, the Earldoms

of Errol and Rothes:—On the death of William, sixth Earl of Errol, before Whitsunday, 1541, leaving an only daughter, he was succeeded by his cousin and nearest male relation, who soon after had a charter of the Lordship of Errol, &c., 5th and 13th December, 1541, as "heir of entail," under the name of George Hay. He thus appears not to have had the title immediately, but on the 30th December, in a grant from King James V., under the Privy Seal, he was addressed as Earl, by virtue of the entail and of the charters a few days before. It would seem that, but for the settlement upon heirs male, the daughter of the last Earl would have been the rightful successor. By dispensation she married her cousin Andrew, who succeeded his father George in the Earldom, and thus the heirs male and heirs of line continued united down to Gilbert, the eleventh Earl, who having no family, obtained the power to appoint his successors, male or female, whom failing, the Earldom was destined to heirs male of entail and provision in the old settlements, and then to heirs male whatever. Immediately before his death, in 1674, he executed an entail, nominating his heir male Sir John Hay, who thereupon had a charter as his heir apparent, to himself and the heirs male of his body, whom failing, to the heirs female of his body, whom failing, to the other persons and their heirs in the Earl's nomination, whom failing, to the heirs male and of entail and provision in the Earl's prior settlements, whom failing, to the Earl's heirs male whatsoever, whom all failing, to his heirs and assigns. John, twelfth Earl of Errol, had a ratification by Parliament, 31st January, 1701, to the heirs male and of tailzie succeeding to him in his dignity, title, and estate, whom failing, to his heirs male whatsoever, whom

failing, to his heirs and assignees whatsoever. The present Earl, who is heir male of the forfeited Earl of Kilmarnock, Lord Boyd, is heir to the above John, the twelfth Earl, by descent from his daughter and granddaughter, but is not heir to any of the eleven Earls who preceded his above ancestor.

The Earldom of Rothes descended regularly to George, third Earl, and, apparently, the old destinations were to heirs whatever, but the singular and complicated nature of his matrimonial affairs led to a change. He first married, in 1517, Margaret, daughter of Lord Crichton, who, though her mother was a Princess, was illegitimate. She bore to him Norman and other children, but she was divorced, in 1520, on account of impediment by affinity, not neutralized by dispensation. He afterwards married the Countess Dowager of Huntly, by whom he had no issue, and then Agnes Somerville (widow of Lord Fleming, who had been assassinated 1st November, 1524), by whom he had a large family, still young when she died. Upon her death he remarried his first wife about 1539, and either by virtue of this second solemnization, after a regular dispensation, or on the plea of ignorance of any legal obstacle to the first ceremony, Norman Leslie, his son by her, was acknowledged as his heir apparent in 1539, and his style in consequence was Master of Rothes. The settlements henceforward were upon male heirs, and he was made proprietor of the estate, reserving his father's liferent. In 1546 he was attainted for murdering Cardinal Beaton in his own castle of St Andrews, and his brother William was also concerned with him. The Earl, who was now married for the fourth time, in 1547, had to obtain a new grant of the estate, which had been forfeited by

his son Norman, and which he got entailed by charter upon Andrew, his eldest son by Agnes Somerville, passing over Norman and his other sons by Margaret Crichton. Norman's turbulent spirit led him to enter the French service, and he fell with great honour in the battle of Cambray, in 1554, in his father's lifetime, without issue by his wife Isabel, daughter of Lord Lindsay. When the Earl was poisoned for not agreeing to bestow the matrimonial crown of Scotland upon Queen Mary's first husband, King Francis II., in 1558, his son Andrew succeeded as fourth Earl according to the entail in the charter of 7th June, 1548. This transaction may partly be explained by observing that, at that period, the Duke of Chatelherault was Regent of Scotland, and on the 16th of the above month, Andrew married Agnes Hamilton, whose father was natural brother of the Regent, and her mother was the Duke's half sister. For further security he procured a decreet-arbitral by Queen Mary, forcing his eldest brother William to renounce all his right and claim to the Earldom, &c., on getting a small portion of the estates,—Remarks, p. 178—and he obtained a ratification of his succession by Parliament in 1567. His great-grandson, John, sixth Earl, was created Duke of Rothes in 1680, with remainder to the heirs male of his body, which title, as he never had any sons, died with him next year. Previously, however, foreseeing that he was to have no family, except his two daughters, he got a charter, in 1663, settling the Earldom in such a case upon them and their issue, and afterwards upon his sisters and their issue, then upon his collateral heir male, heirs male whatsoever, and heirs and assigns whatsoever, with the original precedency. This was ratified by Parliament,

9th October, and after his own posterity the remainder is to the other heirs male of tailzie, provision, and assignees, mentioned in the charter. In consequence, the title has since passed through the families of Hamilton and Evelyn to the present Earl, whose father's name was Gwyther.

I shall be more brief in referring to modern instances of this species of settlement. The title of Lord Balmerinoch was conferred, in 1603, on Sir James Elphinston, with remainder to the heirs male of tailzie and provision in his settlement of the lands of Barnton, and Sir James, his son, by his second wife, was created Lord Coupar, with remainder (after the heirs male of his body) to his father, and his heirs male and of entail of Balumby, which ultimately merged in Barnton. In both these entails in 1597 and 1602, which regulated the descent of the Peerages, Lord Balmerinoch's collateral heirs male are next in order after the heirs male of his own body. The titles were united in the sixth Lord Balmerinoch, well known for his intrepid conduct when he was tried and beheaded for adherence to the ancient dynasty in 1746. He had no issue, and the male posterity of the first Lord being exhausted, the heir male collateral appears to be Lord Elphinston, who, being a remainder man in the entails to which the patent refers, has a claim to the titles independent of the forfeiture.

The titles of Viscount of Lauderdale, 1616; Lord Ramsay of Melrose, 1618; Strathern and Menteith, 1631, require no particular notice, as the former has descended regularly with the Lordship of Thirlstane, and the two latter have been annulled.

The heirs male of the body of Thomas, Viscount Dupplin, having continued down to the present Earl

of Kinnoull, the import of the entail to that Earldom and Viscounty has never come farther into operation.

But the Earldom and Viscounty of Seafield, by failure of the heirs male of the body of the first Earl of Finlater and Seafield, have now, by a similar entail, devolved with the lands upon the heir general, Sir Lewis Alexander Grant.

The Earldom of Balcarres has descended regularly in the male line from the first Earl, so that the singular destination to heirs male of entail and provision expressed, *or to be expressed*, has hitherto been a dead letter.

The Marquisate of Lothian also having continued in the male descendants of the first Marquis, there has been no opening to the second class, the heirs of entail.

The Earldom of Hyndford, since 1817, when the last male descendant of the first Earl died, has remained dormant. The limitation being to heirs male and of entail succeeding to him in his lands, and the settlement of the estates having now conveyed it to the heir general, a question arises similar to that of the Viscounty of Oxfurd, which was partly discussed in 1735.

The Earldom of March, as the heirs male of the body of the first Earl are extinct, is also affected by the view that is taken of such a clause, and the Earldom of Cromarty, had it not been forfeited, would have been involved in the discussion.

It seems a very minute point on which to suppose the right to a Peerage to turn, viz. Whether the copulative conjunction "and" has been used or not? Whether the limitation is to heirs male of entail, or to heirs male *and* of entail? Whether the latter is indivi-

sible, or two separate phrases. My object here being merely to make each patent throw light upon the others, I shall give the full details of the case of Oxfurd separately. The destination is to heirs male of entail and provision whatever, and the decision that the heir male "had not made out any right," is understood to have been on the ground that he was not heir of entail. The case of the heir of entail was not brought forward, probably because he was not the heir male. The heir male appears to have got a scrimp measure of justice, in being cut off from the Peerage by a deed, which, being executed by the second Viscount, ought not to have affected the patent under any circumstances, but, especially when, by the death of the maker, before it was produced for sanction, the succession had actually opened to him.

The succession to the Viscounty of Stormont is a valuable precedent, as it proves that "heirs male and of entail" need not be heirs male at all, if they only be males and heirs of entail; but where they are really heirs male they are collaterals. According to that rule the Earldom of March, by the entail of the Lordship of Nidpath, to which it is indissolubly annexed, has devolved on the Earl of Wemyss, notwithstanding his descent through a female. But her male posterity (as well as that of various other female nominees) are called to the succession before the ancestor of the present Marquis of Queensberry, who is now the heir male collateral; not, however, before his ancestor's wife, who was a nearer relation to the entailer and entailee, and through whom he derives a prior claim to that of his male descent.

I know not when the entail of the Hyndford estates was made, but as they have reverted to the heir gene-

ral of the third Earl, after having gone through the male heirs of two junior branches of Earls, the present possessor appears to have a claim to the Peerage.

The attainder of the Earl of Cromarty, in 1746, having broke the entail, it would be a question, were the forfeiture rescinded, whether or not the old settlements were actually upon male heirs.

It thus appears, therefore, that the Earl of Morton, in 1589, is styled heir male and of tailzie, without being truly heir male; that the Earl of Angus, at the same time, is designed in the same way, although there was no entail, but only a general settlement upon a previous Earl's heirs male and his assigns whatever; that the Earl of Errol got a ratification, in 1701, to heirs male and of tailzie, by which settlement his daughter's posterity now hold the Earldom; that the Earl of Rothes, in 1663, got a ratification, after his own female posterity, to his *other* heirs male of tailzie, provision, and assignees in his charter; that the claimant to the Viscounty of Oxfurd was thrown out, because, though he was the acknowledged heir male, he was not heir of entail; and, lastly, that the Viscounty of Stormont, destined to heirs male and of entail, has descended to successive heirs of entail, who had no pretensions to be heirs male. The entail rules the succession; but, except in the case of Balcarres, in which the power of afterwards making an entail is expressly given, the settlements, at the time of granting the patent, appear properly to fix the order of the heirs, unless the Crown has distinctly consented to its being new modelled, so as to change the destination of the Peerage. It is only in old cases, however, that this is of consequence, as it must be observed, that although, in former times, entails were alterable by

every successive heir as often as they pleased, or could get charters from the Crown, yet, since 1685, no change can be made so as to affect vested rights.

### EARL OF MORTON.

The history of this Earldom is so remarkable, that I am induced to attempt to explain it.

James Douglas, Lord Dalkeith, who had married Joan, widow of the Earl of Angus, and daughter of his granduncle, King James I., obtained from his brother-in-law, James II., a grant of the Earldom of Morton, 14th March, 1457-8, which, judging by the old investitures, was probably to heirs male. His grandson, James the *daft*, third Earl, was married to a natural daughter of King James IV., by whom he had only three daughters. He, therefore, allowed his title and estates to be entailed on Sir Robert Douglas of Lochleven, one of the most remote, but the most powerful, branches of his own family, 17th October, 1540. The inducement to this step most likely was, that Sir Robert's mother, Elizabeth, and the Countess's mother, Mary Boyd, were sisters. And King James V. may have directed or consented to the transaction, because Sir Robert had relieved him by marrying Margaret Erskine, his violent mistress, who had borne him James Stewart (the future Regent Earl of Moray), and who afterwards behaved so tyrannically to Queen Mary, when intrusted to her custody in Lochleven Castle, that her own son, Sir George Douglas, helped her to escape from the cruelty of his mother and of the Regent, who was half-brother both to the Queen and to him.

As the power to choose an heir seems to have been

procured by the Earl and Countess, this predilection is the more extraordinary from their having passed over their own daughters as well as the Earl's brother and nephews. But after the death of King James V., in 1542, that settlement was upset, and a totally different series of heirs appointed. The Regent for the infant Queen Mary was James, second Earl of Arran, afterwards Duke of Chatelherault, who happened to be husband of Margaret, the Earl of Morton's eldest daughter. He and his wife being disinterestedly not desirous of the title and estates for themselves, got them settled primarily on James Douglas, husband of Elizabeth, the Earl of Morton's youngest daughter. He was nephew of Archibald, Earl of Angus, who had formerly been husband of Margaret Tudor, Queen-dowager of James IV., and had lately been restored to all his influence by the reversal of the attainder, which the hatred of the late King had passed against him and his family in 1528, since when they had been in banishment in England. The remainders in the entail were to James and Elizabeth, and the longest liver of them, and the heirs male between them; then to David, elder brother of James; George, father of James; Archibald, Earl of Angus; Richard, brother of the Earl of Morton, the granter, and several other Douglasses and the heirs male of their bodies respectively (omitting entirely Sir Robert Douglas of Lochleven), 22d April, 1543. James thus became Master of Morton, as heir apparent to his father-in-law, whom he succeeded, as fourth Earl of Morton, before September, 1547. This personage is well known as the powerful and ambitious Regent Morton, to which office he was appointed in 1572. He resigned the Regency in 1578—obtained an act of full approbation

and ample pardon in March, which was ratified, 25th July, 1578; but, after all, he was tried, 1st June, 1581, as an accessary to the murder of his cousin, King Henry (Darnley), the plot for which he had refused to concur in, but had not disclosed, and was beheaded next day by the machine called the Maiden, which he himself had introduced, but which had not yet been used. He never had any family by his wife; but after having had the settlement in his favour ratified by the Duke of Chatelherault, his wife, and son, in 1560, he got a new entail, 17th October, 1564, while he was Chancellor. The limitations were to himself and his spouse, and the survivor and the heirs male born to them; then to the heirs male of his own body,—Archibald, Earl of Angus (his nephew),—William Douglas, of Lochleven,—Francis Douglas, of Longniddry,—William Douglas, of Whittingham,—William Douglas, son of the deceased Richard Douglas, brother of the late Earl of Morton,—James Douglas, brother of the said William,—and the heirs male of their bodies successively; whom all failing, to the Earl's nearest legitimate heirs male whatever, ratified by Parliament, 19th April, 1567. Here the rightful heirs male, the nephews of the daft Earl, are hopelessly postponed; and Lochleven, probably through the interest of his half-brother, the Earl of Moray, *then in high favour* with his half-sister, the Queen, secured this near place in the succession. Thus the last were called first, and the first last. The fourth Earl's execution and attainder conveyed the honours and estates to King James VI., who immediately, 5th June, 1581, granted them to Lord Maxwell, the son of the third Earl's second daughter, Beatrix, of whom no notice had hitherto been taken, and his patent con-

ferred the original precedency of 1458. But on the triumphant return of the banished Lords, the re-habilitation of the Regent Morton deprived him of his Earldom, which thereby devolved upon the next heir of entail, the Earl of Angus, whose sister was his wife. On his death, in 1588, followed by that of his infant son in 1589, William Douglas, of Lochleven, became sixth Earl, and had a charter from the Crown, 20th June, ratifying the right of succession. His grandson, William, seventh Earl, who was High-Treasurer of Scotland, and K. G. in England, got a charter of the Earldom in 1638.

At the commencement of the Civil War, he was one of the richest and greatest subjects in the kingdom; but his zeal in supporting King Charles I. irretrievably injured his fortune. He sold lands to the amount of L.100,000 Scots of annual rent, including Dalkeith, which gave title to his eldest son, and which the Earl of Buccleuch bought in 1642. In 1672 his grandson, William, ninth Earl, and Charles, Lord Aberdour, his eldest son, granted a renunciation of the title of Dalkeith to James, Duke of Buccleuch and Monmouth, who had been created Duke of Buccleuch and Earl of Dalkeith, 20th April, 1663, the day of his marriage with Anne, Countess of Buccleuch. William, ninth Earl, dying without surviving issue in 1681, the title and estates went to his uncle, whom the present and seventeenth Earl represents in the male line. But it may be observed, that the ninth Earl had a sister, Lady Mary, who became his heir general, and, by Sir Donald Macdonald, third Baronet of Sleat, is ancestrix of Lord Macdonald.

### VISCOUNT OF STORMONT.

David, Lord Scone, was created Viscount of Stormont, 16th August, 1621, with remainder to the heirs male of his body; which failing, to his heirs male and of entail, bearing the name and arms of Murray, contained in his infeftment of the Lordship of Scone. He never had any family; and on referring, therefore, for a description of the heirs to the said Lordship and Peerage of Scone, it turns out to be a most whimsical series, appointed in 1616. The first nominee, Sir Andrew Murray, of Balvaird, was his nephew and heir male; the second, Sir Mungo Murray, of Drumcairn (fourth son of John, first Earl of Tullibardine), though a distant male relation, is only selected as having married his *eldest* niece; the third, Sir John Murray, of Lochmaben, a great favourite at Court (eighth son of the Cockpool family, and afterwards Earl of Annandale), was of no traceable connexion whatever; the fourth, Gilbert Murray, eldest son of David Murray, of Balgony, and the fifth, Andrew, the second son of the said David, were his next heirs male, successively, after his nephew; and the sixth and last, William, eldest son of Sir William Murray, of Clermont, was another stranger Murray, picked out of a different family from any of the preceding, his only connexion appearing to be, that he was grandson of the celebrated Dame Grizel Betoun, Lady Buccleuch, and thus was second cousin to Elizabeth Betoun, the Viscount's barren wife. It is remarkable that, excepting in the instance of his nephew, every one in the above fanciful selection has brothers

omitted out of the entail. After he had been raised to the Viscounty, and had succeeded to the family estate, by the death of his nephew in 1624, without issue, he altered the entail of the Lordship of Scone, 26th October, 1625, leaving it first to No. 2 in the deed of 1616, next to No. 3, and then to No. 5, passing over No. 4, although he, by decease of the nephew, had now become his nearest heir male. He thus divested the whole series of the character of heirs male, so that none of them could succeed but as heirs of entail. The Viscount dying without issue in 1631, he was succeeded by his nephew-in-law, Mungo, second Viscount, who having likewise no family, at his decease, in 1642, the next heir was James, second Earl of Annandale, the son of No. 3, who also having no children, at his death in 1658, the Peerage and estate devolved upon David, second Lord Balvaird, the son of No. 5. As his father's elder brother, Gilbert, the disinherited heir of the family, had alienated his estate of Bin to his third brother, Mr William, in 1635, and no trace of him appears afterwards, probably the above David, who was son of Gilbert's next brother (Andrew, first Lord Balvaird), was by this time head of the family, and collateral heir male of the first Viscount. It was, however, not as his nearest male relation, but as heir of entail, or singular successor, that his father had inherited estates on the death of the first and second Viscounts, and that he himself became heir to the third Viscount in 1658, and afterwards got his right to the estate of Scone set aside on account of debt, in 1662. It may be a question—whether the Peerage came by the first or second entail, as he appears to have been heir under either — whether the first Viscount had the power, subsequently, to dispossess his heir male of

the place in the succession, secured to him by the patent and the previous entail to which it referred.

The present Earl of Mansfield, who is eighth Viscount of Stormont, is heir-male of the body of the fourth Viscount, and it is a curious coincidence, that, although the succession by the entail was the only connexion between them when his ancestor became heir to the second Earl of Annandale, yet, since that time, by two successive marriages, the family have become representatives of that Earl's widow, who soon followed the destination of his Viscounty by marrying his successor, and they are also heirs general to that Earl and the Cockpool family by descent from her son's wife, Marjory Scott, the next Viscountess Stormont, who (through the Griersons of Lag) was sprung from Margaret Murray, eldest daughter and heir of line of Sir James Murray of Cockpool, elder brother to the first Earl.

Andrew, first Lord Balvaird, so created, in 1641, with remainder to his heirs male, had been minister of Abdie, and must have been an especial favourite of the first Viscount, who gave him the family estate, besides making him ultimate heir to all his acquisitions. Immediately after he succeeded his said cousin, in 1632, he made as capricious a settlement as those of the Viscount himself. After the heirs male of his own body he first appointed as his successor, Mungo, then Viscount Stormont, a very distant connexion, and the heirs-male of his body by his wife, the disinherited heiress of Balvaird, then his own immediate younger brother, William, then his disinherited elder brother, Gilbert Murray of Bin, then Sir William Murray of Clermont, who was no relation, and then his own youngest brother, David, thus interweaving strangers

and brothers alternately. As the issue male of his three brothers appears long ago to have failed, the Baronets of Clermont, though a distinct race, appear to be the heirs after the present family.

### VISCOUNT OF OXFURD.

This is a case of considerable importance, as there are other patents which resemble it closely. In 1661, the Peerage was granted to Sir James Macgill and his heirs male of entail and provision whatever. In 1706, on the death of his only son, the second Viscount, without issue male, the title dropped; but in 1733, his grandson, by his eldest daughter, Robert Maitland Macgill, who had long called himself Viscount of Oxfurd, appeared and voted at an election, as having succeeded to the estates, and James Macgill of Rankeillor, descended from the first Viscount's granduncle, also came forward and assumed the title as collateral heir male, but he was not received. This was the first occurrence of two persons answering to the same title. Each protested that the other had no right, and gave in his own grounds of claim. As it was held that there could not be *two Peers at once under one patent*, the clerks leant to the first usurper. The latter, therefore, in 1734, presented a petition to have his case investigated, but the House of Lords, in 1735, decided that he had not made out any right. Lord Hailes remarks that this was unexceptionably just, as, although "the claimant had in his person *one half* of the description in the limitation, being the heir male, he had not *the other half*, Robert Macgill being the heir of entail and provision. The former seems never to have pursued his own claim, but to have given up the title as, indeed,

according to Lord Hailes's view, he had no more right than his competitor.

I am not aware of the exact ground on which the House of Lords dismissed James Macgill's claim, but if, as he asserts, the first Viscount made an entail of his estate upon heirs male in 1662, almost cotemporary with the creation of the Peerage, it seems a great hardship that a charter changing the destination of the lands in favour of females, executed by his son, the second Viscount, should have the effect of incidentally causing the heir male also to lose the title, although such an event could not have been in the contemplation of the Crown. The heir male contended with great reason, that the Viscount had no power to alter the course of succession of the said titles of honour established by the patent, and that the resignation was not made in the hands of the Crown, but in the hands of the Barons of Exchequer only, and not till after the death of Robert, the maker of the said tailzie. As this deed, even if not liable to these serious objections, but valid in all respects, should not have affected the descent of the Peerage, the only point fairly open to investigation regarded the settlements of the patentee. If the heirs he provided to the estate, tallied with the terms of the patent he had obtained, the right of the heir male to the title should not have been defeasible *by any deed of his successor*, unless with the express sanction of the Crown, which is not even pretended, and could not be given after the Union.

The result, however, seems to have been, that the first Viscount, who was a lawyer and a judge, in procuring a remainder, clogged with a double condition, has outwitted himself, or, at least, left it in the power of his son to frustrate his plans, so that the qualifica-

tion of the heirs being capable of being cut in two, without any chance of re-union, the honour he had acquired has been prematurely nipped by the irregular act of his heir, when he probably had intended it to flourish for ages.

### EARL OF MARCH.

The Earldom of March was created 20th April, 1697, with remainder to the heirs male of the body of the first Earl, whom failing, to his other heirs male and of entail contained in his infeftment of the lands and lordship of Neidpath. In 1810, on the death of the fourth Duke of Queensberry, the heirs male of the body failed, and the estate went to the Earl of Wemyss as heir male of the body of the only sister of the first Earl of March, by failure of the male posterity of two intermediate collateral heirs male. According to the principle of the succession to the Viscounty of Stormont, the Earl of Wemyss has a right to the title, because the second and third Viscounts were no more heirs male to the first Viscount than he to the first Earl of March.

After going through the male issue of all but the youngest of the intervening female relations in succession, the destination ultimately is to the heirs male of the body of Sir James Douglas, of Kelhead, who, had he not been postponed, would have come in at once as heir male collateral. His descendant is now Marquis of Queensberry, as collateral heir male of the last Duke. But what proves, if possible, even more decisively, that he was not intended to succeed to the Earldom of March as heir male, out of the order established by the entail is, that the male issue of the body

of his wife, Lady Catherine Douglas, are previously called to the succession in her place in the family, and solely by virtue of their descent from her. Thus this later appointment of the heirs male of *his* body turns out to be a nullity, as he never had any other wife; but Lady Catherine and her issue male have a prior rank.

### EARL AND DUKE OF LENNOX.

Mr Riddell having ably explained the state of the "Question of the Representation of the Ancient Earls of Lennox," from p. 93 of "Tracts, Legal and Historical," down to 111, and, again, still more fully, in the "Answer to the Partition of the History of the Lennox," I shall limit my observations on this head to a later period.

I shall only at present remark, that in p. 48 of the latter work, he points out that Matthew, second Earl of Lennox, of the Stewarts, sued for brieves to be retoured heir "be the deceise of unquhill Erle of Levenax," in 1507, and that he supposes this service was to a remote ancestor, Earl *Duncan*. But if the Christian name be omitted, it would rather appear that his object was to enter heir to his father, *John*, who had been himself Earl of Lennox, and was the last Earl, having died in 1495. He was not immediately served heir to his father in the Earldom, his charter of which was not till 25th January, 1511.

However the Earldom was acquired by this family, the claim having come through female descent, the right of inheritance was continued to heirs general. Matthew, second Earl, fell at Flodden in 1513, his son, John, third Earl, was slain after a skirmish in

1526; and his son, Matthew, fourth Earl, while Regent of Scotland, was mortally wounded at the surprise of Stirling in 1571. By Margaret Douglas, sole heir of Archibald, Earl of Angus, by his wife, Margaret Tudor, Queen-dowager of King James IV., and sister of King Henry VIII., he had two sons. His eldest son, Lord Darnley, King Henry by courtesy, from having been second husband to Queen Mary, his cousin-german of the half-blood, was murdered in his father's lifetime, in 1567, leaving a son, afterwards King James VI.; so that, in 1571, the title fell to the Crown. During the Regency of the Earl of Mar, Charles Stewart, the King's uncle, only surviving son of the fourth Earl, got a grant of the title and estates to himself and "*his heirs*," 18th April, 1572. He died in 1576, leaving, by Elizabeth Cavendish,* an infant child, the unfortunate Lady Arabella, the victim of her relation to royalty, whom her natural guardian, King James, following the evil example of his Tudor relations, and possibly listening to the fears and jealousies of Elizabeth, persecuted for having that very blood in her veins. The first and only act of oppression to be noticed here is, that one of the earliest acts of the King's own government was to deprive her of the succession to the Earldom of Lennox, which he resumed under pretence of "its having reverted, on the death of her father, throw default of airis maill in his personne," and the grant having been revoked as made in his Majesty's nonage. It was bestowed on Robert Stewart, Bishop of Caithness, granduncle to her and to the King, 16th June, 1578, with remainder to heirs

* The Cavendishes *having no royal blood*, found this alliance a step to the Peerage while Arabella had a gleam of favour.

male of the body. The Bishop may have facilitated the arrangement, by having joined the Earl of Morton's party, and married the daughter of his rival, the Chancellor, Earl of Athol (widow of Lord Lovat, who died, 1st January, 1576). The Bishop was old when he married, and his wife's age must have been very disproportionate, as she was great-granddaughter to his uncle. The King's French cousin, Esme Stewart, Lord D'Aubigny, the Bishop's nephew, now coming into favour, the King, on his "voluntar dimissioun" of the Earldom to him, conferred, in lieu of it, the Earldom of March. The negotiations are fully detailed in Andrew Stewart's "Genealogical History of the Stewarts," p. 244–259; and it is only remarkable that so eminent a genealogist should, by the King's loose mis-statement, and by the failure in his searches, have been misled into saying, that "that first grant of the Earldom of Lennox to Esme Stewart remains yet to be discovered," when it would have helped his argument so much to know that it is actually in the record of the Great Seal, B. xxxv. No. 150, dated 5th March, 1579-80.* The remainder is to his heirs male legitimately born, or to be born, of his body; whom failing, to return to the King. The grant of the Earldom of March to his uncle was made on the same day under the Privy Seal, but was not confirmed under the Great Seal till 5th October, 1582, when the limitation was to heirs male of his body. His dissolute wife, soon after, forsook and divorced him, and he died childless in 1586.

In the very long list of King James's favourites, Esme

* Moysie's Memoirs, p. 26, says ane litle space after the 15th February, and before the 16th March.

was, at least, *one* of the most respectable, and enjoyed the real regard of his zealous patron. He was created Duke of Lennox by a patent (5th August, 1581), which requires the more notice, from the late Earl of Darnley having upon it founded a claim to the Dukedom, because, no remainders being specified, and no heirs appointed, it was presumed to include heirs general. The document is given at length in p. 255 of Andrew Stewart's History, and in Appendix xxx. of Sir Robert Gordon's Brief in the Sutherland case. The reasons for having conferred the Earldom on Esme are stated to be, " His Majestie having still ane earnest desire of the standing of the said hous of Lennox in the possession of his next cousinges maill of the same hous and blude." This does not look at all as if the King contemplated female succession; and the next statement, that he, therefore, had given the Earldom to Esme and his " airis," though apparently countenancing the idea, does not do so in reality, because the charter was, as I have already shown, to heirs male of his body; and it is thus only another instance of the *inaccuracy of references*, in contradistinction to *remainders constituted for the first time in a settlement.* This appears the more strongly from the lands of the Earldom having been afterwards erected into a Dukedom, with limitation to the heirs male of his body; whom failing, to return to the Crown, by charter, dated 13th December, 1581. Jealousy of the French favourite soon drove the Duke back to France, where disappointment quickly ended his days, in 1583. His eldest son, Ludovick, second Duke, got a charter of the Earldom, which had been erected into a Dukedom, with other lands, to his heirs male whatever, 31st July, 1583; but, in reality, this

did not open the succession more than before, as the King was, after his brother, his nearest heir male. In England he was made Duke of Richmond, and K.G. He died in 1624, without issue by any of his three wives, the last of whom, though by birth a Howard, and, by her second husband, Countess of Hertford, had first married Henry Pranel, citizen and vintner of London. His only brother, Esme, became third Duke of Lennox and K. G., but died in less than six months. His son, James, fourth Duke, was created Duke of Richmond and K. G., and died of the effects of grief for King Charles's martyrdom, in 1655. He married Mary,* only daughter of George Villiers, Duke of Buckingham, to whom that Dukedom was granted in remainder. His only son, Esme, fifth Duke, died of a surfeit of fruit, under age, in 1660, leaving an only sister, who married Richard Butler, Earl of Arran, in 1664, and died, without issue, in 1667. During the seven years of her survival she ought to have been Duchess of Lennox if the title had been descendible to females; but her cousin-german, Charles, Earl of Lichfield, whose father had been killed at Edgehill in 1642, succeeded her brother, in 1660, as sixth Duke, and was also Duke of Richmond and K. G. He died on his embassy to Denmark in 1672, without issue by his three wives, the last of whom was the celebrated beauty, Frances Stewart, who preferred the Duke, to the King with the chance of a preliminary divorce. The King succeeded to the estate as heir male general, under the charter of 1583. But the Duke's sister, Catherine, Lady Ibracan, became heir general of the family, and succeeded to the title of Baroness Clifton,

* She had another husband before and a third after him.

as representative of Catherine, the second Duke's wife, only child of Gervase, Lord Clifton, who was so created in 1608, on account of his daughter's marriage, and who committed suicide in October, 1618. Her granddaughter, and heir, married, in 1713, John Bligh, who was in consequence created Earl of Darnley, in Ireland, in 1722, and the Earldom and Barony have accompanied each other down to the present day.

### EARL OF CRAWFORD.

Sir David Lindsay, of Glenesk, succeeded as heir male to his cousin, Sir James Lindsay, of Crawford, in 1397; and having married Catherine, daughter of King Robert II., was, by his brother-in-law, Robert III., created Earl of Crawford in 1398. The family settlements appear to have been upon males exclusively. His son, the second Earl, was slain in 1446, in a feud with the Ogilvies, assisted by the Earl of Huntly; but his son, the third Earl, gained the battle. He was nicknamed Earl Beardy, from having said of the King's favourites, that he would beard the best of them. He thought himself so powerful, that having entered into a league with the Earls of Ross and Douglas, he took up arms to avenge the death of the latter, and was defeated by the Earl of Huntly in 1452. He was forfeited; but on a most humiliating submission, he was pardoned, entertained the King, and died of fever in September, 1453. His son, David, fourth Earl, was created Duke of Montrose for his loyalty, by King James III., in 1488, immediately before his death at Bannockburn. This brought him into disgrace with King James IV., who deprived him of the title, but afterwards restored it with restriction to his life. His

son, the fifth Earl, succeeded in 1495, and was slain at Flodden in 1513, leaving no issue but several sisters. The Earldom, however, went to their uncle, Alexander, sixth Earl, who did not long survive. Dying in 1517, his son, David, seventh Earl, succeeded. He had a son, Alexander, styled the wicked Master of Crawford, who had a charter of the Earldom in 1527. He and his brother were disinherited for laying violent hands on their father, whom they imprisoned and fettered, while they seized his houses and revenues. The Earl adopted, as heir, his nearest male relation, Sir David Lindsay, of Edzell, and the heirs male of his body; then his three brothers; and, ultimately, his heirs male whatever, carrying the name and arms of Lindsay, 16th October, 1541. The Master was killed in December, 1541, leaving two sons, David and Alexander; and the Earl dying next year, Sir David succeeded as eighth Earl. He had been long married to Janet, daughter of Lord Gray, who had been twice a widow, and who bore him no children. In a rash fit of romantic generosity, he conveyed the right of succession, after his own liferent, to David, son of the Master, and grandson of his predecessor, on condition that, failing heirs male of his body, the title and estates should return to the heirs of entail, which the charters of 1541 had provided, 2d May, 1546. This restoration may be traced to David's marriage (more prudent than honourable) with the natural daughter of Cardinal Betoun, a few days before. The Earl himself, being now free, married the widow of James, Master of Ogilvy, slain at Pinkie in September, 1547, and by her had five sons, from the second of whom descends the Earl of Balcarres. At his death, however, in 1558, the Earldom went to his

adopted heir and assignee, David, ninth Earl, whose succession restored the old line. Next year he ungratefully attempted to cut off the remote chance of his benefactor's family inheriting after the male issue of his three sons and of himself; but this was rectified in 1565 by another charter, ratified by Parliament in 1567. His son, the tenth Earl, and the Chancellor Lord Glammis, with their respective followers, having had a scuffle at Stirling, in which the latter was slain, a long contention ensued; and the English envoy, in 1583, reports his living and estate much ruined, and his power "tyed shorte by the feude." He narrowly escaped forfeiture by joining the Popish faction. His son succeeded in 1607, and dying, without issue, in 1621, his uncle, Henry, who, as adopted heir, had taken the name of Charteris, of Kinfauns, became twelfth Earl. He had been prosecuted for invading Robert Cochrane, of Pitfour, and turning out of doors himself, his wife, and nine children, in 1592. He died in 1623. His eldest son, George, thirteenth Earl, did not long survive; and his brother, Ludovick, was fourteenth Earl, in 1641. He was a staunch and valiant loyalist in the Civil War, and, in 1644, was forfeited by Parliament, which transferred the title to John, first Earl of Lindsay, his tenth cousin, who was not even descended from the first Earl, but from his uncle, and had no pretensions to the Earldom. He was taken prisoner soon after, and prevailed upon to save his life by surrendering the title to the Earl of Lindsay, provided that he had no heirs male of his own body, and that, after the male descendants of that Earl, it should revert to his own heirs male. He was released by the Marquis of Montrose next year, and at last went to Spain, where he had obtained high distinc-

tion by previous service, and there ended his eventful life. Four years after getting the title, the new Earl of Crawford-Lindsay (who was Lord High Treasurer of Scotland) made a new settlement to bring in his own heirs-general in preference to the heirs-male under the old patent; but this charter, 1st March, 1648, appears insufficient to carry the honours, as not having proceeded on proper powers. Thinking that Parliament were going too far, the Treasurer wished to stop, got into disgrace, and became a persecuted royalist. When King Charles II. was restored, in 1660, he got into great favour, regained the Treasurership, and always continued in high esteem. George, third Lord Spynie, the grandson of Earl Ludovick's uncle, and a ruined royalist, was now served heir male of the old family, in 1666; but his death, without issue, in 1672, prevented any trial of his rights. On this event all the issue male of the ninth Earl became extinct; and John Lindsay, of Edzell, the male descendant of the eighth Earl, put in his claim, according to the settlements of 1546 and 1565, and petitioned that the whole transactions by which the title had been conveyed to a new race should be annulled, not only because of their own special iniquity, but because the whole proceedings of that Parliament had been rescinded. His claim was unanimously admitted in 1685; but the superior interest and connexions of the other party prevailed. The Duke of Queensberry, the King's Commissioner, overturned it by the royal veto, without King James VII.'s authority, for which he was obliged to take out a remission. Such, however, was the effect of this flagrant act of injustice and partiality, committed by an individual in opposition to the sense of the whole Parliament, and against the opinion

and wishes of the King, that the victims of it never recovered their ascertained rights; but falling a prey to oppression, sunk into penury and obscurity. A branch of this family is represented by the Earl of Balcarres, who is now the heir male of the eighth Earl; and, under the patent of 1644, as well as the previous settlements, has a claim of the Earldom of Crawford since the death of the twentieth Earl in 1808, when the whole male descendants of the Earl of Crawford-Lindsay became extinct. Some Irish pretenders have since attempted to prove themselves to be lawfully descended from that Earl in the male line; but the only one who came publicly forward was convicted of forgery in making out his case. As there is a valuable estate, as well as various titles, annexed to the establishment of such a position, it may be supposed that no pains will be spared to make out a pedigree; but the long period of twenty-nine years having now elapsed since 1808, without any credible evidence or unsuspected documents being produced, the nature of these claims may be considered sufficiently indicated.

### EARL OF ATHOL.

John Stewart, created Earl of Athol in 1457, was half-brother to King James II., being eldest son of Sir James Stewart, the Black Knight of Lorn, by Joan Beaufort, Queen-dowager of James I. She was sister of the first and second Dukes of Somerset, and great-aunt to King Henry VII.; and, by the half-blood, she was niece to King Henry IV., and great-niece to King Richard II. This complicated relation to royalty was remotely diffused by her son, the Earl of Athol, who, according to an old pedigree, by Cam-

den, anno 1627, in the British Museum (Harl. MSS., No. 1423), had sixteen daughters. The Earl's father was a handsome younger son, who had no fortune; but when he was taken prisoner, he was "borrowit under the pane of 3000." * After the Queen's death, being at sea, he was seized, and carried to Flanders, and "thar was put to deid, and with him 8 score of Ynglismen," in 1448.*— *Chron. of* JAMES II.

The Earl had previously received from his royal brother a grant of the Lordship of Balveny with his first wife, the heiress of the Douglasses, Dukes of Touraine, and Earls of Douglas, who, by favour of the Pope, had been already married to her cousins, William, eighth Earl, and James, his brother, the ninth and last Earl of Douglas. He had by her (called the Fair Maid of Galloway) only two daughters; but, by his second wife, he had John his son and heir.

The original limitations of the Earldom are unknown; but the Earl got a charter of the Earldom, 18th March, 1480-1, to the heirs male of his body; whom failing, to return to the Crown. His son, John, second Earl, held the title only a few months, and fell at Flodden. John, third Earl, gave the Highland hunting-feast to the Pope's nuncio, which made the first favourable impression upon the Italian, and redeemed Scotland in his opinion. John, the fourth Earl, who was Chancellor, and a man of great importance from his office and estates, as well as from his abilities and intrepidity, was poisoned at an entertainment given by the Earl of Morton, who was accused, as having contrived the plot, which, however, he most solemnly denied. The last Earl, the fifth John in succession, had only four daughters. And as the whole male line failed in him, in 1595, the title re-

turned to the Crown; and King James VI. gave it immediately to John, sixth Lord Innermeath, descended from the uncle of the first Earl, with limitation to the heirs male of his body. He married the widow, and his son, James, by a former wife, the second daughter of his predecessor; but, in 1625, his only son died without issue. William Murray, second Earl of Tullibardine, the husband of the eldest daughter of the fifth Earl, now prevailed on King Charles I. to recognise his claims in right of his wife. He surrendered his own title (with a view to its being continued separate) to his brother, but died before he got the Earldom of Athol. The transaction, however, was completed in 1628-9. His Earldom was transferred to his brother, and the title of Athol was conveyed to his son, John, as if he had succeeded as heir of line to the original Earl, with remainder to his heirs, 17th February, 1629. The King certainly made a mistake in thinking himself bound, in "honor and conscience" to ratify this as a claim of right. It was a pure act of grace; and the new grant reserved his rights as heir general to the first Earl.

His son was created Marquis of Athol, with limitation to the heirs male of his body, in 1676; and his son was created Duke of Athol, with remainder to the heirs of the Marquisite, in 1703. John, the Duke's eldest son, having been killed in battle, in 1709, William, his second son, became heir apparent; but being an adherent of the ancient dynasty, he was forfeited, and set aside, and the title settled upon the third son, James, who accordingly became second Duke in 1724, while his elder brother was in exile till the expedition of 1745; after which, falling sick, he surrendered himself a prisoner, and died in the Tower, in 1746.

The second Duke, by descent from his grandmother (the Marchioness), Lady Amelia Stanley, daughter of the loyal Earl of Derby, at length, in 1736, succeeded to the Lordship of Man, and Peerage of Strange, as heir to her nephew, the tenth Earl. He had no male issue, and his daughter, Lady Charlotte Murray, succeeded to Man and the title of Strange, and she was well known as the Strange Duchess, having, in 1753, married her father's nephew, and heir male, who became third Duke in 1764, notwithstanding the attainder of his father, Lord George, who had been commander-in-chief in the invasion, in 1745, but had fortunately died in 1760, four years before his brother. Their eldest son, the late Duke, was father to the present.

It only remains to remark that, by the patent of the Earldom of Athol, granted in 1629, the title appears to have descended to the second Duke's daughter, and to have been transmitted by her to the present Duke.

### EARL OF STRATHERN, MENTEITH, AND AIRTH.

King Robert II., who had been Earl of Strathern, on his accession to the throne, gave the Earldom to David Stewart, eldest son of his second marriage, before 27th March, 1371. He had a charter of the Earldom, 13th June following, to him and his heirs. He was also created Earl of Caithness. His only child, Eupheme, succeeded to both Earldoms, but resigned the latter to her uncle, Walter, Earl of Athol. She married Sir Patrick Graham, who, in her right, was Earl of Strathern, in 1406, and was treacherously slain by a brother-in-law in 1413. Their son, Malise,

third Earl, was unjustly deprived of his Earldom by King James I., when he assumed the Government, in 1424, upon his return from captivity, and wished to reduce the nobility. The pretence that it was a male fee was notoriously false; but the King gave him a smaller estate, which he erected into the Earldom of Menteith, 6th September, 1427, with limitation to the heirs male of his body. This unjust transaction exasperated his uncle and guardian, Robert Graham, and was made the ostensible cause of the granduncle of the young Earl, the above Walter, Earl of Athol, joining him in the conspiracy to assassinate the King, although he had got a grant of the disputed Earldom to himself for life. But his real object was the *Crown*, to which he pretended as *heir male* of King Robert II.'s second marriage, setting aside the whole of the numerous progeny of Elizabeth Mure, his first wife, as well as his own grandnephew, Malise, who was heir of line of the second wife, Eupheme, Countess-dowager of Moray.

Without dilating on the barbarous murder which ensued in 1437, I go on to state that the Earls of Menteith, from their reduced fortune, and three successive minorities, were not very prominent till William, seventh Earl, Justice-General, and President of the Privy-Council, got himself recognised by service as heir of line to his ancestor, David, 25th August, 1630; and being then in high favour with King Charles I., obtained a restoration and confirmation of the Earldom of Strathern to him and his heirs male and of entail of the Earldom, 31st July, 1631. But too much elated with this acknowledged descent and royal title, he was so ridiculously vain as to boast of having the reddest blood in Scotland. The question, as to the lega-

lity of King Robert II.'s first marriage not having been then, entirely, set at rest by the discovery of the dispensation at the Vatican, the King and some of his Scotch ministers were absurd enough to be alarmed at this insinuation. His retour and patent were both cancelled on the allegation, which the best evidence contradicted, that Earl David had died without issue; and he was arbitrarily deprived of both the Earldoms of Strathern and Menteith, 22d March, 1633. After this second deprivation of the family, a new Peerage was invented to get rid of both the objectionable titles. William, as heir of line, and by right of blood, had a patent, six days afterwards, but dated 21st January preceding, creating him Earl of Airth and Menteith to him and his heirs, with the precedency of 1427. This again opened the succession of this family to females, although the right be founded on an erroneous assertion that Malise's patent was to heirs general.

His eldest son, Lord Kilpont, being assassinated in Montrose's camp, in his father's lifetime, he was succeeded by his grandson, William, who altered his designation by giving Menteith the precedency of Airth. He had no family, and was prevailed on by the third Marquis of Montrose to pass over his sisters and all his near relations, and make an entail on him, they being each twelfth in descent from half-brothers. The Earl was even persuaded to transfer the honours at the same time, 2d May, 1680. But the King, on the Earl's complaints, cancelled the clause as to the titles a few days afterwards. The contract and charter were ratified by Parliament, 6th September, 1681, under protestation by the Earl. The estate accordingly, in 1694, went to the fourth Marquis, afterwards Duke of Montrose, and the claim to the Peerage is vested in

Robert Barclay Allardice, of Urie, heir general of the last Earl's sister.

### EARL OF HUNTLY.

Alexander, son of Alexander Setoun, Lord of Gordoun, by Elizabeth, the heiress of Gordoun, was thrice married. By his first wife, Jean Keith, he had a fortune, but no children; by his second, Giles or Egidia, daughter and heir of Sir John Hay of Tullibody, Knight, he had a son, Alexander, who succeeded to his mother's estate; and by his third, Elizabeth, daughter of William, Lord Crichton, Chancellor of Scotland, he had a son, George. The Chancellor got the estates of Gordon, Huntly, &c. settled by charter, 3d April, 1441, on his grandson, George, and the heirs male of his body, reserving the liferent of Alexander, his son-in-law, who, through his interest, was soon after rewarded, for disinheriting his eldest son, by being created Earl of Huntly. This was before 3d July, 1445, when he was one of the Earls who witnessed the creation of Lord Hamilton; and it must have been some time previous, as the Chancellor was out of office and favour from 1443, when his enemy, the Earl of Douglas, rose to power, till 1446, when these great men were reconciled. On the 15th October, 1446, the charter of 1441 was confirmed, without alteration, to Alexander, now Earl of Huntly. But his charter of the *Earldom of Huntly*, 29th January, 1449-50, was to the heirs of his third marriage. He was accordingly succeeded, in 1470, by his son, George, second Earl, who, next year, divorced his wife, Annabella, daughter of King James I., on pretence of a former contract with Elizabeth, Countess of Murray.

By her, however, he had many lawful children. His eldest son, and heir apparent, Alexander, was contracted by his father to Joan, daughter of John, first Earl of Athol, in 1474, two years before the Earl's last marriage to Lady Elizabeth Hay, whom some writers, contrary not only to fact, but possibility, have alleged to be the mother of the heir. Alexander succeeded his father as third Earl, in 1501, and had a charter of Strathbogy, &c., erecting it into the Earldom of Huntly to him and his heirs, 12th January, 1505-6. This eminent family survived all the rebellions, and forfeitures, and disasters of the stormy times which so long afflicted them and Scotland, and were represented with great power and distinction by the descendants of the third Earl's son (who died before him), through two Earls, three Marquisses, and five Dukes, down to 1836, when, to the great grief of Scotland, and of the Highlands in particular, George the last Duke died, the most popular man of his day. As he had no family, the Dukedom became extinct; but the Marquisate devolved on his father's fourth cousin, George, fifth Earl of Aboyne, now ninth Marquis of Huntly.

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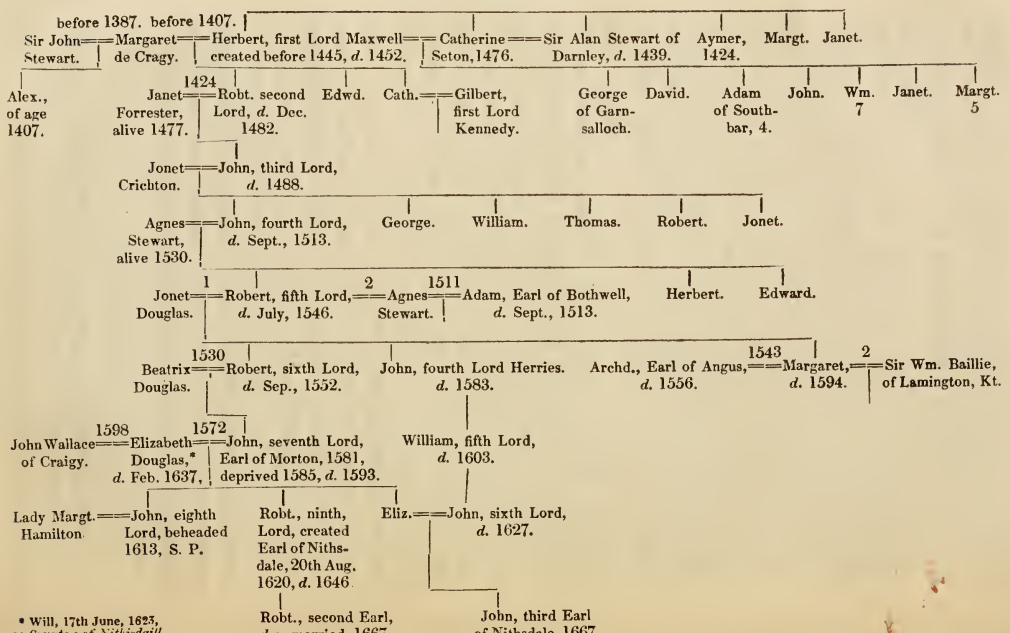
I take this opportunity of correcting some errors in the pedigree of the great Border family of the Lords Maxwell. It is evidently a mistake to make Sir Herbert and Robert be succeeded by Herbert, first Lord, and Robert, second Lord, because there were only two generations, the two Herberts being only one, and the Roberts are also one. But, in part compensation, John, third Lord, requires to be severed into a father and son of that name, as the following table and proofs will show.

# LORDS MAXWELL.




* Will, 17th June, 1623, as *Countess of Nithisdaill.*

## PROOFS NOT IN WOOD'S EDITION OF DOUGLAS'S PEERAGE OF SCOTLAND.

Herbert, 1st Lord Maxwell, was created a Peer before 28th June, 1445, when, as a Lord of Parliament, he witnessed the charter of creation of Lord Hamilton. —Acts of Parliament, vol. ii., p. 59.

Robert, second Lord Maxwell, granted a charter to his step-mother, Dom. Katherine de Seytoun, 20th March, 1456; confirmed by charter under the Great Seal, 12th June, 1475. John, Lord Darnlee, granted a charter to Michael de Hamilton of Bathkat, 19th February, 1467, which was witnessed by George de Maxwell de Garnsallow, and Adam Maxwell, *his brothers;* confirmed 20th June, 1489. The same John, Earl of Lennox, gave a charter to Sir Thomas Stewart of Minto, 16th August, 1477; also witnessed by his brothers, George and Adam; confirmed 25th June, 1489.

John, third Lord Maxwell, had a charter, as heir apparent to his father, of the Barony of Maxwell, &c., 14th February, 1477-8, reserving liferent to his father, Robert, Lord Maxwell, and her terce to Jonet, spouse of the said Robert. He was still heir apparent to his father, Robert, Lord Maxwell, 12th December, 1482, but was himself Lord Maxwell on the 27th March, 1482-3. John Maxwell, steward of Ananderdale, gave his bond to Thomas, Bishop of Aberdeen, 28th January, 1479.

cta Audit. om.

John, fourth Lord Maxwell, nevo (grandson) and are of umquhile Robert, Lord Maxwell, 31st January, 1488-9. John, umquhile Lord Maxwell's bond to the

cta Dom. ncilii.

Bishop of Aberdeen, 3d February, 1488-9. John, Lord Maxwell, sone and are to umquhile John, Lord Maxwell, to pay L.500 to John, Lord Carlile, for the marriage of his sister Jonet to William Carlile, are to the said Lord Carlile, 7th February, 1488-9. William Maxwell, brother to the Lord Maxwell, 21st October, 1493. Thomas and Robert Maxwell, both witness a charter by their brother, John, Lord Maxwell, to William Maxwell of Teling, Knight, 13th October, 1505; confirmed 14th November. Acta Dom Concilii.

EARLDOM OF NEWBURGH.

This Peerage is destined to heirs general, and has already passed through a female. As the crotchet, about the whole blood, is at length exploded, and the only other pretence, on which the family, who have now assumed the title, can found a claim is, that the elder line are aliens, I shall state a simple question connected with this succession:—I have only to premise, that in Scotland the custom is, that the eldest daughter has a preference over her sisters, with respect to a Peerage, similar to that of the eldest son over his brothers. If, in a case of attainder, the title cannot be assumed by, or granted to one of an unforfeited, but more remote branch, *while any of the forfeited line exists*, because they may be restored—can a more distant branch supersede a prior series of heirs, merely on the ground that, when the succession opens to them, they happen to be aliens, yet not beyond the reach of naturalization? Is the ban of alienship *more* severe and insuperable than forfeiture?

In case it should be supposed that the irregularities I have adverted to, in the descent of some of the titles of the Scotch Peers, are confined solely to that illustrious body, I shall here shortly touch upon a few English cases somewhat similar :—The Earldom of Devon has been already mentioned. It came to the Courtenays by an heiress above five centuries ago, and has since been restricted to males, twice passing over females.

The Earldom of Arundel, William de Albini obtained on his marriage with Queen Adeliza, the childless widow of King Henry I. Vincent proves that it was not his *son*, William, second Earl (as Dugdale represents it), but his *grandson*, William, third Earl, who was father to the two last Earls, and to the four coheiresses of their youngest brother. Of them, Amabel, or Mabel, was the eldest, and, in the partition, her husband, Robert de Tatshall, a great Baron of Lincolnshire, got Buckenham the original Albini estate in Norfolk, and, as was afterwards proved, half the right of being butler to the King at the Coronation. He had also the custody of the Castle of Lincoln in her right, and though their male line failed in the fourth generation, their heirs general have always continued. The second sister was Isabel, who married John FitzAlan, Lord of Clun, &c., and both being dead at the partition, their rights went to their son John, a minor, who got the Castle of Arundel as his purparty. Of the other two sisters it is not my purpose to treat. But I must proceed to observe, that, at that period, 1244, it was not understood that the tenure of the Castle of Arundel conveyed the Earldom, otherwise Buckenham would not have been considered the capital seat of the family, and, therefore, the inheritance of the eldest par-

titioner. This second John died in 1268, and his son John appears to have been considered as Earl of Arundel (at least, his widow was called Countess of Arundel); but he died a young man of twenty-four, and it was his son, Richard, who, in 1289, was at length completely recognised as Earl of Arundel, in right of his possession of the Castle, rather than by his descent from his great-grandmother, Isabel de Albini. His great-grandson, Richard, tenth Earl, had an only son, Thomas, eleventh Earl, who died without issue, and four daughters, three of whom had families. The eldest, Elizabeth, had four husbands; but was first the wife of Thomas de Moubray, first Duke of Norfolk, well known as having been the Duke, whom King Richard II. banished with the Duke of Hereford, afterwards King Henry IV. By him she had three daughters, of whom two left representatives to share the succession, when Anne, the only daughter of their grand-nephew, John, the fourth and last Duke of the Moubray line, died a child, after having been contracted to Richard, second son of King Edward IV. The elder of these ultimate coheiresses was not, as is sometimes alleged, Margaret, who married Sir Robert Howard, and was mother of John, created Lord Howard by King Edward IV., and Duke of Norfolk by King Richard III., upon the murder of the husband of the young Moubray heiress—the elder was Isabel, who first married Henry, son and heir of William, Lord Ferrers of Groby, and had an only daughter, who carried that title to her husband, Edward Grey, and by him had a son, Sir John, whose widow, Elizabeth, was wife to King Edward IV., and mother to the above victim. But Isabel's second husband, James, Lord Berkeley, having by her four sons, the eldest became senior co-heir

of the Moubrays and Fitz Alans. But by entail of Richard, ninth Earl, in 1347, the Castle of Arundel, and consequently the title of Earl, descended, in 1416, to John Lord Maltravers, grandnephew and heir male of Richard, tenth Earl. His son had a judgment in his favour, 11th Henry VI., and his line continued down to Henry, eighteenth Earl, who died in 1579, leaving only two daughters. The eldest, Joan, Lady Lumley's children, died infants; and Mary, the youngest, finally brought the Earldom to the Howards by marrying Thomas, fourth Duke of Norfolk, who was beheaded, in 1572, for attachment to Mary, Queen of Scotland. Their son, Philip, notwithstanding the attainder, had the title of Arundel on possession of the Castle, according to the above decree, in 1422. Queen Elizabeth also forfeited him in 1589, and he died in the Tower in 1595. His son, Thomas, was restored to the Earldom, and the title is still in his male posterity, but not in his heirs general, Lords Stourton and Petre, who are cut off by another entail. Thus the right heirs have lost this inheritance; first, in the case of the Tatshalls; second, the Moubrays, and, through them, the Berkeleys, rather than the Howards; and, finally, the female representatives of the Howards themselves.

The case of the Barony of Berkeley is also singular. I know not why *Maurice* should have been considered the first Peer of this family, from 1295, though his father, *Thomas*, was also summoned to Parliament, and writs appear to have been directed to both together, from the 2d to the 14th of Edward II. Thomas, fifth Lord, had only a daughter and heir, Elizabeth, who was first wife of Richard Beauchamp, Earl of Warwick, and had three daughters. The Earl struggled

to secure the inheritance to them; but by virtue of the entail on male issue made by the third Lord, 23d Edward III., it went to James (nephew and heir male of Thomas), who became sixth Lord, and married Isabel Moubray, *eldest* daughter of Thomas, first Duke of Norfolk. His son and heir, William, had to maintain the contest against Viscount Lisle, who claimed, as representing the Countess of Warwick's eldest daughter, and whom he slew in battle, in 1469. He had a great accession of fortune afterwards, as co-heir to the Moubrays; and King Richard III. gave him one of their titles, creating him Earl of Nottingham, while he, at the same time, made the other co-heir Duke of Norfolk and Earl Marshal. He soon, however, fled to join the Earl of Richmond, who, as King Henry VII., forfeited his rival, and advanced him successively to be Earl Marshal and Marquis of Berkeley. By his three wives he had no surviving issue. He showed his revenge and contempt for his brother's mean alliance, his excessive pride, and his gratitude to the King, by sacrificing his name and family in favour of Henry VII., on whom, and his male issue, he entailed the Castle and estates of Berkeley, with a reversion to his right heirs in case of their failure. The King did not add the title of Lord Berkeley to his other dignities; but it is believed to have followed the destination of the Castle. At all events, the heir of the family, though summoned to Parliament, did not sit with the precedency of his ancestors till after the death of King Edward VI., when Henry's male line expired. They were then acknowledged to have succeeded to the old Barony, and got their original place; and this, notwithstanding the supercession of the Countess of Warwick, the heir general, and the subsequent suppression of the title in the usually unrelinquishing grasp of the Crown.

The Barony of Abergavenny is also a singular case of succession by tenure. The Castle descended by the second co-heir of Milo, Earl of Hereford, to the great family of Braose, in her right, Lords of Brecknock. Her great-grandson had three daughters and co-heirs; Eve, the second of whom brought Abergavenny to William de Cantilupe, between whose two daughters, on the death of his only son, the inheritance again divided. Joan, the eldest, married Henry, Lord Hastings, grandson of David, Earl of Huntingdon, brother of William, King of Scotland. By him she had John, Lord Hastings and Abergavenny, one of the competitors for the Crown of Scotland; but his grandmother, Ada, having been indisputably the youngest of the three sisters, in order to make out a claim, he insisted on its being divisible, and demanded a third part. He was twice married. By his first wife, Isabel, sister and co-heir of Aymer de Valence, Earl of Pembroke, he had John, his heir, and Elizabeth, who married Roger, Lord Grey de Ruthyn. By his second wife, Isabel le Despenser, he had a son, Hugh. His son, John Lord Hastings, was father of Laurence, aged five at his death, and afterwards created Earl of Pembroke, in 1339. His son, John, the second Earl, succeeded as an infant in 1348, and was the first subject who, in imitation of King Edward III., quartered arms. He was taken prisoner by Henry the Usurper of Castile, sold to a French nobleman, and was poisoned in 1375, leaving John, third and last Earl, then three years old, who was found entitled to carry the golden spurs at the coronation of King Richard II. He was accidentally slain at a tournament, in 1389, aged seventeen, without issue, though married. It is remarkable, that owing to early deaths, and wars

abroad, none of these Earls ever saw each other! In him terminated the whole descendants of John, Lord Hastings, the father of the first Earl. And now a question arose between Reginald, Lord Grey de Ruthyn, grandson of Elizabeth, the competitor's daughter, and Hugh de Hastings, great-grandson of Hugh, the competitor's younger son. Reginald had a claim upon the Valence succession had it not been settled on King Edward III. by the second Earl; but this way of stating the question shows the strength of the claim of the heir male to the estates and the title of Hastings. Nevertheless, by virtue of that quirk of law called the whole blood, they went to Lord Grey, and Edward, the brother and heir of Hugh, for even pretending to carry the arms of Hastings, without a mark of cadency, was condemned in heavy costs, and imprisoned sixteen years. The present Lady Grey de Ruthyn, who, from the Greys, Earls of Kent, through the Longuevilles, the Yelvertons, Earls of Sussex, and the Goolds, represents the above Reginald, has now united her pretension to the old Barony with her husband, the Marquis of Hastings' later Barony of Hastings, of 1461, which he has through his grandmother, the heiress of the Earls of Huntingdon.

But the destiny of the Barony of Abergavenny was quite different. John, second Earl of Pembroke, easily obtained the King's license to make an entail, 43d Edward III., 1369, whereby, in case he died without issue, he left Pembroke to the King, and Abergavenny to his cousin, William de Beauchamp, second son of Thomas, Earl of Warwick, by Catherine, sister of his own mother, Agnes, both daughters of Roger Mortimer, first Earl of March. On the death of his son,

the third Earl, therefore, William de Beauchamp, though a stranger to the blood of Hastings, Cantilupe, &c. was immediately summoned to Parliament as Lord Abergavenny. He married Joan, sister and co-heir of Thomas, eleventh Earl of Arundel, and had Richard, his heir, created Earl of Worcester. By Isabel le Despenser, posthumous daughter and heir of Thomas, the beheaded Earl of Gloucester (who afterwards married her husband's cousin-german, Richard Beauchamp, Earl of Warwick, and had Henry, Duke of Warwick), he had an only daughter, Elizabeth, who married Edward Neville, sixth son of the first Earl of Westmoreland. But Abergavenny, by entail of her grandfather, went, on failure of his issue male, on the death of her father, to the Earl and Duke of Warwick; and it was not till the death of the Duke, leaving only an infant daughter, Anne, in 1445, that Abergavenny returned to her as the right heir.*

Edward Neville was summoned to Parliament, in right of his wife's castle; and their great-grandson, Henry, Lord Abergavenny, died in 1587, leaving an only daughter, Mary, wife of Sir Thomas Fane, when, by entail on heirs male, Abergavenny went to her father's cousin-german, Edward, who also got the Peerage, and is ancestor of the present Earl of Abergavenny. But Mary was allowed to be Baroness le Despenser, and her son Francis, who succeeded her, was created Earl of Westmoreland. The present Earl

* I may note here, by the way, that Elizabeth's half-sister, Anne Beauchamp, on the death of her mother, the Duke's only daughter, in 1449, succeeded to the Earldom of Warwick, which she carried to Richard Neville, nephew of Edward, Lord Abergavenny, her sister's husband, son and heir of the Earl of Salisbury, and afterwards Earl of Warwick, the *King-maker!*

is his male descendant, and the present Baroness le Despenser is his heir general.

Thus Abergavenny, after passing through a female, was conveyed to a stranger, a singular successor, who settled it upon his own and his brother's heirs male, and then on his right heirs. It again went to a female, and has since, by a new entail, been kept in her male posterity, passing over various successive heiresses.

I shall conclude with a few observations on the history and representation of the house of Baliol. There are few families of equal eminence about which there is so much misapprehension. It may be thought that this is not a matter of much moment to us; but that would be begging the question. Is truth of any value, and is history of no more use when clear than when full of error? Is it not a curious speculation to see who, *by divine right*, should have inherited these realms, as representing the munificent Dervorgilda, the foundress of Baliol College, and, through her, the aboriginal Kings of Scotland, and the Saxon Kings of England? In short, if we look back from the mere passing events and politics of the day, and read any thing besides newspapers, magazines, and novels, why not rectify long continued mistakes, and elucidate controverted points regarding personages, who ought to be more interesting to us, than many whose history is deemed of importance, merely because they lived a little more remotely either as to time or place?

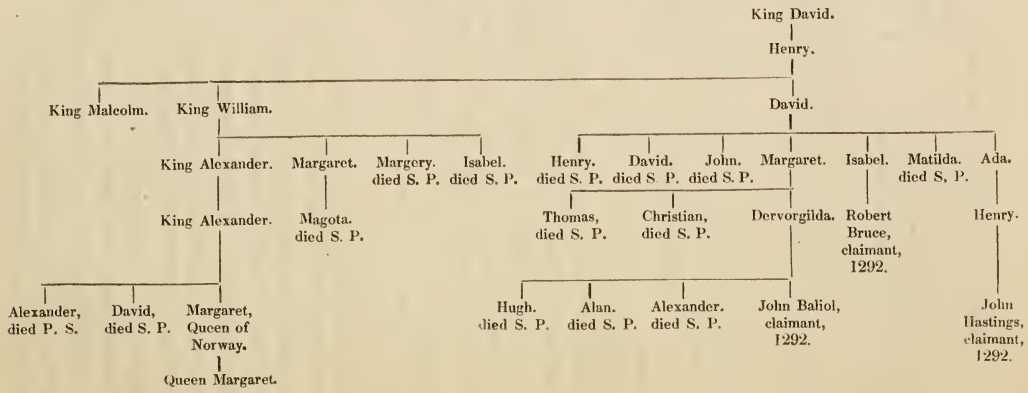
The late Mr Surtees, the distinguished antiquarian, in his invaluable but unfortunately unfinished History of the County Palatine of Durham, has done much to throw light upon that subject, as upon every other

which came within his range; and Mr Riddell, one of the greatest legal authorities in Scotland regarding the rights and descents of families, has also illustrated many disputed and doubtful questions. But Mr Surtees's work being in three thick folio volumes, enriched with plates, with a fourth in preparation, is not generally accessible; and Mr Riddell's tracts only taking up scattered points, are not intended to clear the whole ground.

The oldest blunder of consequence respecting this family regards their alliance with the Lords of Galloway, Constables of Scotland, and, through them, with the Royal House. The English Heralds of former times—perhaps not enquiring with much zeal as to a Scotch descent—with a view to verify a preconceived notion, transposed Alan, Lord of Galloway's three daughters, and made Margaret of Scotland mother of them all; viz., 1. Dervorgilda married John Baliol; 2 Christian married William, Earl of Albemarle; 3. Helen married Roger de Quinci, Earl of Winchester. It is surprising that so much confusion should prevail as to these sisters, when the explanatory claim of Dervorgilda's son, John Baliol, is so fully and clearly given in Rymer's Fœdera.* He there states that his

* Baliol's claim enumerates several persons not mentioned elsewhere, and rectifies an error of the great English authority, Dugdale, respecting Margaret, daughter of King William the Lion, one of the five wives of the eminent Hubert de Burgh, Earl of Kent. It is there shown that Margaret had only one child, Magota, who died without issue, and this must have been the true state of the case, otherwise no claim would have accrued either to Baliol or Bruce. Yet Dugdale, confused by such uxoriousness, and not adverting to so decisive a proof, has given all Hubert's numerous descendants the royal blood. It may be observed, however, that this honour was soon acquired to some of his posterity, through his grandson's wife.

JOHN BALIOL'S CLAIM TO THE CROWN ARRANGED IN THE FORM OF A TABLE, FROM RYMER'S FŒDERA, VOL. I., PART II., P. 776.



mother was younger than Christian, who died without issue, and he takes no notice of Helen. As he has evidently given a list of all the descendants of his grandmother, Margaret, as heirs of the Crown before himself, the accuracy of which was never impugned; and as Helen, Countess of Winchester, brought to her iron-hearted husband the Lordship of Galloway, and the office of Constable, which, it was not disputed, descended to her as heir to her father, Alan, it is clear that she must have been Alan's eldest daughter by a previous wife, now unknown, and that Dervorgilda transmitted her mother's claim to the Crown entire to her son.*

Having now proved that John Baliol's mother, Dervorgilda, became the sole heir of Margaret of Scotland, the next point for discussion is—who are his representatives? Mr Tytler, the recent indefatigable historian of Scotland, is inclined to revive the old story that William, the first Earl of Douglas, succeeded to his rights. But in attempting to make this good, he has varied from the tradition that his claim came by his mother, and now derives it through his wife. But this is equally objectionable.

1. Alexander de Baliol, of Cavers, was not, as Mr Tytler assumes, the brother of King John, but a quite

* It is singular that the proof of this remote point produces one heraldic effect, even in the present day, as it cuts off a number of the great families in England from the Kings of Scotland, and blots out the quartering of the Royal arms, which, in England, has been improperly assumed or allowed. The greatest amateur herald in England, William Penn, who has long been aware of the error, thinks that the Earl of Stamford, who is descended from the Countess of Winchester's eldest daughter, must have obtained his grant of the Unicorns as supporters on the untenable plea of his having thus a royal pedigree.

different person. Alexander, the brother, was *elder* than John, and is shown by the claim to be then dead, without issue. In fact, he died in 1279, leaving Eleanor de Genoure, his widow.—RYMER, vol. I., p. II., p. 779; SURTEES, p. 60.—The other Alexander was a knight, who bore arms of different tinctures, married Isabel, Countess-dowager of Athol, survived the King's accession in 1292, was summoned to the English Parliament as a Baron till 1307, when he died, and was father of another Alexander de Baliol, of Cavers.—SURTEES, p. 58, 59.

2. Isabel, Countess of Mar, mother to the wife of the Earl of Douglas, was not a Baliol, as Mr Tytler calls her, but a Stewart.—RYMER, 3d March, anno 1338. Donald, Earl of Mar, her first husband, was killed in 1332. William de Careswell was not, as Mr Tytler asserts, her second, but her third husband, her second being Geoffry de Moubray.—RYMER, anno 1334, 1335.—There appears to have been some alliance between the Earl of Mar and the Baliols, not of the royal line, but of Cavers. Perhaps we ought to shoe Isabel's horse all round, and give her a *fourth* husband,* to make William, Earl of Douglas, and Thomas Baliol brothers-in-law; but, in those complimentary days, such phrases were used, upon the slightest species of connexion, without blood. It is now difficult, however, to show the relationship of these two families of Baliols, or of Mar and Cavers. A claim through the Cumyns to the Earl of Douglas is as easily disproved. The imaginary marriage of Archibald Douglas, the father of the Earl, with Dornagilla, daughter

* She is, indeed, by the Peerage, married also to her cousin, John, third Earl of Moray; but that is quite impossible.

of John Cumyn and Mary Baliol, if it were true, and if heired by the Earl, would have conveyed nothing, because the phantom Cumyn had a brother whose posterity exists to this day. Mr Riddell's proof as to the Earl's mother, Beatrix, being a Douglas, is not quite conclusive, because widows, even when married again, or after becoming widows again, often kept the name of their first husband in those remote times. Thus, Christian de Keth, spouse of Sir Robert de Erskine, was by birth a Menteith, and widow of Sir Edward Keth; and Marjory de Lindsay, widow of Sir Henry Douglas of Lochleven, was by birth a Stewart, but first married to Sir James Lindsay.

I take this opportunity of expressing my cordial agreement with Mr Riddell's admiration of Lord Hailes, who first showed the practicability of proving the earlier part of the history of Scotland, notwithstanding the dogma of the elegant but indolent and unsatisfactory Robertson; and I fully coincide with him in regretting the tone, dictated by zeal and disappointment, which Mr Tytler has assumed in his attacks upon Lord Hailes, who, even if mistaken in a few immaterial points, has done more than any antiquarian or historian to rescue truth from fable, and whose chief error seems to be that from caution, lest he should be considered partial to his country, he has sometimes been too scrupulous in admitting evidence in its favour.

King John Baliol's two sons having died without posterity, the representatives of his sisters became his heirs.

1. There is a want of satisfactory information regarding Margaret, the eldest, who is said to have had a husband of the baronial name of Multon,

and also to have married in Abrogines. According to the Bowes MSS. of the Baliols, and the records in the Herald'sCollege, she had no family.

2. Ada, the second, married William de Lindsay, and the present Duchess d'Angoulême is her unhappy representative, by the marriage of her lineal male ancestor, Francis de Bourbon, Count of Vendôme, with Mary of Luxemburg, Countess of St Pol, who, through the elder line of the Ducal House of Bar and Ingelram, Sire de Couci, and Earl of Bedford, son-in-law of King Edward III., was sole heir to the above William.

3. Cicely, the third, has two lines of descent proceeding from her marriage with John de Burgh, grandson of Hubert, Earl of Kent. The blood of the elder co-heir came through the families of FitzWalter and Mareschal to the Lords Morley, about 1330, and descended with that Peerage till 1685, when, on the death of the fourteenth Lord, his aunts, the daughters of the Gunpowder Plot Lord Monteagle, afterwards twelfth Lord Morley, became his heirs, through one of whom it is now vested in the heirs of the Savages Earls Rivers. The representative of the junior line from Cicely through the Lords Greslei and De la Warr, passed, about 1425, to Lord West, and thus superseded that less ancient title. The present Earl De la Warr is heir male of that marriage, which took place about 1390, and he also inherits the old Barony, though he is not the heir general—but of this hereafter.

4. Mary the youngest sister of King John Baliol, has also a double representation by her marriage with Black John Cumyn, Lord of Badenoch, by her son Red John's two daughters, Joan and Elizabeth. The elder married David, eleventh Earl of Athol, whose father had been hanged by King Edward I. for being

a patriot, but on a high gallows as a cousin. Her grandson, David, thirteenth Earl, left two daughters, the elder of whom, Elizabeth, married first Sir Thomas Percy, called of Athol, Hotspur's brother, and her line continued through the Lords Burgh and Cobham to the heirs of the family of Boothby by Baronets. The Earl's other daughter, Philippa, married Sir Ralph Percy, another son of the Earl of Northumberland, but had no issue by him, and she afterwards married John Halsham of Sussex, and had issue, which appears to be extinct.

Elizabeth Cumyn, Red John's other daughter, married Richard, Lord Talbot, and was progenitrix of John, the renowned Earl of Shrewsbury, whose heir the ninth Duke of Norfolk, left it to be divided with the representation of the Howards, between Lords Stourton and Petre.

I must now revert shortly to the instances of singular succession in the De la Warr family. I have mentioned that the claims of Edward Hastings, as *heir male*, were trampled upon on account of his being the offspring of a second marriage, while every question was decided in favour of an *heir female in the same degree of propinquity*, because of being of the whole blood. Soon after this decision the De la Warr inheritance came to the West family as heirs of the half blood, but a step nearer than the heirs of the whole blood. The heiress's great grandson, Thomas, eighth Lord, was twice married. By his first wife he had a son and four daughters, and by his second wife he had three sons and three daughters. His only son by the first marriage, Thomas, ninth Lord, died without issue in 1554, when a portion of his lands went to his four sisters of the full blood, the youngest of whom

was mother to the wife of the ambitious John Dudley, Duke of Northumberland. His next brother of the half blood, Sir Owen West, had died before him, leaving only a daughter, and the second brother, Sir George, was also dead, leaving a son, William, who, by settlements on heirs male, had been recognised in his uncle's lifetime, and lived with him, as his heir. But getting impatient at his uncle's longevity, he attempted his life by poison, was attainted and disabled from succeeding to the title or estates. After his uncle's death he procured a pardon, and a patent to be Lord De la Warr, and his son and heir, Thomas, recovered the precedency of his ancestors, it being adjudged that his father's taking a new patent did not foreclose their older rights.

It is unaccountable in all these proceedings that no notice was taken of the rights of Sir Owen's daughter, Mary, who, as there was no obstacle from the half blood, was the right heir in preference to William, and apparently had the best possible chance of having her claims duly considered, in consequence of his disgrace. As the titles were baronies in fee, and the older Peerage of De la Warr had actually come into the family by an heiress, they ought to have descended to her, and even now they seem to be vested in her heirs. She married Sir Adrian Poynings, and had three daughters, and whether the claim was neglected owing to this repeated female succession, or to the entail of the estates on heirs male, or whether the rules of inheritance as to titles were not then distinctly known or settled, no proceedings seem to have been adopted by them.

Of Lady Poynings' three daughters, Elizabeth, the eldest, had no issue by Andrew Rogers, younger of

Brianston. Mary, the second, married Sir Edward Moore of Larden, in Salop and Hertmere, in Surrey, whose arms were the same as those which Lord Mountcashel of Ireland bears. She had five sons, (of whose issue I trace nothing after 1656, when the fourth Edward, in a direct line, died an infant,) and a daughter, married Sir Thomas Drew of Broad Henbury, in Devon.

Anne, the third, married Sir George More of Losely, in Surrey, whose arms were azure, on a cross argent five martlets sable. Their rights were transmitted to the family of Molyneux, the last of whom was Jane, daughter of Sir William More Molyneux, Baronet, who died unmarried in 1802, aged seventy-four.

The last determination in favour of the whole blood was at the death of Henry, eighteenth Earl of Oxford, in 1625. When the office of Great Chamberlain, &c. went to his aunt's son, Robert, Lord Willoughby d'Eresby (created Earl of Lindsey in 1626), as heir of the whole blood, although by the first marriage of his father, Edward, seventeenth Earl, he had three sisters, the Countesses of Derby, Berkshire, and Montgomery (afterwards Pembroke), represented respectively by the Duke of Athol, Earl of Abingdon, and Marquis of Bute. But such a decision, I believe, will never be given again.

# ADDENDA.

P. 52.—Add to Lord Ochiltree—As the new Lord was to enjoy the honours in as ample a manner as his predecessor, and as they were descended from a common male ancestor, *who had the title*, so that Sir James could have succeeded him in the Peerage if his male issue had failed, was it equitable, after the extinction of Sir James's heirs, to prevent the old line resuming the place they had demitted when they again succeeded to the representation?

P. 53.—It is difficult to say what caused the disuse of the ancient custom of husbands enjoying the titles of their wives when Peeresses. Up to 1616-17, when James, Earl of Buchan became Earl by marriage, the right seems to have been absolute. And when Hugh, Lord Loudoun, died in December, 1622, the husband of his granddaughter succeeded, and sat in Parliament as Lord Loudoun, before he was created an Earl, in 1633. Yet, in 16 1, the husband of the Countess of Lothian required a patent to be Earl; and, in 1660, the husband of the Duchess of Hamilton, who had been married in 1656, was *created* a Duke for life. In the

pleadings in the Sutherland case (ch. vii. p. 177), is quoted the opinion of the Chancellor, Earl of Clarendon, who told his Majesty, as to his son the Duke of Monmouth's alliance with the Countess of Buccleuch, "that he need not give him any other title of honour than he would enjoy by his marriage, by which he would, by the law of Scotland, be called Earl of Buccleuch." Yet, when her elder sister, who had previously been Countess of Buccleuch, married Walter Scott in 1659, he was created Earl of Tarras for life in 1660, and never was Earl of Buccleuch.

P. 60.—The claim to the Peerage of Rutherford was again lately tried and dismissed from defect of evidence as to pedigree, but is revived this session; so that, having been formerly agitated without intermission for fifty years, it has now been open for one hundred and thirteen years.

P. 68, line 21.—After "confirmed to his son," add —As "heir to his grauntshir and faider, Lordis Sinclair for the tyme."

P. 110.—It appears, that almost immediately after the grant of the Earldom of Lennox to Esme, the old system, by which Earldoms and Baronies were conferred, merely, by charters of the lands, began to give way to the new plan of bestowing simple patents of honour; such as the creation of the same Esme to be Duke of Lennox in 1581.

In connexion with the above remark, I may here state, that in old times, when the King granted an Earldom, the lands being then in his hands, the destination, as in the case of Athol, p. 117, and Buchan,

p. 87, was often restricted, apparently because of the possible reversion of the estates; but in erecting the estates already possessed by a favourite subject into an Earldom, or in allowing an alteration in an existing series, more latitude prevailed, because speedy extinctions were not THEN considered desirable, and when other heirs existed, as in Buchan, &c., it signified little in what line the succession went.

FINIS.

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