

(Heard, 21st *February*. — Judgment, 2d *August*, 1842.)

THE RIGHT HONOURABLE COSPATRICK ALEXANDER HOME,
commonly called LORD DUNGLAS, and ROBERT CUNNINGHAM,
Appellants.

HER MAJESTY'S OFFICERS OF STATE FOR SCOTLAND, and HER
MAJESTY'S ADVOCATE, for, and in name and behalf of the
Commissioners of her Majesty's Woods, Forests, Land
Revenues, Works, and Buildings, *Respondents*.

Crown. — Public Office. — Pension. — A grant of an office of Cham-
berlain of a royal forest, and of “an annuity or yearly salary, as
“ well in consideration of the said office, as out of the royal bounty,”
which salary amounted to more than the whole revenue to be
collected, the surplus being made up out of another source of royal
revenue, was set aside as being the grant of a pension under cover
of the grant of an office, and as an alienation of the crown property.

Crown. — Whether the Crown, when respondent, has a right to reply
on the reply of the appellant, *Query*.

Process. — Sufficiency of libel to support judgment.

ON the 27th day of July, 1827, a warrant was issued by George
the Fourth, directing a letter to be passed under the Great Seal
of Scotland for “giving and granting unto the Honourable
“ Cospatrick Alexander Home, commonly called Lord Dun-
“ glas, during the term of his natural life, the office of chamber-
“ lain and collector of the rents, revenues, feu-duties, and other
“ casualties of superiority, issuing and payable to the Crown, out
“ of the lands and lordship of Ettrick Forest, in the shire of
“ Selkirk, Scotland, in the room of Alexander Pringle, Esq.
“ deceased, to hold the said office of chamberlain and collector
“ to the said Cospatrick Alexander Home, commonly called

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“ Lord Dunglas, during the term of his natural life, with power
“ to the said Cospatrick Alexander Home, commonly called
“ Lord Dunglas, from time to time, so long as the commission
“ subsists, to constitute one or more deputies in the said office,
“ for whom he shall be answerable, that they shall duly collect
“ and account for the said feu-duties, and other casualties of the
“ superiority, in his Majesty’s court of Exchequer, in Scotland,
“ and yearly, and thereafter pay, or cause to be paid, to the
“ Receiver-General of his Majesty’s land-revenues, and casual-
“ ties in Scotland, for the time being, all such sum and sums of
“ money as shall appear to be due to his Majesty, upon the end
“ and determination of each respective account. And to that
“ end, the Barons of the said Exchequer are hereby required to
“ cause sufficient security be taken in his Majesty’s Remem-
“ brancer’s office from the said Cospatrick Alexander Home,
“ commonly called Lord Dunglas, before he enters upon the
“ said office, for his making such yearly account and payment as
“ aforesaid ; and his Majesty, as well in consideration of the said
“ office, as out of his royal bounty and favour to the said Cos-
“ patrick Alexander Home, commonly called Lord Dunglas, is
“ graciously pleased to ordain, that the same letter do contain
“ his grant unto the said Cospatrick Alexander Home, com-
“ monly called Lord Dunglas, of an annuity or yearly salary of
“ L.300 sterling to himself, and L.20 sterling to his deputy or
“ deputies, to commence from the date of the letters-patent
“ hereby intended, and to be computed by the day to Martin-
“ mas now next ensuing, and the subsequent payments half-
“ yearly, at Whitsunday and Martinmas, by even and equal
“ portions in time coming, during the term of the natural life of
“ the said Cospatrick Alexander Home, commonly called Lord
“ Dunglas, out of the moneys of the said collection, and wherein
“ they come short, out of the first and readiest of the rents,
“ revenues, and feu-farms, and other casualties of superiority,

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“ issuing and payable to the crown out of the lands and lordship
“ of Dunbar, in Scotland, by the purchasers of the lands of
“ Spott, and other lands within the sheriffdom of Haddington;
“ and his Majesty revokes and declares void all former commis-
“ sions of chamberlain relative to the said revenues; and it is his
“ Majesty’s pleasure that the said grant be extended in the best
“ and most ample form, with all precepts and clauses that are
“ needful to be inserted in grants of the like nature.”

A commission was accordingly issued under the Great Seal in terms of this warrant, on the 4th of September, 1827. And on the 22d day of September, 1829, the appellant, Lord Dunglas, granted a deputation or factory in favour of the other appellant, Cunningham.

George the Fourth died in the year 1830, and was succeeded by William the Fourth. In February, 1837, the respondents brought an action of reduction against the appellants, for setting aside the above recited warrant, and the commission following upon it, together with the deputation in favour of the appellant Cunningham. The reasons of reduction, after the first or formal one, were, “ *secundo*, that George the Fourth had no power or
“ authority to make, give, or grant the same, at least to the
“ effect of the said warrant, commission, grant, or letters patent,
“ enduring, or having effect beyond the period of his said late
“ majesty’s demise. *Tertio*, The said warrant, commission,
“ grant, or letters patent, under the narrative and disguise of a
“ grant of the office of chamberlain or collector of the rents and
“ revenues of Ettrick Forest, was and is unwarrantable, illegal,
“ and inept, as an alienation, and for a period exceeding the
“ reign of his majesty, granter thereof, of the whole revenues of
“ the lands and lordships specified in the said grant, and also of
“ a large part of the rents and revenues of the lands and lord-
“ ship of Dunbar. *Quarto*, The said warrant, and the said
“ commission, grant, or letters patent, in so far as they purport

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“ to give and grant to the said Honourable Cospatrick Alexan-
“ der Home, commonly called Lord Dunglas, for all the days of
“ his natural life, an annuity or yearly salary out of the rents,
“ revenues, feu-duties, and other casualties of superiority, of the
“ lands and lordships of Ettrick Forest and Dunbar, forming
“ parts and portions of the hereditary land revenue of the Crown
“ in Scotland, were *ultra vires* of his said late Majesty King
“ George IV. — inasmuch as the said hereditary revenue, having
“ been surrendered without reserve to the disposal of Parliament,
“ on the accession of his said late Majesty, was afterwards settled
“ upon his said late Majesty for his life only; whereby it was
“ beyond the power of his said late Majesty to alienate, burden,
“ or affect the same in any way, by grants to have effect or be
“ operative beyond the period of his demise. *Quinto*, The
“ settlement of the said hereditary revenue made at the accession
“ of his said late Majesty, for the period of his natural life, hav-
“ ing come to an end upon his demise, such hereditary revenue
“ was, upon our accession, again placed by us at the disposal of
“ parliament, and by parliament thereafter made part of the
“ consolidated fund, and subsequently vested in the Commis-
“ sioners of our woods, forests, land revenues, works and build-
“ ings, in terms of and for the purposes expressed in the said
“ act of the 3d and 4th years of our reign above referred to, and
“ the acts therein recited; whereby the said Commissioners have
“ now the sole and undoubted right to the whole hereditary and
“ land revenues of the Crown in Scotland, whereof the rents,
“ revenues, feu-duties, and other casualties of superiority of the
“ said lands and lordships of Ettrick forest and Dunbar form
“ parts and portions; and farther, by the said illegal grant we
“ are prevented, for an indefinite period, from fulfilling the sur-
“ render made by us to Parliament of our royal revenues in
“ Scotland at the commencement of our reign, as above set
“ forth. *Sexto*, The said warrant, and the said grant, letters

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“ patent, or commission, and the said deputation and factory are
“ made and granted in violation of our right to nominate and
“ appoint a chamberlain and collector of the rents, revenues, feu-
“ duties, and other casualties of superiority issuing and payable
“ to the Crown out of the said lands of Ettrick forest in the shire
“ of Selkirk, during our own reign. *Septimo*, For the reasons
“ above stated, it was incompetent for, and *ultra vires* of, the said
“ Honourable Cospatrick Alexander Home, commonly called
“ Lord Dunglas, to grant and subscribe the foresaid deputation
“ and factory in favour of the said Robert Cunningham.” For
these reasons, the summons concluded, that the warrant, commis-
sion, and deputation should be reduced, and be declared “ to
“ have been from the beginning, to be now, and in all time
“ coming, void and null, and of no avail, force, strength, or
“ effect in judgment, or outwith the same; and being so reduced,
“ the defenders, and all others acting or pretending to have
“ authority to act for and under them, or either of them, should
“ be ordained to desist and cease from acting as chamberlain
“ and collector, or deputy-chamberlain or sub-collector foresaid,
“ and from collecting or intromitting with the rents, revenues,
“ feu-duties, and other casualties of superiority issuing and pay-
“ able as aforesaid, out of the said lands and lordship of Ettrick
“ Forest, or from uplifting, receiving, or retaining for their or
“ either of their benefit, any part or portion of the rents, reve-
“ nues, feu-farms, and other casualties of superiority issuing and
“ payable as aforesaid, out of the lands and lordship of Dunbar.”

In support of their action, the respondents averred, that the lordship of Ettrick Forest was in the reign of James II. annexed to the Crown by the Act 1455, cap. 41. That the barony of Dunbar was also annexed to the Crown in the reign of James III. That the revenue from Ettrick Forest had consisted for a long time of certain feu-duties and casualties. That the crown had been in use to appoint a chamberlain for the collection of this revenue. That

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this appointment had been usually bestowed during the pleasure of the Crown, and had been uniformly so given from the period of the Union, down to the time of George IV. That on the accession of George the IVth, he, by 1 Geo. IV. cap. 1, surrendered the hereditary revenues of the Crown to Parliament, and in return a certain annual sum was granted for his civil list, and the hereditary revenue from Scotland was given to him for his life, subject to the same charges upon it as in the previous reign. That when the warrant for the appellant Lord Douglas's appointment of chamberlain was issued, the revenue from Ettrick Forest was only L.235, 7s. 7d. That it had never in any year since the date of the warrant exceeded that sum, and that the difference between the revenue and the sum granted, had always been made up from the revenue arising from the lordship of Dunbar. That on the accession of William IV., he made the same surrender as George IVth had done, but did not in return receive a grant of the hereditary revenue of Scotland, as that, with the other hereditary revenues, was ordered to be carried to the consolidated fund by 1 Will. IV. cap. 25.

The appellants, in answer, admitted the annexation by the Act 1455, but averred, that it had been dissolved by the Act 1587, cap. 30. And they farther averred, that the Kings of Scotland had from time immemorial given hereditary grants, and grants for life, of offices connected with the administration of the property and collection of the revenues of the Crown. That a chamberlain for Ettrick Forest had been appointed from time immemorial, and the salary had at first been paid out of the moneys collected, but latterly, it had been partly paid out of the revenue of the lordship of Dunbar. That the Act of 1 Geo. IV. cap. 1. did not include the hereditary revenue of Scotland, which was specially excepted from it, as farther confirmed by 1 and 2 Geo. IV. cap. 31. They admitted that the hereditary revenues of the three kingdoms was put on one and the same footing by 1 Wil.

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IV. cap. 1., but alleged, that that statute, by its 12th sect. saved the right of the Crown as to the appointment of collectors, and the right of parties who had been appointed, and that this saving was repeated in the 18th sect. of the 3d and 4th Will. IV. cap. 69. which gave the management of the hereditary revenue to the Commissioners of Woods and Forests, and from that period the appointment of the appellants had been recognized by these Commissioners. They admitted the nature and amount of revenues derived from Ettrick Forest.

On these statements, the respondents founded the following pleas:—“ 1. His late Majesty George IV. had no power or authority to issue the warrant, or grant the letters-patent and commission sought to be reduced, in so far as the same purport to extend beyond the life of the granter, and thereby encroach upon the undoubted rights and prerogatives of his Majesty’s royal successors; and the right of Lord Dunglas to the said office, and the salary attached thereto, expired by the demise of his said Majesty George IV.

“ II. The warrant, with the letters-patent, and commission following thereon, in so far as they purport to give and grant to Lord Dunglas, for all the days of his natural life, an annuity, or yearly salary, out of the rents, revenues, feu-duties, and other casualties of superiority of the lands and lordship of Ettrick Forest and Dunbar, forming parts and portions of the hereditary land-revenue of the Crown in Scotland, were *ultra vires* of his late Majesty George IV. inasmuch as the said hereditary revenue having been surrendered, without reserve, to the disposal of Parliament, on the accession of his late Majesty, it was afterwards settled upon him by statute for his life only, whereby it was incompetent for his late Majesty to alienate, burden, or affect the same, in any way, by grants, to have effect, or be operative, beyond the period of his demise.

“ III. Assuming that, in respect of the preceding pleas, the

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“ warrant, with the letters-patent, and commission following
“ thereon, are to be set aside as null and void, it follows, by neces-
“ sary consequence, that the deputation and factory, granted by
“ his Lordship to the defender, Captain Cunningham, must also
“ be reduced, as flowing *a non habente potestatem*.

“ IV. The writs libelled being reduced and set aside, the pur-
“ suers will be entitled to decree against the defenders, discharg-
“ ing them from continuing to act as chamberlain and collector,
“ or deputy-chamberlain and sub-collector of Ettrick Forest,
“ and from collecting or intromitting with, or receiving or retain-
“ ing, for their own benefit, any part or portion of the Crown-
“ revenues, payable from the lands and lordship of Ettrick
“ Forest, or from the lands and lordship of Dunbar.

“ V. There are no grounds on which a plea of acquiescence
“ and homologation can be maintained against the pursuers, in
“ respect generally of the circumstances of the case, and that the
“ interests of the Crown cannot be injured by any neglect on the
“ part of its officers.”

The appellants pleaded in answer, — “ I. His late Majesty
“ George IV. did not exceed the powers with which, in right of
“ the Crown, he was invested, in appointing the defender, Lord
“ Dunglas, Chamberlain of Ettrick Forest during the whole
“ period of his life, for the purpose of collecting the revenues of
“ the Forest, with a salary for the performance of that duty.

“ II. The reasons of reduction, in so far as rested on the sup-
“ position of the hereditary revenues of the Crown of Scotland,
“ having been surrendered to the disposal of Parliament by his
“ late Majesty George IV. are ill founded, inasmuch as no sur-
“ render was ever made, his late Majesty having enjoyed and
“ possessed the income of his hereditary revenues in Scotland
“ until his demise.

“ III. The defender’s appointments are effectually protected
“ by the provisions of the statutes passed during the reign of his

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“ late Majesty William IV. in respect that they expressly declare,
“ 1st, That the hereditary revenues shall only be surrendered
“ under the burden of all such grants as those in favour of the
“ defender. 2d, That they shall only be transferred to the con-
“ solidated fund, under the burden of the annual sums or pen-
“ sions charged upon them; and 3d, That no appointment of
“ chamberlain or collector, shall be made void by the passing of
“ these acts, but that every such chamberlain or collector shall
“ continue in office until his death or resignation.

“ IV. As the defender, Lord Dunglas’s appointment, has been
“ recognized and sanctioned by the Crown since the demise of his
“ late Majesty King George IV. while the pursuers were in the
“ full knowledge of its provisions, they are barred by acquiescence
“ and homologation from reducing it.”

There was produced by the respondents in support of their averments, in regard to the appointment of chamberlain of Ettrick Forest, a list shewing that there had been appointments in 1703, during pleasure, with a salary of L.8, 6s. 8d. payable out of the feu-duties, &c. In 1718, an appointment until recalled, with the same salary, payable out of the same fund. Between 1742 and 1768, five appointments during pleasure, with a salary of L.500, with one exception, when it was L.20, payable out of the same sources as the salary of the appellant. In 1786, an appointment to two jointly, and the survivor, during life, and the life of the sovereign. And in 1812, another appointment, during life, without limitation. In both of the last instances, the salary was L.500, payable in the same manner as the appellant’s. The last of these appointments, was that which immediately preceded the appointment of the appellant.

There was also produced for the appellants a list of appointments to various Crown offices, such as of forestry and chamberlainship, keepers of castles and palaces, in some instances during the lives of the holders; in others, for the lives of joint grantees;

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in others, to them and their heirs, and ranging from the year 1481, to the year 1691.

The Lord Ordinary (*Cunninghame*) ordered cases to the Court; and the Court, upon advising the papers, remitted the cause for the opinion of the other Judges.

Lords *Jeffrey*, *Fullerton*, and *Cunninghame*, concurred in giving a very elaborate opinion, holding, that the grant to the appellant was *ultra vires* of Geo. IV., because it was an alienation of the annexed property of the Crown, and as such illegal, independent of the surrender at the accession of George IV., and because the Crown property was then surrendered, and put at the disposal of Parliament, who granted it back for the period of his Majesty's life only, whereby he was necessarily disabled from binding it in any way beyond that period. One part of this reasoning, from which these conclusions were drawn, was expressed thus:—“ We do not think it admits of any serious
“ doubt, that the alienation, which is here indisputably made
“ of the hereditary revenue from the succeeding sovereign, can
“ be in no respect palliated, or varied in its true character, by
“ being called the salary of a crown-collector. A reasonable
“ deduction no doubt must be made from feu-duties, as well as
“ other sources of revenue, for the trouble of collection. But it
“ would be rather difficult to deduct L.320, in this way, from
“ L.230; or indeed, to speak seriously of the former sum being a
“ mere allowance for the trouble of collecting the latter. The
“ old allowance, it appears, up to 1742, was only L.8, 6s. 8d.;
“ and even now it is not disputed that the actual collector is
“ overpaid by a salary of L.20. All beyond this, therefore, is a
“ mere gratuitous alienation; and might just as well have been
“ fixed at L.3000 as L.300. If the reigning sovereign, in short,
“ could not gratuitously settle his whole annexed revenues, in
“ his old age, on a young favourite for his life, and thus (in all
“ probability) deprive one or more of his successors of any share

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“ of them during their whole reigns, we do not see how this
“ grant can be sustained, merely because the grantee is called a
“ collector. The truth is, that the grant to the noble defender
“ is merely a pension, thinly disguised with the name of a salary :
“ And as it is certain that all pensions, (except upon the Irish
“ establishment, or with Parliamentary authority,) become legally
“ void on the demise of the sovereign who bestowed them, it
“ seems impossible to doubt that this must fall, when challenged,
“ as it now is, by authority of the successor.”

Lord President Hope and *Lord M'Kenzie*, concurred in the result of this opinion, though not in its reasoning throughout, *Lord M'Kenzie* saying, “ I do not consider the grant to the noble defender, as truly and substantially the grant of an office, but of a pension.” *Lord Moncrieff* concurred in the opinion absolutely, expressing himself as confirmed in the conclusion, because “ the grant in question could not be considered as in any sense a *bona fide* appointment to an office under the Crown.” *Lord Cockburn* likewise concurred absolutely, saying, “ I conceive the grant to have been palpably illegal, and a mere cover for a pension under the name of an office; and this pension to be taken from a part of the royal or public property, with which the granter had no right to interfere in the way he did beyond the period of his own life.” Lords *Cranstoun* and *Gillies* held, that if the grant were *bona fide* for the collection of the revenue, the Acts 1455, cap. 41, and 1597, cap. 238, had no application, as in that case, the grant was no alienation, and that, at all events, these two acts had fallen into desuetude; they however concurred in the result of Lord Jeffrey's opinion, because they thought “ that this is not the *bona fide* grant of an office, but a mere blind or cover for a gratuitous alienation of part of the revenue. Considered as an office, it is a simulate gift, and that appears *ex facie* of the warrant itself. It never could be seriously meant to give L.320 a-year

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“ as a fair and reasonable salary for the trouble of collecting
 “ L.230. The plain object in view, was to give a pension under
 “ the name of a salary, which was to subsist, or might subsist,
 “ after the death of the sovereign by whom it was granted.

“ We doubt if this would have been competent at common
 “ law, even before the British statutes upon which the pursuers
 “ found, relative to the surrender of the hereditary revenues of
 “ the Crown at the accession of George III. and George IV.
 “ But, putting the same construction upon those statutes which
 “ Lord Jeffrey has done, and which he has enforced by a clear,
 “ and, in our opinion, unanswerable argument, we come to the
 “ conclusion at which he has arrived.”

In conformity with these opinions, the Court (*Second Division*) on the 21st December, 1838, pronounced this interlocutor:—
 “ The Lords having resumed consideration of this process, with
 “ the opinions of the consulted Judges, in respect of the opinions
 “ of a majority of the whole Judges, reduce the grant under
 “ challenge, and decern and declare accordingly — repelling, in
 “ so far, the defences against the conclusions of the libel — *Quoad*
 “ *ultra* appoint parties to be farther heard at the bar.” Lords *Meadowbank* and *Justice Clerk (Boyle)* however, entirely dissented from the opinions given, and Lords *Glenlee* and *Medwyn* concurred, upon the ground that the grant was truly of a pension under the cover of a grant of an office.

The respondents then gave in a minute, renouncing the conclusions in their summons for repetition of the moneys received by the appellants, and thereafter, on the 26th January, 1839, the Court pronounced the following interlocutor:— “ The Lords
 “ having resumed consideration of this process, with the minute
 “ for the pursuers, assoilzie the defenders from the conclusion of
 “ the summons for repetition and payment, and decern; reserv-
 “ ing to the pursuers, and all concerned, to insist upon the same
 “ before a competent Court as they shall be advised; and

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“ reserving to the defenders their answers and defences, as
“ accords.”

The appeal was taken against the two interlocutors of the Court.

Mr Pemberton and Mr Hope for appellants. — The matter at issue by this appeal is one of pure law; it was not within the power, as it does not appear to have been the intention of the Court below to express any opinion upon the propriety of the grant to the appellants. Whether the duties of chamberlain are onerous, or merely nominal? whether the salary attached to the office is only commensurate to the duties to be performed, or excessive? are questions with which the House cannot deal. The only question before it, is, whether the judgment of the Court below, grounded on considerations irrespective of the grant, is well founded in law? and subsidiary to that, whether the judgment can be supported upon the terms of the respondent's summons, and its conclusions?

I. The grant to the appellant was not *ultra vires* of Geo. IV., but was simply the exercise of a right which he and his predecessors, Kings of Scotland, had enjoyed from time immemorial. That the Kings of Scotland have always been in use to make appointments to offices to endure beyond their own reign, is shewn by the list which the appellants produced in the Court below, and which, with farther research, could have been greatly enlarged. That these appointments were within the power of the monarchs is shewn *Ersk.* I. 2. 12, and that they were legal, independent of the effect of usage, and without regard to their effect on the revenue of the succeeding monarch, is confirmed by the grants of the liferent escheat of Crown vassals, by the terms of the acts 1587, cap. 65, and 1685, cap. 9, which recognized

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heritable chamberlainships, and for life, by the 20th act of the union, which expressly saves “heritable offices,” and “offices for life,” and still more recently by the 3 and 4 Will. IV. cap. 69. No doubt, the act 1597, cap. 238, revoked all grants of chamberlainries and baileries, but that applied only to heritable grants of these offices, and as to them, only to such as had been made in the minority of the reigning monarch, and the revocations in each instance were not to be valid until sanctioned by Parliament. That this statute did not apply to grants for life, is shewn by the terms of the act 1685, recognizing such grants as then in existence.

II. If the grant be good according to the common law of Scotland, the several British statutes in regard to the hereditary revenue of the Crown do not in any way affect its validity. The hereditary revenues were not touched by the articles of the Union, but were enjoyed by the different monarchs as they had been previous to that treaty, as theirs in right of the Crown, nor were they affected by any statute, until the 1 Geo. II. cap 1, which declares, that they should be levied in the same manner as they had been during the reign of George I. Under this statute they were collected and applied separately from the English revenue.

On the accession of Geo. III. the hereditary revenues of England and Ireland were, by 1 Geo. III. cap. 1, carried to the aggregate fund, and out of this fund his majesty received, in lieu of the revenue, a yearly income of L.723,000 ; but the hereditary revenues of Scotland were not included in this arrangement, but by the 8th section of the statute, were to continue to be drawn as they had been previously, with an express saving of all charges upon them in favour of any of the subjects. The 27 Geo. III. cap. 13, substituted the “consolidated” for the “aggregate” fund, and, to guard against any doubt whether the hereditary

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revenue of Scotland was embraced in the arrangement, the statute 28 Geo. III. cap. 33, was passed, declaring expressly that it was not included.

The same arrangement as in the case of Geo. III. was continued on the accession of Geo. IV., by the acts 1 Geo. IV. cap. 1 and 2, and 1 and 2 Geo. IV. cap. 31, with the like saving of the rights of the subject.

On the accession of William IV. the hereditary revenue of Scotland was, for the first time, carried to the consolidated fund, by 1 Will. IV. cap. 25, but with an express saving, in the 12th section, of all “rights or powers of control, management, or direction,” which had been exercised by the Crown, and of “all grants, claims, and demand,” of any of the subjects in, to, or out of the revenue.

The 2 and 3 Will. IV. cap. 112, vested the management of the revenue in the Commissioners of Woods and Forests, instead of the Exchequer. This was continued by 3 and 4 Will. IV. cap. 69, which enacted that the revenues should be applied, “in the first place, in payment of the costs, charges, and expenses attending the management of the said lands and other property, and subjects of the Crown. In the next place, in payment and discharge of any annual sum or sums of money, or any pensions already lawfully charged, or to be charged thereon respectively.” And “that the passing of this act shall not vacate the appointment of any chamberlain or collector of the revenues and profits of any of his Majesty’s lands, or other property or subjects to which this act relates, or vacate, render void or voidable any security given by or for such chamberlain or collector, but every such chamberlain or collector who shall be in office at the time of the passing of this act, shall continue in office until his death or resignation, or until he shall be removed by the Commissioners for the time being, of his Majesty’s woods, forests, land revenues, works, and buildings, or until

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“ his appointment shall cease under the provisions herein con-
 “ tained or referred to.” — “ Provided always, and be it farther
 “ enacted, that nothing herein contained shall extend, or be
 “ construed to extend to abridge or interfere with any rights of
 “ his Majesty, his heirs or successors, or of the Lord High
 “ Treasurer or the Commissioners of his Majesty’s Treasury, or
 “ the Chancellor of the Exchequer for the time being, or any
 “ grantee of the Crown, in respect of any appointment lawfully
 “ made by his Majesty or the said Lord High Treasurer or
 “ Commissioners, or the Chancellor of the Exchequer, or such
 “ grantee previously to the passing of this act.”

Therefore, until the reign of William IV., the sovereign enjoyed the same rights in regard to the Scottish hereditary revenue that his predecessors had done previous to the Union, and the act of Will. IV. expressly saved all grants and appointments lawfully made previous to its date. The grant to the appellant was lawfully made in exercise of a right always enjoyed by the sovereign, and is therefore unaffected by this statute of Will. IV.

III. If the grant of the office for life is consistent with law, in respect of its endurance, there is nothing in the other terms of the grant to make it illegal. The office of chamberlain is necessary for the collection of the Crown revenue, and is admitted to have existed from time immemorial, and with a salary annexed to it. It is said, however, that the amount of salary annexed to the grant, shews that it is in truth the grant of a pension. The distinction between a grant of an office with a salary, and the grant of a pension merely, are plainly distinguishable in law. The office here is not created for the first time, to be a cover to the grant of the yearly payment, but was subsisting, and must subsist, for the collection of the revenue. If the Crown had power to grant the office, it had power to fix the salary. It is not possible, therefore, to enter upon a consideration of the

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amount of the salary without interfering with the royal prerogative. There is no authority to shew that such a power is vested in the Courts of law. The same principle which would warrant the exercise of such a power, would justify an inquiry into the validity of the grant upon any other supposeable objection, such as the inadequacy of the salary, the incompetency of the party for the office, and the like. But so far as the amount of the salary can affect the question, it is less by L.200 per annum, than it had been for 80 years previous.

IV. Neither can the grant be said to be an alienation of the Crown property. The property is no way parted with, but remains in the Crown as it did previous to the grant, and although the salary may exhaust the revenue to be collected, that will not support the argument in favour either of pension or alienation. The revenue from Ettrick Forest consists of a great variety of small duties. These, notwithstanding the grant, are still vested in the Crown, but their collection may give much more trouble to the collector than payments of much larger amount, so as to make his remuneration exceed his receipts; yet it may be necessary to enforce the payments in order to preserve evidence of the tenure. And when the office returns into the hands of the Crown so will the regulation of the amount of income. That the deficiency of the revenue for payment of the salary was to be made up out of the revenues from the lordship of Dunbar, does not alter the case. If the whole salary had been made payable from the Exchequer, the chamberlain paying over, in the first place, the amount of his receipts, it might have been argued whether the salary was proportionate, but it could never have been maintained that the grant was an alienation. It cannot then make any difference, that a part of the salary is made payable out of a particular source of revenue, instead of being charged on the aggregate receipts.

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V. If the grant be challengeable, as in truth the grant of a pension, it cannot be challenged under this summons. There is no allegation, that intending to grant a pension, a grant of the office was given to cover the pension; neither is there any allegation of an excess in the amount of the salary, and no one of the reasons of reduction quarrel the grant upon either of these grounds in any thing like a substantive form.

Mr Attorney General, and Mr Anderson, for the respondents.—

I. The Crown can only grant offices as they have been granted in ancient times, unless altered by Parliament. The right must be exercised according to usage, and what has been held during pleasure cannot be granted for life. In the present instance, whatever may have been the earlier history of the chamberlainship of Ettrick Forest, the earliest grant of it shewn was in 1703, during pleasure, and so it continued until the year 1786, when, for the first time, a grant for the life of the grantee was made, and this grant, with the exception of that to the appellant, is the only instance of a grant beyond the life of the sovereign.

II. By the act 1455, cap. 41, Ettrick Forest, and by the act 1487, cap. 112, the lordship of Dunbar, were both annexed to the Crown, and by the act 1597, cap. 235, all “pensions, gifts, or dispositions whatsoever,” of the annexed property, are declared to be null and void, which was farther enforced by cap. 242 of the same act. All these statutes were especially confirmed by the act 1633, cap. 10, and are, by the institutional writers, held as being in force, *Stair*, II. 3. 35; *Bank*. vol. I. p. 538; *Ersk.* II. 3. 14, and received effect in *Advocate v. Morton*, *Mor.* 7859; *Advocate v. Moncrieff*, *Mor.* 3460; *Dun*, *Mor.* 3462: and moreover, being in relation to public policy, these statutes could not fall into desuetude, *Ersk.* Prin. I. 1. 16; *Wilson v. Queensferry*, *Mor.* 1835; *Jack v. Stirling*, *Mor.*

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1838; *Anderson v. Wick*, *Mor.* 8463. Whatever effect possession, in the instances given by the appellant of grants contrary to the statute, might have upon these individual instances, it could not free others from the enactments of the statutes. By the grant to the appellant the whole revenue of Ettrick Forest, and a part of the revenue of the lordship of Dunbar, are made over by the sovereign, not for his own life, but the life of the grantee. No doubt, the revenue is given in the *name* of salary, and the grantee is *called* a chamberlain, but the substance is not the less an alienation of this part of the annexed property, and therefore void under the ancient statute law. This view was taken by the Barons of Exchequer in regard to the chamberlainship of Ross in the year 1720. In that case they refused to pass a signature for a grant of the office during the life of the Earl of Sutherland, because, by the laws relating to the annexed property, “the sovereign can make no grant thereof for any longer time than during his own life,” but they passed one for the Earl’s life should his Majesty so long live. Barons Clerk and Scrope, who were on the bench during these proceedings, afterwards prepared a treatise on the forms and powers of the Court of Exchequer, which was subsequently printed, wherein, under the word “gifts,” they enforced the principles on which the signature of the Earl of Sutherland had not been allowed to pass.

[*Lord Brougham.* — How had the Court of Exchequer jurisdiction? The opinions of the Barons must have been quite extrajudicial.]

As a judicial opinion, no doubt, what fell from them cannot have weight, but it is of great value, as shewing the opinions of those who had the administration of the royal revenue.

[*Lord Brougham.* — No better than any thing that might fall from the Chief Justice of the King’s Bench during a vacancy in the office of Chancellor of Exchequer, which the Chief Justice, *ex officio*, fills during that time.]

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III. The grant to the appellant was farther *ultra vires* of George IV., inasmuch as by the arrangement which took place on his accession to the throne, the hereditary revenue was placed at the disposal of Parliament, and beyond his control. George III., at his accession, surrendered to Parliament “the hereditary revenue” generally; this of course included the revenue of the United Kingdom, not of England and Ireland only, to the exclusion of Scotland; and by the 8th section of 1 Geo. III. cap. 1, Parliament granted the Scotch hereditary revenue back to the sovereign, declaring, that the respective “revenues and duties” payable in Scotland should be enjoyed by his Majesty during his life. An arrangement in precisely the same terms, and embracing the same matters, was made on the accession of George IV. That monarch, therefore, enjoyed the hereditary revenue of Scotland under a grant from Parliament, and for his life only, and consequently, any grant by him to endure beyond his own life must be void, and cannot bind his successors.

IV. The grant of the L.300 pound a-year, whether it be called salary, pension, or annuity, is quite independent of the grant of the office; it is as well “in consideration of the said office as out of his royal bounty.”

[*Lord Brougham.* — Can any other warrant be produced having the words “royal bounty?”]

None; but these words were probably introduced when the salary was raised. A grant of the office merely, with all perquisites, &c., thereto belonging, would not have carried more than the ancient salary of L.100 Scots, or L.8, 6s. 8d. But the grant here of L.300, and L.20 to the deputy, is quite distinct from the grant of the office, and it is, in truth, neither more nor less than a pension out of the royal bounty, with a colour given to it by coupling it with the grant of an office, and calling it a salary.

Mr Attorney General, at concluding, said he should claim the

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right on behalf of the Crown to reply, when the counsel for the respondent should have concluded his reply.

[*Lord Brougham.* — We understand there are three instances where this claim was not allowed, but we don't know whether the matter was argued. There is no precedent for it in the Courts of Scotland, from which this appeal is brought.]

There is no order of the House against it, and the prerogative is founded on this, that the officers of the Crown are supposed to assist in the administering of justice, and not to conceal or impede it. If the claim is allowed, I shall not, in this instance, exercise it. I only claim the right.

Mr Pemberton, in reply. — There have been many instances where the right to have the last word might have been, but was not claimed by the Crown. This would argue against the existence of the right. Certainly no such right exists in the case of informations by the Commissioners of Woods and Forests; and in charity cases, where the Attorney General sues without a relator, there is no instance of the right having been allowed on the argument of exceptions, demurrer, or motion.

[*Lord Brougham.* — If any case should be discovered affording a precedent, we will act upon it.]

If an office have been in use to be granted in a particular form, no doubt this form must be continued, but that is not the case made upon the record; there is no allegation in it of any particular form or period of endurance in grants of the office in question. There is no proof of usage prior to 1712, and since then the grant has never been identical either in form or duration. And instances of grants of offices, not only for life, but in fee, are numerous in the history of Scotland.

[*Lord Brougham.* — The office of first Criminal Judge, the Justice General, was in fee, and exercised.]

As we do not found on any ancient or universal usage, what has been said upon this subject, in regard to the amount of the

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salary, is quite immaterial; the only question is, whether any statute provides that the Crown shall not grant above a certain amount of salary. If the effect of the annexation acts is to declare that a salary cannot be given out of the hereditary revenue, then there is an end of the power to grant the office at all, supposing it otherwise competent; and if there be a power to grant the office with a salary, the power may be abused, but this can never be said to be an alienation. The amount of the salary might be important in considering whether there was an intention to create a new office, and under form of a grant of the office, to give a pension, inasmuch as the Crown cannot create a new office if the salary is to come from a tax on the subject; but this consideration cannot arise here, where the office had existed from time immemorial, and for nearly 100 years, with a greater salary than that given.

LORD BROUGHAM. — In January, 1827, a warrant under the Sign Manual, and in September of the same year, a grant under the Great Seal of Scotland, was issued to the appellant, purporting to confer upon him for life the office of “chamberlain and collector of the rents, revenues, fines, duties, and other casualties of superiority issuing and payable to the Crown out of the lands and lordships of Ettrick Forest,” with power to appoint a deputy or deputies. There is added the farther grant of an annuity or yearly salary of L.300 to Lord Douglas himself, and L.20 to his deputy or deputies, and this annuity or salary of L.320 a-year is stated to be “as well in consideration of the said office as out of his Majesty’s royal bounty and favour to the said grantee.” The rents and feu rents are admitted, upon the pleadings, to consist of money payments, which amount to the fixed sum of L.235, 7s. 7½d. and never have exceeded that sum. The warrant and grant provide, that if the annuity or salary of L.320 cannot be obtained from the rents of Ettrick Forest, the

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difference shall be made good out of the Crown revenues in the lordship of Dunbar.

An action of reduction of this grant was brought first by the Lord Advocate on behalf of the Crown, and of the Commissioners of Woods and Forests, and upon an objection being taken to the competency of the parties, the action was afterwards brought by the Officers of State, with the concurrence of the Lord Advocate on behalf of the Commissioners. The Court of Session sustained the objection to the competency of the action as first brought, and this formed the subject of an appeal. They also, by a majority of the consulted Judges, sustained the reasons of reduction, and set aside the grant decreeing the defendant to make repayment of the sums received by him since the first demise of the Crown which happened after the grant, that is since June, 1830.

It does not seem necessary to go into many of the reasons upon which this decision proceeded; one is sufficient to set aside this grant. There can be no ground whatever for treating it as the grant of an office. It was, to all intents and purposes, the grant of a pension. This appears clearly enough even from the language of the grant; but the annexation of a salary of L.320, for collecting a revenue of L.235, at once shews that it was a pension out of the land revenue, which was granted under the colour or disguise of granting an office. Nor does this disparity appear to have been matter of any doubt when the grant was made, for provision is expressly made, that “whenever the moneys of the said collection come short,” that is, the moneys for collecting which the salaries were granted, payment shall be made out of the Crown rents of Dunbar. This grant, therefore, was merely colourable as the grant of an office, it was a shift for the grant of a pension, which could not be granted to endure beyond the life of the Sovereign granting it, and being charged on the land revenues, it was in fact an alienation of a portion of that revenue. If the Sovereign could grant L.300 a-year out of

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that revenue, he might have granted the whole, and if he could grant any portion of it during the life of the grantee, there is no conceivable reason why he might not, in like manner, have granted the whole away from the Crown in perpetuity.

It thus becomes unnecessary to consider what power the Crown has of granting the office of chamberlain for life of the grantee, because this was in truth no grant of the office. But it may be observed, that a very strong opinion was given by the learned Judges of the Exchequer in Scotland, where a grant for life had been made of the chamberlainship of Ross, and L.500 per annum in 1721 to Lord Sutherland. Their Lordships remonstrated with the Treasury on the ground expressly stated by them, that no such grant could be made either for life or years. Although this may be said to be in some sort an extra-judicial opinion, it is yet entitled to great respect, considering the quarter from which it comes. It is well known, that, to say nothing of such opinions taken in ancient times, there was one of great celebrity taken early in the last century. An important principle respecting the constitutional power of the King, in this country, rests upon the opinion taken in the time of George First, the Judges reporting their opinion, that the care and disposal of the children of the royal family belongs to the reigning Sovereign. The law on this point has ever since been regarded as settled by that report.

An objection has been taken by the appellant, on the ground, that the summons gives no reason of reduction, which raises the question, whether the grant was a *bona fide* gift of the office, or only a pension under colour of such a gift. But supposing that it were necessary to specify the reasons in the summons, and that the general words at the conclusion could not cover the particular reasons; and supposing that the second reasons of the supplemental summons, denying the power of the King to make such a grant, were not sufficient, still there seem to be particular

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words quite sufficient for the purpose. The third reason of reduction in the summons at the instance of the Officers of State, expressly states the grant to be illegal and inept as an alienation, and for a period beyond the King's life, "under the narrative " and disguise of a grant of the office of chamberlain." This seems to be the very reason in question.

It has become unnecessary to examine how far the surrender and enactments at the commencement of their reigns have in recent times tied up the hands of the successive Sovereigns. There appears, however, no reason for coming to a different conclusion on this subject from that which several of the Judges below have arrived at, particularly Lord Jeffrey, after a very careful and able examination of the civil list acts. The grant of the pension, in this case, appears to be wholly inconsistent with those provisions. The judgment, therefore, which is appealed from in the reduction must be affirmed.

Lord Campbell. — My Lords, I would merely take notice of one single point which arose, to which my noble and learned friend has referred, namely, the construction of the civil list acts. It seems to me that the learned Judges below have thrown out some expressions upon that subject which are hardly to be defended, because they supposed, that the King, by his speech, surrendered all his land revenues for ever, to the use of the public, and that there was only a re-grant by act of Parliament for his own life. It seems to me that that is an erroneous view of the subject, because the King's speech would operate nothing, it was only an intention indicated by the Sovereign, that the Sovereign was willing to enter into such an arrangement if Parliament should approve of it; and all these civil list arrangements are only for the life of the Sovereign, and are carried into effect by act of Parliament. With this qualification I entirely agree in the view taken by the learned Judges in the Court below, who considered this as a mere disguise for granting a pension

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under the name of an office; and I think that the third reason is quite apparent, and covers it most expressly, though I think one of the learned Judges intimates his opinion, that the objection is not raised. It seems to me that this is clearly the grant of an annuity under the name of an office, and that the annuity undoubtedly fell in upon the death of the sovereign granting it.

Lord Brougham. — I ought to mention to your Lordships, that my noble and learned friend, (*Lord Cottenham*,) who is not now present, entirely agrees with my noble and learned friend and myself in our view of the case. The main ground upon which I wished to look into the case was, to see that the objection was raised, by the pleadings, as I thought that there must be some ground for the formal objection which was urged; but when we come to look at it, the word “disguise” puts it out of question. I move that the interlocutors be affirmed.

Ordered and Adjudged, That the petition and appeal be dismissed this House, and that the interlocutors, so far as therein complained of, be affirmed.

PEMBERTON, CRAWLEY, and GARDNER — SPOTTISWOODE and
ROBERTSON, Agents.