

THE HERRIES PEERAGE CLAIM.

BEFORE THE LORDS COMMITTEE FOR PRIVILEGES.

Per Lord Cranworth: It is a settled rule of law as to Scotch Peerages that where the origin of the honour is lost in antiquity, and so does not appear in any direct proof, the presumption is that it was in its creation limited to males only ; p. 588.

Per Lord Cranworth: Though, however, this is undoubtedly the rule, yet, as it was always in the power of the Sovereign to make an honour descendible on females as well as males, this general presumption will give way wherever there are circumstances sufficient to show in any particular case that females as well as males were included in the original destination ; p. 588.

Per Lord Brougham: It is the presumption in Scotch Peerage law that where the patent of creation does not appear, the descent is limited to heirs male ; p. 600.

On the other hand, it is equally certain and equally clear that that presumption may be rebutted ; p. 600.

By the Scotch Peerage law, a husband might sit in Parliament *jure uxoris* ; pp. 595, 607.

By the Scotch Peerage law, a Peeress might resign her dignity in favour of her eldest son.

There never was in Scotland a doctrine corresponding with the English doctrine of abeyance in Peerage cases.

ON the 15th of June 1848 the petition of William Constable Maxwell of Nithsdale in the county of Dumfries, and of Everingham in the county of York, Esquire, claiming to be Lord Herries of Terregles in the Peerage of Scotland, was, together with Her Majesty's reference thereof to the House,

1848.
*June 15th and
July 28th.*

1849.
*May 8th, 18th,
June 7th, and
July 9th.*

1851.
May 20th.

1853.
April 8th.

1854.
*May 30th, 31st, and
June 2nd, 16th.*

1858.
June 23rd.

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presented by command, and referred to their Lordships' Committee for Privileges to consider thereof, and to report thereon.

On the 28th of July 1848 the petition of William Maxwell of Carruchan, in the Stewartry of Kirkcudbright, Esquire, not claiming the said Peerage, but praying to be heard in opposition to the claim of the said William Constable Maxwell, Esquire, was referred to the said Committee for Privileges.

On the 8th May 1849, Counsel having been called in, Mr. *Stuart Wortley* and Mr. *Fleming* appeared on behalf of Mr. Constable Maxwell, the Petitioner.

Mr. *Hope*, afterwards Mr. *Hope Scott*, appeared as Counsel for Mr. Maxwell of Carruchan.

The *Attorney-General* and the *Lord Advocate* were in attendance on behalf of the Crown.

Mr. *Stuart Wortley* opened the allegations of the Claimant's petition. Divers witnesses were then examined, and sundry documents were produced. The inquiry was continued by successive adjournments on the 18th of May, the 7th of June, and the 9th of July 1849.

In the Sessions of 1851 and 1853 further evidence was delivered in ; but it was not until the Session of 1854 that Counsel were fully heard on the merits of the claim and of the opposition.

On the 30th and 31st May 1854, Mr. *Fleming* summed up the evidence which had been adduced, and commented at great length on the questions of law which that evidence involved.

The *Solicitor-General* (a), with whom was Mr. *Rolt*, on the 31st May and 2nd June addressed their Lordships on behalf of Mr. Maxwell of Carruchan, in opposition to the claim of Mr. Constable Maxwell.

(a) Sir Richard Bethell.

On the 2nd June 1854 Mr. *Fleming* replied.

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On the 16th day of June 1854, the *Lord Advocate* delivered his opinion to the Committee, and thereupon the further consideration was adjourned *sine die*.

In the Session 1858 the Committee came to the resolution that the Claimant's case was established. The following opinions were delivered.

Lord CRANWORTH :

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opinion.*

My Lords, there is no direct proof of the creation of this Peerage, the original grant, if any ever existed, having long since disappeared. It is, however, sufficiently shown that in or prior to the year 1489 Herbert Herries, who is described in a Royal Charter of the 3rd of May 1486 as Herbert Herries, son and heir apparent of David Herries of Terregles, Knight, had been created a Baron by the title of Lord Herries of Terregles, and by that title sat in Parliament.

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He was succeeded by his eldest son Andrew in or before the year 1505 ; and Andrew having died in the year 1513 or 1514 was succeeded by his only son, William. Andrew and William successively sat in Parliament, first by the title of Lord Terregles, and afterwards of Lord Herries of Terregles or simply Lord Herries ; but it is, I think, clear beyond any reasonable doubt that though the title thus varied, it was used to designate the same individual.

William, the third lord, died in the year 1543, between the months of April and September, leaving no son, but leaving three daughters, Agnes the eldest, Katherine the second, and Jane the third.

If the title was, according to its original destination, descendible to heirs of line generally, and was not confined to males, then on the death of William it passed to Agnes, his eldest daughter. The present

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Claimant has satisfactorily made out that he is the heir of line of Agnes, being descended from William her eldest son; and, therefore, if the title was descendible to heirs female as well as male, the Petitioner has made out his case, otherwise he has not.

It is a settled rule of law as to Scotch Peerages, that where the origin of the honour is lost in antiquity, and so does not appear in any direct proof, the presumption is that it was in its creation limited to males only. This question was much discussed in the *Cassillis* (a) and *Sutherland* cases (b) nearly a century ago, and the rule was then finally established, and certainly ought not now to be questioned, even if the foundations on which it rests were less solid than I believe them to be.

Though, however, this is undoubtedly the rule, yet as it was always in the power of the Sovereign to make an honour descendible on females as well as males, this general presumption will give way, wherever there are circumstances sufficient to show in any particular case that females, as well as males, were included in the original destination. The question, therefore, is, whether in the case now under consideration such circumstances have been shown.

The first observation which it occurs to me to make is, that here there was certainly a Peerage descendible to some class of heirs, for it was enjoyed during more than half a century successively by Herbert the first baron, on his death by Andrew, his eldest son and heir, and after him by William, Andrew's only son and heir.

So far the descent is consistent with the hypothesis of a Peerage descendible to heirs of line generally,

(a) Mr. Maidment's Report. (b) *Ibid.*

or to males only. If the former theory be correct, then on the death of William the Peerage passed to Agnes, his eldest daughter. If the latter, then it passed to Archibald Herries of Maidenpaup, the eldest or only son of Roger Herries, the second son of Herbert the first lord, and the younger brother of Andrew the second lord. It certainly did not become extinct.

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In support of the former theory, it is to be observed that the title was never assumed or claimed by Archibald or his descendants, although it must have been well known to him that on the death of William he was heir male of the body of Herbert. By a Royal Charter, dated the 28th of April 1543, the lands of Reidcastle were granted to William Lord Herries and his wife Catherine jointly, and the heirs male of their bodies, and for default of such heirs then to the general heirs male of William Lord Herries. When, therefore, William Lord Herries died without issue male, Archibald, his cousin, as his general heir male, became entitled to these lands, subject to the life interest of Catherine, the widow of William; and, accordingly, we find that on the 14th of March 1561 Archibald obtained seisin of the lands of Reidcastle, as heir male of William entitled under the entail of 1543. . This is important as showing,—what, indeed, even without such evidence could hardly have been doubted,—that Archibald was aware of his title as heir male of his cousin William, and so of his right to the Peerage as heir male of Herbert, in case the Peerage were confined in its descent to the heirs male of his body. With this knowledge, however, he never claimed the title, and the present Claimant relies on this as a most important circumstance tending to show that the Barony was not confined in its descent to the male line.

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Against this it is said that the omission to claim a dignity in those days affords but slender proof against the right, because the obligations connected with a dignity were often onerous so as to make it be regarded rather as a burden than a benefit. This may be to some extent true. At the same time, I must observe that rank and precedence in the 16th century were objects much valued in Scotland, and the evidence shows that the Maidenpaup branch of the Herries family, that is, the heirs male of Herbert the first baron, were proud of their name and family. I infer this from two settlements made by George of Maidenpaup, the eldest son of Archibald, in which, settling lands at Maidenpaup on his son and grandson, he confines the destination to those heirs male only who shall bear the name and arms of Herries. It is difficult to believe that persons thus desirous of upholding the importance of their family, and knowing that they had a right to the honour as heirs male of the first lord, should have failed to assert it.

It appearing, then, that there was not after the death of William Lord Herries any assertion or enjoyment of the title by the persons who were entitled on the supposition that the destination was confined to the male line, the next question is, was there any such enjoyment by those entitled on the assumption that it was not so confined, but that it was to go to all heirs of line of Herbert, the first taker?

The first inquiry to be made on this head is as to the manner in which Agnes, (who, if the honour was descendible to females as well as males, was the person entitled,) was treated and described after the death of her father. The evidence on this part of the case stands thus:—On the 30th of September 1543 the wardship and marriage of the three daughters of William Lord Herries, who had died since the month

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of April then last, were granted under the Privy Seal to John Hamilton, one of the sons of the Earl of Arran, then Protector of the realm. In that grant (which is set out in the Minutes, in page 29,) the three daughters are mentioned without any title of honour, and with blanks for their Christian names, and they are merely described as daughters and heirs of the unquhill William Lord Herries.

On the 19th of March 1547 John Hamilton sold and assigned the marriage of Agnes, the eldest daughter, to John Master of Maxwell; and in the instrument of disposition Agnes is described as the eldest daughter only, and one of the heirs of William.

On the preceding day, namely, the 18th of March 1547, a grant of this same marriage of Agnes to John Master of Maxwell had been made under the Privy Seal, in order, I presume, to make the title more sure, and she is there also described as Agnes Herries, only eldest lawful daughter and one of the heirs of William unquhill Lord Herries.

It appears, therefore, that in none of the documents relating to the grant of the wardship and marriage of Agnes was she described by any title of honour. She is merely spoken of as one of the daughters, or as the eldest daughter of William Lord Herries. Agnes did not marry during her minority, for there is a precept of Chancery, dated the 13th of November 1548, and directed to the Sheriff and Bailiffs of Dumfries, reciting that she was then of age, and authorizing them to give her seizin of one-third part of (*inter alia*) the Barony of Terregles; and there is a similar precept directed to the Sheriff and Bailiffs of Ayr, dated the 13th of June 1549, commanding them to give to Agnes seizin of one third part of (*inter alia*) the Ba-

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rony of Barnewell and Symonton. In neither of these precepts is she described otherwise than as "*senior filiarum et una de tribus hæredibus*," &c.

We have before us on the Minutes the instrument of seizin taken of the Barony of Barnewell and Symonton, in pursuance of that precept. It bears date the 7th of November 1549, and Agnes is there only described as "*senior filiarum et una de tribus hæredibus*."

Before the 1st day of February next following, John Master of Maxwell married Agnes, and on that occasion she surrendered to the Crown the third of her father's lands of which she had obtained seizin, in order to obtain a re-grant to herself and her husband; and accordingly we have on the Minutes a Crown Charter, dated the 1st of February 1549, granting to John Master of Maxwell and Agnes his wife one-third of (*inter alia*) the Barony of Terregles and the Baronies of Barnewell and Symonton, to hold to them and the survivor, and the heirs of their bodies. On the same day there was a precept of seizin, directed to the sheriffs of the counties in which the lands are situate, commanding them to give seizin to John Master of Maxwell and Agnes his wife of the third part of their lands, according to the tenor of the charter. Seizin was accordingly delivered, as appears by two instruments of seizin, the one dated on the 23rd of March 1550, relating to the third part of the Barony of Barnewell, and the other, dated on the 12th of April 1551, relating to the third part of the Barony of Terregles.

In the Crown Charter and in the precept of seizin Agnes is merely described as the eldest daughter and one of the heirs of William Lord Herries, and the wife of John Master of Maxwell; but in both the instru-

ments of seizin she is designated as "*nobilis domina Agnes Hereis*"(a).

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Some years afterwards, namely, in or about the year 1561, John Master of Maxwell became the purchaser of the other two-thirds of the lands formerly of William Lord Herries; that is, of the two-thirds which had descended on Catherine and Jane, the two younger daughters; and the whole of the lands were, by a Crown Charter bearing date the 8th of May 1566, erected into a new barony, to be called the Barony of Terregles, and were granted to Sir John Maxwell and Agnes his wife, and the heirs male of their bodies, to be holden in blanch ferm. In order to accomplish this change in the tenure, Sir John Maxwell and Agnes his wife surrendered the third which they held jointly into the hands of the Crown. The surrender was made by Agnes through an attorney or procurator, Robert Fraser, whom she appointed to act for her by a regular procuratory of resignation, dated the 20th of April 1566. And on the following 7th of May, Fraser, as her procurator, and Sir John Maxwell personally, surrendered the third in question into the hands of the Queen, in her chamber at Edinburgh. The procuratory of resignation and the notarial minute of the resignation into the hands of the Queen are set out in the printed Minutes now in the hands of your Lordships. The surrender of the other two-thirds by Sir John Maxwell does not appear, but no doubt it was duly made at the same time, for on the 8th of May 1566, being the day after the surrender in

(a) The Lord Advocate in his address to the Committee described the instruments of seizin as "notarial." An instrument of seizin is a *public* instrument. The notary who prepares and certifies it is a *public* and *quasi* judicial officer, sworn to accuracy and fidelity. In 1540, prior to the instruments of seizin in favour of "Agnes Hereis," the Scotch Parliament passed an Act for the punishment of "false notaries." See "Office of a Notary Public," p. 241.

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the Queen's chamber, there was a Royal Charter granting the entirety, as I have already stated, to Sir John Maxwell and Agnes Herries his wife, and the heirs male of their bodies, in blanch farm. A precept of seizin issued on this charter, dated the same 8th of May 1566, on which seizin was duly given on the 17th of the same month. In all these documents Agnes is described simply as "Agnes Hereis, wife of Sir John Maxwell."

It appears, therefore, that in none of these documents which proceeded from the Crown was she ever described as "*nobilis domina* Hereis Lady Herries," but in two of the instruments of seizin she is so designated by the notary by whom the instrument was prepared. The argument on this point urged against the Claimant was that the parties must have been aware that Agnes had not the right now insisted on, otherwise she would have insisted on the proper title being used in the documents emanating from the Crown as well as in those prepared by her own lawyer.

It must, however, be observed that these two instruments of seizin are by no means the only documents in which she is described as "Domina Herries," Lady Herries. There are in evidence four discharges of old wadsets, dated respectively 6th August 1562, 31st July 1564, 25th September 1564, and 25th November 1564. In all of these the discharge is described as made by the "Right Honourable John Maxwell, of Terregles Knight, and Dame Agnes Lady Herries, his spouse, eldest daughter and heir of umquhill William Lord Herries." So in the instrument of resignation by Catherine of her third of the Barony of Herries, dated the 18th of November 1566, she resigns the same in favour of the "Right Honourable Sir John Maxwell, of Terregles Knight, and Dame Agnes Lady Herries, his spouse."

Whatever may have been the reason for Agnes having been thus differently described in the charters and other documents emanating from the Crown and in those framed by her own law agents, one thing at least is fairly deducible from the evidence, namely, that she did not abandon her claim to the title. It may be that she or those about her thought her right doubtful, or she and her husband may have considered that until she and her husband had become entitled to the whole of her father's land it would not be prudent to claim a title, the dignity of which they had no adequate means to support, and the possession of which might have been onerous. Still the fact that in many legal instruments prepared by her lawyers she was described as "*nobilis domina* Agnes," or as "Dame Agnes Lady Herries," makes it plain that she did not abandon the claim now insisted on. Had she done so, there would have been no reason why she should have been described as "*nobilis domina*" or as "Dame Agnes Lady Herries," any more than her sisters, who are never so described in any of the numerous instruments to which they were parties.

Bearing this in mind, and recollecting that in May 1566 Agnes and her husband had become entitled to the whole of the barony of Terregles, formerly held by her father William Lord Herries, and that by the law or courtesy of Scotland a husband may take up a title belonging to his wife, we have next to remark that before the 12th of March 1566-67, the next year, Sir John Maxwell, the husband of Agnes, had certainly by some means become Lord Herries; for on that day there was an Order of Council relating to the claim of certain English merchants which is stated to have been referred to John Lord Herries; and whereas before that time he had always sat in the Privy Council as "John Maxwell of Terregles, *miles*," after that date he always sat by the title of "Johannes Dominus

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Herries." And further, in the Parliaments of 1567, 1579, and 1591 he sat as Lord Herries, never having sat in Parliament before 1567.

The Claimant argues from these facts that, as there is nothing to show that he ever was created Lord Herries, it must be assumed that he took up the title in right of his wife, and that his neglect to do so at an earlier time after his marriage must be explained by the fact that he and his wife had not until the year 1566 become the owners of the whole of the lands which were then erected into the barony of Terregles; or that it must be presumed that there was some reason not now capable of explanation which deterred them from insisting on their rights at an earlier period.

After 1567 Agnes and her husband were certainly always described as Lord Herries and Lady Herries his wife, and he regularly sat in Parliament and at the Privy Council as Lord Herries, till his death in 1582. After his death his son William succeeded and enjoyed the title till his death in 1603. He was succeeded by his son John, who lived till 1631, and the present Claimant is undoubtedly his heir of line.

The argument of the Claimant may be thus shortly stated. The title was certainly descendible either to the heirs male of the body of Herbert the first lord or to the heirs general of his body. All the facts are consistent with the latter, they are inconsistent with the former hypothesis. If the destination had been to males only, then Archibald of Maidenpaup, on the death without male issue of his cousin William, became entitled, and would certainly have asserted his claim. This he never did, and on the contrary Agnes, who, if the original destination was not confined to males, was certainly entitled, always kept alive her claim, and eventually took up the title, which was enjoyed by her husband, and afterwards by her descendants till it was

absorbed, after the lapse of a century, in the higher title of Nithsdale. And, as a corroborative circumstance, it may be observed that in the original Crown grant of the lands of Barnewell and Symonton made in 1493 to Herbert the first lord, four years after he is first shown to have sat in Parliament, the destination is to Herbert and Mariote his wife, and the heirs of their bodies, and for default of such heirs, to the heirs general of Herbert, not to his heirs male. Now, though certainly the lands might be settled in a different course of descent from the title, yet the fact that very soon after the creation of the title these lands were settled so that they might go to females as well as to males is a circumstance in favour of the Claimant not altogether to be overlooked.

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This is the argument on the part of the Claimant. Against this claim it is urged that the title taken by Sir John Maxwell must have been taken, not in right of his wife, but by virtue of a new grant by the Crown at the end of the year 1566, or at the beginning of 1567; and in support of this hypothesis it is urged, that at the end of the year 1566 took place the baptism of Prince James, who had been born in the month of June in that year. Large sums of money were raised for the festivities on that occasion, which was a great State solemnity, and it was argued that a creation of new Peerages was then in all probability made; and to no one would the favour of the Crown be more likely to be extended than to Sir John Maxwell, who had rendered great services to the country, which, as appears from the evidence, were highly appreciated. No grant of any such Peerage is proved to have been made, but it is urged that on no other hypothesis can the fact be accounted for, that on the death of John Lord Herries, the husband of Agnes in 1582, William their eldest son took the title

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and sat both in Parliament and in the Privy Council as Lord Herries in his mother's lifetime for above ten years, she having lived till 1593. This was what would happen if John sat in Parliament in right of a title newly conferred on himself and the heirs male of his body. It is not what ought to have occurred if he sat merely in right of a title derived through his wife, for the argument that a son was in such a case summoned to Parliament as of right in respect of his parent's title rests on no authority. I must, however, remark that it is very unlikely that the Crown should have conferred the title of Lord Herries of Terregles on Sir John Maxwell when according to the hypothesis there was another person who had a right to that same title, a fact of which no one could have been ignorant. The hypothesis that on the occasion of a great State solemnity Sir John Maxwell should assume the title to which his wife was already entitled, and should by that title be summoned to Parliament, is attended, as it seems to me, with much less difficulty.

There is one other matter of great importance to which I have not yet adverted, I mean the Decree of Ranking in 1606. That decree cannot by any means be taken as conclusively establishing the relative rank of the different Peers, but it is still a document of weight; and it appears that in settling the precedence of the Peerage at that time John, the then Lord Herries, who was the grandson of Agnes, claimed and obtained a rank to which he was not entitled if his honour was to take its date from 1566, but to which he was entitled if it was to date from 1489. This goes far to negative the proposition that the descendants of Agnes sat, or at all events that they sat exclusively, by virtue of a title first conferred on Sir John Maxwell.

What your Lordships now have to do is to weigh the facts on the one side and on the other, and having done so, to say whether there is such a preponderance of evidence on the part of the Claimant as to warrant us in reporting that he has made out his case.

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I do not remember ever to have had a case of fact to consider on which I have had more difficulty in making up my mind ; but in the result I have come to the conclusion that we ought to report in favour of the Claimant. The circumstances that Archibald, who was, and knew that he was, the heir male of the body of Herbert, never asserted a claim to the honour, and that Agnes was generally described by her sisters and lawyers as "*nobilis domina*," or "Lady Herries," which would be her proper designation if she had succeeded to the dignity, though she never formally took it up, before 1566 or 1567, coupled with the fact that in the Decree of Ranking in 1606 the grandson and heir of Agnes was placed in a rank to which he was not entitled if he had no claim except through a title first created in 1566,—these circumstances appear to my mind so strong in favour of the claim as to outweigh the difficulty arising from the undoubted fact that the son of Agnes sat in Parliament as Lord Herries in his mother's lifetime. Whether this happened by reason of a new dignity having been conferred on the husband of Agnes, independently of that which he enjoyed in her right (which might have been), or whether on the death of the husband it might have been deemed reasonable, in consideration of the great services of the family, to confer a new dignity on the son, or to call him to Parliament in his mother's lifetime, or whatever other cause may have existed not now capable of explanation, the circumstance seems to me insufficient to outweigh the evidence adduced by the Claimant ; and I shall

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therefore move your Lordships to report that the claim has been established.

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Lord BROUGHAM :

My Lords, I entirely agree with my noble and learned friend in his expression of the difficulty which attends the decision of this case. I have felt it throughout, and your Lordships may recollect, and the learned Counsel at the bar may recollect, that in the course of the evidence and of the argument I more than once threw out an opinion rather inclining against the claim ; but upon the fullest consideration I have since been able to give to the evidence, and upon full communication and consultation with my noble and learned friend who has just addressed your Lordships, I have come to the same opinion with him, that the Claimant has done enough to entitle us, I may say *to call upon us*, to report in favour of his claim.

My Lords, there is no doubt whatever of the fundamental proposition that where, as in this case, the patent of creation does not appear, the presumption is in favour of heirs male. On the other hand, it is equally certain and equally clear in Peerage law that that presumption may be rebutted. This was held clearly in the cases which have been referred to by my noble and learned friend, the *Cassillis case* and the *Sutherland case*, and though I do not mean to refer to what fell from Lord *Camden* in the latter case, the *Sutherland case*,—because I well know that it has among learned men been made the subject of very considerable observation, as having gone a little too far in one view,—yet in this respect he clearly did not go too far in expressing a most clear and confident opinion, still more strongly than Lord *Mansfield*, who had preceded him in the discussion, had expressed, in favour of the proposition that, although the general

presumption is in favour of heirs male, still that presumption may be rebutted.

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Now, my Lords, the circumstances to rebut that presumption in this case, which have been distinctly and forcibly stated by my noble and learned friend, appear to me to be sufficient. Among them I may say is this, that William having died in 1543, and Archibald of Maidenpaup having succeeded to the lands and continued in possession 23 years, till 1567, no claim whatever was made by him to the Peerage, although he was a member of a family who (whatever may be said of the onerous nature of a Peerage in those days) were most prone, as my noble and learned friend has well observed is proved in evidence, to assert their preponderance and precedence as heirs male, and to claim the honours. This is clearly seen in their settlements, which appear on the Minutes, some of them before and some of them after 1600; some of which my noble and learned friend has referred to, but there are others, in 1604 and 1629; in all those cases the family clearly showed their strong disposition to claim the honours, making it peremptory condition in the deeds which they then executed that the party taking should bear the name and arms of Herries.

My Lords, my noble and learned friend has also well adverted to the nature of what I may call the documentary evidence that we have, which is not so clear and not so decisive, I frankly admit, and did in the course of the evidence and of the argument at the bar, as it would have been if those documents had been Crown Charters—as if they had been documents proceeding from the Crown. But at all events they show that in the family Agnes was treated as *nobilis domina*, and these documents at all events most clearly show one thing, that she did not abandon her claim. That

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is perfectly clear. Now it is said, and I recollect the topic was urged upon our attention at the bar, and it is one to which my experience and my recollection of Scotch family procedure leads me to give great weight, that in those days, and much later than those days, down to very nearly the present day, it was customary for ladies not ennobled and not claiming any Peerage to take the title of "Lady." But how did they take it? They did not take the surname, and call themselves (for example) "Lady Herries," but they took the title of the estate feudally, and in that case this lady would have been called "Lady Terregles," not "Lady Herries." Take the name of any individual, say Lady Campbell of Succoth; she would not have been Lady Campbell, she would have been called Lady Succoth, because Succoth was the estate; and so with respect to various others. The whole family of the Campbells used to take some one name and some another, never calling themselves "Lady Campbell," but "Lady So-and-so," according to the name of the estate.

It appears also, as my noble and learned friend has well observed, that no other lady of the family, except Agnes, was called *nobilis domina*.

My Lords, I really am unwilling to trespass much longer on your Lordships' time; I only wish to run over one or two of the circumstances which have had the effect of leading me to agree with my noble and learned friend in favour of this claim. There is the sitting in Council, which is not immaterial, and in Parliament in 1567, 1579, and 1591. In 1567, I think it was, that John Maxwell sat in the Council and afterwards in Parliament.

Then, my Lords, as to the circumstance that seems to cast a doubt upon this claim, which is undeniably one of very great importance, for it is the sitting of William the son of Agnes, which is inconsistent with

the present claim. But, in order to get rid of the argument on behalf of the present Claimant, and to rebut it upon that ground, you must assume the creation of a new Peerage. My Lords, I think the circumstances of this case are inconsistent with that presumption.

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The Decree of Ranking in 1606 is very material in this case. It is quite clear that if the Peerage had been created in 1567, or thereabouts, the ranking in 1606 would have been according to that date, instead of which it was a ranking according to the prior date of the earlier title.

My Lords, upon the whole, therefore, I agree in the conclusion at which my noble and learned friend has arrived, that in this case we have ground for reporting, and are called upon to report, that the Claimant has made out his claim.

• The CHAIRMAN (a):

My Lords, after the most careful investigation, having formed an opinion different from that which has been expressed by the two noble and learned Lords, and conceiving as I do that the decision which may be come to in this case will tend very much to shake that which has been hitherto settled, I feel it my duty to lay before your Lordships the grounds of my conclusion.

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opinion.

My Lords, the presumption in favour of a male descent, where no instrument of limitation can be produced, may be considered as finally settled by the decision of Lord *Hardwicke* in the *Cassillis* case in 1762, and confirmed by Lord *Mansfield* in his speech in the *Sutherland* case in 1771, and in the *Spynie* case in 1785 (b), and by Lord *Loughborough* in the *Glencairn* case in 1797 (c).

(a) Lord Redesdale.

(b) Mr. Maidment's Report.

(c) Ibid.

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Lord *Mansfield* thus fairly and clearly states the rule and the exception which may be admitted:—"I take it to be settled, and well settled, that where no instrument of creation or limitation appears the presumption of law is in favour of the heir male, always open to be contradicted by the heir female upon evidence shown to the contrary. It was settled by Lord *Hardwicke*, that where no instrument of creation or limitation appeared, the legal presumption was in favour of heirs male. It is not now open to litigate this general matter. I hold it to be of great consequence. The presumption in favour of heirs male has its foundation in law and in truth. I am satisfied many claims would start up if it were departed from."

In this case no instrument of limitation is produced, and the presumption, consequently, is in favour of the title not having descended to an heir female. Mr. Maxwell Constable claims as heir general of the first grantee, and proposes to contradict the presumption of law by proving, first, that Agnes, the eldest daughter of William the third Lord Herries, who died in 1543, without issue male, succeeded to the barony on his death; and, secondly, that her husband, Sir John Maxwell, who unquestionably sat in Parliament as Lord Herries in 1567, did so in right of her barony. Unless these two points are satisfactorily proved, there is no contradiction of the presumption of law in favour of the heir male.

It has been distinctly laid down by the House in the *Devon case* (a) that no failure on the part of the immediate heir or of his descendants to claim a Peerage, nor even the general belief of those heirs and of the Crown during centuries that they had no right, can be held to preclude its being afterwards adjudged to belong to them. The decision in that case shows

(a) Mr. Maidment's Report.

clearly that neither the fact of Archibald Herries having failed to claim the barony in 1543 or afterwards, even although this arose from a belief that he was not entitled to it, nor the creation of another barony of Herries in the person of Sir John Maxwell in 1567, would bar the right of the heir male if he was now to claim the title; and that, consequently, it would be most dangerous to admit that, as the barony did not become extinct, it must have gone to the heir female, merely because the heir male did not claim it. If the heir female shall be admitted upon any evidence which does not directly prove that she did enjoy the title, and was acknowledged to do so before her husband sat in Parliament in 1567, the legal presumption in favour of the heir male must be departed from it; and those evils which Lord *Mansfield* anticipated would ensue if that principle should be unsettled may be confidently apprehended.

As, however, the point was considered by the *Lord Advocate* to have some weight in support of Mr. Constable Maxwell's claim, and as it cannot be denied that the fact of the heir male not claiming would afford indirect evidence in favour of the claim of an heir general, if that claim were otherwise adequately supported, it will be desirable to inquire what may have probably been the reasons which prevented Archibald from advancing his claim. It is impossible to know at this distant period, in the absence of all evidence on the subject, whether the heir male did put forward any claim or not in 1543 or afterwards. But bearing in mind that the indisposition which has been evinced by the House in modern times to recognize any connexion between the tenure of lands and the succession to titles of honour has by no means been universally acknowledged as warranted by Scotch authorities, it is hardly possible to avoid admitting

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that the want of possessing the land barony of Terregles, or even the *caput baronis*, may have been considered by Archibald Herries a bar to his claiming the parliamentary barony, or at all events that it was sufficient to prevent his having that claim acknowledged in opposition to the powerful influence of Sir John Maxwell.

The second point to be established by the Claimant is, that Sir John Maxwell sat in Parliament in 1567 in his wife's barony. The only evidence in favour of this is, that in 1606, in the Decreet of Ranking, her grandson appears to have been allowed the precedence of the ancient barony. The incorrectness of this Decreet is, however, so clearly proved that no reliance can be placed upon it, unless otherwise supported.

Against Sir John Maxwell having become Lord Herries in right of his wife there is an accumulation of evidence of the strongest character, direct as to the fact itself, and indirect as showing that he sat under a new creation; and there is not a scrap of evidence to show that Agnes was ever recognized as a Peeress until he became Lord Herries. I am therefore of opinion that William Constable Maxwell has not made out his claim to the Barony of Terregles.

Lord BROUGHAM: My noble friend in his very able and lucid statement has referred to the Devon Peerage case. Now, I only wish to say, without going into the particulars of it, that I advised your Lordships upon that case; and I do not consider that the opinion which I entertain upon the present case is at all in conflict with the advice I gave in the *Devon case*, notwithstanding the reference made to the want of claim in that case as being a very important point. But my opinion upon this Herries Peerage claim goes upon the whole circumstances of the case.

There is only one other observation of my noble and learned friend that I wish to advert to. I think he rather understates the opinion of the *Lord Advocate*, which he gave for the help of this House, upon the subject of this case. I have read that opinion with great care, and certainly the result of that perusal was that, taking it altogether, the *Lord Advocate* was in favour of the Claimant (a).

(a) The Lord Advocate, in delivering his advice to the Committee, among other things made the following observations :—

There may have been many reasons why Agnes Herries, the eldest heir portioner, did not assume the title. The land or territory had been split into three; the family do not appear to have been in very affluent circumstances; and even after Sir John Maxwell's marriage in 1549, he had not acquired the old land, nor was it until the date of his sitting in Parliament that he had succeeded in gathering together the scattered fragments of the old family estate. I think that, if there were nothing to militate against that view, the fact of Sir John Maxwell appearing in Parliament in 1567, immediately consequent upon his acquisition of the family estate, would be a most important circumstance to show that Agnes Herries truly had the right in her.

But, my Lords, on the other hand there are very great difficulties which meet the Claimant here; and the main difficulty is this, that upon the death of Sir John Maxwell in 1582, his eldest son, in his mother's lifetime, took up the succession to the title.

Lord BROUGHAM: I should like to be referred to some authority to negative the proposition that the husband might sit in Parliament in right of the wife.

Lord Advocate: I admit that proposition completely. I admit that the husband may sit in Parliament in right of the wife, and that he did so in innumerable instances. I will dispose of a theory put forward by the learned Counsel for Mr. Maxwell of Carruchan, which I think is untenable. The first of these is, that when a Peerage fell to heirs portioners it came to an end. A quotation was made from a work of Mr. Wallace, in order to show your Lordships that that was the result. My Lords, I have to state to your Lordships that that work of Mr. Wallace is no authority at all, and that the statement which he makes is contrary both to the high authority of Lord Stair and Lord Erskine, and to four or five cases.

Lord BROUGHAM: Certainly, Mr. Wallace's work is of no authority as regards the law.

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Lord CRANWORTH: I can most certainly confirm my noble and learned friend upon that subject. Your

Lord Advocate: Perhaps it may be satisfactory to your Lordships that I should refer to the passages in Lord Stair and Lord Erskine, which are quite conclusive upon the matter.

The LORD CHANCELLOR: To show that the Peerage does not come to an end by falling to heirs portioners?

Lord Advocate: Yes; that it does not come to an end by falling to heirs portioners, but on the contrary that the eldest heir portioner takes. It is in Lord Stair, book iii. title 5. section 11. He says:—"Heirs portioners are amongst heirs of line; for
" when more women or their issue succeed, failing males of that
" degree, it is by the course of law that they succeed; and because
" they succeed not *in solidum*, but in equal portions, they are
" called heirs portioners; and though they succeed equally, yet
" rights indivisible fall to the eldest alone, without anything in
" lieu thereof to the rest; as, 1, the dignity of lord, earl, &c." Then he goes on to say, that the principal mansion house goes to the eldest of the heirs.

The same doctrine is laid down by Erskine, book iii. title 8. section 13.:—"But though each heir portioner has an equal
" interest in the succession, in so far as it is divisible; yet the
" eldest daughter enjoys this privilege from necessity, that rights
" which are indivisible, *ex sua natura*, fall to her alone, *ex gr.*
" titles of dignity."

Lord BROUGHAM: Is Mr. Wallace, the author of the work "Ancient Peerages," the same gentleman who is the author of a curious book upon the numbers of mankind.

Mr. *Fleming*: I believe so; because he has a long chapter upon that subject introduced into his "Law of Peerage."

Lord BROUGHAM: And wrote also a great number of articles in the "Edinburgh Transactions" upon the cause of the coldness of the east wind. Does he introduce that into the Peerage Law too?

Mr. *Fleming*: Yes; that is also introduced, in the first chapter. I did not mention that to your Lordships when I alluded to the authority of Mr. Wallace.

Lord Advocate: There is no such thing as a Peerage remaining in abeyance because it falls to daughters. There are three or four instances which prove that unquestionably, and which I may as well mention to your Lordships, although I have not here the references to the books from which I took them. There is the case of the Angus Peerage, where the eldest daughter took, and her son took; and then, on failure of her son, it reverted to the second sister. There is the case of the Buchan Peerage, where the same thing happened.

Lordships are not in any way bound by the advice that you receive from the *Lord Advocate* at the bar, but that that advice in the present case was in conformity with the motion which I have had the honour of making I am perfectly certain.

Lord BROUGHAM: That is the Stewart Buchan Peerage.

Lord Advocate: Yes; and there is the case of the Atholl Peerage. Therefore, upon the authority of Stair and Erskine, and upon the practice as well, the proposition in law which I think the Claimant is entitled to maintain is, that upon the death of William Lord Herries in 1543, if the patent of Peerage was to heirs general, it went to Agnes Herries, his ancestress.

That point, therefore, being out of the case, the matter in dispute is resolved into a very narrow point indeed. The question is, whether this was a patent to heirs male or to heirs general. My Lords, I have very great difficulty upon that point; and if I am to say on which side I think the evidence preponderates, I should say that I think there is evidence that the title was *not* to heirs male.

It appears to me that this was a title that you cannot hold or presume was taken in the first instance by heirs male. It is a mistake to suppose that the fact of the destination of the lands is not material in inquiring into the destination of the honour; and I find that Lord Mansfield, in the case of Spynie, places very considerable weight upon the fact that the charter of the lands was taken to the heirs male of the body, as an element in presuming that the title went in the same way.

The LORD CHANCELLOR: Where is that?

Lord Advocate: It is in Mr. Maidment's Report of the *Spynie case*.

Then, my Lords, my learned friend Mr. Fleming referred to the Order of Ranking in 1606; and it is a fact, certainly, that Lord Herries appears in the precedence of the old Herries Peerage in that copy of the Order of Ranking. But, on the other hand, it was not an uncommon circumstance for the Crown, in granting anew an old Peerage, to grant it with the old precedence.

Upon the point whether eldest sons sat in Parliament, I may as well mention to your Lordships, as making it perfectly clear, that on more than one occasion we find a peeress in her own right resigning her title in favour of her son. I am reading now from Douglas' Peerage, page 708. I find that Ann Duchess of Hamilton resigned her title into the hands of King William the Third, on the 9th of July 1698, in favour of her eldest son the Earl of Arran, who was accordingly created Duke of Hamilton, with the original precedence; and there are one or two other instances otherwise of that.

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Proposed to resolve, That it is the opinion of this Committee that William Constable Maxwell of Nithsdale in the county of Dumfries, and of Everingham in the county of York, Esquire, has made out his claim to the title, honour, and dignity of Lord Herries of Terregles in the Peerage of Scotland.

The same was agreed to.

And the said resolution having been reported to and adopted by the House, it was ordered to be laid before Her Majesty by Lords with White Staves.