NOTES ON DIGNITIES IN THE PEERAGE OF SCOTLAND WHICH ARE DORMANT OR WHICH HAVE BEEN FORFEITED

Published @ 2017 Trieste Publishing Pty Ltd

ISBN 9780649097449

Notes on dignities in the peerage of Scotland which are dormant or which have been forfeited by William Oxenham Hewlett

Edited by Trieste Publishing Pty Ltd.
Cover @ 2017

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WILLIAM OXENHAM HEWLETT

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BY

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LONDON:

WILDY AND SONS,

Law Booksellers and Publishers,

LINCOLN'S INN ARCHWAY, CAREY STREET, W.C.

EDINBURGH: BELL & BRADFUTE, 12, BANK STREET.

1882

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CORRECTION.

Page 70, line 2—*For* "Wedderburn" *read* "Marchmont."

INTRODUCTION.

THE limitations contained in Letters Patent or Charters creating Scottish Titles of Honour vary so much, and special destinations are so numerous, that few of the Dignities in the Peerage of Scotland which appear at the present time to be either dormant through non-claim, or to be suspended in consequence of attainders for High Treason, can be in truth extinct. It has, therefore, been thought that short accounts of such Dignities might prove interesting.

In England claims to Baronies in abeyance, created by Writ of Summons to and sitting in Parliament, which are descendible to heirs general, are not unfrequent, though necessarily limited in number: but claims to titles above the rank of a Barony, can for the most part only arise on questions of disputed succession, or, as in the Devon and Wiltes cases, upon the construction to be placed upon limitations in Letters Patent, other than to heirs male of the body, or upon the validity of the destinations of the Peerage as limited in the Letters Patent, as in the Buckhurst case, or upon the question whether the Letters Patent confer a right to a seat in the House of Lords, as in the Wensleydale case: but in Scotland, where any Peer may impeach the title of another at the election of Representative Peers, and where the destinations of Dignities are so various, and before the Union were so constantly altered on the application of the Peer in possession, the heirs, whether heirs male, of line or provision, substitute or general,

must of necessity be extremely numerous, and claims must consequently be frequent.

The doctrine of abeyance did not prevail in Scotland, and there are not any co-heirs or heirs portioners in relation to Scottish Peerages, a Dignity descendible to heirs of line descending, failing heirs male of line, to the eldest daughter or her representatives.

All Scottish Dignities were in their origin territorial, that is, incident to or dependent upon tenure: and they appear to have gone to heirs general in cases in which the lands were destined to such heirs. This conclusion is supported by the law as laid down on the claims to the Crown of Scotland, the Crown having been awarded to Baliol, the eldest co-heir, in 1292; on which occasion the Lords Auditors declared that the principle of non-partition between co-heirs, which governed the descent of the Crown, applied also to territorial Earldoms.

Cases of the descent of Peerages in the female line occur in the succession to the Herries Peerage, the Barony of Balfour of Burley, constituted by Letters Patent in 1607, the Barony of Saltoun, recognized by King Charles the Second in 1670, in the Sempill case in 1685, and in the Sutherland case in 1771; and, indeed, wherever the facts prove a descent to a female, or to the representative of a female, a destination to heirs of line has been held to exist.

After the Sovereigns of Scotland ceased to create Dignities purely territorial, Peerages were created either by inserting words of creation in Charters granting or erecting territorial Earldoms or Lordships, by investiture only, or by special Charters or Letters Patent, accompanied by a solemn inauguration by Belting or Cincturâ Gladii, analogous to feudal investiture. (Earl-

doms of Home and Perth in 1605, Wigtoun Earldom in 1606, Buccleuch Barony in 1606, and Douglas Marquisate in 1633.) Investitures were, however, afterwards dispensed with by special dispensations from the Crown.

Previously to the accession of King James the Sixth to the throne of England, the creation of Peers of Scotland merely by Letters Patent was rare; but towards the close of his reign, grants by Letters Patent became the ordinary mode of conferring Dignities in Scotland. The grants were sometimes accompanied by the ceremony of investiture, sometimes they were declared sufficient of themselves, and sometimes the ceremony of investiture was dispensed with by express words. Creations by Writs of Summons were unknown in Scotland, for as there was only one Chamber of Parliament there could be no separate House of Peers. Prior to 1582 all the Members of the Parliament, whether they sat as Spiritual or Temporal Lords of Parliament, or as Tenants in chief of the Crown (*a*), or as Commissioners of the Royal Burghs, were called by a general summons to attend; and special Writs of Summons to any of the Lords of Parliament, although occasionally issued, were rare, and the Lords of Parliament sat under their right as Lords of Parliament and not by virtue of the Writs which might have been directed to them.

Although the Letters Patent creating Dignities generally made destinations of the Peerage conferred by them, it was by the law of Scotland competent to the Grantee

(*a*) Although the Act of 1427 (Acts of the Parl. of Scot. V. 2, p. 15, No. 2) authorized the Lesser Barons or Tenants in Chief of the Crown to elect Commissioners, the Act does not appear to have been acted upon, and there are no returns of Commissioners previously to 1587 upon record. The Lesser Barons sat in person and not by Representatives when they attended Parliament until the Act of 1587 was passed. (Acts of the Parl. of Scot. V. 3, p. 509, No. 120.)

or any of his successors to resign such grant into the hands of the Crown for a new grant, limiting the title in such manner as the Grantee with the consent of the Sovereign might direct, or to such heirs as he might nominate thereafter, and the Patents granting the Dignities of Coupar, Braedalbane, Erroll, Roxburghe, Rutherford, Maderty, Stair and Cardross, are instances in which a power of nomination was given to the Grantee. A Peeress also might resign her title in favour of her eldest son, as was done by Ann Duchess of Hamilton in 1698. It was, however, necessary to have a valid act of resignation made to the Sovereign, the Sovereign's acceptance of it, and a re-grant by the Sovereign, and it was also necessary that the re-grant should state and proceed upon the resignation, a title by resignation being in reality a title by progress, and not a title proceeding from the mere will and gift of the Crown.

Instances occur where the re-grant did not follow until after the death of the Resigner. A re-grant, if it professed to follow upon the resignation, carried the original precedence, even although it was not mentioned, but usually the precedence was expressly granted.

The case of the Earldom of Stair, in 1748, involved the effect of a nomination to Honours made under the authority of a valid re-grant in 1707, anterior to the Union, when the nomination was made after the Union (*b*).

(*b*) The Printed Case for the Claimant James Dalrymple, who controverted the Nomination, a copy of which is in the possession of the Author, shows that he founded on the contention that as the Crown could not after the Union ratify the Nomination which had been made, the Nomination must be considered as null and void. It does not appear, however, that the House acted upon the views expressed in Mr. James Dalrymple's Case, although they decided in favour of his claim. Lord Loughborough in the Erroll case stated that if a power of nomination were given, the act of nomination did not require any ratification.