

PART TWO.

HEIRS BY SCOTS LAW.

CHAPTER 7.

SUCCESSION TO THE THRONE.



SUCCESSION TO THE THRONE.

The geographical area we now call "Scotland" did not become a single political and legal unit until after 1124, even nominally, and it is therefore only from this time that we can reasonably trace with the authority of continuity what we now call Scots Law⁽¹⁾. Before this period the soil of North Britain was divided among an ever-decreasing number of realms, each with its own laws and customs⁽²⁾. After this period, survivals from the local laws of several of these formerly separate countries doubtless influenced the laws of this new kingdom formed by their union, but none of these local laws can be said to have formed the basis of the new kingdom's laws to such an extent as to be of valid authority in deciding subsequent matters of dispute, anyway as regards our Scots Law of Succession⁽³⁾. The new united kingdom was called "Scotland" (like one of the smaller realms that had gone to make it up) because its Royal House were in the direct male line "Scots" i.e. Irish Gaels⁽⁴⁾; and not because the majority of its inhabitants were Scots, which they were not.

In considering Scots Law, therefore, it is important to emphasise that it had no basis for existence before the introduction of feudal tenure, which took place simultaneously with the unification of North Britain. This unification may now seem to have been inevitable, and modern historians tend to trace its growth around the particular people that happened to give it its name (the Scots, first in Dalriada and later in Gowrie). But this is misleading, for the early history of a part is made to seem the early history of the whole (even though the contrary is implicit in the context), and it is especially misleading when the political system and laws of united "Scotland" are retrospectively linked to that of a single part of it (the earlier kingdom of Scots).

For an inhabitant of North Britain, living in 1123, would no more have thought of this whole area as his "country" than a modern Swede thinks of Europe as his "country". Not so long before (at a time

then far less remote than the Union is to us) the area now known as England had contained about half-a-dozen countries, and the Norwegian fjords had been separated among about twenty-nine realms; while Wales had contained the countries of twenty-three dynasties and was still divided into several kingdoms - and there were still nearly a hundred kingdoms in the island of Ireland, recognising a ritual emperor⁽⁵⁾ whose suzerainty was even more nominal than that of the contemporary "Caesar" over the many Germanic rulers of 1123. North Britain contained at least three independent realms at this time, and even these were themselves but recently formed out of a larger number of separate kingdoms. Alasdair mac Ghillechaluim⁽⁶⁾, king of Albany or Alba, reigned in a unified realm of the Gaels and southern Picts on the mainland benorth the Forth, but his conquest of the northern Picts was both recent and precarious. Olaf "Morsel" was king of the Hebrides, ruling the islands from the Lewes as far south as the isle of Man. David of Huntingdon, son of the Anglo-Saxons' last royal princess, husband of the Beornician comital heiress, and grandson of the last separate king of the northern Cymry⁽⁷⁾, was the independent ruler of Cumbria and of Beornicia benorth the Tweed. Even within these realms, the laws were not necessarily unified: and Galloway, for example, was held autonomously under David by its own prince.

In 1124, at the death of Alasdair mac Ghillechaluim of Alba, David of Huntingdon (who was his brother) inherited his realm also, thus finally uniting the mainland north of Tweed - in so far as the extreme north and west could be kept subdued (or at least brought to recognise his over-kingship in the Norse and Celtic mode). The islands off our coastline were added much later to this combined kingdom. In 1266 David's descendant acquired a nominal suzerainty over the Hebridean kingdom still ruled by Olaf Morsel's descendants, who nevertheless periodically attempted to reassert their independence until the death of Donnall Dubh in 1545; and the acquisition of Orkney and Shetland towards the close of the fifteenth century marked the final expansion

of Scotland to her present boundaries. However, for the purposes of this paper, true Scots Law may be said to begin as early as 1124, but no earlier. Thenceforward the customary laws of our country began to take shape⁽⁸⁾.

The Heirs to the Crown originally the Heirs General.

King David sought gradually to establish the Norman type of feudal tenure throughout his newly united realm, in so far as his laws could be enforced. His descendants merely extended it in so far as they were gradually able to enforce their laws more thoroughly⁽⁹⁾. The Norman feudal law differed from the Lombard feudal law, and the so-called Salic Law, in that the heir general was preferred to the heir male, and females were themselves admitted to the inheritance when they had no brothers or when their deceased brothers had left no issue. That it was this Norman type of feudal tenure and inheritance that became the basic law of David's newly-united realm, will become clear when we come to deal with succession to earldoms and baronies. Here we are concerned with its effect on the succession to the throne itself, and this was only gradually ascertained.

The first moment of testing came at King David's death in 1153. He had been predeceased by his only surviving son, the king-designate⁽¹⁰⁾ Henry, earl of Northumberland (i.e. earl of Beornicia south of Tweed), but the king-designate had left several sons of whom the eldest was Malcolm the Maiden. The laws of succession of the various component kingdoms that had gone to make up David's realm differed. Taking David as the founder-king of the new united realm - by the Pictish law of succession, long discontinued but nevertheless originally the law of the greatest component of the new realm, David's rightful heir would have been his sister's daughter's son, Henry fitz Empress, king of England (but this would have presupposed that David had got the throne by mother-right, which was not the case). By the law of the Irish Gaels, the best claim would perhaps have rested with Donald, son of

William son of Duncan son of King Duncan II of Alba (King David I's elder half-brother and a predecessor on the throne of the greater part of the new realm), as the eldest male of his generation of the royal house⁽¹¹⁾. By the customs of the mixed Picto-Scottish Realm that had been centred on Scone, a good claim lay with the head of the house descended from the daughter of King Lulach, the distant cousin and predecessor of King David's father on this throne: this claim was now vested in Donald son of Malcolm mac Aoidh, and received general support in the former country of the northern Picts. By the old Welsh and Norse laws, the land would have been divided among King David's male issue, Malcolm the Maiden and his brothers, who would all have become kings. By the contemporary Welsh (i.e. Cymric) law, Malcolm the Maiden would have succeeded to the paramountey as heir male - and by the contemporary Norse law, Malcolm the Maiden would have succeeded to the over-kingship as heir general. By the Norman law, although it was not yet always clearly ascertained, Malcolm the Maiden would have succeeded as heir general. And, in accordance with King David's will, Malcolm the Maiden did succeed to the undivided throne of all his newly united kingdom, although aged only twelve.

So far as is recorded, this was the first instance of the succession of a minor to the throne of any of the realms that went to make up Scotland⁽¹²⁾. It marked, therefore, a great step forward in certainty of succession among them all. Moreover, it was clear that Malcolm the Maiden succeeded by right of birth (without any real question of selection, since he was only a boy) and that this was either because he was heir male or because he was heir general of his predecessor, King David.

King Malcolm the Maiden died unmarried in 1165. As he left no legitimate son, the question did not arise whether he should be succeeded by his next brother in preference to a son of his own, as would have been the custom among the old Gaels. For his next brother was also of course both his heir male and his heir general. This brother, who anyway succeeded him, was William the Lyon. But the problem - whether a brother was to be preferred to a son, as being nearer in generation

to the Founder - was resolved in 1214 at the death of King William the Lyon, who was survived both by a younger brother (David, earl of Huntingdon, who lived on until 1219) and by a son, Alexander. For it was the son Alexander who became king (he is referred to as Alexander II, since Alasdair mac Ghillechaluim had preceded him on the throne of Scone, though not of Cumbria). Alexander II was both heir male and heir general of his predecessor, and it is especially important that he succeeded in preference to his uncle, in that the legal advisers of Robert Bruce the Competitor for the throne towards the end of the century argued strongly (though unsuccessfully) that the old doctrine that preferred the elder generation was the Scots Law in matters of royal succession.

A transaction, however, took place during the reign of King Alexander II, which was of far-reaching importance. Unfortunately our only account of it is in one of the claims advanced in support of Robert Bruce the Competitor and we therefore only have a partisan version of what took place. It is printed as No. IV para. 4 in Palgrave's edition of "Documents & Records illustrating the History of Scotland" vol. i p. 19, and additional details are given in a Norman-French petition of the same Robert Bruce's, printed as No. VII para. 7 at p. 29. According to the Competitor, King Alexander II had nominated him his provisional heir at a time when the king was still childless⁽¹³⁾. We will have occasion to refer to this nomination again later. But what concerns us, for our examination of the state of Scots Law with regard to succession to the throne during the reign of Alexander II (1214-1249), is that Robert Bruce alleged that not only did he receive this nomination, but that a declaration of the law is said to have been made by the Great Council at that time. It is perhaps worth quoting Sir Francis Palgrave's paraphrase of the claims advanced for Robert Bruce in this respect: "Alexander II having advanced almost to the verge of senile age⁽¹⁴⁾, and there being no expectation of his having an

heir of his body, he assembled all the Nobles and Magnates of Scotland, the Bishops and other Clergy, and Laity, as many as could be brought together, at a certain day and place, in order to prevent the dissensions which would arise in the event of his death without issue. Unto this Parliament or Convention, he declared the state of his age, and that he had no issue of his body: but that his uncle David had three daughters, the first of whom had a daughter and the second a son; and he enjoined them all, as they were bound to him by their allegiance, fealty, and homage, that they would decide and adjudicate between the parties, - Which and whether of them should inherit the Crown, the daughter of the eldest sister or the son of the second sister? - And the Great Council being assembled together, they decreed and adjudged by all their own laws, and by the imperial and other laws, that the son born of the second sister should inherit in preference to the daughter born of the eldest sister. And all present, Clergy as well as Laity, unanimously declared the same as a true judgement to the King. Such judgement being given by the Great Council, and accepted by the Sovereign, he, King Alexander, took Robert Bruce, Lord of Annandale who now is, by the hand, and presented him to all the Nobles and Magnates, Clerks, and Laymen then and there present, as his true and legitimate heir to the Kingdom of Scotland; and all such Magnates, by the King's command, and in his presence, took the oath of fealty to the Lord Robert Bruce upon the Holy Gospels"⁽¹⁵⁾.

There is no special reason to doubt Robert Bruce's affirmation that the Great Council were asked to determine the law in this matter, although it is possible that he over-stressed his case and that they were merely asked by King Alexander II who would be the more suitable heir: Robert Bruce, son of Earl David's second daughter, or Dervorguil of Galloway (wife of the Anglo-Picard lord of Baliol), daughter of Earl David's eldest daughter. The circumstances of the Council would perhaps have made a man seem preferable, since the kingdom was at war⁽¹⁶⁾ and King Alexander was about to set out on an expedition against the

king of the Isles. Moreover (so far as is known to be recorded) none of the various countries that went to make up Scotland had ever had a queen regnant before, although all their thrones had passed through the female line to the contemporary royal house, and of course Pictland (the largest single territory in united Scotland) had formerly always been ruled by mother-right. However, this Council (which was apparently held in 1238, for Earl David's son only died in 1237 and King Alexander's first wife in 1237/8, while King Alexander married again in 1239) merely made a provisional choice of heir that was soon superseded by the birth of King Alexander II's only legitimate child Alexander in 1241; nor were the views on law of such Councils binding on later assemblies.

It is nevertheless important to note that the heir male of the royal house (and there were then, as now, a number of male-line descendants of the dynasty living) was entirely ignored, as having no conceivable claim to the throne. The problem in 1238 was between two female-line heirs portioners: between a senior co-heir general who was a woman and a junior co-heir general, her contemporary in generation, who was a man. By the Scots feudal law, heirs portioners could and can of course only succeed to divisible inheritances, and such inheritances as were and are indivisible (e.g. Arms and dignities, as will be shewn) required a single heir: who was gradually ascertained to be the eldest heir-portioner. But where the inheritance was divisible, then as now, sisters who were heirs portioners presumptive had equal rights that could be defeated by the birth of a brother to them. The Great Council may therefore (in that very early stage of ascertainment of Scots Law, when no component part of the new Scottish realm had ever had a queen regnant) have felt that in the case of the realm (since a man had always reigned up to that time) a junior heir portioner's representative being a man should, in the same generation, be preferred before a senior heir portioner's representative being a woman⁽¹⁷⁾ - thus treating the representatives of the original sisters

as though they were themselves the original heirs portioners, so that any one of them being a man was treated as though he were a brother and thus allowed to defeat the claims of his "sisters". But it was only proposed to apply this view to succession to the throne itself, and soon afterwards the law of succession to the throne itself was in fact ascertained to prefer the true heir general even though a woman, and this view of the Council (if it was ever put forward as law) was set aside. It must however be stressed that at no time is it suggested that the Council considered that the then heir male had any claim at all: the right was taken to be in the heirs general, and the problem was simply one between two co-heirs. As early as 1238, therefore, it was demonstrated that it was as heir general and not as heir male that King David's descendant Alexander II was sitting on the throne.

At the death of Alexander II in 1249, he was accordingly succeeded by his son Alexander, although only a child, as his heir general. This son, King Alexander III, had two sons who died (without issue) during his lifetime, and a daughter who also predeceased him. Margaret, the daughter, had been queen of Norway, and by her husband King Eric she left an only child, Margaret, "the Maid of Norway", who was thus King Alexander III's granddaughter and heir general. Accordingly, she was acknowledged heir presumptive to the throne by the Parliament held at Scone in 1283/4⁽¹⁸⁾, and succeeded to the throne at King Alexander III's death in 1285/6. So far as is known, she was the first queen in North Britain to be a queen regnant instead of a queen consort. Following the example of her great-great-grandfather's first cousin the Empress Maud, who had styled herself sovereign "Lady of the English" more often than she styled herself "Queen of the English"⁽¹⁹⁾, Margaret is styled "Lady of Scotland" more often than "Queen"⁽²⁰⁾. It is possible that this was because she had not been infeft in the realm by installation on the stone of Scone, but

on the other hand she is occasionally referred to as Queen: e.g. "Reyne e Dame de Escoce"⁽²¹⁾. In 1290 Margaret, Queen of Scots died unmarried, and there followed the famous Competition for the Crown.

All the competitors recognised King Edward I (who incidentally was descended from King Malcolm Ceann-mor through David I's sister) as the over-king or lord superior of all Britain, including the kingdom of Scots (which of course had its own under-kingdoms such as the Isles). Whether they did so rightly or wrongly has long been disputed, but there are grounds for supposing that they may have recognised Edward I as over-king though only in the limited and shadowy Celtic ritual sense usual among allodial peoples, for there was clearly no intention of regarding Scotland as a fief of England in the feudal sense. Although Robert Bruce the Competitor, for example, referred to Edward I as his "emperor"⁽²²⁾, the writer of the Book of Pluscarden shews that a strong tradition existed anyway in the days after the War of Independence that the Lord of Annandale had made it clear during the Competition for the Crown that he was not prepared to accept the Scots throne as a feudal fief. The original documents printed by Palgrave do not give much support to this tradition, except that Annandale's case depended on stressing that succession to the Scots throne should not be decided on the analogy of succession to inferior fiefs, since these undoubtedly went to the senior co-heir general, whereas John de Baliol's case was reinforced by the contrary argument. From the point of view of Scots Law, this point is academic, for Scotland's feudal independence of England was clearly established during the fourteenth century. And from the point of view of this paper, it matters little whether Edward I was acting as feudal overlord, as shadowy ritual paramount, or as neutral arbitrator, since there can be no doubt whatsoever that all the Competitors accepted him as their judge in the disputed succession. There appears to have existed an earlier machinery for determining such questions of law when the succession to the throne was in dispute, but this machinery abrogated

itself in Edward's favour. For the Seven Earls of Scotland, who claimed the duty of adjudging between rival claimants for the Blood Royal when the rightful succession was in doubt, appealed to Edward I because the temporary Regents would not allow them to perform this function. The Competitors themselves also recognised him as their judge for this purpose, and presented their claims before him. There does not seem to be any contemporary evidence that he acted in bad faith from the point of view of his judgement, or that it was not believed at that time to be a just declaration of the law of Scotland.

The principal claims⁽²³⁾ were straightaway assumed to be those of Queen Margaret's nearest lawful co-heirs general, the representatives of the three daughters of King William the Lyon's brother, Earl David. The youngest daughter had married the lord of Hastings, and her grandson John of Hastings brought forward his claim as an heir portioner, if only to a third of the kingdom, but it failed because he was the junior of the three co-heirs and Scotland was impartible. The claim advanced by Robert de Bruce, lord of Annandale, was threefold. First, he claimed as being nearer in generation to the Founder than the other co-heirs. The contemporary pleadings on this count, reinforced by his having been the senior male among his own generation of the royal next-of-kin, are set out in Palgrave (op. cit.), and complicated arguments to further this claim may be found in chapters iv-x of the Book of Pluscarden. Secondly, he claimed in virtue of the alleged declaration of law by the Great Council of 1238 referred to above, which undoubtedly strengthens his first claim very considerably. Thirdly, he claimed through his solemn nomination as provisional heir by King Alexander II as confirmed by that Council, the heirs subsequently issuing from King Alexander's body having now failed. King Edward I, as judge, was not prepared to accept the renewed validity of this nomination, and he held the Lord of Annandale's other contentions to be unsound in Scots Law. The throne was accordingly adjudged to the senior co-heir general - the eldest heir-portioner's

representative - of the Blood Royal. This was John de Baliol, son of Dervorguil of Galloway, daughter of the eldest daughter of Earl David, the brother of King William the Lyon. This declaration that the law of succession to the throne was in accordance with the general law of succession within the realm was accepted by the whole of Scotland (notwithstanding retrospective protests by the Bruce supporters after the Bruce branch were established on the throne in the next century), and John Baliol became King of Scots accordingly as heir general of his predecessor.

As is well known, King Edward's advisers proceeded to "extend the incidents" of his over-kingship "beyond their legal bounds"⁽²⁴⁾, treating King John just as the later Kings of Scots were to treat their own under-kings, the Kings of the Isles. The result was war between King John and King Edward, and the overthrow by English armed force of the Baliol branch of the Scottish royal family. In overthrowing his kindly under-king John (who retired to his seigneurie of Bailleul in Picardy) Edward I ultimately overthrew his own over-kingship, and it is ironic that his grandson Edward III was to try so hard to restore the Baliols to the Scottish throne. That it is Bruce propaganda rather than contemporary feeling that has come down to us about King John as the despised tool of Edward I, is demonstrated by the loyalty to King John of the patriots Sir William the Wallace and Sir Andrew of Murray, who acted consistently in his name. All the same, the forced abdication⁽²⁵⁾ of King John was, within his lifetime, to revive the claims of the Bruce branch of the Scottish royal family, and as is known these revived claims survived the ultimate test of battle: trial by combat on a national scale.

Since King Robert I did not claim to found a new dynasty, but to reign by right as the true representative of the ancient Blood Royal, it must be taken as settled Scots Law (since Bannockburn) that his succession was just. It does not necessarily follow that

all his grandfather's pleadings were sound, and his grandfather's contentions about being nearer in generation to the Founder as also senior male among the next-of-kin may or may not therefore be sound in law: they were never intended to apply outside the succession to the throne, which has been settled by tailzie ever since King Robert I's time, so the question is not only academic but also probably insoluble. The most valid of the Bruce claims was almost certainly King Alexander II's special nomination, which will be discussed below. But it is important to remember that the Bruces were not heirs male of the Blood Royal, and that they were junior heirs-portioners claiming by virtue of a special provision⁽²⁶⁾.

The Heirs of Provision and Tailzie to the Crown.

It should by now have been sufficiently demonstrated that as early as the thirteenth, and by inference the twelfth, century it was the law of Scotland that the throne was vested in the heirs general of King David (subject to a legal question between co-heirs, and to any special destination that might override the general rule), under which king the realm had been finally united and who had established the Norman-type feudal laws of succession by primogeniture in the direct line as those of his new realm. It has been necessary to emphasise this, because of the strongly-held views of leading judges (cited earlier in this paper) that Scottish feudal law favoured the heir male, whereas in fact of course it ignored him. "Nevertheless, for all their vaunted pride of ancestry, Scotsmen have never favoured the automatic succession of unsuitable heirs"⁽²⁷⁾, and the law has always made provision for the diversion of the succession from the legal heir, the "heir-at-law" or heir general, to some other specially-chosen heir or line of heirs (of the same Blood) named in a special destination or "tailzie". Where such a change in the succession was made by a vassal, it required the consent of his superior, and where it was made by a dignitary holding directly of the

sovereign, it required the consent of the Crown. Where such a change was made by the sovereign, dealing with the succession to the throne itself, it is arguable what consent was required: today we should say, the consent of Parliament. In earlier times, it might have been argued that the consent of some over-king, or the consent of the Seven Earls, or no consent save that of God alone, was needed⁽²⁸⁾. According to the Lord of Annandale's petition in the famous Competition for the Crown, reinforced by a deed from the Seven Earls, King Alexander II thought it wise in 1238 to secure the consent and confirmation of the Great Council when he named Robert de Bruce his heir and fixed the succession provisionally upon him: in Palgrave's paraphrase (op. cit. p. xxiii, the original in Norman-French is printed at p. 29, and differs from the Latin of the Seven Earls in that there is no suggestion that the Great Council made any declaration of the existing law of succession) "when Alexander II proceeded in war against the Islands, he granted and ordained, as he who was best informed concerning his own blood or family, and by assent of the Bishops and Earls, and of his Baronage, that, in the event of his dying without an heir of his body, Sir Robert Bruce, as the nearest of his blood, should be held his heir in the Kingdom of Scotland". Although Edward I, acting as over-king or judge, set aside this nomination and preferred instead the ordinary heir-at-law, John de Baliol; the over-kingship was abolished by the Lord of Annandale's grandson, the Earl of Carrick, who established the validity of his grandfather's nomination by recourse to the highest Court of all: the battlefield, where he was able to demonstrate that he was indeed King Robert I by the Grace of God. Since Bannockburn, therefore, it may be taken as settled Scots Law that the provisional nomination by King Alexander II of the Lord of Annandale was effective - anyway after the death of the Maid of Norway or at least after the abdication of King John, although there was perhaps legally an interregnum until sasine was taken of the realm by

Amundale's grandson King Robert through his coronation ceremonies at Scone in 1306 - and that the Crown was lawfully diverted by special destination from the original heirs-at-law (who eventually recognised this diversion as lawful) to the Bruce branch of the ancient Blood Royal.

King Robert I himself made two settlements of the succession to his Crown. These settlements diverted the succession from the heirs of law to certain fixed lines of heirs of provision, and since this time the succession to the throne has been governed by successive tailzies. The first of King Robert's settlements was made in an Assembly at Ayr on 27 April 1315⁽²⁹⁾, whereby the Crown was settled on King Robert and the heirs male of his body lawfully begotten, whom failing on his brother King Edward of Ireland ("Eadw. de brois") and the heirs male of his body lawfully descended, whom failing on King Robert's daughter Marjorie, whom failing "to the next heir proceeding and lineally descending from the body of the said King Robert, unconditionally". Here, in an act of the first importance with relation to the law of succession to the Crown, a clear distinction is made between the king's "heredibus suis masculis de corpore suo" and his "propinquiorem heredem de corpore domini regis Roberti": the word "heir" can mean nothing else here but "heir general" in contradistinction to "heir male". The Bruce was evidently anxious to preserve the throne in the male line of the Name of Bruce as far as possible⁽³⁰⁾, but he makes it clear that the Bruce heirs male are heirs of provision, and not heirs by the common law - bearing out Lord Marchmont's dictum cited above: "certainly our succession was always lineal and always female, and where there was an heir-male, he was no heir of law, but an heir of provision".

In 1318, after the death in battle of King Edward of Ireland without legitimate male issue, this tailzie was in effect renewed by the Act of Settlement passed by the king in Parliament at Scone

on 3 December⁽³¹⁾. By this statute, the Crown was settled on King Robert I and the heirs male of his body legitimately procreated, whom failing on Robert (son of the king's daughter, the late lady Marjorie, by her husband, lord Walter the Steward of Scotland), whom failing, the next heir was to be "proximior masculus tempore mortis regis ex linea recte descendente vel masculo deficiente proximior femella ex eadem linea recta", and all these failing, the Crown was settled on the nearest collateral male. Accordingly, at King Robert I's death in 1329 he was succeeded by the only surviving heir male of his body, his son David II - and King David II was succeeded in his turn at his death in 1370/1 by his nephew, Robert the Steward of Scotland, as heir of tailzie.

On 27 March 1371, a Parliament or Great Convention was held at Scone to do homage and swear fealty to King Robert II, and to settle the succession in favour of his eldest son John, Earl of Carrick and Steward of Scotland, who was anyway next heir under the 1318 Act⁽³²⁾. A new settlement of the succession, however, was made by King Robert II in Parliament at Scone on 4 April 1373⁽³³⁾, when the Crown was settled on a new series of heirs. The legal and constitutional importance of this Act is twofold. Firstly, the 1373 Act was the governing tailzie of the succession to the throne until the 1688 Revolution: and it demonstrates that statutes fixing the succession to the throne are not unalterable declarations of divine law "unalterable by any human jurisdiction"⁽³⁴⁾, but that they are ordinary tailzies subject to the law of Scotland; for the destination of the Crown under the 1373 Act differed from that under the 1318 Act, and this clearly disproves a later parliamentary declaration that "no Law nor act of Parliament made or to be made can alter or divert the Right of Succession and Lineal descent of the Crown"⁽³⁵⁾. Secondly, the 1373 Act gave priority to the legitimated issue of the King's first marriage, before the legitimate issue of his second marriage⁽³⁶⁾:

an arrangement that accords with the general Scots succession practice when children are legitimated by the subsequent marriage of their parents.

The heirs to whom the Crown was destined by the 1373 Act were King Robert II's eldest son John and his heirs male, whom failing to the king's second son Robert, Earl of Fife and Menteith, and his heirs male, whom failing to the king's third son Alexander, Lord of Badenoch, and his heirs male, whom failing to David, Earl of Strathearn (son of the king's second marriage) and his heirs male, whom failing to Walter (brother of the said David) and his heirs male. It is clear from the context that the words "of his body" are implied after "heirs male" in each case. The male issue of the five brothers all failing, the Crown is destined to heirs general by a clause that runs "veri et legitimi heredes de sanguine et parentela regali ex tunc in antea in regnum et in ius regnandi succedent", and it was this clause that took effect on the extinction of all the lawful heirs male of the bodies of the five brothers in 1542.

In accordance with the 1373 Act, King Robert II was succeeded by his eldest son John as King Robert III (1390-1406), and he in turn by the successive heirs male of his body: his son, King James I (1406-1436/7), father of King James II (1436/7-1460), father of King James III (1460-1488)⁽³⁷⁾, father of King James IV (1488-1513), father of King James V (1513-1542).

During the years 1540-1541 two little sons were born to King James V - James, Duke of Rothesay and Arthur, Duke of Albany - but within the same sad period both boys died: the last heirs male apparent of the body of King Robert III, in terms of the 1373 Act⁽³⁸⁾. In 1542 a daughter was born: the "heir" who was to take on the failure of all heirs male under the Act. She became Mary, Queen of Scots⁽³⁹⁾, and was succeeded in turn by her own heirs, the successive

"heirs" of the Blood Royal in terms of the 1373 Act: her son, King James VI (1586/7-1625), father of King Charles I (1625-1649), father of King Charles II (1649-1685).

Since 1603 the Crowns of England and Scotland had been united in the person of these successive kings, and during the reign of King Charles II great exception was taken by strong parties in both countries against the religion and politics of the heir presumptive to the throne: the king's brother James, Duke of York and Albany. There was talk of preventing him from succeeding to the throne, and in England an Exclusion Bill was mooted. As he was at this time Lord High Commissioner for the king in Scotland, Duke James secured the passage of an Act of Parliament fortifying his position as next heir under the 1373 Act. This, the statute of 13 August 1681, runs: "ACT Acknowledging and asserting the right of Succession to the Imperial Crown of Scotland⁽⁴⁰⁾. THE Estates of Parliament, Considering that the Kings of this Realm deriving their Royal power from God almighty alone, do succeed lineally thereto, according to the known degrees of Proximity in blood, which cannot be interrupted, suspended or diverted by any Act or Statute whatsoever, And that none can attempt to alter or divert the said Succession, without involving the subjects of this Kingdom in Perjury and Rebellion, and without exposing them to all the fatal and dreadful consequences of a Civil war: DO therefore from a hearty and sincere sense of their duty, Recognise, acknowledge and declare, that the right to the Imperial Crown of this Realm, is by the inherent right and the nature of the Monarchy, as well as by the fundamental and unalterable Laws of this Realm; transmitted and devolved by a lineal Succession, according to the Proximity of blood, And that upon the death of the King or Queen, who actually Reigns, The subjects of this Kingdom are bound by Law, duty and allegiance, to obey the next Immediate and Lawful Heir either Male or Female, Upon whom the right and administration of the Government is immediately devolved. And that no difference in Religion, nor no

Law nor Act of Parliament made, or to be made, can alter or divert the right of Succession and lineal descent of the Crown to the Nearest and Lawful Heirs, according to the degrees foresaid: nor can stop or hinder them in the full, free and Actual administration of the Government according to the Laws of the Kingdom. Likeas OUR SOVEREIGN LORD, With advice and consent of the saids Estates of Parliament, Do declare it is high Treason in any of the subjects of this Kingdom, by Writing, speaking, or any other manner of way to endeavour the alteration, suspension or diversion of the said right of Succession, or the debarring the next lawful Successor from the immediate, Actual, full and free administration of the Government, conform to the Laws of the Kingdom And that all such attempts or designs shall infer against them the pain of Treason"⁽⁴¹⁾.

It is noteworthy that the 1681 Act does not profess to make any alteration in the existing law (governed by the 1373 Act) but merely to fortify it - and it is a matter of common knowledge that the purpose of the Act was to secure Duke James's succession (and not to make any changes in the law, e.g. to capacitate anybody who would not otherwise have been legally acceptable in the personality of heir at law). Since no parliament can bind its successor, part of the declaration incorporated in this statute is meaningless. Nor can it be supposed for a moment that the Act was intended to be, or ever was, construed literally when it declared "that the right to the Imperial Crown of this Realm, is by the inherent right and the nature of the Monarchy, as well as by the fundamental and unalterable Laws of this Realm, transmitted and devolved by a lineal Succession, according to the Proximity of blood". For the realm was undoubtedly founded as early as the reign of David I, from whose time the fundamental Laws therefore were taken to date: "When any legislators of a later age wished to stamp their institutions with a name of authority, they founded them upon the laws and statutes of the good King David"⁽⁴²⁾.

Indeed, Lord Stair himself includes the law of succession among "our ancient and immemorial customs" that constitute the common law of Scotland. Were the 1681 Act to be meant literally, therefore, no lawful king had sat on the Scottish throne since King Edward de Baliol: in 1681 the "lineal Succession, according to the Proximity of blood" from King David I (the founder of any fundamental laws) led to Louis XIV, King of France. Again, it was not until 1542 that the succession had opened to the heirs (at law) of the Stewart line: before that these heirs were postponed to the various heirs male called in terms of the 1373 Act, which was undoubtedly the governing Act in force at the time the 1681 statute was passed.

The real effect of the 1681 Act is simply to fortify whoever is next lawful heir general in terms of the existing 1373 Act.

(1) The Estates make a declaration in a sort of preamble which is not put forward as the Sovereign's Act, that "The subjects of this Kingdom are bound by Law ... to obey the next Immediate and Lawful Heir either Male or Female". (2) The Sovereign in Parliament enacts that "it is high Treason ... to endeavour the alteration, suspension or diversion of the said right of Succession, or the debarring the next lawful Successor ... conform to the Laws of the Kingdom".

This point is of considerable academic significance, from the Jacobite point of view⁽⁴³⁾ as well as that of the 1688 Revolution⁽⁴⁴⁾. In 1681, however, all that was intended was to secure Duke James's accession to the throne on his brother's death. This was achieved when he became king in 1685: his position as heir at law of the Blood Royal of King Charles II having this consequence only because he was the true representative of the "veri et legitimi heredes de sanguine et parentela regali" who (by the extinction in 1542 of the lawful heirs male of the bodies of Robert III's sons) had become lawful heirs of tailzie of King Robert III under the 1373 Act, as a result of which he was "next lawful Successor" under the 1681 Act.

When the Parliament of 28 April 1685 reiterated "the just and legal Succession of the Sacred Line as unalterable by any humane Jurisdiction", it was not declaring in favour of King David I's heirs general, but in favour of King Robert III's heirs of tailzie. In 1688, therefore, the position was that - by the 1373 Act fortified by the 1681 Act - the Crown was settled on the true and lawful heirs (male or female) of the Blood Royal of King Robert III. "Heirs" in this context has been demonstrated to mean heirs at law, i.e. heirs general. What constituted the lawful or legal personality of an heir (as opposed to nearest blood relationship) will be discussed later.

The Revolution Settlement.

We must take it as settled Scots Law that the proceedings of the 1688 Revolution were valid, since all law and order as established within this realm for more than two and a half centuries flow from it; quite apart from any question of where the Jacobite royal prerogative has resided since the death of Cardinal York in 1807⁽⁴⁵⁾.

The Convention of 1689 declared "That King James the Seventh being a profest papist, Did assume the Royal power and acted as king, without ever taking the oath required by law ... whereby he hath forfeited the right to the Crown, and the throne is become vacant" ... "THAT by the law of this kingdom no papist can be King or Queen of this realm, nor bear any Office whatsoever therein: nor can any protestant successor exercise the royal power, until he or she swear the Coronation Oath"⁽⁴⁶⁾. The only surviving son of James VII was James Francis Edward, Prince of Wales (later known as the "Old Chevalier"), who had been baptised a Papist, and in accordance with the Convention's declaration of Scots Law he was therefore incapable of having the legal personality of "heir" to the throne: for so they interpreted the 1373 Act when taken in conjunction with the Accession Oath (taken up to that time at Coronations) to "maintain the true

Religion of Christ, now preached and professed within this Realm, abolishing and gainstanding all false religions contrary to the same"⁽⁴⁷⁾. This royal oath they took to be the complement to the feudal oath of allegiance taken by the kings' vassals. The nearest heir of the Blood Royal to be a Protestant was James VII's elder daughter Mary, whose sister Anne was the next heir after that, and then the next heir was Mary's husband William, Prince of Orange (son of James VII's sister), although there was some doubt in his case as he was born an alien. However, his marriage to Mary, the senior Protestant heir, and the consent of Anne to his accession provided Anne's issue was preferred to any issue he might have by a second wife, placed William in a strong legal position quite apart from his military dominance of the situation. For, if Mary was "rightful" sovereign as nearest lawful (i.e. Protestant) heir, he was naturalised by his marriage to the sovereign. Also, the only Protestant heirs nearer than himself were his wife, and his sister-in-law who had consented to his accession.

The Convention of 1689 therefore continued: "That William and Mary, King and Queen of England, France and Ireland, Be, and be declared KING AND QUEEN OF SCOTLAND ... and after their decease the said Crown and Royal Dignity of the said Kingdom, to be to the heirs of the body of the said Queen, which failing to the PRINCESS ANNE OF DENMARK and the heirs of her body, which also failing, to the heirs of the Body of the said WILLIAM KING OF ENGLAND". This line of heirs (with the exception of placing William for life before his cousin Anne, which was done with her consent and which was exceptional in that he was married to Anne's elder sister) in no way differed from the heirs of tailzie under the existing 1373 Act, if the Convention were right in supposing a Papist to be incapable of having the legal personality of "heir" in the succession to the throne after the Reformation had altered the meaning of the Accession Oath, and in supposing James VII and his son to have forfeited their chance to

acquire such a personality by abjuring Roman Catholicism through this oath. It was simply as though the word "Protestant" were implied by the word "legitimi" in the 1373 Act (after 1560) and by the word "lawful" in the 1681 Act (though this was doubtless not at all the intention of that statute at the time it was passed).

In due course, Anne succeeded to the thrones of Scotland and England. By an Act of the English Parliament in 1701, the Crown of England had been settled (in default of issue by William III or Anne) on the next Protestant heir, Sophia, Electress of Hanover, and the Protestant heirs of her body. But there were very grave doubts whether anybody born in the liegeance of a foreign sovereign could have the legal personality of "heir" to the throne⁽⁴⁸⁾. Certainly, no alien born could be "lawful heir" to real estate or dignities in England, or to heritage (including dignities) in Scotland. In 1706, therefore, the English Parliament passed a special statute naturalising the Electress Sophia and all her Protestant descendants: that is to say, removing the incapacity of alien birth from all potential heirs to the throne under the existing Settlement of the Crown (the Law Officers of the Crown in England, in their ignorance of the essential purpose of this vital statute, proceeded recently to contest its continuing validity in the House of Lords, but fortunately they failed). The position in England in 1707 was thus that the throne was settled on the nearest Protestant heirs of the Stewart Blood Royal, and that aliens within the succession had been naturalised by statute to enable them to be such "heirs".

Meanwhile, the Scottish Parliament in 1704 had passed the Act of Security, whereby it had been declared inter alia that "upon the ... death of her Majesty, without heirs of her body ... the foresaid Estates of Parliament convened or meeting are hereby authorised and impowered to nominate and declare the successor to the Imperial Crown of this Realm, and to settle the succession thereof upon the heirs

of the said successor's body, the said successor, and the heirs of the successor's body, being always of the Royal Line of Scotland and of the true Protestant Religion. Providing always, That the same be not successor to the Crown of England, unless that ... during her Majesties reign there be such conditions of government settled and enacted, as may secure the honour and sovereignty of this Crown and Kingdom, the freedom, frequency and power of Parliaments, the religion, liberty and trade of the nation from English, or any foreign influence, with power to the said meeting of Estates to add such further conditions of government as they shall think necessary"⁽⁴⁹⁾. The Scots were at this time very bitter about the blow to their economy caused by the failure of the Darien Scheme, partly through English sabotage.

The English, however, had reacted to the Act of Security by passing their own Alien Act of 1705, which had declared inter alia that "no person or persons being a native or natives of the Kingdom of Scotland ... shall be capable to inherit any lands ... within this Kingdom of England or the Dominions thereunto belonging or to enjoy any benefit or advantage of a natural born subject of England, but every such person shall be ... adjudged and taken as an alien born out of the allegiance of the Queen of England, until such time as the succession to the Crown of Scotland be declared and settled by an Act of Parliament in Scotland in the same manner (as) the succession to the Crown of England is now settled by Act of Parliament in England"⁽⁵⁰⁾. In case this bullying was insufficient, the Alien Act had continued: "... until such time as the succession to the Crown of Scotland be declared ... as aforesaid, no great cattle or sheep shall be brought out of or from the Kingdom of Scotland into the Kingdom of England or Ireland, Dominion of Wales or town of Berwick upon Tweed, under the penalty of forfeiting all such great cattle or sheep ...; no Scotch coals shall be imported out of the Kingdom of Scotland; ... no Scotch linnen shall be imported or brought out of Scotland ..."⁽⁵¹⁾.

The "rough wooing" was at last successful, and what the sword had failed to accomplish throughout so many centuries, was achieved by economic sanctions.

In 1707 the two kingdoms of England and Scotland were united. Article II of the Treaty of Union, and of the Act of Union, runs: "THAT the succession to the monarchy of the United Kingdom of Great Britain and of the dominions thereto belonging after her most sacred Majesty and in default of issue of her Majesty be remain and continue to the most excellent Princess Sophia Electress and Dutchess dowager of Hanover and the heirs of her body being protestants upon whom the crown of England is settled by an Act of Parliament made in England in the twelfth year of the reign of his late Majesty King William the Third intituled An Act for the further limitation of the crown and better securing the rights and liberties of the subject And that all papists and persons marrying papists shall be excluded from and for ever incapable to inherit possess or enjoy the imperial crown of Great Britain and the dominions thereunto belonging or any part thereof and in every such case the crown and government shall from time to time descend to and be enjoyed by such person being a protestant as should have inherited and enjoyed the same in case such papist or person marrying a papist was naturally dead according to the provision for the descent of the crown of England made by another Act of Parliament in England in the first year of the reign of their late Majesties King William and Queen Mary intituled An Act declaring the rights and liberties of the subject and settling the succession of the crown"⁽⁵²⁾.

It was provided in Article IV "that there be a communication of all other Rights, Privileges and Advantages which do or may belong to the subjects of either Kingdom except where it is otherwise expressly agreed in these Articles". Thus the Protestant descendants of the Electress Sophia were automatically naturalised in Great Britain,

and ceased to be "as it were dead" from the point of view of inheritance in the two realms.

As a result, the alien-born Elector George-Lewis of Hanover was as it were a natural-born Briton, and in 1714 he succeeded to the throne as the nearest Protestant heir of the Blood Royal. Although the succession from then onwards has depended on the entail made by the Act of Union, it should perhaps be stressed that from the point of view of the Scottish Crown this line of succession is exactly the same as that laid down by the tailzie in the 1373 Act, provided always that the words "lawful heirs" be interpreted (after 1560 or 1689) as meaning "Protestant heirs". George I (1714-1727) was succeeded by his son, King George II (1727-1760), who was succeeded by his grandson and heir general, King George III (1760-1820), whose son King George IV (1820-1830) was succeeded by his brother and heir general, King William IV (1830-1837). King William, whose heirs male continued to be Kings of Hanover and are now styled Dukes of Brunswick, was succeeded on the British throne by his niece and heir general, Queen Victoria, daughter of his next brother Edward, Duke of Kent and Strathearn (who had died in 1820). Queen Victoria (1837-1901) was succeeded by her son, King Edward VII (1901-1910), father of King George V (1910-1936), father of King Edward VIII. By the Declaration of Abdication Act 1936, Edward VIII became as it were dead in the personality of "Heir" in the Crown, which accordingly passed to the next heir, his brother King George VI (1936-1952). He in turn was succeeded by his daughter, Her Majesty the Queen, who is the present (Protestant) heir of the Blood Royal of King David I, following the line of heirs indicated by the nomination of 1238 and the Acts of 1315, 1318, 1373, 1707 and 1936 as interpreted by Scots Law in accordance with the Reformation.

NOTES TO CHAPTER ON SUCCESSION TO THE THRONE.

- (1) Cumbria and ~~Alba~~ shared a king for various periods during the eleventh century, but they do not seem to have merged their laws, nor was there any permanent unity under an immediate sovereign before 1124.
- (2) See chapters above, on Succession among the Picts, Gaels, Cymry and Northmen, and on the Beornician Succession.
- (3) The most powerful influence, anyway from the succession point of view, appears to have been Norman law, which combined greater continuity with greater certainty by comparison with most of the other laws formerly in use in various parts of what is now Scotland, except perhaps as regards the alienability of family land (which, however, required the superior's consent).
- (4) In the female line, of course, the united Royal House descended also from the Blood Royal of the Picts and Cymry, and of the other peoples who went to make up Scotland.
- (5) In 1004, the (still extant) Book of Armagh was displayed to the Irish high-king Brian Boroma, and in his presence his official historian wrote in Latin on the back of the sixteenth page-leaf: "I Mael Suthain (Calvus Perennis) write this in the presence of Brian, Emperor of the Irish (imperator Scottorum)". See Dict. Nat. Biog. sub BRIAN (926-1014), in vol. ii at pp. 1214-5; also Professor Eoin MacNeill, "Phases of Irish History", p. 271.
- (6) Alexander I, son of Malcolm III, the majority of whose subjects spoke Gaelic.
- (7) Duncan, King of Cumbria for some years before he became King of Alba as well.
- (8) Since King David finally united the realms in 1124, it is

perhaps appropriate that "when any legislators of a later age wished to stamp their institutions with the name of authority, they founded them upon the laws and statutes of the good King David" (Cosmo Innes, "Scotland in the Middle Ages", p. 115). See also Dr. W. Mackay Mackenzie, "The Scottish Burghs" (1949), p. 29.

(9) The Norman succession law is briefly reviewed in the chapter above on Succession among the Northmen. For the process at work, see G.W.S. Barrow, "The Beginnings of Feudalism in Scotland", Bulletin of the Institute of Historical Research, vol. xxix (1956), and the authorities therein cited. Galloway had "special laws" of its own until the end of the 14th century. In the Hebrides, the hereditary Brieves (Brehons) of the Lewes, for example, appear to have been functioning as late as the end of the 16th century. Orkney and Shetland had their own laws until 1611.

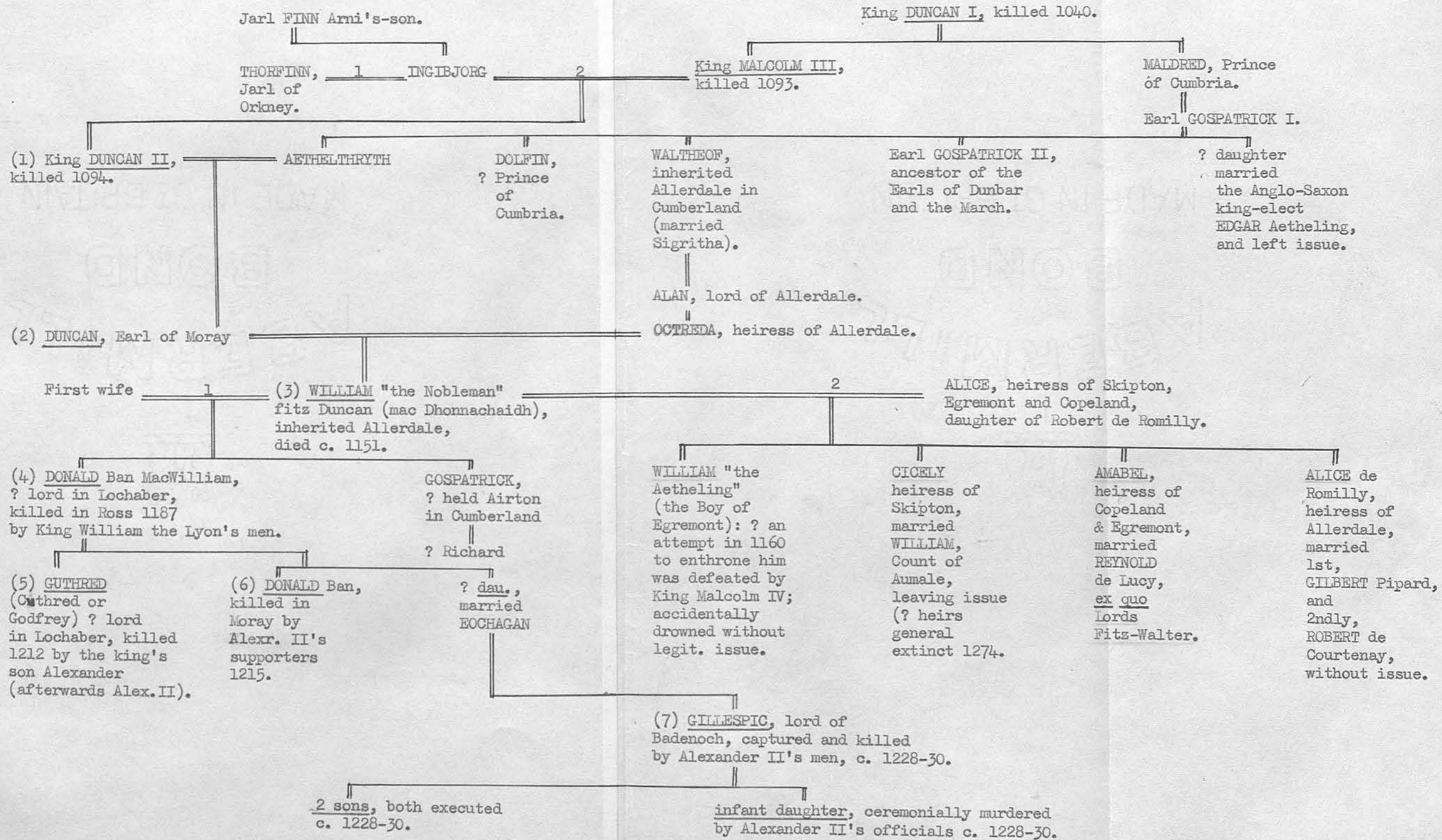
(10) David I had evidently arranged for the succession of his son, Earl Henry, who was styled "Heres et Rex Designatus" (Lawrie, "Early Scottish Charters", no. 163 and 164). After the king-designate's death in 1152, his little son, Malcolm de Warenne ("the Maiden"), was taken on a tour of the realm by the Earl of Fife, who proclaimed him the new rightful heir (see also appendix below, on Coarbs and the Succession to the Crown-Bearing).

(11) Donald was also heir general of Malcolm III, but this was an heirship from before the union of 1124. The older system of the Gaels, however, allowed heirship to the brothers of founder-kings, since their brothers belonged to their derb-fine (e.g. Brian Boroma succeeded his brother Mathghamhain, first of the line to be King of Munster).

The house of Duncan II presented a long-standing menace to King David I's successors, but their genealogy does not seem to have been clearly ascertained. The following table may therefore contain

inaccuracies: but see, inter alia, G.E.C. i. 353n., vi. 127, viii. 247-248, A.O. Anderson, ii. 4-5, 36-39, 91-92, 312, 389, 404, 471, Skene's "Celtic Scotland"; i. 484-488, iii. 479-480, also article on "The Descendants of Duncan II" (Dumfries & Galloway Standard, 20 Feb. and 23 March, 1957), and the sources referred to by the foregoing writers.

DUNCAN II & THE MACWILLIAM CLAIMANTS.



The MacWilliam family seem to have derived support both from Galloway and from the North, and it may be worth noting that c. 1228-30 one of the leading supporters of the last MacWilliam claimant was Gilleroth mac Gillamartin, apparently ancestor of the MacMartins from whom the Clan Cameron in Lochaber claim descent in the male or female line (c.f. Skene, "Celtic Scotland", i. p. 486, iii. pp. 479-480). In view of notes 27 and 60 to the chapter above on Succession among the Gaels, the slaying of potential heirs (often while they themselves were in revolt to slay their predecessor, but hardly so in the case of the infant girl) by King William the Lyon and his son Alexander II is entered on the MacWilliam table.

The main doubt in the foregoing table is, perhaps, whether William "the Nobleman" was son of King Duncan II (as is usually asserted: see A.O. Anderson, ii. p. 4) by Earl Gospatrick's daughter Aethelthryth or Octreda, or whether (as is asserted by G.E.C., i. p. 353n.) there were two Duncans, father and son, the elder being King Duncan II who married Aeththryth and the younger being Earl of Moray and married to Octreda, by whom she was mother of William "the Nobleman". The second view has been followed in the foregoing table because (1) it explains strength of the MacWilliam following in Moray, including Ross, and (2) it accounts for the descent of the lordship of Allerdale, to which Aethelthryth's line as such could hardly have been heirs on the death of Alan Waltheof's - son of Allerdale.

(12) Minors never succeeded to any of the thrones of the Gaels in Ireland - nor to any of the Anglo-Saxon thrones in England. The line that became the House of Godwin were in fact excluded altogether from the succession until 1066, because at the critical moment in the ninth century their ancestor had been a minor and so a younger branch of the House of Wessex had gained and retained the throne instead of him (see table above, in the chapter on Succession among

the Picts, at note 52; also New England Hist. & Gen. Register, vol. cxi. no. 441, Jan. 1957). It seems inconceivable that Eochaid, King of Alba 878-889, could have been a minor at the time of his accession, and it should be noted that the original sources make no such suggestion: see A.O. Anderson, "Early Sources of Scottish History", vol. i. p. 364 note 1.

(13) Palgrave, op. cit., p. 29: "Por ceo qe le Reis Alexandre pere le Rey Alexandre qe dereyn morust qant il ala en guere sur les idles graunta et ordeina come celuy qe meuz fust avise de son sank par commun assent des Evesqes Contez et de son Barnage qe si Dieu vousist qe il moursist sanz heir de son cors, Sire Robert de Brus come plus procheyn de son sank fust teneu son heir al Reaume de Escoce avoir et de ceo fust fet un escrit seale du seel le Rey et des Eveskes ... granz Seigneurs le quel escrit demoerra en la Tresorie le Rey".

(14) Actually, King Alexander II was born on 24 Aug. 1198, and cannot have been more than thirty-nine or forty at the time in question.

(15) Palgrave, op. cit., pp. xvi-xviii.

(16) As was the case later, when Edward Bruce was preferred to Marjorie in 1315 (see below).

(17) But, of course, in 1291/2 there was a son of the first daughter's line, namely John Baliol.

(18) In her babyhood. A woman or a baby on the throne, let alone a combination of the two, would have been unthinkable in the days before Scotland was unified. This was pure Scots Law carried to its logical conclusion.

(19) See Dr. J.H. Round, "Geoffrey de Mandeville", pp. 70-77.

(20) E.g. Palgrave, op. cit., pp. 30, 31, 42, 50.

(21) Ibid., p. 48.

(22) "son Sovereyn Seigneur e son Empreur" (Palgrave, op. cit., p. 29).

(23) For the other claimants, see Palgrave, op. cit.; J. Hill Burton, "History of Scotland", ii. pp. 202-259; Dr. George Neilson, "Bruce versus Balliol", Scot. Hist. Review, vol. xvi. p. 1 et seq.; and especially Grant G. Simpson, "The Claim of Florence, Count of Holland, to the Scottish Throne, 1291-2", Scot. Hist. Review, vol. xxxvi p. lll et seq. But until the material has been revised and re-edited, it is unsafe to found upon it (except in the case of Mr. Simpson's interesting article, also referred to in the chapter on Succession among the Gaels). See further Professor W. Croft Dickinson's comments in "The Court Book of the Barony of Carnwath", p. xxx.

Lord Lyon Sir Thomas Innes of Learney, in his edition of Frank Adam's "Clans, Septs and Regiments of the Scottish Highlands", at p. 28 note 1, writes: "The great 'multiplepointing' - if I may so term it - for the Crown of Scotland has never been properly described, or reported, though it is by far the most momentous of all British 'trials'. ... Burton by no means understood the drift of many parts of the proceedings, and points which to him seemed 'anomalous' (always a dangerous sort of expression, and one which too often merely covers 'what we don't understand') are capable of most interesting explanations from other sources. Moreover, many of the damaged pleadings, supposed last century to be incapable of further elucidation, could probably now be more amply deciphered by scientific photography. A full re-examination of the whole would throw much important light on ancient Scottish laws and principles of succession and procedure". Fortunately, such a work is in hand, and detailed analysis of the legal problems presented by the other claimants in the Competition for the Crown must await its publication: see Professor E.G.L. Stones, "The Records of the 'Great Cause' of 1291-92", Scot. Hist. Review, vol. xxxv p. 89 et seq.

The Count of Holland claimed as heir of a sister of King William the Lyon, and Robert de Pinkeny claimed to be heir of another sister. At first sight, these claims could not be valid so long as there were legitimate descendants of King William the Lyon's brother, Earl David, but some attempt was made to set aside David's issue as attainted, and the Count of Holland's case was supported by Earl David's apparent agreement with King William the Lyon to renounce all claim to the throne on behalf of himself and his heirs in return for the Garioch (see chapter on Succession among the Gaels, text and notes 81-82). Patrick Galightly, William de Roos, William de Vesey, Roger de Mandeville and Patrick, earl of Dunbar, each claimed as the heir of a different (natural) child of King William the Lyon; and Nicholas de Soulis, lord of Liddesdale and butler of Scotland, claimed as heir of a (natural) child of King Alexander II. With the exception of Patrick Galightly, whose father had been a (natural) son of King William the Lyon, every one of these claims was based on descent in the female line: that is, each claimant petitioned as heir general, passing over of course all mention of bastardy. Moreover, the claim of Patrick, earl of Dunbar, is especially important in this respect. He was legitimately descended in the direct male line from the brother of King Duncan I (David I's grandfather), and was thus a lawful member of the reigning dynasty in the direct male line: one of the royal heirs male. He may even have been King Alexander III's nearest heir male, but it is possible that nearer male heirs may still have existed, e.g. in the Atholl branch of the royal house. It is therefore of the first importance to note that nobody at all appeared as a competitor for the throne in the character of heir male, although heirs male of the royal house were by no means extinct; and furthermore that one of these heirs male (Patrick, earl of Dunbar) actually preferred instead to claim as heir general through a (natural) daughter of King William the Lyon. For the earl clearly regarded even an illegitimate descent in the female line as affording a better claim to the succession, than

a lawful descent in the direct male line of the Celtic Blood Royal that was more remote than the female descent of his fellow competitors (none of whom, save Patrick Galightly, were Celts in the male line). The special importance of this point is, that it disposes of any argument that the heir general was only considered because of some supposed extinction of the male line of the dynasty.

All these claims through bastards were rightly of no avail, in the absence of any special destination in their favour. Nor was the claim of John Cummin, lord of Badenoch, who was the heir general of King David's uncle, King Domnall Ban (younger brother of Malcolm Ceamm-mor), and who therefore only represented a junior line of the royal house. Nowadays, owing to the (surely inequitable) judicial decision against the old rule of heritable succession, maternis materna, in matters of corporeal heritage (though happily not in the case of Arms and dignities), the best claim of all might have vested in King Eric of Norway as father of "the Maid"; although it could doubtless have been argued then that Queen Margaret had never been properly infeft at Scone and it would still be rightly argued that the throne is a dignity - indeed, the fountain of all dignity - and thus incorporeal heritage even though the corporeal realm is carried with it. However, maternis materna was then still the undoubted law of Scotland, and so Queen Margaret's rights returned to her mother's family.

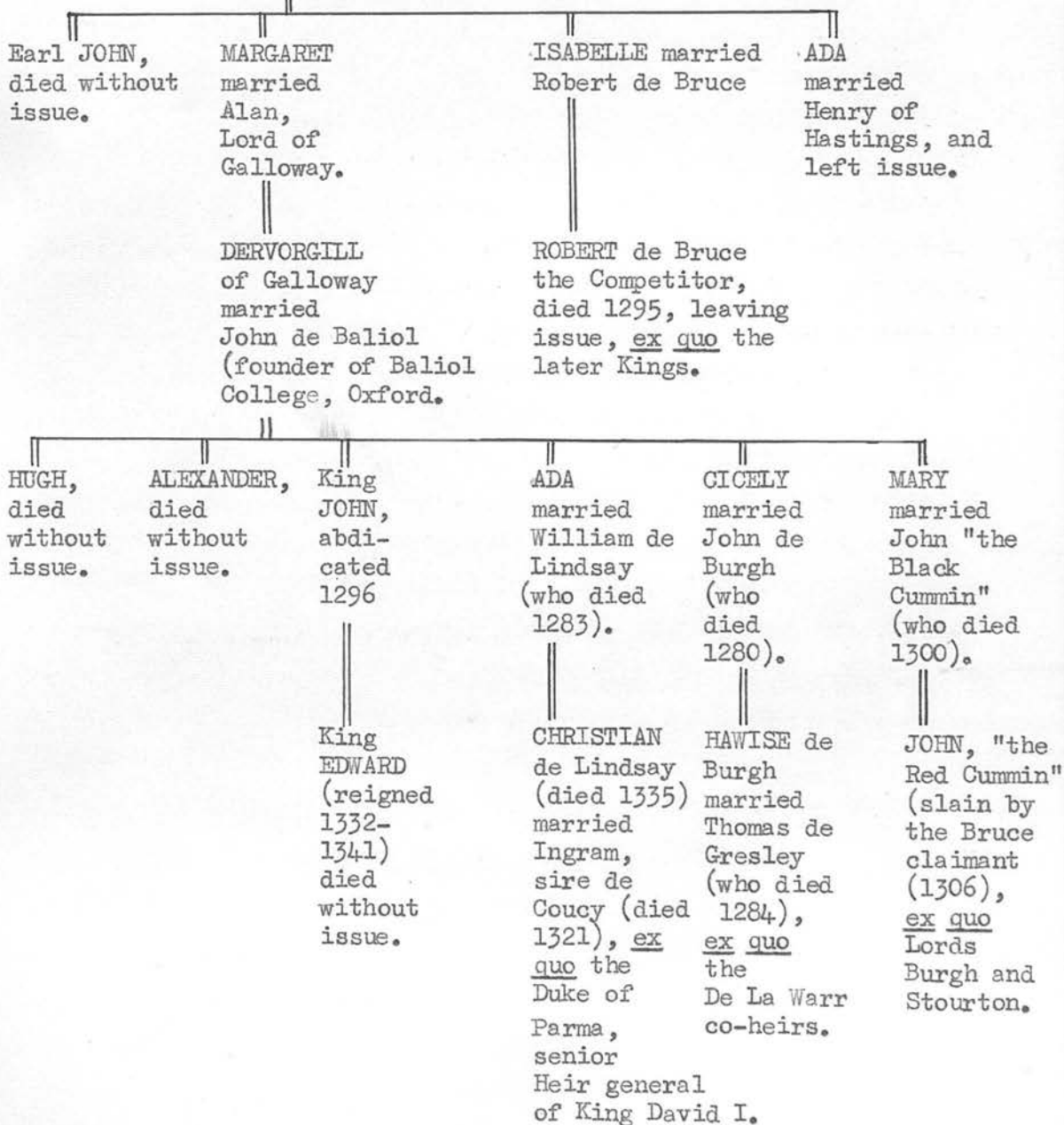
(24) Palgrave, op. cit., p. xiiii.

(25) After King John's abdication, Robert Bruce might also have argued that the kingdom and kingship reverted to him as the descendant of the second co-heiress, were it not that (besides King John's own issue) there were other nearer heirs of the eldest co-heiress through King John's sisters.

This point is illustrated by the following table:

THE BALIOL SUCCESSION.

Earl DAVID (brother of King William the Lyon).



The Bruce claim after 1296 therefore rested on the case advanced in 1291-2, reinforced by the Baliol abdication and established by the victory of Bannockburn.

(26) The senior heirs general of King David I, who may be regarded as the founder king of modern Scotland, were the heirs of King John's eldest sister (see previous note). The line passed through the sires de Coucy, the Bar counts of Soissons, the Luxembourg counts of St. Pol, and the Bourbon kings of France, to the Dukes of Parma. So, by an interesting historical coincidence, this (Baliol) senior heirship passed through King Louis XIV, who was so long the champion of the Stuarts, heirs general of the rival (Bruce) junior line. The senior co-heir general of Malcolm Ceann-mor (by his first wife) appears to be Lord FitzWalter, but since this line branched off before Alba was united or the later succession law established, it has no significance from the point of view of this chapter. Again, it is often said that the heirs of Malcolm Ceann-mor's second wife, St. Margaret, were the representatives of the Anglo-Saxon house of Wessex: but it is in fact far from certain that the issue of her brother, the king-elect Edgar Atheling, are extinct (see M. de Manteyer, "Les Origines du Dauphiné de Viennois", Bulletin de la Société d'Etudes des Hautes-Alpes, 1925, pp. 307-426, in which he suggests that the King-Elect married a sister of Earl Gospatrick and had a son, the "Edgar Adling" who was living in Northumberland in 1158 and 1167, and also two daughters, the mother of Henry Lovel - for whom see G.E.C. sub LOVEL - and Maud the Queen who married Guigues VIII the Count of Albon).

(27) The writer's intr. on Scottish genealogy in Burke's Landed Gentry, 1952 ed.

(28) And, in the 12th and 13th centuries, the consent of the king's curia which declared the law and determined all questions affecting the kingdom. The curia consisted of the whole body of tenants-in-chief, as opposed to the council who were those asked by the king.

- (29) A.P.S., i, 464-465.
- (30) See also note 16 above.
- (31) A.P.S., i, 465.
- (32) A.P.S., i, 546.
- (33) A.P.S., i, 549.
- (34) See the statute of 13 August 1681, cited below.
- (35) ibid.
- (36) While Steward of Scotland, King Robert II had married (papal dispensation 22 Nov. 1347) Elisabeth, daughter of Sir Adam Muir of Rowallan, but his sons by her (John, afterwards King Robert III; Walter, who died about 1362; Robert, afterwards the Regent Albany; and Alexander, "the Wolf of Badenoch") had been born before the marriage and, although subsequently legitimated, were not "lawfully begotten" in terms of the 1318 Settlement. He had married secondly (papal dispensation 2 May 1355) Euphame, widowed Countess of Moray, daughter of the Earl of Ross, and his sons by her (David, afterwards Earl Palatine of Strathearn; and Walter, later Earl of Atholl) were of course "lawfully begotten".

"The condition at birth of that King's children by his first wife, though they were afterwards legitimated by papal dispensation, gave the heir of line of the second marriage a plausible pretension to the throne, and was the cause of constant jealousy between the descendants of the second marriage and the reigning family, descendants of the first" (G.E.C., vol. viii p. 668n).

After the death of the Earl Palatine David, his brother Walter, Earl of Atholl, was the nearest lawfully-begotten heir male of King Robert II, and this led to his execution for the plot in which King James I was assassinated. The assassination itself had been brought about by King James I's unjust treatment of the heir female of the Earl Palatine David - the boy Malise Graham (Earl David's grandson) whom

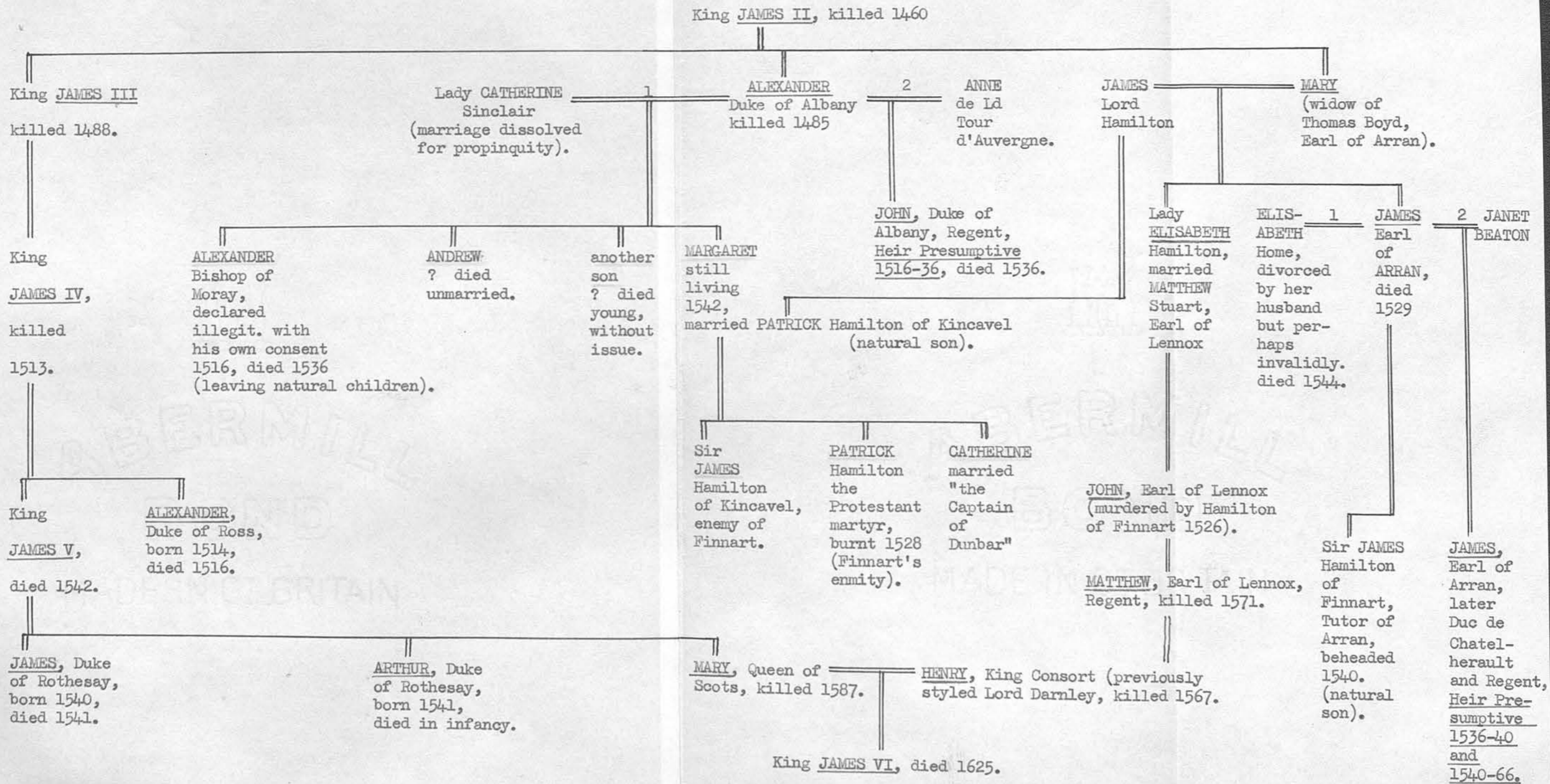
the king deprived of the Earldom of Strathearn on the pretence that it was a male fee, creating him Earl of Menteith instead and immediately sending him into captivity as a hostage in England, where the poor earl was imprisoned for more than twenty-five years. His descendant William Graham, Earl of Menteith, was restored to the earldom of Strathearn by King Charles I in 1631: "this right, however, to the Earldom of Strathearn was very shortly afterwards taken from him by the Court of Session, which, on 22 Mar. 1633, set aside the retour of 25 May 1630 on the (erroneous) ground that David, Earl of Strathearn (to whom as abavus atavi that retour had served him heir), had died without issue" (G.E.C., vol. viii p. 674). Apparently the unfortunate earl had been heard to remark that he "had the redest blood of Scotland" (Riddell's "Remarks upon Scotch Peerage Law", 1833, p. 40: nowadays the earl would have spoken of the "bluest" blood), and a commission was appointed to try whether it were true, as Lord President Skene had affirmed, that the earl had also said "that he should haif bein King of Scotland ... and to haif better or as guid rycht to the Croune as we ourselffis" (Red Book of Menteith, vol. ii p. 50). See also "Scots Peerage", vol. i pp. 133-135.

(37) King James III's younger brother Alexander, Duke of Albany, who in 1479 styled himself "Prince Alexander" on his seal ("Sigillum Principis Alexandri Ducis Abbanie: Macdonald, "Scottish Armorial Seals", no. 2576), assumed the style of "King Alexander" while in England in 1482, and signed himself "Alexander R." (Foedera xii, 145-146), but was not accepted as such in Scotland, and was forfeited in 1483. His only possible claim would have been under the old custom that preferred kings' brothers to kings' sons, and that sanctioned attempts by the heir to overcome the king: a custom then otherwise long discontinued in Scotland, but still practised for yet another century afterwards in Ireland by such dynasts as the MacCarthys of Muskerry, whose people seem to have regarded the periodic contest between dynast and potential

heir as a cross between a boxing-match and a football-match (in that each usually had their armed supporters but the generality of the people were spectators rather than participants), so that the contestant heir could be spoken of as having the best challenge to the dynast's position (see chapter on Succession among the Gaels, note 27).

(38) The sinister figure of Sir James Hamilton of Finnart, the fiery "Bastard of Arran", flits across the scene during the reign of King James V, when for the first time the Stewart heirs male under the Act of 1373 seemed likely to fail. At James V's accession in 1513, the heir presumptive appeared to be his cousin John, son of the late Duke of Albany who had been younger brother of King James III. But the Queen Dowager was enciente, and in 1514 the king's brother Alexander, Duke of Ross, was born. However, this baby boy died within twenty-one months, and John of Albany was the only recognised heir male of Robert III's body left, besides the king. There were, nevertheless, grave doubts about John of Albany's legal capacity to be heir male. His father, after a rebellion in which he had proclaimed himself Alexander IV, King of Scots (see previous note), and had offered to accept English overlordship of the realm, had been forfeited and had died in exile abroad. He himself had been born in France, in the liegeance of a foreign king, and although France was already according special privileges to Scotsmen and receiving them in return, and the statute 1491 c. 23 may have capacitated French-born heirs, aliens could not normally inherit any heritage in Scotland: whether honours or lands. Further, there were doubts about his legitimacy or, alternatively, about his elder half-brother's illegitimacy. Their father Alexander, Duke of Albany, had married first the Lady Catherine Sinclair, daughter of William, Jarl of Orkney, Earl of Caithness and Lord High Chancellor of Scotland, and of this marriage there still survived a son, Alexander Stewart (afterwards Bishop of Moray), and a daughter Margaret (wife of Arran's natural brother Sir Patrick Hamilton

POTENTIAL HEIRS TO THE THRONE: 1513 - 1542.



of Kincavel). By one of the marital arrangements so typical of those days, Duke Alexander had caused this first marriage of his to be dissolved (by decree of John Otterburn, official of Lothian, in 1477/8) on the ground of propinquity, thus bastardising the children in the same way as English Protestants looked on Catherine of Aragon's daughter (Queen Mary I) as bastardised (while English Catholics looked on Anne Boleyn's daughter, Queen Elizabeth I, as a bastard only because they did not recognise the validity of the decree against Catherine of Aragon's marriage to Henry VIII). Duke Alexander had then proceeded to marry Anne de ^{La}Tour, daughter of Bertrand, Count of Auvergne and Bouillon, and by her was father of John of Albany, who was of course only legitimate if his father's first marriage to Catherine Sinclair was really nul (about which there was considerable doubt). The realm, however, desired John of Albany to act as Regent, and all these doubts were resolved by his restoration to his father's lands and dukedom, followed by an Act of Parliament of 13 November 1516, in which he was declared his father's only lawful son and to be heir presumptive to the throne. Since, however, he himself had no legitimate issue, the succession problem until his death in 1536 turned on who was next heir after him. This heir was to be sought among the Hamiltons.

In terms of the 1373 Act, on the failure of heirs male to the Stewart royal line, the Crown was to pass to "heirs", i.e. to the heir general. This heir general (in the event of Albany's death without lawful issue, that duly took place) was apparently James Hamilton, Earl of Arran, whose mother Mary had been elder of the sisters of King James III and of Alexander, Duke of Albany. Arran had a natural son, Sir James Hamilton of Finnart, whose devious intrigues doubtless stemmed from the desire to see his father succeed to the throne. About 1527, Finnart ceased to debruisse the Hamilton cinquefoils with a riband on his own coat, but surrounded his cinquefoils instead with a royal tressure (see his seals). After Arran's death in 1529,

Sir James acted as Tutor of Arran in the interests of his young half-brother, the new earl. He is said (see authorities cited by Andrew Lang, "History of Scotland", i. App. G) to have done his utmost to keep young James V from marrying, and "is even said to have turned the course of the royal ship homewards when James lay asleep during his frustrated voyage to France to woo Marie de Vendosme in July 1536". Thus far, Sir James's actions are only of interest from the point of view of this paper, in that they illustrate that the ultimate succession to the throne of the heir general in terms of the 1373 Act was contemplated as a reasonable likelihood long before James's deathbed realisation that "it cam' wi' a lass, and will gang wi' a lass" came true, and that the young Earl of Arran was regarded as James V's potential heir presumptive long before he became Regent and was officially recognised as heir presumptive of Mary, Queen of Scots.

There were however doubts about the young Earl of Arran's strict legitimacy, as he was the son of his father's second marriage (to Janet Beaton) and there was some question about the validity of his father's divorce from his first wife (Elisabeth Home, who survived her husband): see "Scots Peerage", iv pp. 358-360, 366-367, also "Source Book of Scottish History", ii p. 120. If the divorce were invalid, any claim derived from King James III's sister Mary would have passed through her only daughter, Lady Elisabeth Hamilton (sister of the first Earl of Arran and) wife of Matthew Stuart, Earl of Lennox, who had been slain at Flodden. Accordingly, even before the first Earl of Arran's death there had been a bitter rivalry between the Hamiltons of Arran and the Stuarts of Lennox. In 1524 John, Earl of Lennox (Elisabeth Hamilton's son) had plotted unsuccessfully to slay the Earl of Arran at Holyrood-house (Lang, *op. cit.*, i. 410), and when Lennox himself had fallen into the hands of the Hamiltons after his defeat at Manuel in 1526, Sir James Hamilton of Finnart had murdered him in cold blood and (according to Pitscottie) had set "his mark",

a slash across the jaws, on many of Lennox's party. In the event, young Arran's legitimacy was recognised by his eventual appointment as Regent during Mary Queen of Scots's minority; while Lennox's grandson was to marry the Queen and found the second line of Stuarts upon the throne.

But further interesting doubts about the simplicity of the legal position are raised by other actions of Sir James, that have hitherto been dismissed by historians as inexplicable (see Sheriff J.R.N. Macphail, "Hamilton of Kincavil", Scot. Hist. Review, xi. p. 156). It seems to the writer, as it must also have seemed to Sir James, that the Earl of Arran's position as ultimate heir presumptive was still by no means secure. The bastardising of Alexander, Duke of Albany's children by his first marriage could be undone if Parliament should at any time have a desire to revive the question of that marriage's dissolution. The Act that had confirmed Otterburn's decree was only passed by a Regent's parliament, and not only was there a tendency for kings to revoke the deeds of those who acted during their minority, but the Act in question had been passed for the express purpose of securing that Regent's position. As a churchman, the Bishop of Moray was unlikely ever to be a serious rival to John, Duke of Albany - and as an heir male Duke John was in any case preferred by the 1373 Act to his half-sister Margaret (supposing both to be considered legitimate). But the Earl of Arran's claim to be ultimate heir presumptive depended entirely on the bastardising of this Margaret, lady Kincavel (who was still alive as late as 1542). Nor was she an ordinary bastard: her parents had been married, a king's son to a great jarl's daughter, and she had only been bastardised retrospectively. The writer is therefore inclined to see in Margaret, lady Kincavel's position as potentially a nearer heir to the throne than Arran (her father having been brother to Arran's mother), the cause of Sir James Hamilton of Finnart's unclannish persecution of her children. He is said to have taken a leading part

in causing her Lutheran son Patrick Hamilton, abbot of Fearn, to be burnt at the stake in 1528. Six years later, when her other children (Sir James Hamilton of Kincavel, sheriff of Linlithgow, and Katherine Hamilton "the spouse of the Captain of Dunbar") were accused of heresy, and Kincavel was forfeited and forced to flee into exile, Finnart was apparently active against them and himself obtained a charter of the lands of Kincavel and the office of Sheriff. Such a persecution of fellow-Hamiltons was most uncharacteristic both of Sir James and of the period, unless Finnart (by now Tutor of Arran) had a very special interest in discrediting a family who were a potential danger to Arran: which it may be suggested they were. In the sequel, a son was born to James V in April 1540, and the Arran Hamiltons thereupon became a source of possible danger to the infant. In August following, Sir James Hamilton of Finnart "was accused of having been 'art and part' in an old plot against the king, possibly a 'frame-up' . . . , and was worsted in a duel fought as a 'trial by combat' between him and his accuser, the avenging brother of his Lutheran cousin. Sir James was therefore judged guilty of the treason charged against him, and was himself beheaded". (the writer's "Falkland Palace", 2nd ed., p. 24.; G. Neilson, "Trial by Combat", appears to overlook this duel). Nevertheless, the ultimate possibility of a Hamilton succession to the throne remained an important influence on Scottish politics for over a century.

(39) She married firstly, in 1558, François, Dauphin de Viennois, who thereupon became King Consort of Scots. They were styled "Franciscus et Maria, Dei gratia Rex et Regina Scotorum, Delphinus et Delphina Viennensis, etc." (see e.g. commission of lieutenantcy to George, 7th Earl of Erroll, 22 July 1559, printed in Spalding Club Misc. ii pp. 328-329; original now in charter-room at Easter Moncreiffe) until the news reached Scotland of his accession on 10 July 1559 to the throne of France as François II. He died, however, in 1560.

She married secondly, in 1565, her cousin Henry, Duke of Albany,

who was proclaimed King of Scots the day before the wedding. He was eldest son of the Earl of Lennox, and while in exile in England had been styled after the English fashion by the courtesy title of "Lord Darnley" instead of by the Scottish custom as "Master of Lennox"; although at this time the Queen's own half-brother was a peer in Scotland as Lord Darnley (see G.E.C. sub DARNLEY). In Scotland, he was known after his marriage as "King Henry", although historians persist in referring to him as "Darnley". He was murdered in 1566/7, leaving a son who was heir to the throne.

She married thirdly, in 1567, James, Earl of Bothwell, Lord High Admiral of Scotland, whom she created Duke of Orkney.

(40) An imperial crown is a crown subject to no other suzerain. It was in a similar sense that a statute of Henry VIII declared that "this realm of England is an Empire": Act in Restraint of Appeals, 1533 (see also Dr. J.R. Tanner, "Tudor Constitutional Documents 1485-1603", 1930 ed., p. 41 note 1).

(41) A.P.S. viii, 238, c.2.

(42) See note 8 above.

(43) See note 44 below.

(44) The 1689 Convention ascertained the law to be that no Roman Catholic could have the legal personality of a lawful Successor to the throne: see main text below.

(45) From the Jacobite point of view, of course, no legal transactions that could override the 1373 Act (fortified by the 1681 Act) were possible after 1688, since no Parliament was validly summoned by the exiled James VII or his successors and nobody else had the authority to summon a Parliament.

It is necessary, in tracing the Jacobite succession, to ignore the legal presumption (supported by the post-Reformation Coronation Oath

and by the Revolution) that the word "Protestant" was in any way implied by the word "legitimi" in the 1373 Act (which was passed long before the Reformation) and by the word "lawful" in the 1681 Act (which rather asserts the contrary in the preliminary declaration by the Estates). If the words "legitimi" and "lawful" had then no other limiting meaning than "lawfully procreated", or rather "born of married parents", the Jacobite succession would have to be taken as having passed to the nearest heirs general of the Stewart Blood Royal in accordance with the modern meaning of the word "heirs" at law.

By the ordinary modern interpretation of the word "heirs" (i.e. that introduced by statute in 1870) the line of succession would be taken to have run thus: James VII (1685-1701); his son James VIII (1701-1766); his son Charles III (1766-1788); his brother Henry (1788-1807) better known as Cardinal York; his kinsman (the descendant of James VII's sister "Minette") Charles Emmanuel (1807-1819) King of Sardinia; his brother Victor Emmanuel (1819-1824) King of Sardinia; his daughter Mary Beatrice (1824-1840) Duchess of Modena; her son Francis (1840-1875) Duke of Modena; his brother's daughter Mary Teresa (1875-1919) Queen of Bavaria; her son Rupert (1919-1955) Crown Prince of Bavaria; and now his son Albert, Duke of Bavaria. This is indeed the commonly accepted view of the Jacobite succession, and when Prince Henry of Bavaria (son of the Crown Prince Rupert) visited Scotland in 1939, he wore a kilt of the Royal Stewart tartan throughout his stay in order to mark this sentimental claim.

It should perhaps be remarked that the Kings of Sardinia who, according to this view, were the Stewart successors from 1807 to 1824 (and probably also the Duke of Modena from his accession to that sovereign duchy in 1840 to his deposition by the Piedmontese in 1860) recognised the successive British monarchs, the Stewart Protestant heirs George III and George IV (and probably also Victoria) and exchanged diplomatic representatives with them. It might have been

argued that such recognition was accorded de facto and not de jure, had the Sardinian kings (and the archduke) made any attempt to reserve any rights or to assume any English or Scottish royal styles. This recognition would go a long way towards implying an implicit cession by the senior branch of the Stewart Blood Royal (the Sardines) of their claim and an acknowledgement by them of the junior branch of the Stewart Blood Royal (the British monarchs) as being in right of the kingdoms: even had the only claim of the British monarchs been that of conquest, or of the necessity of Protestantism to complete the legal personality of a royal "heir".

But it is by no means absolutely certain that these Sardinian kings had a better claim than the British monarchs in any case, or that the commonly accepted view of the Jacobite succession after 1807 is necessarily well founded in law. For the Sardinian claim is based on the modern interpretation of the word "heirs", and not on that in force in 1373, 1689 or 1807. Yet, unless their claim can be sustained according to the meaning of the word "heirs" at the time the succession opened to them, i.e. in 1807, by the Jacobite law that had necessarily remained unaltered since 1689, it must fail. A possible alternative argument might be based on the meaning of the word "heredes" in 1373, but in point of fact the only important change of meaning in the words "heredes" or "heirs" between 1373 and 1689 was that during the sixteenth century the legal interpretation of these words was modified to include Frenchmen, and that Englishmen born after 1603 were also included. Since 1870 (but not by Jacobite Law) it has only been required of "heirs" that they be legitimately born or legitimated by subsequent marriage of their parents, but before that date (with certain exceptions such as those noted above) it was also required of "heirs" that they be born in the liegeance of the Sovereign. At no time between 1373 and 1807 were Italians (who had not been naturalised over here) capable of having the legal personality of "legitimi heredes" or "lawful heirs" in Scotland - or in England, for that matter.

The present state of the law with regard to the right of foreigners to succeed to heritage in Scotland is set out in Green's "Encyclopaedia of the Laws of Scotland", para. 670, at pp. 271-2: "At common law, aliens, whether in their own right or as trustees (Collins v. Boyd, 1759, M. 4648), 'can neither enjoy nor succeed to a feudal subject in a country to whose sovereign they bear no allegiance' (Erskine iii. 3, 10; Bankton I. ii. 64; Leslie v. Forbes, 1749, M. 4676; Dundas v. Dundas, 1839, 2 D. 31). The ratio of this disability was partly residence abroad and partly foreign allegiance (Erskine, ibid.). Its scope has been greatly reduced by statute until in 1870 (33 & 34 Vict., c. 14, s. 2) 'it was finally abolished. The matter is now regulated by s. 17 of the 1914 Act, which provides that 'real and personal property of every description may be taken, acquired, held and disposed of by an alien in the same manner in all respects as by a natural-born British subject'. This, however, only applies to interests conferred or acquired on or after 12th May 1870, and there is a general limiting clause appended (subsecs. (5) and (4). . . ."

Before discussing its application to succession to the throne, it may be worth while first examining the history of this limitation on the capacity to be an heir in Scotland. It formed no part of the law of Scotland during the "Golden Age" of the Celtic monarchy, and appears to have become established as a result of the Wars of Independence. John de Baliol, before his accession to the throne, was lord of Galloway in Scotland, held a great fief around Barnard Castle (called after its founder Bernard de Baliol) in England, and was seigneur of Bailleul in Picardy: it did not matter in which king's liegeance he had been born. The shadow of a more limited tenure appears in England as early as the Conquest of Normandy by Philip Augustus from John (accepted in 1206), when the great Anglo-Norman families like St. John were compelled to opt for France or England, and to give up their fiefs in the other country. After Bannockburn and the parliament at Cambuskenneth the

great lords had to decide where their allegiance lay, and the first signs of such a disherison thus also begin to be discernable in Scotland. Once foreigners had come to be disinherited for following the sovereign in whose liegeance they had been born, it took little time for the common law - in a period of constant wars against foreign aggression - to harden against the succession of any alien to heritage.

The effect of the common law may be discerned from statutes that mitigated it, as well as from lawsuits (which were rare because the rule was unchallengeable and therefore claims by aliens were not worth the expense). The statute 1491 c. 23 enacted a confirmation of the "auld alliance" with France, "to obtain and procure others new franchises and privileges to the honour and profit of our Sovereign Lord, his realm and lieges, and to the good of Merchants, that our Sovereign Lord's lieges using they parts, have sik freedom within the Realm of France, and bounds of the same, like as the Frenchmen has within our Sovereign Lord's Realm and Bounds ..." This was followed in 1558 by an Act of Parliament anent "the privilege and liberties of French-men within Scotland", setting forth that "Because the most Christian King of France has granted a letter of naturality, for him and his Successors, to all and sundry Scotsmen being in the Realm of France, or shall happen to be in the same in any times to come: Making them able to bruik lands, heritages, offices, dignities and benefices: And to dispone thereupon, and their heirs to succeed to their lands and heritages ... Therefore the Queen's Grace Dowager, and Regent of this Realm, and the three Estates of the same, thinks it good and agreeable, that the like letter of naturality be given and granted by the King and Queen of Scotland, Dauphin and Dauphiness of Viennois, to all and sundry the said most Christian King of France subjects, being, or shall happen to be in the Realm of Scotland, in any times to come, with siklike privileges and faculties as is given by the said most Christian King of France to the subjects of this Realm ...". In accordance with this arrangement, many

Scotsmen were enabled to inherit estates and dignities in France, while a few Frenchmen were enabled to do the like in Scotland. The privileges accorded to Scots in France appear to have been increasingly curtailed after the Union of the Crowns of Scotland and England in 1603, and in consequence it was argued that similar limitations applied to Frenchmen in Scotland under the 1491 and 1558 Acts. For instance, in the case of the Earl of Kincardine v. Heere Van Sommerdyke in 1683 (6 Morison's Dict. 4635), it was argued that "an infertment of annual rent granted in favours of Heere Van Sommerdyke could not be respected, because he was a stranger not naturalised, and so not capable to acquire a feu in Scotland"; and when he replied that he had a marquissate in France and so had "the benefit of the general Act of Naturalisation granted to the subjects of France in Queen Mary's time", it was further argued against him that "subjects of this kingdom are not capable to purchase in France, unless they be denized, no more ought the French be capable here", although this contention was weakened by an additional argument that Van Sommerdyke was "not properly a Frenchman; so that it was fictio fictionis to allow him the privilege of a French subject". After the 1870 Act removed the incapacity of foreigners in general to be heirs, the 1558 Act became of less importance from this point of view, and it was repealed by the statute of 1906 (6 Ed. VII, c. 38).

In Scotland, as in England, (where see, for example, the De La Warr case in G.E.C. iv. 158 n.) this legal incapacity of aliens to be heirs applied to all heritage, whether honours or lands. The effect of the succession opening to a foreigner in Scotland was that, if he had not been naturalised or if his case was not covered by some special statute, the succession passed to the next heir, who thus became the only "lawful" heir. Even after the accession of King James VI of Scotland to the English throne in 1603, this rule of law continued to be applied in either country to subjects of the other born before the Union of the Crowns. It was of course always open to the Sovereign to confer an

honour (e.g. the Boreel baronetcy) or even an estate on a foreigner, the rule of law merely prevented aliens from being "lawful heirs" to existing inheritances. Nevertheless, so stringently was the law against aliens enforced, that the king's friend Sir James Hay (a cousin of the 1st Earl of Kinnoull) found it convenient to be naturalised an Englishman on 14 May 1604, which enabled him to take full advantage of the English estates and dignities with which he was afterwards showered (among them the Earldom of Carlisle, the Garter, and the hereditary proprietorship of Barbados, then an English possession). A complicated legal situation arose when Andrew Stewart, Lord Ochiltree decided to abandon his Scottish nationality and emigrate to Ireland with his son in 1615, for both had been born when Scotland and Ireland were in the liegeance of different Sovereigns. An arrangement was therefore made whereby Lord Ochiltree resigned the Scottish peerage in favour of the nearest heir who was remaining a Scotsman: his cousin, Sir James Stuart of Killeith. The words whereby King James wrote under his own sign manual on 27 May 1615, to notify the Scots Privy Council of his consent, are very significant: for the king refers to Lord Ochiltree and his son, the Master, as "he and his son being as it were dead in that our kingdom" of Scotland, and writes of their cousin "as next of the race", "the said Sir James coming in a kind of succession" (P.C. Reg., 6 June 1615, and Canon A.G. Stuart, "Genealogy of the Stuarts of Castlestuart", 1854, p. 193).

Subjects of England or Scotland born after 1603, however, were held to have been born in the liegeance of the Sovereign of both kingdoms, and could be lawful heirs in both countries. The position was explained in the case of Leslie v. Forbes (1749, 6 M. 4638): "In England so strictly are aliens excluded. ... and there Coke, as also in his Institutes, c. 1. and the case of Calvin, 6to James I. when Scotsmen born after the King's accession, as being born under the same allegiance, had allowed them the privileges of natives ... And the act of Parliament 1607, approving the articles of union then agreed

on betwixt the Commissioners of England and Scotland, declares the English born since the death of Queen Elizabeth to be natural subjects of Scotland, agreeably to the English decision in Calvin's case". In consequence, the Scottish Dukes of Hamilton were able to succeed to the English earldom of Cambridge conferred on their Scots-born father in 1619, and the English Fairfaxes were able to inherit the Scots peerage conferred on English-born Sir Thomas Fairfax in 1627, although the recipient of each of these peerages (Cambridge and Fairfax) was born before 1603, and at first there appears to have been some doubt about such honours for, when Sir Henry Cary (an Englishman born c. 1576) was created Viscount of Falkland in the Scots peerage in 1620, it was thought wise to ratify the creation and to naturalise the Viscount and his successors as Scottish subjects (Reg. Mag. Sig., 18 Sept. 1627).

Various statutes passed after the 1689 Settlement, and cases settled after that time, serve to illustrate the Jacobite law, for the common law remained unchanged and the statutes illustrate the common law by amending it. The continuing exclusion of aliens from the right of inheritance was emphasised by a series of cases in which the unfortunate Count Anthony Leslie (born in the Empire or possibly in Bohemia) was involved in the middle of the eighteenth century, when the succession to the ancient family barony of Balquhain in Scotland opened to him. In Count Leslie v. Lady Forbes (1749, 6 M. 4636) it was objected against him "that he was a German born, and incapable, as being an alien, to hold lands in Scotland", and "the Judges at last pronounced their opinion unanimously, that an alien or foreigner cannot succeed to land in Scotland; and, therefore, that the pursuer Count Leslie cannot insist in the present action". In a similar case brought by poor Count Anthony Leslie to recover Cowbairdy (part of the entailed Balquhain estate that had been alienated from the main barony) "the lords found, that by the law of Scotland an alien could not succeed to lands in that Kingdom without naturalisation" (6 M. 4638 et seq.). Early in the next century, the American-born James Dundas

was unable to succeed to the old Dundas estate of Manor in Perthshire, and his cousin Colonel Thomas Dundas therefore took as next and only "lawful" heir. This was the case of Dundas v. Dundas in 1839 (2 D. 31), when "A domiciled citizen of the United States, who had been born in America after the treaty of independence, was an heir-substitute of entail to a Scotch estate. ... the succession to the Scotch estate having opened to the heir-substitute - Held that he was incapable from alienage of inheriting ...".

In this Dundas case, it was also held "that his incapacity as an alien was not removed by the statutes 4 Geo. II c. 21, or 13 Geo. III c. 21, or by the provisions of the American treaty of 1794". The first of these statutes, following on an Act of 7 Queen Anne, enacted: "that all children born out of the liegeance of the crown of England, or of Great Britain, or which shall afterwards be born out of such liegeance, whose fathers are or shall be natural-born subjects of Great Britain at the time of the birth of such children respectively, shall and may be adjudged and taken to be, and all such children are hereby declared to be, natural-born subjects of the Crown of Great Britain, to all intents, constructions, and purposes whatsoever". The second statute extended this privilege a generation further, to the children of fathers covered by the first Act. Commenting on these statutes, Lord Moncreiff (in Dundas v. Dundas, 2 D., at p. 52) observed: "Could the grandson of a British nobleman by a son born abroad, whether in France or in America, and at whatsoever time, and who had never returned to Britain, be excluded, on the rights of British peerage emerging to him, from electing to return to the country of his grandfather, and claiming all the honours and estates of that grandfather's house? At least this would not, in my humble apprehension, be consistent with the policy and principle of the statutes". It is very clear from this, that Lord Moncreiff was of the opinion that such a grandson, born abroad, would have had no claim at common law to "the honours and estates" of a British nobleman who was his

grandfather; and in this case Lord President Hope and Lords Gillies and Cunningham concurred with him, while the majority of judges (Lord Justice Clerk Boyle and Lords Mackenzie, Jeffrey, Fullerton, Cockburn, Glenlee, Meadowbank and Medwyn) were for an even more rigorous application of the rule excluding aliens from succession. As Lord Medwyn put it (at p. 54): "By the laws both of England and Scotland, aliens cannot succeed to heritable property".

It should by now have been sufficiently demonstrated that until the nineteenth century, and certainly as late as 1689 when Jacobite law became fixed, and from a period as early as the fourteenth century (but not before that), anyone born in the liegeance of a foreign Sovereign (with certain exceptions naturalised by statute) was unable to have the legal personality of a "lawful heir" in Scotland, and was in this sense as "illegitimate" as if he had been born a bastard. There is no question but that Prince Charles Edward and his brother Cardinal York were "born in the liegeance" of their father, the Old Chevalier, who was certainly "born in the liegeance" of King James VII. The exiled Stewart kings James VII and James VIII lived exclusively on ground accorded full diplomatic privilege by Sovereigns (the King of France or the Pope) who recognised the Stewart kings as such, and it was at the Stewart Court maintained extra finem terrae that the Old Chevalier's two sons were born: they were both born in Rome, but there was never any suggestion that they were regarded by the Pope as born in his (temporal) liegeance. But it was quite another matter when the Cardinal York died in 1807.

By his will, dated 15 July 1802, and registered at Rome in 1810, he renewed his protest against the long exclusion of his line from the throne, but made no attempt to alter the law in connection with the succession of his lawful heir. "Finally, it is our intention to renew here and to consider as expressly inserted in it our protest deposited in the Acts of the notary Cataldi on the 27th of January, 1764, and published on the 30th of January, 1788, at the death of our most serene brother, relative to the transmission of our rights of succession to

the throne and crown of England in behalf of the Prince on whom they devolve by right, by proximity of blood and by right of succession. We declare to remit these rights to him in the most explicit and solemn form". To an Italian speaker like the Cardinal, as indeed to anybody unaccustomed to the modern spate of apparently inequitable statutes, the words "right" and "law" are interchangeable: and there seems no doubt that the Cardinal intended the Jacobite crown to pass to the nearest heir of the Blood Royal who was entitled to it by the existing law of succession. He was not a constitutional lawyer, nor an authority on succession law, and he did not set out whom he considered to be that heir: he left it to be decided according to law. Though he did not mention the Crown of Scotland, there seems no reason to suppose that he intended it to be separated from that of England or to pass to anyone other than the lawful heir. The question then is, who was the lawful heir to whom the Jacobite succession opened in 1807?

The Cardinal's nearest relation of the Stewart Blood Royal living in 1807 was his kinsman Charles Emmanuel, King of Sardinia, who descended from King Charles I's daughter Henrietta, Duchess of Orleans (the famous "Minette"). The then British monarch, George III (the nearest Protestant heir of the Stewart Blood Royal), was only one generation more remote: descending from King Charles I's sister Elizabeth, the "Winter Queen" of Bohemia. But none of "Minette's" descendants had been born in the liegeance of the exiled Stewart monarchs, whereas George III, who was born in London in 1738, had by Jacobite law been born in the technical liegeance of King James VIII. The whole question of the Jacobite succession after 1807, therefore, turns on the legal problem: whether a foreigner, who was as incapable of being a lawful heir to anything in England or Scotland as if he had been born a bastard, could have the legal personality of heir in the throne itself?

This was a well-known problem that had not been solved by 1689,

else Queen Anne would not have needed to pass a special statute naturalising all the potential heirs called under her settlement of the English crown (so that they were also naturalised in Scotland as a result of the Act of Union). But the fact that such an Act was thought necessary shews that opinion was strongly against any difference between succession to the realm and the common law of succession in general.

For the King of Sardinia, it might be argued that the Maid of Norway had inherited the Crown of Scotland although she was foreign-born, but she had been personally named heir by the King and the Estates in 1284 and this occurred before the rule excluding aliens had come into being, and has no more bearing on the state of the law in 1689 (and thus in 1807) than the fact that alien-born Bruces and Baliols and Lindsays had inherited Scottish fiefs in the thirteenth century. Again, it might be plausibly argued for the King of Sardinia that the 1318 Act had declared that "the said succession ought by no means to be settled or to have been settled by the custom in force in inferior fiefs or heredities in the kingdom". But the Act was passed before the period in which foreigners were excluded; this clause alludes very clearly to Robert de Bruce's case as against John de Baliol and not to any (unheard-of) problem of foreign succession; and in any case the 1318 Act was superseded by the 1373 Act, which refers to "legitimi heredes" without qualification at a time when these words had a meaning in Scots Law that was known to exclude aliens and bastards.

The strongest argument in favour of the King of Sardinia is probably the accession of James VI, Scots-born King of Scots, to the English throne in 1603. Although of course this was not a matter of Scots law, it is important because the English rule excluding aliens was apparently as strict as the Scots rule. But King James does not seem, on a close examination of the circumstances, to have succeeded automatically by the English common law. Had he done so, there would have been no

previous uncertainty and the tremendous importance attached at the time to Queen Elizabeth's dying nod would have been meaningless. Her council stood anxiously around her, and interpreted a sign she made to mean that she nominated James VI to succeed her: such an act of the Sovereign overcoming any question of incapacity through alienage, as it were naturalisation by the Sovereign. Marriage to the Sovereign seems to have had the same effect: as witness Philip of Spain in England, the Dauphin Francis in Scotland, and William of Orange in both countries.

Throughout the sixteenth century it had been long and anxiously discussed whether an alien could be heir to the English throne (without some special act of the Sovereign), and whether the Greys and Seymours, or the Cliffords and Stanleys, would be the lawful heirs should the Tudors make no move to overcome the Stewart incapacity through alienage. A strong body of legal opinion, drawing on Continental examples, held that alienage applied only to vassal fiefs and honours, and could noways affect succession to the Crown. Naturally, James VI was anxious to be considered heir in any case, and for this reason Sir Thomas Craig was reluctant to enunciate the doctrine, excluding aliens from inheritance, even where the throne was not involved. Lord Kilkerran (*FOREIGN*, No. 6, p. 207, cited at 6 M. 4642) sums up Craig's attitude: "The opinions of our lawyers also tend to support the same doctrine, particularly Craig, the only author who has ex professo wrote on the subject. It is true, that after he has laid down the doctrine of the feudal law, and civil law, and laws of most nations, as excluding aliens from succeeding or being succeeded to, he speaks with some uncertainty as to our custom. Vide Lib. 1. Dieg. 8. De bis qui feudum acquir. poss. which can be no otherwise accounted for, but that being at that time a great advocate for the succession of the King of Scotland to the Crown of England, he appears unwilling to admit the law of Scotland to stand so, though according to his own general rules laid down in his Dieg. 6. Book 1. Quo jure Scoti hodie utuntur, he fell to have pronounced the law of Scotland to stand so. But having afterwards got a

clearer light into that controversy, and become satisfied that the succession to kingdoms stood upon a different footing from that of the succession among subjects, and upon which distinction he puts his argument in his book, thereafter, ex professo, written upon the King of Scotland's right to succeed to the crown of England, against Parsons the jesuit, who assumed the name of Dolman, he in plain and strong terms asserts, that with us, aliens neither do succeed, nor are succeeded to, L. i. Cap. 2."

From what Lord Kilkerran observed, it seems fairly obvious that Sir Thomas Craig's arguments in favour of admitting aliens as heirs to kingdoms were based on political rather than legal conviction, and that they were not found overwhelmingly convincing is obvious, both from the Council's insistence that Queen Elizabeth had performed a special sovereign act in order to render James VI eligible to succeed her, and from the need for the special statute passed by Queen Anne to naturalise all her potential heirs despite any precedent set by James VI's accession to the English throne. Moreover, Craig reveals his doubts, since he puts forward an alternative argument for King James VI's future accession to the throne of England. He refers to two English statutes, 17 and 25 Edw. III, which reinforced the law "prohibiting a foreigner to succeed to estate within the realm" (Craig, 2.18.27), and says that "the law of Edward III speaks in chosen and exact language of those born 'beyond the sea', among whom the king of Scotland can by no means be counted; for he was born, reared, and educated within the four seas, as the Channel, the Irish Sea, the North Sea, and the German Ocean, which surround the coast of Britain, are called" (Craig, 1.14.8). The writer therefore feels that Sir Thomas Craig will not object to his descendant's advancing an opinion to the contrary, especially in view of the present circumstances being almost the opposite of those that prevailed in his time.

There seems no doubt that legal opinion in general was far from

certain that the doctrine excluding foreigners from heirship did not apply to the throne as much as to any other inheritance, but that political considerations influenced the opinions expressed by legal writers on the subject from time to time (especially at the period when Craig was writing). But in the case of the succession to Cardinal York, no political consideration could reasonably be urged in favour of the King of Sardinia, that could make it desirable in the public interest to tilt the scales of justice in favour of making the throne - for the first time in the history of this law - an exception to the legal rule excluding foreigners from inheritance in Scotland. The arguments in favour of the King of Sardinia's potential claim are so well known, that it may therefore possibly have been of academic interest, from the point of view of the heraldic lawyer, to demonstrate that a case can also perhaps be made out in support of the legal proposition that (according to a possible interpretation of the statutes of 1315, 1318, 1373 and 1681 in terms of the then law) George III may have had a reasonable claim to be called Cardinal York's "lawful heir".

(46) The Claim of Right: A.P.S. ix, 37 (see "Source Book of Scottish History", iii pp. 200, 203). Note that the Scots said "forfeited"; the English, after talking about abdication and a regency, simply declared the throne "vacant".

(47) The Accession Oath in this Protestant form was first established by statute in 1567, at the time of the Coronation of the infant-king James VI. For the original form then established, see A.P.S. iii, 23 c. 8 ("Source Book of Scottish History", iii pp. 4-5); for the Oath as taken by William & Mary on their acceptance of the Crown of Scotland in 1689, see Nat. MSS. Scot., iii, no. cvii ("Source Book", iii pp. 208-209).

(48) See note 45 above.

(49) A.P.S., xi, 136, c. 3 ("Source Book", iii pp. 474-477).

(50) Statutes of the Realm, viii, 349-350 ("Source Book", iii pp. 477-478).

(51) Ibid.

(52) For the treaty, and the circumstances in which it was made, see Professor George S. Fryde, "The Treaty of Union of Scotland and England 1707" (pub. Nelson, 1950).

CHAPTER 8.

THE HEIRS AT LAW TO EARLDOMS.

THE HEIRS AT LAW TO EARLDOMS

It is beyond the scope of this paper to discuss fully the origin and history of earldoms and of the dignity of earl, as opposed to their succession. But it has been thought advisable to examine their background and the law of succession to earldoms separately from that governing other peerages, because earldoms undoubtedly occupy a special position in Scotland. We are told that the territories that gave rise to the institution of the Seven Earls of Scotland were originally kingdoms, and this is not surprising. Writing of "Celtic Ireland", Professor Eoin MacNeill at p. 4 tells us that in ancient Ireland "Tuath in the older literature indicates a state ruled by a petty king. The territory of a tuath corresponds in many instances to a modern barony". At p. 103, he adds of such a king that "His military force, we are told, consisted of 700 men"⁽¹⁾. It is perhaps worth observing that in 1745 such a territory and following was average for a highland chief in Scotland, and that these chiefs were treated almost as kings and in the majority of instances claimed a royal descent:⁽²⁾ for it may serve to indicate one of the reasons for the special position of the chiefs in the Gaelic world. Above the petty Irish kings, whose territory corresponded to no more than a Scottish thanage or barony, were degrees of greater kings whose territory approximated more to that of one of the Seven Earldoms. The King of Munster, or at least the King of Desmond, may perhaps be equated with the King of Moray, or the King of Atholl.

The Gaelic title of mormaer borne by these local princes⁽³⁾ when they were not styled kings or earls, is usually translated "great steward" (though the word would more reasonably in that case have been expected to be maermor), and it has therefore been suggested that their dignity was official in origin and that it later merged in the personal dignity of earl⁽⁴⁾; but the writer has not yet been convinced that "earl" was anything more than an English translation of "mormaer" at the time when the Scots Court was Anglicised by St. Margaret and her children, especially as the Norse sagas translate "mormaer" as "jarl". To the Norse, the "jarl" was of the royal class of mankind, which at the Creation had been made separately from the other two classes of "karl" and "thrall". There is not space in this ^{chapter} ~~paper~~ fully to elaborate this point, which only bears indirectly on the origin of their succession laws, but the writer believes that among the Teutonic peoples

the early "counts", "jarls" or "earls" were almost invariably (if not always) related by blood or marriage to royal houses:⁽⁵⁾ though it must be borne in mind that royal houses were at that time far more numerous than later.

It is uncertain to what extent the Seven Earls of Scotland in the reign of King David I, when the realm was united, were the descendants of the local kings, or to what extent the local royal houses had been supplanted by cadets of the dominant high-kingly house. Intermarriage must in any case have made them all cousins, at a time when there were so few earls and when marriages were always made between equals if possible. Atholl, and probably Fife (styled "Dei Gratia"), were held by near cadets of the Scottish royal house. Moray was held (until its conquest by David I and his line) by the family descended from "Lady Macbeth", who was really Queen Gruoch and whose line were rivals of David I for his own throne until he defeated and slew Angus, King or Earl of Moray in 1130.⁽⁶⁾ The Earls of Mar, who still continue today, appear to have been related to the Moray ruling house. The Earls of Strathearn (styled "Dei Indulgentia") ruled the ancient kingdom of Fortrenn. The Norse Earls of Caithness were closely related by marriage to the Scottish royal family, and the Earls of Angus were closely related by marriage to the Caithness earls. Outside Albany, south of the Forth in Scottish Beornicia, were the Earls of Dunbar: sprung of the marriage of King Duncan I's brother to a daughter of the Anglo-Saxon Earl of Beornicia, and related by marriage in King David I's time to the Earls of Angus. In Scotland at any rate, the first earls emerged from the kindred of the Blood Royal, doubtless mingled with that of the former local kings.

Until the reign of King Charles II crowns⁽⁷⁾ were limited to those of the rank of earl or above, and of course until nearly 1400 there was no higher rank in Scotland than earl, except only the king himself. Until the Union of the Crowns led to an imitation of English peerage robes, the Scots baronage (lairds and lords) wore red robes furred with squirrel, but "the Earls, as of regal origin, ... are given 'brown' velvet, or blue purple, mantles" furred with ermine, which fur "was primarily related to Royalty".⁽⁸⁾ In Parliament, the Earls (the other peers being later added to them) "had their seats on the palatium, or 'Benches of the Throne' ... much like the Electoral princes of the Imperial Diet: they were there in a regal capacity, as Righ, beside and under the Ard-Righ-Alban presiding in a Federal Kingdom".⁽⁹⁾ Professor Dickinson observes⁽¹⁰⁾ that "We

must remember that the Celtic earls were princes, if not kings, within their territories: many of their tenants were certainly as great and important as the tenants of the King", and he gives examples of baronies held under Earls in Scotland. The full ceremonial style of an earl, proclaimed for instance by the heralds at state funerals in the old days⁽¹¹⁾, is "Most Noble and Puissant Prince", and he is officially addressed by the Crown as "Our Right Trusty and right well-beloved Cousin"⁽¹²⁾. There are possible grounds for arguing that the Seven Earls of Scotland were peers of the king, as in France, where the Capetian king was originally primus inter pares among the Twelve Peers of France - rather than peers of each other among the feudal tenants-in-chief as in England⁽¹³⁾ - though this does not apply to the earls created later. Certain roles in the highest Scottish ritual can only be performed by earls, as in the case of bearing some of the Honours of Scotland.⁽¹⁴⁾ Above all, at a time when peerage is so much equated with Parliament that many people write of peers as though their essential function was to attend the House of Lords, it is perhaps worth noting that earls (unlike the other ranks of the peerage) are a far older institution than Parliament and in no way owe their origin to it.

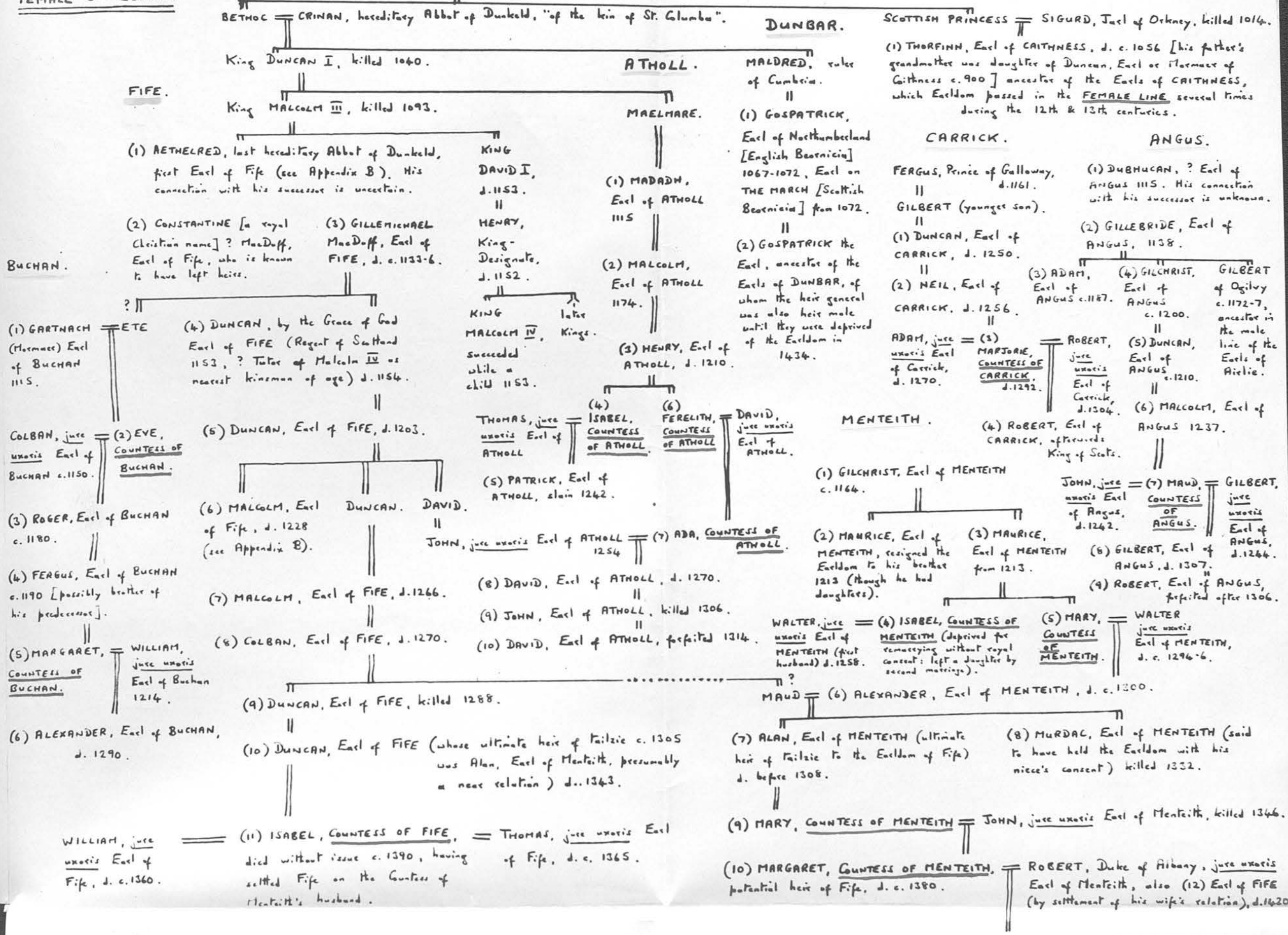
Whatever the prehistory of the Scottish earls⁽¹⁵⁾, there is no doubt that their earldoms were feudalised under King David I and his successors, and must be looked upon as feudal heritage from the point of view of Scots Law. Although in a sense they thus became great baronies, it is among earldoms - and especially among the original Seven Earldoms (for "though the number of seven was always retained, the constituent members were not always the same") - that any survival of a more ancient law of succession, than that applied to the newly-united Crown and the feudal baronies by David I and his successors, might reasonably be expected to be found. Alternatively, we have Lord Mansfield's famous opinion, cited above, that "the feudal system was very early introduced into Scotland. It brought with it earldoms ... They most certainly descended to the issue-male ... they were certainly masculine fiefs"⁽¹⁶⁾. However, Lord Hailes⁽¹⁷⁾ in his "Additional Case for the Countess of Sutherland" (1771), which must remain the standard authority on the subject, proved conclusively that from the earliest times Scottish earldoms descended to the heir at common law (the heir general or senior heir-portioner) unless the destination of a particular earldom expressly provided otherwise.

TABLE TO ILLUSTRATE

FEMALE SUCCESSION.

KING MALCOLM II, died 1034.

CAITHNESS.



RED UNDERLINES indicate COUNTESSSES IN THEIR OWN RIGHT, 12TH-14TH CENTURIES.

NOTE: This table illustrates 8 out of 13 Earldoms in existence by the end of the 13th century. For the other five (four of which passed eventually to female heirs, while the remaining one was forfeited while the heir general was still also heir male) see main text.

Lord Hailes, who was a Scottish judge, so completely controverted the views uttered by Lord Mansfield, who was an English judge, a few years before, that it is unnecessary here to elaborate on his theme. Fortunately, Committees of Privileges of the House of Lords are not bound by their predecessor's mistakes, and the precedent set in the Cassillis Peerage Case was set aside in the Case of the Earldom of Sutherland, which was awarded to the heir general.

It is unnecessary to cover again the ground so carefully mapped by Lord Hailes. But it may be observed that of the thirteen Scottish earldoms in existence by the end of the Celtic monarchy in 1286, all but two passed during the truly feudal period to heirs general in the female line, while the other two were held ^{by} heirs general who were also heirs male (so that no question arose to be settled by law) until they were forfeited. These two exceptions were the Earldom of Strathearn, held by heirs general who were also heirs male until its forfeiture in 1344 (because the earl had resigned it in favour of one of the king's enemies), and the Earldom of Dunbar, held by heirs general who were also heirs male until its seizure by the Crown in 1434. The Earldoms of Buchan, Atholl, Angus, Menteith, Carrick and Caithness all passed to heirs general in the female line in the thirteenth century, as did the Earldoms of Ross, Mar, Lennox⁽¹⁸⁾ and Fife⁽¹⁹⁾ in the fourteenth century. The Earldom of Sutherland, erected c. 1235, continued in heirs general who were also heirs male until the year after Flodden, when it too passed to a female heir general.

It is hardly necessary to say that throughout the truly feudal period the dignity of earl was territorial in that it was inconceivable that there should be an earl without an earldom. The position is summed up in G.E.C., ix (1936) p. 172 n. (a), "in Scotland no grant of the dignity of Earl has been found in public archives or private chests before 1600. The instrument of creation was the grant of the Earldom"⁽²⁰⁾. About twenty new earldoms were so erected during the two centuries between Bannockburn and Flodden, and several of the older earldoms were regranted as they came into the hands of the Crown (while in 1427 James I forced his young cousin to exchange Strathearn for Menteith), but in many cases the foundation charter has not survived.

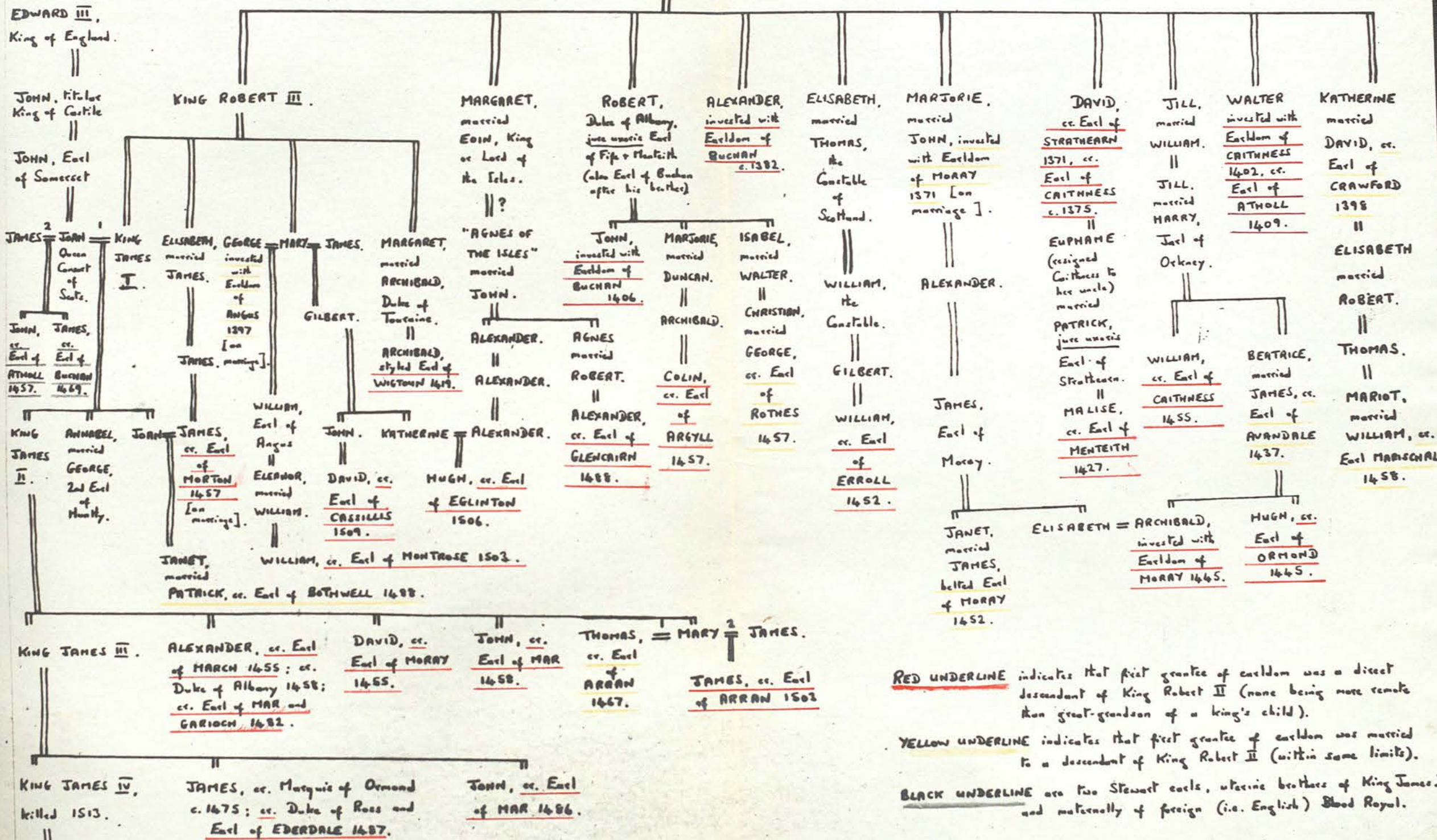
During these two centuries, Parliament became more important and in the fifteenth century peerages of parliament were introduced⁽²¹⁾, but the rank of earl continued to have a special character. When the older earldoms (such as

Carrick, Atholl, Strathearn, Buchan and Mar) were regranted, it was almost invariably as appanages for relations of the royal family, save where they were renewed to connections of the previous earls. Indeed, when the Earldom of Ross was finally seized from Macdonald (of the old royal house of the Isles) in 1476, a special Act of Parliament provided "that it shall not be lawful to his highness or his heirs, nor his Successors to make alienation of the said Earldom, or any part thereof, from his Crown in any wise: Saving that it shall be lawful to him and them, to give the said Earldom at their pleasure to one of his, or their second Sons, lawfully to be begotten betwixt him and the Queen", which statute prevented King Charles II from carrying out his promise to regrant the Earldom of Ross to the Macdonald heir general in 1660 (curiously enough, both Balfour Paul's SCOTS PEERAGE and G.E.C. overlook this Act).

Similarly, it was to noblemen connected with the Blood Royal that the new earldoms were granted throughout the fifteenth century. The writer has examined the relationships of the newly created earls with great care, and has only found two, or possibly three⁽²²⁾, out of over thirty earldoms created or regranted between 1398 and 1513, where the first earl is not known for certain to have been a descendant of King Robert II (who died in 1390) or else married to such a descendant. The apparent exceptions are George Crichton, Earl of Caithness for the two years 1452-1454, whose maternal relationships are uncertain and whose first wife's family seem to have had some connection with the old earldom⁽²³⁾; and the first Earl of Huntly, whose first mother-in-law⁽²⁴⁾ was a niece of Robert II, and whose heir (the 2nd Earl) married the princess Annabel, daughter of King James I and divorced wife of Louis, Count of Geneva. Since all their immediate relationships are not known, there is insufficient evidence to establish that these two earls were truly exceptions. Besides the regranted Earldoms of Buchan, Strathearn, Atholl, March, Moray and Mar, all given (some more than once) to princes of the Blood, and the Earldoms of Atholl and Buchan given yet again to James II's half-brothers who both married descendants of Robert II; the first Earls of Ormond, Moray (Douglas), Erroll, Argyll, Morton, Arran (Hamilton), Montrose, Eglinton, Cassillis and probably Glencairn⁽²⁵⁾, were all direct descendants of King Robert II, while the first Earls of Angus (Douglas), Moray (Dunbar and Crichton), Crawford, Avandale, Rothes, Marischal, Arran (Boyd) and Bothwell, were all married to such descendants. This is not to suggest that royal blood or connection was the sole requisite for elevation to the rank of

THE BLOOD ROYAL: EARLDOMS CREATED 1390-1513.

ROBERT II, KING OF SCOTS, died 1390.



RED UNDERLINE indicates that first grantee of earldom was a direct descendant of King Robert II (none being more remote than great-grandson of a king's child).

YELLOW UNDERLINE indicates that first grantee of earldom was married to a descendant of King Robert II (within same limits).

BLACK UNDERLINE are two Stewart earls, uterine brothers of King James I, and maternally of foreign (i.e. English) Blood Royal.

NOTES: 1. Surnames have been expressly omitted, as they tend to obscure the flow of the Blood Royal.
 2. The only Earldoms 1390-1513 omitted from this table are those surviving or regranted that remained with the families that held them before 1390 (e.g. Lennox) and the two apparent exceptions (i) Caithness granted for the two years 1452-1454 to George Crichton (whose wife's family appears to have been earls of that Earldom), and (ii) Huntly, granted in 1464-5 to Alexander Seton, Lord Gordon and the issue of his second wife, Elisabeth, daughter of Lord Chancellor Crichton. In view of the pattern revealed by this table, it may perhaps be suggested that Lord Chancellor Crichton's wife Agnes (whose parentage is so far unascertained) was a descendant of King Robert II.

JAMES [natural son], co. Earl of Moray 1501.

earl, but power or favour alone do not seem to have been considered enough, else the Regent Boyd might reasonably have made himself (rather than his son) an earl, and this consideration seems to have played its part in the events that led to poor Cochrane being hanged by "Bell-the-Cat"⁽²⁶⁾. With the passage of time, these earls' families spread the comital flow of the Blood Royal throughout the whole Scottish aristocracy - although becoming ever more remote in kinship from the reigning sovereign, so that the degree of earl gradually became less closely connected with royalty. The writer doubts, however, whether there was ever an earl created in Scotland after 1488, who was not a descendant of King Robert II⁽²⁷⁾.

The desire of the Crown to keep a reserve of earldoms to appanage royal cadets, and the desire of noblemen to keep their honours within their surname (a new development, for the families of the original Seven Earls had of course had no surnames), tended in a number of cases to lead them to settle these earldoms on heirs male or on a limited line of heirs of provision. But this was always regarded as an exception to the common law rule and, at first at any rate, as a special favour. Earldoms held on a destination to heirs general were often surrendered and regranted with a destination to a narrower class of heirs⁽²⁸⁾, and repeated royal acts of revocation of such arrangements made with regard to lands during royal minorities refer to "tailzies made from the heirs general, to the heirs male, of any lands within our Realm, against the law and good conscience"⁽²⁹⁾. To earldoms, as to all other heritage, the heir general remained the heir at law, unless defeated by a special tailzie.

The first earldom to be erected after the accession of the Bruce branch of the Blood Royal, was the Earldom of Moray conferred by King Robert I on his nephew Sir Thomas Randolph, lord of Nithsdale, in 1312⁽³⁰⁾. This earldom was not destined to heirs, as with the older earldoms which had no creation charter, but instead it was specially provided that it should pass to the heirs male of his body. That this was intended to be a favour, rather than a limitation, is perhaps demonstrated by King Robert's own desire to keep the throne in the Bruce male line even to the exclusion of his own daughters, and also perhaps by the events that occurred when Earl Thomas Randolph's heirs male of the body became extinct (as a result of the battle of Nevill's Cross in 1346). The earldom of Moray was assumed by the senior heir general and her husband (Patrick, Earl of Dunbar or the March), and after his death without issue by her, it was granted to the son of her sister

(wife of Dunbar's heir), who had been junior heir-portioner. Following the Scottish custom of trying to keep separate the inheritances of two historic families merged by marriage⁽³¹⁾, however, the son to whom the earldom was granted was the second son, as the elder son had inherited the great earldom of the March. But the intention of continuing the Randolph inheritance is demonstrated by the fact that, after the new earl and his heirs, the renewed earldom was destined to his elder brother March and his heirs⁽³²⁾.

A curious error in G.E.C., *op. cit.*, iii p. 508 n., is reiterated in G.E.C., iv p. 431 n., where we are told of the earldom of Douglas, created in 1358, that "This far-famed Earldom was the second created 'since the extinction (1290) of the Celtic dynasty'; the Earldom of Moray ... being the first, while the Earldom of Crawford (1398) was the third". This mistake is obviously taken from Lord Lindsay's admirable "Lives of the Lindsays" (1858), i. p. 97. The context excludes a number of new grants of the older earldoms during the period 1290-1398: Atholl to King Robert I's nephew John Campbell in c. 1320, to the Knight of Liddesdale in 1341, to King David II's nephew the Steward of Scotland in 1342; Carrick to King Robert I's brother Edward Bruce (afterwards King of Ireland) in 1313, to King Robert I's son David of Scotland in 1328, to King Edward of Ireland's natural son Alexander Bruce in c. 1332, to King David II's great-nephew John Stewart in 1368, to King Robert III's son David of Scotland in 1390; Angus to Sir John Stewart of Bonkyl (husband of the great Abernethy heiress) in 1329; Buchan to King Robert II's son Alexander, "the Wolf of Badenoch", in 1382; Strathearn in 1371 and Caithness in c. 1376, to King Robert II's son David, born of the king's second marriage. But the context of G.E.C. and Lord Lindsay's note cannot exclude the Earldom of Wigtown, erected for the first time in 1341. This earldom, granted to Sir Malcolm Fleming of Cumbernauld, followed the earldom of Moray in being specially destined to heirs male of the body⁽³³⁾. Insufficient is known about Sir Malcolm's genealogy, especially on the maternal side, to account for his being honoured in this very exceptional way (Moray being then the only other new earldom erected since the previous century), but it should be noted that not only he, but his brother's line⁽³⁴⁾, surrounded the chevron in their Arms with the royal tressure. The earldom descended to Sir Malcolm's grandson and heir male, who in 1371/2 sold it to his neighbour Archibald "the Grim", lord of Galloway and afterwards third Earl of Douglas, and as an earl without an earldom was inconceivable at that date, he divested himself of the

style after this transaction had been confirmed by Act of Parliament (7 October 1372). Archibald "the Grim" did not assume the style, but in 1418 his grandson, being then heir apparent to the earldom of Douglas, styled himself Earl of Wigtown⁽³⁵⁾ doubtless a very early example of what would now be called an heir's courtesy title: the Douglasses as usual being in the van.

The new earldoms erected during the fourteenth century, then, were those of Moray (1312), Wigtown (1341), Douglas (1358) and Crawford (1398). Unlike the older earldoms of the Celtic monarchy and early feudal period, each of these new earldoms was destined to heirs of provision. Moray and Wigtown, as we have seen, were settled on heirs male of the body. The great Douglas fief had been resigned (by the first Earl's uncle) and resettled on (William, afterwards first Earl and) a complicated series of heirs of tailzie in 1342, and after the erection of the fief into an earldom in 1358 this tailzie was considered to be the governing destination of the new dignity as well as of the lands. This tailzie⁽³⁶⁾ is of special interest as some of the heirs called must have been otherwise excluded by the common law as bastards: and indeed Archibald "the Grim", who inherited under this tailzie as third Earl of Douglas, was a natural son of the "Good Sir James" (the hero who took King Robert I's heart to Spain) and was not descended from the first Earl (the "Good Sir James's" lawful son). This is by no means the only case of bastards being called as heirs of tailzie to Scottish dignities⁽³⁷⁾. No creation charter of the Crawford earldom is known, but it is not to be supposed that the earldom could at that period have been destined separately from the powers of regality granted to the earl in the same year, 1398, and attached to his fief of Crawford⁽³⁸⁾. However, the second Earl of Crawford in 1421 obtained a confirmation charter, in which the earldom is tailzied to his heirs male "bearing the Name and Arms of Lindsay", with a forfeiture clause providing for the devolution of the earldom on the next heir male if the immediate heir male should change or disuse the Name and Arms⁽³⁹⁾. This is apparently "the earliest instance in Scotland of what is termed a strict entail, with an irritant and forfeiting clause or penalty, in the event of infringement of its conditions"⁽⁴⁰⁾, although as early as 1324 the great office of Marischal of Scotland with the territorial fief of Keith-Marischal had been tailzied on the then Marischal's heirs male bearing the Name and Arms of Keith: "cognomen et arma predicta principaliter gerentibus"⁽⁴¹⁾. Now that the insignia of great houses had become attached to their surnames, and surnames had become deeply rooted

among the nobility, the heirs at law to their dignities were being increasingly excluded in favour of heirs of tailzie, especially in favour of heirs male or at least male heirs who belonged to the same surname. But, in the absence of any special destination, the heir general remained the heir at law, and several earldoms passed from the older native families to scions of the surname of Stewart who married their heirs general about this period⁽⁴²⁾.

During the fifteenth century, and in the years before Flodden, more new earldoms were erected: Avandale in 1437 for Lord Balvenie⁽⁴³⁾, afterwards 7th Earl of Douglas; Ormond and Huntly in 1445 for Hugh Douglas (son of the 7th Earl of Douglas) and Lord Gordon⁽⁴⁴⁾; Erroll in 1452 for Lord Hay, the Constable of Scotland; Argyll in 1457 for Lord Campbell; Rothes and Morton in 1457/8 for Lord Leslie and James Douglas of Dalkeith (husband of the king's sister); Marischal in 1458 for Lord Keith, the Marischal of Scotland; Arran in 1467 for the Master of Boyd (husband of the king's sister); Glencairn in 1488 for Lord Kilmaurs; Bothwell, later in 1488, for Lord Hailes, the Admiral of Scotland; Arran (recreated) in 1503 for Lord Hamilton (whose mother had been King James III's sister); Montrose in 1503 for Lord Graham; Eglinton in 1506/7 for Lord Montgomerie; and Cassillis in 1509 for Lord Kennedy. During the same period some of the older earldoms were revived: in 1473 Lord Darnley (an agnate of the Stewart kings) was served heir to the ancient Earldom of Lennox, by descent from a co-heiress of the old earls, and in 1455 Caithness was given as an earldom to the Jarl of Orkney (Lord Sinclair, a great-grandson of King Robert II), who descended from a co-heiress of the ancient Earls of Caithness.

In most cases, no creation charter has survived, but these earldoms cannot conceivably have been expected to have passed to landless earls at the height of the feudal period, and where a tailzie of the lands that would carry their caput baronie is known to exist, this tailzie may be sufficient to overcome the initial presumption in favour of the heir at law⁽⁴⁵⁾. As might have been expected, the example of the Crown was at first closely followed by the earldoms, and while the ancient earldoms like the Celtic Crown were left to pass to the heirs according to the customary law; after the Bruce and Stewart tailzies designed to keep the Crown as long as possible in the male line of the Names of Bruce and Stewart, the new earls tended to have their earldoms settled with similar tailzies: as in the case of the four new fourteenth-century earldoms

(though Douglas depended on a series of male heirs who were not actually heirs male, and Crawford had its special Name and Arms clause as well).

Where there is no governing destination known, the history of an old earldom will often indicate whether it remained to heirs at law or was diverted to heirs male⁽⁴⁶⁾, and so the initial presumption in favour of the heir general may be rebutted by evidence of the actual succession having been to the contrary. However, no fixed principle can be said to have governed the different tailzies such as a general exchange of heirs general for heirs male, but rather each case was settled on its merits according to the situation of the earl's family - and the succession was often altered to meet changed circumstances, by the system of resignation to the Crown followed by a regrant to the resigner and a new series of heirs⁽⁴⁷⁾. As a result, there is now no surviving earldom older than the Union of the Crowns, and unmerged in a higher honour⁽⁴⁸⁾, that has not been held at one time or another by someone who was neither heir general nor heir male of the original grantee.

Someone who was neither heir general nor heir male of the original earl, held the Earldom of Crawford 1542-1558 and 1652-1808, held the Earldom of Erroll 1585-c. 1600 and has held it since 1717 (the heir general of the first Earl of Erroll being the Duke of Roxburghe), held the Earldom of Mar 1408-1562, has held the Earldom of Rothes since 1558, has held the Earldom of Morton since 1550 (the heir general of the body of the first Earl of Morton is Lord Derby, while the first Earl's heir male whatsoever is Count Douglas in Sweden), has held the Earldom of Buchan since 1695, has held the Earldom of Eglinton since 1612, has held the Earldom of Caithness since c. 1480, and has held the Earldom of Moray since 1700. Other instances could doubtless be found among the earldoms created between the Union of the Crowns and the Union of the Parliaments: such as the Earldom of Haddington since 1685, the Earldom of Stair 1747-1760, and the well-known case of the Earldom of Selkirk.

But from the time of the Union of the Crowns, "grants by Letters Patent became the ordinary mode of conferring Dignities in Scotland"⁽⁴⁹⁾, and the destination of particular earldoms can usually be ascertained by reference to them, although it is important to discover whether an earldom was affected by any subsequent resignation and regrant or by a special nomination. "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 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"⁽⁵⁰⁾, but such nominations have been held not to be valid unless they were executed before the Act of Union in 1707⁽⁵¹⁾.

It is not within the scope of this paper to discuss all the variations of the law and practice governing individual tailzies of earldoms, but it should be noted (a) that "heirs" are "heirs at law", i.e. heirs general, unless the context clearly imports otherwise, (b) that "eldest daughter or heir female" means no more than "heir at law"⁽⁵²⁾, (c) that "heirs male" are not limited to "heirs male of the body", as is usual in England⁽⁵³⁾, and (d) that it appears no destination of a Scottish earldom (or other peerage) can be changed from that which subsisted at the time of the Act of Union in 1707⁽⁵⁴⁾.

Scottish earldoms originated in a close connection with royalty, and followed the same common law of succession to the Crown: the heir at law was (and is) the heir general. Just as with the Crown, a tendency to tailzie the succession by special provision on a given series of heirs (often heirs male) arose, and (just as with the Crown) many earldoms have passed to heirs of provision who are neither heirs general nor heirs male of the first earl. Throughout the Middle Ages, earldoms were territorial, and the line of succession to the earldom may therefore be indicated by the heirs called in a settlement of the lands: especially of the caput of the earldom. But if there is no settlement of the dignity or estate, and nothing from the history of the earldom to indicate any special provision, the heir by the fundamental law undoubtedly should be the heir general.

NOTES TO CHAPTER ON HEIRS AT LAW TO EARLDOMS.

(1) These were the lowest grade of kingdom, and there were many larger kingdoms that were still smaller than the great over-kingdoms of Leinster, Munster, Connacht and Ulster. The MacCarthys ruled over a territory four times as great as the sovereign duchy of Saxe-Coburg-Gotha: the kingdom of MacCarthy Mor extending to some 2,080 square miles, while MacCarthy Reagh's country covered 620 square miles. In the reign of Queen Elizabeth I their cadets, the MacCarthy lords of Muskerry, could raise a "rising-out" of 3,000 men from their own lands. See Herbert Webb Gillman, in Journal of the Cork Historical & Archaeological Society, (1892) i. no. 10, pp. 30, 193.

(2) "All our chiftens derive themselves from kings and princes": Wardlaw MS., Scot. Hist. Soc. vol. 47, p. 14. The Lord Lyon will only allow a crest-coronet to the Chief of a Name, and founds this rule upon continuing practice as demonstrated by Lyon Register and his other records. It might be worth investigating English medieval armorial practice, to see whether (anyway at first) crest-coronets were restricted to those who (like Sir Richard Scrope in the fourteenth century, see Chapter on the Heir at Law to Arms) were Chief du sang of their Name. See also Chapter on Succession among the Cymry, note 11: the old Welsh Laws attribute "kingship" to a "chief of kindred".

(3) Fordun calls them principes.

(4) See Dr. William F. Skene, "Celtic Scotland", iii. Chapter 2. Watson suggests that the mormaer was a sea officer: in coastal districts (compare comes litoris saxonicus). The writer does not know of any instance, however, of a district ruled by a mormaer that was not afterwards an earldom when the English language had come into use. The modern Gaelic word for "lord" is morair, apparently derived from old Gaelic mormaer.

(5) This was evidently so among the Norsemen (see Chapter on Succession among the Northmen, notes 23-26) and among the Normans (same chapter, note 41). The process of conversion of local kings into earls can be seen as late as Tudor Ireland: when the King of Thomond (O'Brien) became the Earl of Thomond, and

the King of Tír Eoghain became the Earl of Tyrone. A contrary argument was formerly to be advanced from the supposedly low birth of Earl Godwin of Wessex, but this has now been demonstrated to be false, and in fact Earl Godwin was of royal ancestry (see Chapter on Succession among the Picts, note 52) and helps to prove the rule.

(6) See pedigree of the family of Moray in A.O. Anderson, "Early Sources of Scottish History", i. p. 580, which shews the succession passing in the female line between 1085 and 1130. See also Chapter on Succession among the Gaels, notes ~~73~~ and 74+75, Angus is called "King" of the men of Moray, four thousand of whom are said to have fallen with him, in the "Annals of Ulster", ii p. 124. He is called "Earl" by Robert de Torigni, and in the Chronicle of Melrose (p. 69). His ancestor Ruadri is called "Mormaer of Moray" in the "Annals of Tighernac", and "King of Alba" in other Irish annals, while Ruadri's son Finlaech is called "Skota-jarl" in the "Orkneyinga Saga". There seems to be no distinction here between mormaer and earl, and no incongruity found in describing a very great local king as an "earl" in the twelfth century.

(7) We are accustomed to make a distinction between a "crown" and a "coronet", though the French describe both as couronne and the distinction between a closed crown for sovereigns and an open crown (coronet) for earls (and later, other nobles) only grew up towards the close of the Middle Ages. Lords were not allowed coronets of rank until the reign of Charles II, and the present Lord Lyon informs the writer that he does not know of the use of crest-coronets in Scotland except by chiefs of great families.

(8) Lord Lyon Innes of Learney, "Robes of the Feudal Baronage of Scotland", Proc. Soc. Antiq. Scot., lxxix pp. 132-133.

(9) ibid., p. 120.

(10) Professor W. Croft Dickinson, "Court Book of the Barony of Carnwath", Scot. Hist. Soc. 3rd series xxix, p. xvi.

(11) The most recent funeral at which a Scottish peer's style and titles were

proclaimed officially by a herald was perhaps that of the late Duke of Argyll in 1949. The writer does not know whether the most formal ducal style, "Most High, Noble and Potent Prince", was used, or merely the more informal style of "Most Noble", or "His Grace".

(12) See Burke's "Peerage", historical introduction, 1956 ed. at p. cxxii.

(13) No English earl of the twelfth century would have styled himself in the regal manner of "Duncan, by the Grace of God Earl of Fife" (Carte Monialium de Nothberwic, Bannatyne Club, 4), or of "Gilbertus filius ferthead dei indulgentia comes de Stradern" (Charters of Inchaffray, Scot. Hist. Soc., charter no. ix). For the Twelve Peers of France, see chapter on Heirs at Law to Peerages, notes 2 and 3.

(14) The Sceptre is borne by the senior earl "upon the place", and when the Lord High Constable is otherwise occupied in the duties of his office, the Sword of State is borne by the holder of the second earldom present. In 1953 the Earl of Crawford was the senior earl present (he is the premier earl in point of precedence upon the Union Roll of Scotland) who was not possessed of a higher dignity, and he bore the Sceptre. The Countess of Erroll claimed to bear the Sword by a deputy being an earl, (1) by virtue of the office of Constable, and alternatively (2) as holder of the second earldom "upon the place" (Erroll is the second earldom enrolled upon the Union Roll of Scotland), and it was signified to her that the Queen's pleasure was that she should appoint the Earl of Home to be her deputy. Accordingly the following commission was issued to Lord Home: "I, DIANA DENYSE, COUNTESS OF ERROLL, LADY HAY AND SLAINS, HER MAJESTY'S GREAT CONSTABLE OF SCOTLAND, CONSIDERING firstly THAT I hold the heritable office of Lord High Constable of this ancient realm, which officer is chief swordman therein and unto whom all the ceremonies of the Sword of State and honours of the said office do duly and properly belong; secondly THAT I hold the Second Earldom enrolled upon the Union Roll of Scotland, and that (when the Lord High Constable as such is not available or otherwise occupied in the duties of that office) the bearing of the Sword of State in public ceremonial falls to the holder of the second earldom upon the place; thirdly THAT as I am to be personally present in the Royal Procession and State Service on the 24th June,

1953, the right of bearing the said Sword of State has been officially held to be in me; and fourthly THAT, Our Sovereign Lady the Queen having thought that the physical bearing of the Sword seems in appropriate to a woman, Her Majesty has been graciously pleased to express the wish that upon the occasion of the said State Ceremonial on the 24th June only I should commit by this my lawful deputation the actual bearing of the Sword of State of Scotland on my behalf and in my presence to the holder of another Scottish earldom, namely THE RIGHT HONOURABLE ALEXANDER FREDERICK, EARL OF HOME, LORD DUNGLASS, BARON DOUGLAS OF DOUGLAS, HER MAJESTY'S MINISTER OF STATE FOR SCOTLAND, without prejudice to any rights or procedure on any future occasion: DO HEREBY NOMINATE, appoint and constitute the said Earl of Home to be my lawfully constituted Deputy in the Bearing of the Sword of State of Scotland in my presence and on my behalf upon the occasion allenary of the said State Ceremonial on the 24th June, 1953: AND I ORDAIN registration hereof in the Books of the Court of the Lord High Constable of Scotland; and I consent to registration hereof in the Books of the Court of the Lord Lyon King of Arms and in the Books of the Lords of Council and Session: IN WITNESS WHEREOF these presents are subscribed by me and my Comital & Constabular Seal affixed at Easter Moncreiffe this eleventh day of April 1953, before these witnesses: the Most Noble James, Duke of Atholl, and the Right Honourable Eric, Lord Rollo".

Since the Seven Earls of Scotland were not always, apparently, the holders of the same seven earldoms (see G.E.C., op. cit., i. p. 144), these special ritual duties allotted to the two senior earls "upon the place" may well be a survival of royal ceremonial in which all seven had special duties. See also chapter on Succession among the Picts, note 30.

(15) See chapter on the Succession among the Picts, notes 52 and 53.

(16) Compare Lord Mansfield's dictum about earldoms in feudal times with the evidence given, and accepted by both sides, during the most important succession case that occurred at the height of the truly feudal period - the Competition between Bruce and Baliol for the Crown in 1292: "Earldoms are the highest dignities, and not partible, and pass by prerogative of seniority, descending to the issue of the eldest daughter, without having respect to proximity of degree" (Palgrave, op. cit., p. lix

(17) This very able judge was Sir David Dalrymple of Hailes, 3rd Baronet, the "distinguished scholar and antiquary", of whom Lord Woodhouselee wrote: "He was an honour to the station which he filled, and to the age in which he lived". He became a Lord of Session as Lord Hailes in 1766, a Lord of Justiciary in 1776, and died in 1792. His grandfather, Lord Advocate Dalrymple of Hailes, was younger brother of Lord President Dalrymple of North Berwick, and son of another Lord President, the great Viscount Stair, author of "The Institutions of the Law of Scotland".

(18) However, Margaret, Countess of Lennox in her own right from c. 1364-1385, married Walter of Fasselane, the heir male of her family. That she was countess in her own right is shewn by her joining with her husband in resigning the earldom to their son in 1385 (Cart. de Levenax, p. 9). This son, Duncan, Earl of Lennox, himself resigned the earldom in 1392 and obtained a regrant to himself and the heirs male of his body, whom failing, to his daughter and her Stewart husband, and the survivor of them, and the heirs of their bodies (*ibid.*, pp 10-11).

(19) Isabella, Countess of Fife in her own right as heir at law from 1353, eventually resigned the earldom in 1371 in favour of the king's younger son, who had married her nearest heir of tailzie, Margaret, Countess of Menteith in her own right. The exact relationship between the two families has not been ascertained, but it seems probable that the Menteiths were heirs general of the Fifes after Countess Isabella, for her father had called Alan, Earl of Menteith (Margaret's grandfather) as an heir of tailzie in the earldom of Fife in an earlier settlement (see SCOTS PEERAGE, iv p. 14).

(20) But note charter among Kilkerran Family Papers: "Lord Kilmaurs was, on 28 May 1488, advanced to the dignity of EARL OF GLENCAIRN by royal charter, in which he is designated Alexander, Earl of Glencairn and Lord Kilmaurs. The words used are 'facimus et creamus eundem nostrum consanguineum Comitem in exaltationem sui honoris, perpetuis futuris temporibus Comitem de Glencairn et Dominum de Kilmauris nuncupandum" (SCOTS PEERAGE, iv pp. 233-234, citing Maidments Reports, App. vi. 93). Reference to Maidment's work shews that the same charter includes a grant of lands in support of this earldom, to the new earl and his heirs (Maidment, *ibid.*, 93).

(21) See Chapter on Heirs at Law to Peerages.

(22) The third possible exception is Glencairn. But note that King James III called the first Earl of Glencairn, in the foundation charter of the earldom, "nostrum consanguinem", and in any case Glencairn's grandfather, Sir William Cunningham of Kilmaurs, had married a daughter of King Robert III en secondes noces. The writer has been unable to ascertain whether the first Earl of Glencairn's maternal grandmother, Agnes of the Isles, was a granddaughter of Robert II.

(23) See tabular pedigree of Jarls of Orkney appended to note 5 of the chapter on Succession among the Northmen. George Crichton's first wife was a Douglas of Strabock, and the Douglasses inherited Strabock by marriage to an heir portioner of the earldom of Caithness: though the later Douglas links are obscure. But George Crichton evidently wished the earldom to pass to his second wife's issue: and after a dispute, the earldom returned into the king's hands.

(24) But the earldom was settled on his issue by his second wife, Elisabeth, daughter of Lord Chancellor Crichton. It may therefore be suggested that Lord Chancellor Crichton's wife Agnes, whose parentage is so far unascertained, was a descendant of King Robert II.

(25) See note 18 above.

(26) See Storer Clouston, "History of Orkney", for evidence that the roithman families in Orkney were those akin to the Jarls and Earls. Similarly, the comital families in Scotland appear to have been those akin to the Kings (except for those springing from earlier local kings).

(27) The writer has so far not traced such a descent for the first Earls of Dunbar and Marchmont (both agnates of the Earls of Home), of Elgin and Kincardine (both agnates of the Bruce kings), of Haddington (an agnate of the Dukes of Hamilton), of Newburgh (an agnate of the Livingston Earls of Linlithgow), of Dysart (an agnate of the original Earls of Sutherland and of the Dukes of Atholl), of Carnwath and of Glasgow. He is not quite certain about the descents probably

traceable for the first Earls of Kinnoull (through Inchmartin, Innermeath and Albany: of course Kinnoull was an agnate of the Earls of Erroll), Leven (through Balquhain, Irvine, Forbes and Angus: of course Leven, though illegitimate, was an agnate of the Earls of Rothes) and Middleton (through Balmain, Carnegie and Lindsay). But he has traced the descent from King Robert II of the first Earls of Abercorn, Aberdeen, Aboyne, Airlie, Airth, Annandale, Balcarres, Bothwell (Stewart), Breadalbane, Buccleuch, Buchan (Erskine), Bute, Callendar, Cromartie, Dalhousie, Deloraine, Dirleton, Dumbarton, Dumfries, Dundee, Dundonald, Dunfermline, Dunmore, Findlater, Forfar, Forth, Galloway, Gowrie, Hartfell, Home, Hopetoun, Hyndford, Irvine, Kellie, Kilmarnock, Kintore, Lauderdale, Lindsay, Linlithgow, Lothian, Loudoun, Mar (1565), Melfort, Melville, Moray, Nithsdale, Orkney (Hamilton), Panmure, Perth, Portmore, Queensberry, Rosebery, Roxburghe, Ruglen, Seafield, Seaforth, Selkirk, Southesk, Stair, Stirling, Strathmore, Traquair, Tullibardine, Tweeddale, Wemyss, Wigtown (1600) and Winton; in addition to those for the period 1398-1513 set out in the text.

It is not suggested that in the creation of a seventeenth century earl, the Sovereign would have considered whether he was a descendant of Robert II. But up to the Union in 1707 the Scottish aristocracy was very proud of birth, and genealogically very closely knit, and new earls were drawn from old families allied by blood to the others. In short, the early earls were connections of the Blood Royal (local or national), and the later earls were connections of the earlier earls: so that the ultimate source was royalty. This is important, for it demonstrates that it is to old royal customs that we must look for the ultimate origin of our comital customs.

Note: from the list of earls enumerated above, the Earl of Tarras is omitted, as he (Scott of Harden, ancestor of the present Lord Polwarth) was only created an earl for life (presumably on English advice given abroad) by a patent dated at Whitehall, 4 September 1660, owing to his marriage to Mary, Countess of Buccleuch in her own right. When Countess Anna, her sister and successor in the earldom of Buccleuch, married King Charles II's bastard Monmouth in 1663, it was proposed to create Monmouth a Scots earl as Earl of Buccleuch; but Lord Advocate Sir George Mackenzie pointed out that by the courtesy of Scotland he would become earl on marrying her, and this conflicting with the custom that had grown up in England under the Tudor despotism, the Sovereign promptly created the couple Duke and Duchesse of Buccleuch.

(28) Thus the Earldom of Eglinton, presumably destined originally to heirs (since no limiting charter is known), was resigned and regranted to the 5th Earl (who died in 1612), so that at his death it did not pass to his heir general Margaret Montgomerie, Countess of Wintoun, and thus merge with the Seton earldom of Wintoun; but instead it passed to her younger son, Sir Alexander Seton, who took the name of Montgomerie and continued the earldom of Eglinton as a separate family.

(29) Wording from the Statute of 1540. See also the statutes of 1476, 1493, (1540), 1555, and 1587, cited in the chapter on Heirs at Law to Baronies.

(30) Reg. Episcopat. Morav., pp. 342-344; Reg. Mag. Sig., 1306-1424, App. 1, no. 31.

(31) See the case of Eglinton and Wintoun cited above; also such cases as those of the two brothers John Leslie 8th Earl of Rothes and Thomas Hamilton 6th Earl of Haddington (1700), and the two brothers who were chiefs of different highland clans in 1747: Sir Ludovick Grant of Grant and his brother James Colquhoun of Luss. A case where such an arrangement was given permanent effect was that of the regrant of the Earldom of Selkirk in 1688, where it was provided that if an Earl of Selkirk should succeed to the Dukedom of Hamilton, the earldom should always descend to the brother immediately junior to that one who should succeed to the dukedom, and to the heirs male of his body, whom failing, "ut supra dictum est pertinebit".

(32) Reg. Mag. Sig., l. no. 525; A.P.S., i. p. 560.

(33) Charter Chest of the Earldom of Wigtown, Scot. Record Soc., 824.

(34) Seal of Malcolm Fleming, lord of Biggar: see William Rae Macdonald, Carrick Pursuivant, "Scottish Armorial Seals" (1904), p. 115, no. 933, where he is called in error "cousin" of the 1st Earl of Wigtown; actually he was nephew. This Malcolm's descendant, the 6th Lord Fleming, was recreated Earl of Wigtown in 1600 (his grandmother having been a natural daughter of King James IV, and mother by King Henri II of France of the celebrated Harry de Valois, "Bâtard d'Angoulême").

(35) He also styled himself Earl of Wigtown on his seal during his father's lifetime: see Sir William Fraser, "Douglas Book", i. p. 422. Perhaps the fee of the lands of Wigtown had been propelled to him by his father, the Earl of Douglas (afterwards Duc de Touraine).

(36) A.P.S., i. pp. 557-558; Sir William Fraser, op. cit., iii pp. 357-359.

(37) The 1st Lord Hamilton had a new charter of the barony of Hamilton (which would probably have been considered as carrying the caput of his peerage lordship) on 23 October 1455, to himself and his wife and their lawful heirs male (in this context, necessarily of their bodies), whom failing to their daughter Elisabeth and the heirs male of her body, whom failing to his natural son James Hamilton and his lawful heirs male, whom failing to Lord Hamilton's other natural sons and the lawful heirs male of their bodies, whom failing to Lord Hamilton's brother Alexander Hamilton and the heirs male of his body, whom failing to William Hamilton (son of Lord Hamilton's late brother John) and the heirs male of his body, whom failing to William's brother german Robert Hamilton and his heirs male, whom failing to Thomas Hamilton (natural son of Lord Hamilton's brother german Gavin) and his heirs male, whom failing to Lord Hamilton's own nearest heirs bearing the Name and the Chief Arms of Hamilton: Reg. Mag. Sig. In this tailzie, Lord Hamilton's daughter and a son of her's would take before Lord Hamilton's brother, but her daughter would be postponed to Lord Hamilton's bastard nephew, let alone his illegitimate sons. His son was created Earl of Arran in 1503, and "the original limitation was to heirs male of the body of the grantee, but possibly it was altered on 13 Jan. 1512/2, when the limitation of the lands and Baronies of Hamilton, Machanshire, etc., was extended to several of his bastard sons and the heirs male of their bodies, with remainder to others therein specially named; with a final remainder to the nearest heir male whosoever of the grantee bearing the name and arms of Hamilton. Four days afterwards three of these bastard sons were legitimated on the ground that the Earl 'had no heirs of his body lawfully procreated to succeed to him in his inheritance, and in consideration of his propinquity to the King, &c.'" (G.E.C., op. cit., i. p. 220n),

In 1476, when the former Earl of Ross (Macdonald, whose ancestor Ranald styled himself King of the Isles at the end of the twelfth century, and whose great-grandfather had done the same in the fourteenth century, while his family

were still styled Kings of the Gall-Gael by the Irish annalists until 1500) was created a peer as Lord of the Isles, the destination was to lawful heirs male of his body, whom failing to his natural son Angus and the heirs male of his body, whom failing to his other natural son Iain and the heirs male of his body, whom failing to the new Lord of the Isles's heirs whatsoever (A.P.S. ii pp. 189-190). It has also applied to the chiefs of highland clans: in 1495 Hector Maclean of Duart received a Crown confirmation of the lands his line had held from the Lords of the Isles, and in the following year this fief was erected into the barony of Duart for his natural son Lachlan, ancestor of the later Chiefs of Clan Gillean (see Sheriff J.R.N. Macphail, "Highland Papers", i. pp. 74 and 242; also Reg. Mag. Sig., xiii p. 301).

By the end of the fourteenth century the Black and Red Douglas lines had both been established in bastards, for on 9 April 1389 Margaret, Countess of Angus and Lady Abernethy in her own right, resigned the earldom of Angus and the lordship of Abernethy to her natural son George Douglas (whose father was the 1st Earl of Douglas), which natural son thus became Earl of Angus and was ancestor in the male line of the present Duke of Hamilton. That it was the old earldom that was conveyed is shewn by her destination in the resignation which, after George Douglas and his lawful heirs, brought in Countess Margaret's sister and heir at law Elisabeth Stewart (wife of Sir Alexander Hamilton) and her heirs, although the young earl was not confirmed in the earldom by the king until the marriage contract that arranged his wedding to the king's daughter in 1397 (see Sir William Fraser, "the Douglas Book", iii pp. 38-39). The legitimate descendants of the Stewart Earls of Angus are very far from extinct, as Elisabeth Stewart (Countess Margaret's sister) was ancestress of the Hamiltons of Innerwick, of which the Earls of Haddington are a branch, yet no claim was ever raised against the Douglas succession.

(38) Cal. of Docs., iv 602.

(39) Minutes in Crawford Peerage Case, 18.

(40) Lord Lindsay, "Lives of the Lindsays", i. p. 124.

(41) See remarks of J.H. Stevenson, K.C., Unicorn Pursuivant, "Heraldry in Scotland" (1914), i. p. 27.

(42) Apart from ancient earldoms that were forfeited and then granted afresh to Stewarts by the Crown, the ancient earldoms of Menteith, Carrick, Lennox and Fife all reached the Stewarts through heiress-marriages.

(43) See chapter on Heirs at Law to Peerages, note 14.

(44) See previous note.

(45) This certainly occurred automatically with the earldom of Douglas cited above, and see also (for another rank of the peerage) Lord Bankton's "An Institute of the Laws of Scotland in Civil Rights" (1751), i. p. 52: "If there is no patent, but only possession, which is the case of our ancient lords, the title of honour must go to the heir at law, who inherits all hereditary rights, where a provision in favour of other heirs does not appear; but if the old rights of the Barony or Lordship belonging to the family have always gone in a perpetual channel to heirs male, then all titles of honour thereon founded will be understood to go in the same manner to the heir-male, tho' the rights of the estate came afterwards to be destined to heirs whatsoever" (he means, if the estates without the dignity were resettled away from heirs of tailzie to heirs whatsoever, after Scottish peerages ceased to be as it were attached to the caput of their territorial fiefs).

(46) Thus the 1st Earl of Perth (1605) left a daughter Jean, Countess of Sutherland (ancestress of the present Duke of Sutherland, who is therefore heir general of the Drummonds), and a brother John Drummond, who succeeded him as 2nd Earl of Perth. Although no patent creating the earldom has survived, it was obviously destined to heirs male whatsoever, and they have accordingly always succeeded.

(47) Thus the earldom of Angus, settled on George Douglas's heirs in 1389, was resigned and regranted in 1547 to the then Earl and "suis haeredibus masculis et suis assignatis quibuscunque", as a result of which King James VI himself as heir

of line was unable (in an action in the Court of Session) to inherit the earldom when the succession would otherwise have opened to him, and the dignity passed instead to the heir male (judgment was given against the king's case on 7 March 1588/9, though he received a sum of 35,000 merks in compensation for relinquishing all further claim).

(48) Angus, Argyll and Montrose are still held by the heirs male of the first Earls (subject to the observations on the Angus case in the notes above, and taking George Douglas as 1st Earl of Angus, as is usually done, though it would be more proper - see note 37 above - to regard him as coming in succession to his great-grandfather John Stewart, Earl of Angus). Sutherland is still held by the heir general of the first Earl (in so far as there are not reasons for supposing Countess Elisabeth's half-brother, in 1514, to have been legitimate). Cassillis is still held by the heir male, owing to Lord Mansfield's muddled history discussed above. But the Earldom of Huntly has been held by representatives who were neither heirs general nor heirs male of the original grantee ever since 1470. These dignities are now merged respectively in the Dukedoms of Hamilton, Argyll, Montrose and Sutherland, and the Marquessates of Ailsa and Huntly (subject to certain queries in the case of Angus). Mar (1565) hardly falls into the category under discussion.

(49) W.O. Hewlett, "Dignities in the Peerage of Scotland" (1882) p. 7.

(50) Hewlett, op. cit., pp. 7-8.

(51) Stair Peerage Case, 1748.

(52) In the Nairne Peerage Case, 1873-4, this principle was applied to peerages, as it had been to corporeal heritage in the Kinfauns case (Lyon v. Blair, 1739): see Hewlett, op. cit., Appendix (Minutes of Nairne Peerage Claim) p.211 et seq. There is no doubt it includes earldoms.

(53) The writer was junior counsel in the Dundee Peerage Case, which was decided according to this principle. For a "vindication as to heirs-male in peerages", see Alexander Sinclair, "Archaeologica", pp. 12-23. The only English case in

which this principle was allowed was the Devon Peerage Case in 1831, and it was disallowed in the Wiltes Peerage Case of 1869, while it is demonstrated to have been contrary to English practice, in G.E.C., op. cit., vii App. E & F ("Limitations to 'Heirs Male'").

G.E.C., iv p. 336n., voices current English opinion by referring to "this astonishing decision" in the Devon Peerage Case, and in their dislike of the principle, English heraldists tend to overlook the historical fitness of the head of the great Frankish house of Courtenay being Earl of Devon, a dignity held by his direct male-line ancestors in the fourteenth century. Moreover, the patent of 1553, on which Viscount Courtenay founded his successful claim to the Earldom of Devon in 1831, was no ordinary patent and was granted in no ordinary circumstances. The Courtenays, who had been Sheriffs of Devon from the twelfth century, married during the thirteenth century the eventual heiress (in her issue) of the Norman earls of Devon, and in 1334/5 letters patent were issued that recognised Lord Courtenay as Earl of Devon and declared that he should assume such title and style as his ancestors, Earls of Devon, had been wont to do (G.E.C., iv. 324). During the Wars of the Roses the earldom was forfeited more than once, being recreated in Sir Edward Courtenay, the heir male, in 1485, with remainder to the heirs male of his body: but the new Earl was shortly afterwards restored by statute "to the honours lost by his attainder in the Parliament of 1 Richard III," and so the old earldom may have been thought to have been settled in tail male from 1334 (see G.E.C., iv. 329n.). This new earldom was forfeited and restored (by a new creation of 1511, followed by a reversal of the attainder of 1504), and forfeited again in 1538/9 (when Henry Courtenay, Marquess of Exeter was beheaded). In 1553, however, the late marquess's son (then Heir Male and Head of the Family) was created Earl of Devon "to him and his heirs male for ever", together with a warrant of precedence to him and his heirs in the earldom "that he and they were to enjoy in Parliament, as well as in all other places whatsoever, such place and precedence as any of the ancestors of the said Earl, heretofore Earls of Devon, had ever had or enjoyed". This seems at least capable of the interpretation that the Sovereign intended in effect to restore the old earldom to the Courtenays, but in view of the doubts between heirs general and heirs male, employed this practical method to settle these doubts permanently in favour of the tail male of the first Courtenay earl (of 1334) by a grant to the heirs male "for ever" of the then descendant, coupled with the old precedence. This is how

it was in effect interpreted by the 1831 Committee, who allowed the earldom on the strength of the 1553 patent to the (heir male of the body of the 2nd Earl (of 1334) being) heir male but not of the body of the 1553 grantee.

It is, however, hard to understand why the present Earl of Devon is not accorded place as Premier Earl of England, anyway outside Parliament (for which, see G.E.C., i. App C), and especially why he is not chosen to do homage for the rank of earl at the Coronation. Lord Devon descends in the direct male line from the Earl of Devon of 1334, and indeed his warrant of precedence appears to carry him back to 1141, while Lord Shrewsbury only descends in the male line from the Earl of Shrewsbury of 1442, and has no higher precedence than the fifteenth century. The writer supposes that English heraldists are psychologically unwilling to face all the implications of the 1831 decision. In principle, this decision is undoubtedly as repugnant to them in law as was to us Lord Mansfield's dictum (about heirs general and heirs male) in the Cassillis Peerage Case. But their principle has been saved by the 1869 decision (Wiltes Peerage Case), and is unlikely to be challenged again, just as our principle (about heirs general) has been saved from Lord Mansfield's dictum by Lord Hailes's brilliant work in the Sutherland Peerage Case. And in practice, the special survival of the original precedence of the Earldom of Devon despite the vicissitudes of the Wars of the Roses and the Tudor despotism should be a source of historical pride as great as that accorded to the equally anomalous survival of the Earldom of Arundel. When the writer revised the article on DEVON in Burke's Peerage, 1956 ed., up to Renaud de Courtenay, Sheriff of Devon (died 1194), it seemed reasonable to sum up their remarkable history: "The Earl of Devon is Heir Male of the historic Frankish House of Courtenay, whose pennon waved at Crécy and Agincourt and on crusade in the Holy Land, and who have had a worthy historian in the great Edward Gibbon. The main line has been established in Devon since the twelfth century, first as Vicecomites and later as Comites, giving to England an Archbishop and several Bishops, a Lord High Chancellor and other statesmen, a Founder Knight and three more Knights of the Garter, besides Ambassadors and Admirals and many famous peers; while another branch of the family reigned as warrior Counts, and Emperors were proud to bear their name, in the outposts of mediaeval Christendom".

(54) See Lord Chancellor Loughborough's observations in the Erroll Peerage Case

of 1797, printed by Hewlett, op. cit., App. no. 3, at p. 204, where the Lord Chancellor refers to the Stair Peerage Case: "let us see what the Judgment in that case was. It simply declared 'that the Nomination and Appointment, dated the 31st of March 1747, made by John, Earl of Stair, to his Honors and Dignities, was not valid in law'. No reason is stated, but the obvious reason was, because John in 1747 had no power to nominate. It may be true that the Crown had not then a power to confirm a Nomination made. But in 1747 no power on earth could create a Commoner a Peer of Scotland; and to seek further than the obvious reason of this is like holding up a farthing candle to look for the sun. It was the effect of the Union to annihilate the power of making Scots Peers". It is not easy to agree with the Stair decision, and indeed the arguments to the contrary advanced by John Riddell ("Scottish Peerage & Consistorial Law", 1842, i. chapter iv) seem to be sound Scots Law in principle. But, since the Committee in the Stair Case were considering a point of law and not of fact (Lord Mansfield's dictum in the Cassillis case, on the other hand, being based on facts since disproved), it would be very hard in practice to induce a modern Committee to reconsider the law on this point. Riddell's point, with which it is not easy to disagree, is that it is one thing to say that as a result of the Act of Union no new Scottish peerages can be created, but quite another to insist that as a consequence of that Act the old Scots methods of fixing or changing the particular lines of succession to particular peerages already existing were in principle necessarily in any way brought to an end.

CHAPTER 9.

THE HEIRS AT LAW TO BARONIES.

THE HEIRS AT LAW TO BARONIES.

A barony in Scotland is a jurisdiction⁽¹⁾ vested in the holder of the caput of that barony⁽²⁾. It is a dignity, carrying with it the style of Baron⁽³⁾, which must not be confused with the style of Laird⁽⁴⁾, nor with the peerage dignity that is styled Baron in England⁽⁵⁾ but Lord in Scotland⁽⁶⁾. The history and functions of these Scottish baronies is to be found in Professor W. Croft Dickinson's authoritative introduction to the Scot. Hist. Soc.'s "The Court Book to the Barony of Carnwath", while the ceremonial dress of the barons⁽⁷⁾ is described by Lord Lyon Sir Thomas Innes of Learney in "The Robes of the Feudal Baronage of Scotland", Proc. Soc. Antiq. Scot. lxxix (vol. vii, 7th series), Session 1944-5, p. 111 et seq. These baronial jurisdictions were first introduced into Scotland when the country was united and feudalised during the twelfth century, and the barons sat in Parliament by hereditary right until (as a result of the 1587 Act) chancery missives were issued in 1594 whereby they first began to elect representative commissioners instead of attending in person.

From the point of view of the heraldist considering to what extent the ritual concept of the Scottish baronage was influenced by pre-feudal Celtic ideas, it should be noted that, although the areas covered by old baronial jurisdictions vary greatly⁽⁸⁾, in general they may be said to correspond roughly with the sort of area that had been a thanage in Albany before that time. Indeed, many thanages were converted into baronies⁽⁹⁾ although others continued to be held by the thane (or toisech, as he was called in Gaelic). Skene (op. cit., iii p. 212) tells us that "where there are Toisechs there are Tuaths". This is of interest, since Professor MacNeill remarks that the territory of a tuath ruled by a petty king among the ancient Gaels (anyway in Ireland) "corresponds in many instances to a modern barony".⁽¹⁰⁾ Such petty kings were referred to by the English conquerors of Ireland as "captains of their nations"⁽¹¹⁾. Skene (at p. 214n.) cites O'Flaherty in "Oxygia" as writing of the Gaels of later times: "Taisius (Toisech) apud nos idem est sensu literali ac Capitaneus seu precipuus dux". In Scotland, "captain" is an old word for "chief"⁽¹²⁾. Toisech in Scotland is the Gaelic for "thane"⁽¹³⁾, and is found in early Gaelic charters applied to the head of the principal or ruling kindred in a district⁽¹⁴⁾. When of native origin, local chiefs usually claim descent

from a cadet of an ancient royal or comital house⁽¹⁵⁾. Craig (op. cit. 1. 8. 2) links the idea of district baron and chief of the local ruling kindred⁽¹⁶⁾ when he writes that "The title of baron is taken from the feudal system, and could only have been applied to the chiefs of Scottish clansmen (capitani tribuum) after its introduction into Scotland"⁽¹⁷⁾. Writing of these Scottish baronies, Professor Dickinson (p. lix) reminds us that "Each feudal group strives to be a little state; its ruler and his subjects alike have an interest in all that concerns its territory"⁽¹⁸⁾.

The principles and practice of succession to Scottish baronies are examined with great care by Professor Dickinson (op. cit., pp. xxx-xxxvi), and succession by heirs female (i.e. heirs general) from the earliest feudal times is amply proved by Lord Hailes in his "Additional Case for the Countess of Sutherland". The existing Scots Law of intestate succession to heritage not only carries it to heirs general, but where there are heirs portioners "the eldest heir-portioner ... is entitled to certain subjects as her praecipuum without making compensation to the others. These are titles of honour, as they are indivisible; the principal mansion-house (the seat of the family), with its necessary adjuncts ...; a superiority with its casualties, and if there be more than one she has a right of choice, but if the superiority yield feu-duties she must give compensation for these to the other heirs-portioners"⁽¹⁹⁾. Among the subjects included in her praecipuum is the caput of a barony, together with the baronial jurisdiction, and the baronial chapeau together with any heraldic supporters allowed in respect of the barony. All this applies, of course, only in cases of intestate succession and where there is no tailzie providing for a different destination.

From the point of view of this paper, therefore, the only question is whether the common law has ever been changed from some other line of heirs, and whether Lord Justice Clerk Aitchison and Lord Chief Justice Mansfield were right in saying that under early Scottish feudalism territorial dignities and lands held on a feudal tenure "were certainly masculine fiefs" and descended only to the heir male⁽²⁰⁾. Scotland was only united and feudalised during the twelfth century, as we have seen, and it is not surprising that Lord Hailes was able to prove that our feudal law of succession was similar to that of early feudal England⁽²¹⁾, which followed Norman law in favouring the heir general, rather than to that of the distant Teutonic realms and Lombardy⁽²²⁾, which favoured heirs male. It is unnecessary to do more than offer a few examples of what Lord

Hailes demonstrated to be the common law. William de la Hay, baron of Erroll, who was butler of Scotland in 1171⁽²³⁾, married Eva, an heiress with whom came the lands of Pitmilly⁽²⁴⁾. In about 1180 King William the Lion granted the barony of Panmure to Philip de Valognes, and it was confirmed to his son William de Valognes, Chamberlain of Scotland, "et haeredibus suis"⁽²⁵⁾; when William died in 1219 the barony passed to his daughter Christian de Valognes, wife of Piers de Maule⁽²⁶⁾. In about 1160, during the reign of King Malcolm the Maiden, Simon Fraser had made a grant to the monks of Kelso; in 1190 this grant was confirmed by Eda "filia et haeres Symonis Fraser" and her husband⁽²⁷⁾. In the Competition for the Crown in 1292 both Bruce and Baliol took it for granted that baronies (as opposed to the lands) were "impartible tenures" and descended to the senior heir general. There is no evidence of the common law preferring heirs male to heirs general in the succession (without a tailzie) at any period from the time when King David I first united and feudalised Scotland, and Scots Law began.

From time to time, the common law in favour of heirs general was reinforced by statute. The Act 1425 c. 54 makes it clear that at that date the Regiam Majestatem⁽²⁸⁾ was accepted as sound Scots Law, except in so far as it was now to be amended. The Regiam Majestatem, as might be expected, follows the Anglo-Norman doctrine of succession by the heir general to all heritage that is not otherwise specially settled. A series of Acts of Revocation make it quite clear how the matter continued to be regarded. King James III's statute of 4 July 1476 revokes "tailzies maid in his tender age, fra the righteous aires". King James IV's statute of 26 June 1493 has a clause: "IN likewise we revoke, and cassis all tailzies maid fra the aires general, to the aires maill of any landes in our Realme". King James V's statute of 1540 goes further: "In likewise, wee revoke & cassis, all tailzies maid fra the aires general, to the aires maill, of ony landes within our Realme, against the law and gude conscience". Mary, Queen of Scots's statute of 1555 has the same words, except that she "cassis and annullis" these unconscionable tailzies that favour the heir male instead of the righteous heir general. King James VI's statute of 29 July 1587 makes allowance for those who had "conquest", i.e. acquired new fiefs, but is otherwise resolute in favour of heirs general, which it expressly equates with "heirs whatsoever": "Wee revoke all tailzies, maide be us in our minority and lesse age, fra the aires general to the aires maill of onie Landes

within in our Realme, against the Lawe and gude conscience, quhair the saidis Landes were disponed before to the aires quhatsumever, and the saidis infeftmentes, changed be resignation in the same persone, and to his aires mail. And wee declare that new conquest tailzied in our saide minoritie and lesse aige, Sall nawayes cum under this our Revocation: Because it is not against Conscience, that onie person, quha acquires the richt of onie Heritable Landes, may take the same to sik aires as he pleasis".

All the same, from the fourteenth century onwards baronies and lands are often tailzied on special lines of heirs, and "Name and Arms" clauses are found as far back as 1324⁽²⁹⁾. Sheriff J.R.N. Macphail ("Highland Papers", i. pp. 73-74) refers to several baronial chiefs who disinherited their eldest sons in favour of younger sons (in one of the cases cited, a bastard⁽³⁰⁾ is preferred to lawful sons), and innumerable different forms of settlement⁽³¹⁾ were made from time to time, subject to the Crown's confirmation through the system of resignation and regrant (until such confirmation came to be presumed by statute in modern conveyancing times, and heritage was even allowed to be settled by testament). An interesting example of late mediaeval opinion about such arrangements is to be found in the feu charter of the ecclesiastical lands of Dollar or Gloom (which included Castle Campbell) regranted by the Bishop of Dunkeld on 31 January 1493/4 to the Earl of Argyll and a number of his heirs male of tailzie, subject to "a curious stipulation by this Bishop that if heirs male should exclude nearer heirs female, that the latter should be recompensed either in lands or other goods, or that they should 'tocher' them on their marriage according to the modification (viz. calculation) of the Bishop"⁽³²⁾

Sir Thomas Craig expressed later Scottish feudalists' views on the subject of the heir general as opposed to the heir of tailzie. "Tailzies are not favourites of the law. Before passing on I must say something of the Law of God, so far as relevant to this topic. For there is a question whether, judged by that law, tailzies are consistent with ethical principles, or whether they should be condemned as offensive to the true and natural rights of succession. It does rather appear at first sight as if the divine precept required that, failing sons, an inheritance should belong to daughters. Such is the lesson to be drawn from the fate of the petition of the daughters of Zelophehad to be allowed to succeed to their father in the absence of male issue. It will be

"remembered that, in view of the difficult question raised by their petition, Moses consulted the Lord, who found that the case made by the daughters was a fair and reasonable one; and laid down, as a perpetual law of succession, that (failing sons) daughters should succeed to their father. Indeed, it seems contrary to nature that women should be made to occupy a position inferior to that of men" (Craig, 2. 16. 9.). He goes on to say: "Tailzies are more familiar in Scotland than in any other country ... But, notwithstanding the sentiments and desires of a large number of our nobility in favour of tailzies, they are regarded in our law as odious and receive the strictest construction. Always, if there is doubt, they are interpreted in accordance with the legal rules of succession ... and no tailzied destination can be made without the superior's consent."

He discusses royal revocations of tailzies made during a king's minority, and adds: "Those which may be granted by him subsequently thereto are not revocable. The ground of revocation is expressed to be that grave lesion has resulted from such dispositions, and that both conscience (which must always prevail) and the law of the land are opposed to them. ... A stronger and sounder argument in favour of revocability is to be found in the prejudice and enorm lesion they are calculated to afflict upon the granter. ... Every one knows that it is to the advantage of the prince to have the ward of a female heir rather than of a male heir, for a female heir usually brings with her into ward her whole inheritance, while the marriage of a male heir may bring but small profit. The interests of the prince are thus seriously involved, and the same principle applies to the revocation of a tailzie as - in a lesser degree - to a union of baronies". He makes it clear, all the same, that "it appears to me that those who condemn tailzies as being contrary to the law of the land, or to the dictates of conscience, wanders far from the truth. But it is unnecessary for me to labour the point, inasmuch as the Court of Session has decided that tailzies are contrary neither to law nor to conscience, in the case of Lauchlan MacLauchlan against Lord Lawmound" (the Laird of Lamont): Craig, 2. 16. 13.

Having made it clear that by the feudal law of Scotland a tailzie is a destination that diverts the succession from the heir at law, he makes it quite clear that heirs male are not heirs at law, in the following passage: "In Scotland the ordinary form of tailzied feu is in favour of a person named and

the heirs-male of his body, whom failing a substitute heir and the heirs-male of his body, whom failing a third heir and the heirs-male of his body, whom all failing the heirs-male whomsoever of the said first grantee bearing the name and arms of his family." He then discusses other variations in succession that are established by tailzie, and says: "Heirs of tailzie called to the succession under special provisions of the kind under discussion are otherwise known as heirs of provision. But a little consideration of the matter will shew that heirs of tailzie and heirs of provision, as we call them, are the same; for a tailzie is nothing but a special provision whereby the direct line of succession by descendants or collaterals is cut off, and the way is opened to some other successor" (Craig, 2. 16. 19).

NOTES TO CHAPTER ON HEIRS AT LAW TO BARONIES.

(1) Until 1747, the true baronial jurisdiction included "pit and gallows", i.e. the duty of imposing imprisonment or capital punishment on particular offenders convicted by assizes drawn from among the "good men" of the barony. This feudal public justice appears to have replaced the older customs of private vengeance as the only alternative to financial compensation for private injury (see, for example, Dr. John Cameron, "Celtic Law", p. 187). The Baron Courts formed a democratic check on the powers of the Barons. Since 1747 the baronial jurisdiction has been severely limited, with the result that this check disappeared and barons tended to become unrestricted property-owners instead.

(2) If the caput itself is divided, the barony is vested in the holder of the principal hearth-stane: thus when the Binns was subinfeudated to the National Trust for Scotland, the Dalryell of the Binns retained the principal hearth-stane and with it the barony, providing also in the charter for retention of the right to hold their Baron Courts in the Laigh Hall. When the caput is alienated by the baronial family, but they are desirous of retaining the barony, it is sometimes provided in the charter alienating the caput that it will not carry with it the barony, and a special motte-hill or court-field set aside in the terms of the charter for exercising the baronial duties and holding Baron Courts if necessary. In 1952 the writer drafted a deed in which a baron who had inadvertently failed to retain his baronial status when disposing of the caput of the barony to a school, recovered the baronial superiority with the consent and by the disposition of the school which established those parts and portions of the estate "as are delineated and coloured green on the plan annexed and subscribed as relative hereto, which parts and portions are hereinafter referred to as the Baron Court Field, for the Queen's service and holding of the baronial Courts of Brotherton". The Lord Lyon points out that a baronial status is also vested in the representatives of the pre-1594 baronage as they are entitled to hereditary supporters (in England only accorded to peers) by virtue of such heirship.

(3) "That a feudal barony confers what is termed a 'title', the erection in liberam baroniam as a temporal fief, of the estates of the Bishopric of Moray, provides an example in explicit terms. This Crown charter, 6th May 1590, erecting the free barony of Spynie constituted a Titulum, Honorem, Ordinem et

Statum liberi Baronis ... qui nunc et imperpetuum Barones de Spynie nuncupabuntur" (Lord Lyon Innes of Learney, "Robes of the Feudal Baronage", p. 113). See also "Use of the Baronial Title in Scotland" (Innes of Learney, op. cit., pp. 157-163). See further a legal argument of 1382 (before the existence of Lords of Parliament) that "Baronia est nomen dignitatis et importat iudicaturam et potestatem iurisdictionalem ordinariam" (Professor Dickinson, op. cit., p. xx, citing Aberdeen, i. p. 152).

The style was sometimes used on seals: e.g. the seal of Hugh Rose, baron of Kilravock 1493/4 and 1498/9 ("S. hugonis r̄os baronis": W.R. Macdonald "Scottish Armorial Seals", p. 291, no 2317), and on that of Sir George Towers of Garmilton, baron of Inverleith 1607 and 1613 ("S. DNI. GEORGII. TOVRIS. BARO. BARONIE. DE. INNERLEITH. M.": ibid., p. 356, no 2774), and is often used in deeds and writs, especially in those concerned with nobiliary practice (e.g. Arms and birth-briefs).

(4) A Laird is a tenant-in-chief of the Crown, whether baron or ordinary freeholder. Vavassors holding under mid-superiors in Scotland were called "Good-men" (when James V went about among the people in disguise, he is said to have called himself "the Gudeman of Ballengeich" after one of the royal fārms). See Dickinson, op. cit., p. xlv note 5. Most barons were lairds (though many lairds were not barons), and indeed the writer's forefather Sir John Skene wrote "In this Realme he is called ane Barronne quha haldis his landes immediatl̄ie in chiefs of the King, and hes power of pit and gallous", in his famous glossary of Scots legal terms, "De Verborum Significatione" (pub. 1597). But a number of barons held their jurisdiction under earldoms or bishoprics, or the Lords of the Isles, and were not lairds: for which see Dickinson, op. cit., pp. xlix-lix. The Barony of Cowie, for instance, was held of the Earl of Erroll, and the Barony of Leslie was within the regality of St. Andrews. The writer understands, though he has been unable to check his reference, that the illustrious style of "Premier Christian Baron" borne by the heads of the house of Montmorency (whom King Henri IV declared to be the first house in Europe, after his own) originated in the early tenure of the barony of Montmorency as the senior of those held under the local Bishopric, before the Montmorencys became tenants-in-chief of the Kings and indeed Peers of France. This is certainly borne out by the Jerusalem-type arms attributed to the early

Montmorencys before they adopted the famous eagles, namely Gold a Cross Silver (J.Woodward, "Heraldry: British and Foreign", ii. App. F).

(5) The word baro in origin simply meant "man", and acquired its later meaning from its sense of "king's man". It came to England from Normandy, and to Scotland from England, where originally "Professor Vinogradoff has shown that the term baronia meant the whole body of free men, both great and small" (see his article on "Magna Carta", Law Quarterly Review, xxi (1905) pp. 250-7.

The writer knows little about honorial baronies in England or Normandy, but generalising very broadly, he understands that in principle the eleventh century Norman baronies dating from the time of Duke Robert the Devil (1028-1035) were made up of groups of five knights' fees, though there were also Honours of ten knights' fees, and that such a fief would owe a service d'host of five knights but a service de chevauchée within the Norman marches of only one knight to the Duke, while a ten knight Honour would owe double, and that for every two knights owed to the Duke's service de chevauchée a single knight was owed to the King's service de chevauchée. "It has been shewn by Round, Haskins and Cahen that the servitia debita in England, Normandy and southern Italy were based on units of five and ten knights" (the Normans conquered Sicily about the same time as they conquered England). The system soon got overlaid by the movement of fees through inheritance or alienation, so that barons held more or even less than the original number of fees.

In England, the lands held as Baronies or Honours seem to have been those in which tenants-in-chief had been enfeoffed by King William the Conqueror or at latest by King Henry I: "There is evidence of the foundation of only one barony after 1135 - the barony of Berkeley, Glos., founded sometime before 1166 by grant of Henry II. Even in this case Berkeley was formed from the barony of Dursley, Glos., which had been in existence since the start of the twelfth century. See J. Smythe of Nibley, The Lives of the Berkeleys (ed. J. Maclean; pub. Bristol and Glos. Arch. Soc., Gloucester, 1883-5)". The whole question is discussed very carefully by I.J. Saunders, "Feudal Military Service in England", (1956). At p. 13 he writes: "The law cases show that, in the thirteenth century, tenure per baroniam had become a question of record, not a living fact ... The general tendency was for the tenant to repudiate baronial status because of the greater burden of relief and amercement which fell upon such

tenants. On the other hand, if the rank of baro would mean financial saving the tenants claimed to belong to this class". In fact, feudal taxation operated against all except the leading tenants-in-chief wishing to be barons, because a baronial tenant-in-chief in the thirteenth century had to pay £100 relief whereas other tenants-in-chief paid £5 for each knight's fee (Saunders, p.101). Thus in 1225 Walter de Clifford of Clifford in Herefordshire (of the famous baronial house that produced the "Fair Rosamund", also the Earls of Cumberland and the Lords Clifford of Chudleigh) insisted that he was not a baron, as he would have had to pay £100 relief, and managed instead to get his relief assessed at £6. 13. 4d. for $1\frac{1}{2}$ knight's fees: though there seems little doubt that Clifford was in fact a barony. On the other hand, when Hugh de Baliol was faced with a demand in 1228 for £150 relief for his thirty knight's fees (at £5 each), he hastened to claim baronial status and to profer instead £100 as a baron. It was therefore only worth while being a baron if at least twenty knight's fees were held in chief of the Crown, and "the payment of £100 relief is the surest criterion by which to judge whether a man was a baro in the thirteenth century" (Saunders, p. 98). "When the king stated in 1340-1 that those who were called to parliament were barons many religious houses protested against the royal claim that they were tenants by barony" (Saunders, p. 21n.) As the more powerful barons were summoned to Parliament by writ from the end of the thirteenth century, generation after generation, and letters patent creating parliamentary barons were introduced from 1387, the older barons by tenure gradually disappeared from the English scene. In the FitzWalter Peerage Case of 1660, the Privy Council found that "whatever pretence there might be for presuming that there were originally Baronies by tenure, yet that Baronies by tenure had been discontinued for many ages, and not in being, and so not fit to be revived, or to admit any pretence or right of succession thereupon" (G.E.C., v. pp. 489-490).

For several centuries, therefore, the only barons in England have been what we would call Lords of Parliament, the lowest rank in the peerage. These Barons have a high precedence as peers of the realm, and include besides the older barons by writ several hundred barons by letters patent (from the Barons Stourton who were made Peers of England in 1448 to the leading industrialists and Trades' Unionists of the present day), but their baronies are of course purely "paper" baronies and connected in the public mind with duties at the political centre (Westminster). Although the Scottish Baronage are not peers,

they are an older institution than the modern English Baronage, most of them are tenants-in-chief of the Crown, and they still hold real territorial baronies connected with the actual districts whence they draw their styles. Such great Scottish baronial houses as the Stirlings of Keir, the Wemysses of Wemyss, the Camerons of Lochiel and the Morays of Abercairney, can rival any English Baron of Parliament in point of ancient lineage or extent of territorial duties. The writer only observes this, because he has noticed general astonishment among English writers that Scotland has a different tradition in this respect. In particular, literary critics in the South repeatedly attack James Boswell, younger of Auchinleck, for styling himself a baron while travelling in Germany. Yet the Scoto-Norman Bosvilles or Boswells were a baronial family from the twelfth century. David Boswell, the Baron of Balmuto (living 1492), married secondly Lady Margaret Sinclair, daughter of William, last Jarl of Orkney and first Earl of Caithness, Lord High Chancellor of Scotland, and by her was father of Thomas Boswell, who was granted the Barony of Auchinleck by his kinsman, King James IV on 20 Nov. 1504 and who fell with his king at Flodden. James Boswell himself (the writer) was son and heir of Lord Auchinleck (the judge), who was 8th Baron of Auchinleck and whose wife was an Erskine of the great comital house of Mar. James Boswell's grandfather James Boswell, 7th Baron of Auchinleck, had powers of life and death in his barony until 1747 (whether he exercised them or not) and was married to Lady Elisabeth Bruce, daughter of the 2nd Earl of Kincardine. The Boswells of Auchinleck, as barons whose ancestors had sat in Parliament by hereditary right until 1594, were entitled to heraldic supporters (an honour only accorded heritably in England to peers). In Scotland, the "old laird" and the "young laird", or the "old baron" and the "young baron", were recognised characters vested in the baronial parent and his heir. It is improbable that many, if any, of the German barons whom Young Auchinleck met were of so high a lineage or so ancient a baronial status (nor with so recent a jurisdiction of life and death). Yet the surprising belief is often to be met with in the South, that a great Scottish baron like Lochiel is in some way less of a baron than the cadet of a cadet of a cadet of some paper baron created by the sovereign of some nineteenth century German duchy.

(6) See next chapter. The distinction is between the parliamentary peerage dignity of Lord Forbes, and the territorial dignity of Baron of Drum.

(7) These robes were worn in 1953 by the four barons, Maclean of Duart, Rattray of Rattray, Borthwick of Borthwick and Carnegie of Lour, who carried out the baronial ritual duty of holding the canopy over the Honours of Scotland when they were fetched by the Lord Lyon from custody in Edinburgh Castle. They are well illustrated in the portrait still at Rosshu of Sir John Colquhoun of Luss, 2nd Baronet, who was Baron of Luss from 1650 to 1676.

(8) Quite apart from the so-called "paper barons", who in fact were really only "40/- freeholders", created for voting purposes during the eighteenth century, especially after the Heritable Jurisdictions Abolition Act of 1747. These of course were not barons at all.

(9) The present Barons of Brodie are the heirs of the ancient Thaners of Brodie, and still hold their old territory. The Thaners of Callendar (who derived the Christian name of Alwin from the original Earls of Lennox, by marriage to their daughter) were holding Callendar as a Barony by 1345-6, when Patrick of Callendar backed King Edward Baliol, and was forfeited, his barony (the old thanage) and his daughter going to Sir William Livingston, through whom the line was continued until a second forfeiture in 1715 (their heir general is now the Countess of Erroll). In 1368 King David II converted the Thanage of Boyne into a Barony for John of Edmonstone, whose eventual heiress brought it in the next century to the Ogilvies, cadets of the original Celtic earls of Angus. In 1372 King Robert II granted the Thanage of Glamis in free Barony to his future son-in-law, Sir John Lyon of Forteviot, whose family (by a tradition, now forgotten, but subsisting in the seventeenth century: see "Scots Peerage" sub STRATHMORE) claimed descent from the Lamonts of that ilk (whom the fourteenth century Irish MSS genealogies make cadets of the royal house of O'Neill in Tir Eoghain: see Skene, "Celtic Scotland", iii app., and Sheriff Hector McKechnie, "The Lamont Clan").

All the same, many thanages continued to be granted by the old tenure. In the twelfth century King William the Lion granted the demesne lands with the Thanage of Arbuthnott to the Olifards, from whom they soon passed to the ancestor of the present Viscounts of Arbuthnott; he was Hugh, Thane of Arbuthnott, who appears to have been a cadet of the vicecomital house of Swinton, probably a branch of the semi-independent Edulfing rulers of Beornicia (see chapter on

Succession among the Beornicians). Between 1342 and 1357 Robert, Steward of Scotland and Earl of Atholl (afterwards King Robert II) granted the Thanage of Glentilt in Atholl to Ewen, "brother to Ranald of the Isles" (Chron. Atholl & Tullibardine Families, i. p. 26); Ewen was obviously a member of the local royal house of the Isles, and appears in SCOTS PEERAGE as grandson of Robert II himself, but since he is not called grandson in the charter and since the Lord of the Isles's son Ranald was then only a second son, it seems to the present writer more probable that Ewen, Thane of Glentilt was brother of Ranald MacRuairi (presumably a natural brother, else the MacRuairi inheritance would not have passed to Amy). These genealogical details about the various thanes mentioned are given in this paper for heraldists, to illustrate the genealogical background to which the thanage families belonged.

The relationship between old thanage and new barony became increasingly tangled with the passage of time. Duncan of Atholl, namefather of Clan Donnachaidh, who had inherited a large portion of the ancient earldom of Atholl as heir of a natural son of the last earl of the old Celtic royal line, is said to have married a daughter of the Thane of Glentilt, as a result of which his younger son Patrick inherited the extensive lands of Lude in Glentilt and founded the line of chieftains known as MacThearlaich, the Robertsons of Lude. Lude became a Barony, and on 1 Feb. 1507/8 on a resignation and regrant, it is called "omnibus et singulis terris, et Baroniae de Lude, cum suis pertinentiis, jacentibus, infra than^gium de Glentilt, comitatum de Atholia, et vicecomitatum de Perth" (J.A. Robertson, "Comitatus de Atholia" (1860) p. 47). The destination of this highland barony was to heirs, i.e. heirs general. Sometimes there was a change in the tenure, without a change in the traditional style: in 1475 William, Thane of Cawdor got a novodamus of the thanage with the privileges of a barony (Skene, iii p. 248), and it is well known how a captured heiress brought this famous thanage to a younger son of the 2nd Earl of Argyll, whose brave descendants still hold it together with a modern peerage earldom (since 1900, ten male-line descendants of these Campbell thanes of Cawdor have between them won three V.C.s, nine D.S.O.s, seven bars to the D.S.O., an M.C., an A.F.C., a U.S. Legion of Merit, three French croix de guerre, and a palm and star to the croix de guerre).

(10) Many Irish examples shew that the head of the district of a tuath was also head of the local dynastic cineal or clan, and that he is styled indifferently toisech of the clan or toisech of the country (later, the two were often equated: e.g. Clanmaurice). Thus O'Rothlainn was toisech of the tuath or district of Cuil-Cearnudha, and head of its ruling cineal. They were usually branches of a granter dynastic kindred. It may be suggested that the Scottish toisech was the thane, and that he was the chief of an appanaged branch of a dynastic kindred (his thanage being the appanage provided for that branch, with ultimate reversion to the earl or king who was immediate head of the dynastic kindred in question). It is in this context, no doubt, that the Earl of Strathearn refers to "my thanes" (see Incheffray Charters): probably the appanaged heads of the branches of his comital family (though this presumably includes the female line in Scotland, unlike Ireland).

(11) Sixty "chyeft Capytaynes" reigned over sixty "countryes called Regyons" in Tudor Ireland: see Dr. W.F.T. Butler, "Gleanings from Irish History" (1925) p. xiii. Skene, the great pioneer of the subject in Scotland, unfortunately mistook "captain" to mean "cadet chief", and his error has been followed by many amateurs of highland genealogy, since it assists certain clans in their traditional feud with the Captains of Clan Chattan and Clanranald. This error is corrected by Dr. Alexander Macbain in the 1902 edition of Skene's "Highlanders of Scotland", at p. 413 (p. 275n.), where he adds "captain is the very earliest word for 'chief'. ... The 1587 Act puts 'captain' before either 'chief' or 'chieftain'. See p. 291 ... for proper use of 'captain'." (At p. 291, a sixteenth century Chief of the Mackintoshes is called "a mirrour of vertue to all the Heiland captains in Scotland").

(12) See Previous note.

(13) The family of the Thanes of Glentilt were thus called Macintosh: "Son of the Thane". The Mackintoshes of Mackintosh presumably descended from the lords of one of the several thanages in the old province of Moray, and it may be significant that these chiefs are buried at Petty, but their traditional descent from the mythical "Thanes of Fife" demonstrates their recognition that Mac-an-Toisich simply means "son of the Thane". Fearintosh is the name of the

detached thanage lands in the Black Isle, that formed part of the thanage of Cawdor (Skene, "Celtic Scotland", vol. iii pp. 248-249). The "Leges inter Brettos et Scotos" (see Cameron, "Celtic Law", p. 187) fixed the cro or blood-money compensation for the slaying of the king's son, an earl's son and a thane's son. There is no room in this old Gaelic system of compensation for two separate ranks of thane and toisech: clearly the thane is the toisech, and it is his cro that is fixed as the same as that of an earl's son. These Scottish thanes from benorth the Forth must not be confused with the Anglo-Saxon rank of thegn.

(14) See "The Book of Deer" (Spalding Club, 1869) pp. lvi and lvii for Gaelic charters of early twelfth century: "Comgell mac C annaig t aesech clande canan" (Comhghall mac Choinnich t oiseach chloinne Chanan), "Comgall mac Kenneth, chief of the clan Canan", and "donnachac mac aithig toesech clenni morgainn" (Donnchadh mac Shithich t oiseach chloinne Mhorgainn), "Duncan mac Sithech, chief of the clan Morgan". If the territory of Clan Morgan were called Clanmorgan (in the Irish manner), "toiseach chloinne Mhorgainn" would translate "thane of Clanmorgan": and it is suggested that a thanage was the territory allotted to a dynastic branch whose chief was styled toisech of the clan in Gaelic, and later, thane of the territory in English. On a higher scale, the King of Scots may be styled King of Scotland. Compare the Irish use of toisech in the Lecan Miscellany: "Callraid Laithin i Cairpre Moir Droma Cliab ar slicht Chairpri mc. Neill Naigiallaig & O Nuadan a taisech duchusa & ar slicht Chail mc. Cairpri mc. Neill ita", "Callraige Laithin in Cairpre Mor Droma Ciab derive from Cairpre son of Niall Nine-Hostager and O Nuadan is their hereditary chief, and he descends from Cal son of Cairpre son of Niall", also "Aengus Mar mc. Briain mc. Echach Mugmed ain a quo Cenel nAengusa, & H. Allmurain a taisich ducusa", "Aengus Mor son of Bri on son of Echach Mugmed ain a quo Cenel nAengusa, & Ui-Allmarain are their hereditary chiefs" (Lecan Miscellany 74 and 64, pub. Irish MSS. Comm., Genealogical Tracts I, ed. T. O'Raitbhheartaigh, 1932, pp. 153 and 151). It needs no knowledge of Gaelic to see that the words translated by the Irish editor as "hereditary chiefs" are taisech duchusa, and the word duchus is often used in Scotland by Gaelic heraldists to describe heritage, especially the principal territorial inheritance of a line of chiefs. For thanages in Scotland see Skene, "Celtic Scotland", iii. chapter vi., but it should be remembered that

he uses the word "tribe" indifferently for a local ruling kindred and for their dependents (just as the word "clan" is popularly used, and not unlike a feudal baronial familia). Skene's views on land tenure among the Gaels should be read in conjunction with those of MacNeill, "Celtic Ireland".

(15) Thus, in Carrick the Kennedy chiefs claim descent from the original Earls of Carrick (who were cadets of the Princes of Galloway); in Galloway the Macdowall chiefs claimed descent from the ancient Princes of Galloway; in the Lennox the Macfarlane chiefs were cadets of the original Earls of Lennox; in Atholl the chiefs of Clan Donnachaidh were bastards of the original royal Earls of Atholl; in Angus the Ogilvy chiefs were cadets of the original Earls of Angus; in Fife the Wemyss chiefs claim descent from the Clan Macduff earls of Fife; in Buchan the baronial house of Auchmacoy claim descent from the original Earls of Buchan; in the far North, the Mackay chiefs are supposed to be scions of the ancient Mormaers of Moray; in Lorn, the MacDougall chiefs descend from the old royal house of the Isles; and in the Isles themselves the Macdonald chiefs represent the old royal house, while the Macleod chiefs claim descent from the Norse kings of the Isles. Even on the March, the heraldic evidence of the "boar's head" group of families suggests that the Gordons, Elphinstones, Nisbets and other local chiefs were connected with the Swintons, who appear to have been scions of the old Earls of Beornicia. Indeed, where the able great houses were always seeking to provide for their vigorous cadets, it must have been hard for "new men" to get a territory without intermarrying with the dominant houses: and a study of Irish genealogical history, where the process can be studied from a much earlier period, confirms this view. Thus Lord Bute holds Bute because he is a Stuart, the Stuarts acquired their claim to Bute through marriage in the thirteenth century to an heiress of the house of Somerled, Somerled consolidated his claim to Bute by marrying a daughter of the Norse king of the Isles, and before this the record is lost. Similarly, Major Drummond Moray of Abercairney (who is a Home in the male line) holds Abercairney because of his descent through two women from the ancient dynastic Earls of Strathearn. See also chapter on the Heirs at Law to Earldoms, note 2..

(16) In Scotland, chiefs and barons share the right to hereditary supporters, which in England is accorded only to peers. Much of the enmity towards

feudalism shown by highland historians arose from the grant of baronies by the Crown to incoming nobles instead of to the old local chiefs, but this occurred at a comparatively late date. Chiefs in the highlands of Scotland proper (in Atholl, Mar, Lennox, &c.) naturally tended to have baronial jurisdictions conferred on them by the Crown, at an earlier date than those conferred on chiefs in Macdonald's forfeited principality. Struan became a Crown barony in 1451, while Duart became a Crown barony in 1496, and Lochiel was erected into a barony in 1528.

(17) There is no reason to suppose that the incoming Anglo-Norman baronage settled on Crown lands in the twelfth century by King David I and his successors, were on the whole of different rank to the native earls and thanes with whose daughters they so readily intermarried. For this point, which is often misunderstood owing to scholars approaching the problem very naturally accustomed to post-feudal English ideas equating "nobility" with titles instead of birth, see the Chapter on the Heir at Law to Arms. The incoming baronage often gave their foreign surnames to what were in effect the continuations of old native houses whose heir general was an heiress: thus the Anglo-Breton Stewarts owed their position in Appin to an heiress of Clan Dougall. It should, however, be remarked that (although their eponymous ancestors were normally cadets of ancient ruling stock) most highland clans, like lowland families, are unable to claim a separate existence from pre-feudal times. Since surnames only began to become established in Scotland during the twelfth century, and had not been fully adopted throughout the highlands by the beginning of the eighteenth century, it is not hard to demonstrate that the eponymous ancestors of the various "Mac" clans lived after the introduction of feudal charters (except for those clans that held under Macdonald, who rarely granted charters). The clans of the highlands of Lennox, Menteith, Atholl, Mar and the rest of true Scotland - clans like Colquhoun, Macfarlane, Macnab, MacLaren, Robertson, Farquharson - do not even claim a separate existence from a time before their chiefs must have held their territories by feudal charters with fixed legal succession to lawful heirs: although in many cases their first chiefs were cadets of the allodial ruling kindred of the district (e.g. Macfarlane from the Mormaers of Lennox, and Macnab from the Celtic hereditary Abbots of Glendochart).

(18) Little countries of their own, the great baronies were sometimes at war with one another - but at least they knew their enemy and why they were fighting, and the casualties were nothing compared with those in the wars brought about by the existence of the vast agglomerate States of to-day (USA, UK, USSR: unions themselves of great states). In each district where the chief of the local family possessed a baronial jurisdiction, administering local customary law through duly appointed officers and democratically controlled by the ordinary people (who were themselves his advisers and the judges of fact in the local Baron Courts), it was these ordinary people who formed the fighting men of the Barony in time of war, for the Scottish chiefs and lairds depended upon the loyalty and love of their own kinsmen and tenants rather than on hired men-at-arms. In order to be sure that their people were well equipped in case of emergency, the barons and chiefs - both highland and lowland - held periodic assemblies called in Scots "wapenschaws" at which everybody showed his weapons for inspection. At these periodic gatherings for the inspection of arms, it was customary to hold Games at which feats of athletic prowess were performed by the local youths. Although a chief or baron could usually count on those of his kin or Name, his own following were by no means exclusively drawn from them. A family called Buchan lived in the Barony of Gask for some centuries, firmly loyal to the Oliphant barons, and this "family had a byword, 'Oliphant is King to us'. They cared little for Stuart or Guelf. A Buchan fell on the side of the Oliphants in 1580, fighting against their neighbours the Ruthvens!" and when the Young Baron of Gask was in hiding after the '45, "David Buchan followed young Oliphant through all his wanderings" (T.L. Kington Oliphant, "The Jacobite Lairds of Gask", p. 187). This particular family's feeling must perhaps be cited as a late example in the lowlands (from the contemporary point of view, the Buchans were to the Oliphants as the Oliphants were to the Stuarts, old-fashioned loyalists, and Gask had difficulty in raising most of his men: ibid., p. 108). But it was still alive in the highlands then, and so modern thought tends to think of it as typically highland and only linked to clan kinship, although the editors of "The Prisoners of the '45" observe that "whether in the case of large or small Clan units, the popular idea that the men mostly bore the Clan surname is completely fallacious" (Scot. Hist. Soc., 3rd series, vol. XIII, i. p. 281). As little states, the Baronies also made alliances among themselves. In 1653 a Comwellian publication entitled

"Mercurius Politicus" reported of "the considerable Barons of Atholl ... consisting of the name of Robertson and Stewart, if any be wronged, they all participate" (the writer's "The Robertsons", p. 18). Sometimes such little alliances even defied the paramount power, like petty kinglets, though this was not the rule. An example of this in 1612 may be cited: "When two King's Guardsmen tried to arrest Neil Stewart of Foss for debt to the King's master tailor, Struan came by night and turned them out of doors in the cold dark highlands without their boots or horses, warning all inns and other houses not to shelter them. When they protested, the Robertsons 'disdanefullie answerit that they caird not for his Majestie', and the unhappy guardsmen limped eighteen miles to Dunkeld" (ibid. p. 12: see also P.C.Reg., 19 Nov. 1612). These Robertsons, acting under the Baron of Struan in defence of an ally, would have obeyed the laws of their own little country: but to them at that time their country was the Barony of Struan rather than the Kingdom of Scotland.

It must not be supposed, however, that Baronies were normally rebellious against the Crown, or even that they were mainly organised for war, internecine or national (though they usually owed military service to the Crown). They were primarily organised for peaceful law and order, and a more normal picture of a Barony at work may be found in Professor Dickinson, op. cit., pp. lix-lxix.

(19) Gloag & Henderson, "Introduction to the Law of Scotland", p. 506. In England, "the eldest coheirress also enjoyed the right of esnecia which gave her the caput of the barony" (I.J. Sanders, op. cit., p. 5, where he cites Glanvill: "Maritus autem primogenitae filiae homagium faciet capitali domino de toto feodo.") For the growth of the English doctrine of abeyance, "which was only developed in the 17th century" (J.H. Round, Quarterly Review, July 1915, pp. 53-54), and which only applies to their peerage baronies by writ, see G.E.C., iv. App. H.

(20) See introductory Chapter on the Legal Problem, above.

(21) The Law of England favoured heirs general from 1066, i.e. before Scotland finally became a single united realm and Scots Law was evolved.

(22) Craig, trained in Lombard and Salic Law rather than in Anglo-Norman Law, assumed the Langobardic variety to be the basic "Feudal Law" and speculated mistakenly about its difference from Scots Law as he knew it. "The problem of effecting a reconciliation between them is easy. As I have already explained, the general term heirs in the Feudal Law means heirs-male, and the addition of the word whomsoever is construed by that law conformably to that interpretation. But by the custom of Scotland a reference to heirs (in general terms) is understood to include females on the failure of male heirs. This is due to the frequent association in our legal language of the word whomsoever with the term heirs, which puts the inclusion of heirs-female beyond doubt. It is, in short, the use of the pronoun whomsoever that has caused the difference between the Feudal Law and the Law of Scotland - a use so common in our investitures that it has come to be implied when not expressed. Such is the explanation of a divergence between our custom and ancient feudal usage which (however) only obscures their essential similarity" (Craig, 2. 14. 3.). Craig is of course right when he speaks from first-hand knowledge, i.e. that Scots Law included females among heirs while Lombard Law excluded them. But his speculations were based on the fundamental error that Feudal Law was originally the same everywhere, whereas there was from the first this essential difference between the Anglo-Norman-Scots variety and the Salic-Langobardic variety. This error led him into historical inaccuracy, for all the charter evidence proves that from the very first (the twelfth century) "heirs" in Scotland was employed, as in England, to include females without any addition of "whomsoever". See, for example, the case of Valognes of Panmure, cited below.

(23) It is probably he who was also pincerna of King Malcolm IV (Diplomata, no. 25) and who witnessed various charters of that king, although the traditional genealogists make this his father. Professor Ritchie, "The Normans in Scotland," p. 371n. suggests several La Hayes as his place of origin, but in fact it cannot be doubted that he came from yet another: La Haye-Hue, now La Heye-Bellefond, a knight's fee that marches with Soules near St. Lo. His uncle was Ranulf de Soules (Reg. de Coupar, i. 336), and his son David de la Hay, Sheriff of Forfar, sealed with a coat of three scutcheons, the same Arms as appear for the Seigneurs de la Haye-Hue on their seals and in the earliest Norman armorials (see "the Origin of the Hays of Erroll", by Anthony Wagner, Richmond Herald, in

"Genealogists Magazine", December 1954 and March 1955). The Norman genealogists, past and present, all agree in making the Seigneurs of La Haye-Hue cadets of the Barons of La Haye du Puits (one of the places suggested by Professor Ritchie), but the evidence is far from conclusive. Robert de la Hay of Lincolnshire, cited in "The Normans in Scotland", was of the Haye du Puits family: see also the late Lewis C. Loyd's important work, "The Origins of some Anglo-Norman Families", ed. by C.T. Clay & D.C. Douglas (Harleian Soc., vol. ciii, pub. 1951).

(24) Cart. Priory of St. Andrews (Bannatyne Club), p. 313. Pitmilly is near St. Andrews, and William de la Hay refers to Pitmilly "quam cepi cum uxore mea". In the next century John Monypenny was confirmed in Pitmilly "which pertained to him by hereditary right by reason of his ancestors", by the Prior of St. Andrews (*ibid.*, p. 404), and was forefather of the Lords Monypenny. These Monypennys appear to have been connected with the Hays of Locherworth (if the Thomas Hay who granted lands in the barony of Leuchars to Thomas Monypenny of Pitmilly is reasonably identified with Thomas Hay of Locherworth: see Robertson's Index 58, 11), and this may possibly throw some light on the original connection between the Erroll and Tweeddale Hays.

(25) Here is an early example of a grant to "heirs", yet there is no mention of "whomsoever" and the grantee's daughter inherited under it. So much for Craig's speculations (see note 22 above). It is evident that the early Scots feudal law was as Craig observed it to be in his own time, in this respect.

(26) Reg. de Panmure, i. p. xix.

(27) Cart. Kelso, no. 86. Lord Hailes mistakenly puts Eda's charter at before 1165. On the other hand, Professor Ritchie (*op. cit.*, pp. 371-372) puts the arrival of the Frasers in Scotland "perhaps a few months after Malcolm's death", although Simon Fraser granted the church of Keith to the monks of Kelso in Malcolm IV's reign (Cart. Kelso, no. 85).

(28) Although the Regiam Majestatem is "in great part copied from the Treatise of Glanville, on the Laws of England" (Lord President Inglis, "The Journal of Jurisprudence, ix p. 163), it is clear that it did not differ from the law of

Scotland during the later part of the Middle Ages, and possibly throughout the early feudal period too. Glanville wrote about the end of the third quarter of the twelfth century, and the Regiam Majestatem appears to have been in use in Scotland by the thirteenth or fourteenth century, and was received as authoritative in Parliament by 1425. Sir John Skene (Lord Curriehill) while Lord Clerk Register included it in his collection of the old laws of Scotland, published in 1609 (a statute having been passed in the previous year for printing Skene's work at the public expense, in view of its importance as an authority).

(29) See the Keith case, cited in the Chapter on Succession to Earldoms, note 41.

(30) See also Chapter on Succession to Earldoms, note 37. Craig (2. 16. 19.) says: "It has been held by the Court of Session that a valid tailzie or destination may be made even in favour of a bastard", and he cites the case of Andrew Hay, 8th Earl of Erroll v. Hay of Cokstoun.

(31) Sometimes these settlements are made to keep separate different branches of a family, or even different families. By a charter of 24 November 1581, Easter Moncreiffe (which was erected into a Barony on 12 August 1592) was settled on the then laird and the heirs male of his body, but it was specially provided in the tailzie that in the event of the failure of such issue male "the said lands of Eastir Moncreif shall revert to the second brother of the house of Moncreif Wester, or after his death without heirs male to the next younger brother of the principal house of Moncreif Wester, bearing and wearing the surname and Arms of the said house ... and that the said lands of Eistir Moncreif shall remain in themselves 'locum vive generosis' (sic) - vulgarly 'ane gentilmanis rowme' - with one of the lawful younger brothers of the said house of Moncreif Wester, and not with the elder brother thereof, except there shall be no nearer heirs male of the surname, in which case the granter consents that the said lands shall fall to and remain with the elder brother of Moncreif Wester" (Hon. Frederick Moncreiff & William Moncreiffe, "The Moncreiffs and the Moncreiffes", ii. p. 543, citing Inventory of Moncreiffe Writs, i. p. 28). It may be noted that Sir John, the laird to whom this charter was expedite, was an

Advocate, and presumably settled the tailzie with great care. Nevertheless, doubt arose about the destination of his baronial supporters (two lions, according to Workman's MS) according to a proper interpretation of the words "principal house of Moncreif Wester", owing to subsequent family transactions whereby different branches were infeffed in Moncreiffe Wester at the time the charter was expedite and when Sir John's issue male failed about a century later - which doubt has been resolved by agreement between the two possible heirs, viz. the writer and Francis Moncreiff, present Bishop of Glasgow.

Where such a devolving clause exists, an heir apparent is not counted as the next substitute under the tailzie (unless expressly provided). "Patrick Count Leslie of Balquhain tailzied his estate 1696 to himself in liferent, and George his second son, and the heirs male of his body, in fee, whom failing, to James his eldest son, and the heirs male of his body; providing that, upon the succession of any of the heirs to an estate possess by his brother Count Lesly in Germany, of which they had a prospect, the Scots estate should devolve on the succeeding substitute in the tailzie; and this settlement was renewed by a deed in the year 1700. Ernest Lesly of Balquhain, descended of George, ... dying without heirs of that branch, left the estate to be taken up by the elder; whereupon a competition arose betwixt Charles Cajetan Count Lesly, heir of the elder branch, and so the next substitute, but who was at that time possessor of the estate in Germany; - - his eldest son, who claimed on the devolving clause; Antonius his second son, claiming that the estate devolved to him, as his brother was to take the German, and it could not be the meaning of the clause intended to separate the estates, and found two families, to make the one an appanage for the apparent heir of the other; and James Lesly of Pitcaple, the next substitute to Count Cajetan, claiming on the devolution, which he pleaded was from him and the heirs of his body. The question was decided, by judgment of the House of Peers, in favour of Count Antonius, who thereupon was served heir ..." (Lesly v. Lesly, 6 M 4637). (But on an objection being later raised in the Court of Session that he was a foreigner, "The Lords found, that by the law of Scotland an alien could not succeed to lands in that Kingdom without naturalisation": see chapter on Succession to the Throne, note 45)".

There were, however, cases where such a devolving clause in a tailzie

expressly provided an appanage for the apparent heir to another fief (rather as the heir to France held the dauphiné of Viennois). Thus Nicol Bontine, 13th of Ardoch, settled the Barony of Ardoch by a strict entail on the heir apparent of the Barony of Gartmore (Robert Graham) with a provision that he and each succeeding eldest son had to bear the name of Bontine only, until his father's death. This settlement was to take effect on the extinction of Nicol's brother and any male issue, and this occurred in 1770. Thereafter, the eldest son of each successive Graham of Gartmore was Bontine of Ardoch.

(32) Argyll Charters, cited by Niall D. Campbell (afterwards 10th Duke of Argyll), in "The Castle Campbell Inventory", Scot. Hist. Review, x. p.300.

CHAPTER 10.

THE HEIRS AT LAW TO PEERAGES.

THE HEIRS AT LAW TO PEERAGES.

The legal succession to peerage dignities in general does not differ in any respect from the succession to earldoms, already dealt with in a separate chapter. The reason, however, for treating other peerage dignities separately from earldoms, was that a true historical perspective of the background to the law governing succession is gained more easily if earldoms and feudal baronies are realised to have been the only honours (apart from thanages and chiefships⁽¹⁾) in existence at the time when the Scots law of heritage was going through its formative period.

It is not easy to say what, at any given period, might be meant by the expression "Peer of Scotland". In France, under the Capetian kings who had originally been Counts of Paris, there were at first only twelve Peers of France: six lay peers and six spiritual peers⁽²⁾. They were peers, i.e. equals, of France himself, i.e. of the king⁽³⁾, who was primus inter pares. It is possible that the Seven Earls of Scotland, or at least those who were earls dei gratia or dei indulgentia, were similarly Peers of Scotland; and that to them the king was primus inter pares⁽⁴⁾. In England, on the other hand, which was conquered by its king in 1066, peers of the realm were never peers or equals of the king, but merely peers of each other⁽⁵⁾. Until the Union, it is hard to say that the Scottish lords had become so unequal to the lairds, that they were no longer in some sense peers of each other, although they had long been separate Estates of the realm. The Treaty of Union, however, equated the Scottish lords with the English peerage in every respect except representation in the Upper House and order of precedence, and since that time they have certainly been "Peers of Scotland" in the English sense.

In England, tenants-in-chief of the Crown were originally peers of each other. But as early as the 12th century⁽⁶⁾ the greater barons⁽⁷⁾ received personal summonses to the Curia Regis, while the ordinary barons and freeholders received a general summons through the local sheriffs. This distinction was recognised in Magna Carta: "et ab habendum commune consilium regni ... summoneri faciemus archiepiscopos, episcopos, abbates, comites et majores barones sigillatim per litteras nostras et praeterea faciemus summoneri in generali per vicecomes et ballivos nostros omnes illos qui

de nobis tenent in capite"⁽⁸⁾. With the development of the Parliamentary system, and its eventual division in England into two houses, only those barons who were summoned by writ or entitled through letters patent to sit by hereditary right in the Upper House ultimately retained the style of Baron and were joined with the Earls (to whom were also added the new ranks of Duke, Marquess and Viscount during the 14th and 15th centuries) to form a body of "Peers of the Realm" that excluded from parity with them the ordinary tenants-in-chief. A generation ago, it might have been said that the essence of such a peerage (extended from England into the United Kingdom) was (1) to have the right to sit, or to be elected to a seat, in the Upper House of Parliament, (2) to have the right to attend Coronations among the Lords Temporal to hear the Coronation Oath taken in terms of the Revolution Settlement, and (3) to have the right to be tried by fellow Peers of the Realm in the Court of the Lord High Steward of England⁽⁹⁾. But Irish peers have lost their right to be elected to any seat in the Upper House; all peers were not summoned among the Lords Temporal to hear the most recent Coronation Oath; and the right to be tried by their peers has been withdrawn from the peerage during the last decade. Moreover, it must be remembered that the peerage dignity of earl (for instance, the Earldom of Arundel held by the present Duke of Norfolk) is older than Parliament itself, and that on occasion women have been created peers although unable to sit in the Lords: so it is a mistake to regard peerage as being fundamentally related to Parliament. It has a primarily ritual character, of which place in Parliament is but an incident.

In Scotland, the history of what are now called peerage dignities followed a rather different course. As in England, there were distinctions among the tenants-in-chief of the Crown from an early date. Until the 15th century⁽¹⁰⁾, there were no ritual dignities of what is now called peerage rank in Scotland except earldoms: and it was as territorial barons like the others that these ritual earls had come to the Sovereign's High Court of Parliament. But the 13th century magnates occupied a very different position from the ordinary lairds, and during the 14th century the greater barons like Hay of Erroll and Lindsay of Crawford would have been astounded at the suggestion that they ranked in Scotland in any way below the rank of a peer in England. During the 13th and 14th centuries,

the magnates had been styled "dominus de Lochawe" or "dominus de Kilmarnock", giving their territorial designation like other lairds, who were also styled "dominus". But from early in the 15th century those greater barons who were heads of their whole Name were sometimes styled by it, as lords, without any territorial designation. The earliest undoubted example known to the writer is "the Lord the Hay" in 1405⁽¹¹⁾, and is obviously colloquial rather than official usage; however, from this time onwards such a style is increasingly applied to magnates as opposed to lairds, though there is great inconsistency and it seems clear that there was as yet no clear-cut distinction of style between lords and lairds. In 1428 a statute was passed, that sought (ineffectually) to provide for the representation of the "small baronis and fre tenandis" by elected representatives in Parliament⁽¹²⁾. This act also provided that "all bischoppis abbotis prioris dukis erlis lordes of parliament and barrents, the quhilkis the king wil, be reservit and summonde to consalis and to parliamentis be his special precep"⁽¹³⁾. Thereafter the magnates or greater barons became distinguished more effectually from the other barons, by their definition as Lords of Parliament. At first, this definition does not seem to have been as clear as it soon became, so that it is difficult to say of the early lords exactly when they became Lords of Parliament⁽¹⁴⁾; and it seems doubtful for example whether the successive Lords of Lorne between 1407 and 1469 realised that one of them had become (in the eyes of 20th century peerage editors) more of a lord than his father, by virtue of the king wanting his attendance in Parliament as usual. All the same, in the course of the 15th century the lords became separated from the lairds, and the test as between greater barons and lesser barons was individual summons to Parliament. The other Scottish peerage dignities (apart from duke and earl) date only from about the period of the Union of the Crowns, which the first^(14a) two marquises (Hamilton and Huntly, both so created in 1599) antedate only by four years: the premier Viscount of Scotland is, and always has been, the Viscount of Fentoun⁽¹⁵⁾, whose dignity was only erected in 1606. The differences between these peerage ranks, however, are all purely ritual⁽¹⁶⁾.

Even so, the lords and other peerage dignitaries in Scotland appear to have continued to be peers or equals of the other tenants-in-chief of the Crown, or at least of those lairds who had baronial jurisdictions and at

least from the point of view of trial by their peers. In 1425, before the institution of Lords of Parliament, the only duke then existing in Scotland, a member of the royal family and ex-Regent of the realm, had been tried for his life by an assize of twenty-one tenants-in-chief: Walter Stewart, Earl of Atholl; Archibald Douglas, Earl of Douglas; Alexander Stewart, Earl of Mar; William Douglas, Earl of Angus; Alasdair Macdonald, Lord of the Isles and Earl of Ross; George Dunbar, Earl of the March; William Sinclair of Rosslyn, Jarl of Orkney; James Douglas of Balvenie (probably then Master of Douglas); Sir William Hay of Erroll, hereditary Constable of Scotland; Sir John Montgomerie of Ardrossan; John Stewart, lord of Lorne; William Somerville of Carnwath; Sir Robert Herries of Terregles; Sir James Douglas of Dalkeith; Sir Robert Cunningham of Kilmaurs; Sir Alexander Livingston of Callendar; Sir Thomas Hay of Yester, hereditary Sheriff of Peebles; Sir Patrick Ogilvy of Auchterhouse, hereditary Sheriff of Angus; Sir John Forrester of Corstorphine, Chamberlain of Scotland; and Sir Walter Ogilvy of Lintrathen, Treasurer of Scotland. The author⁽¹⁷⁾ of the Liber Pluscardensis tells us that "these lords, earls and great barons were peers of the realm and greater lords; and they were sworn as an assize upon them" (i.e. upon the Duke of Albany, his two sons and the venerable Earl of Lennox) "and adjudged them worthy of death and guilty of high treason - for a peer must be tried by his peers"⁽¹⁸⁾. Yet, although some of these "peers" of the Duke of Albany were earls, and others belonged to families that became Lords of Parliament so soon as that order was instituted, several of them (notably the officials) belonged to baronial families that remained ordinary lairds for a while after the period when most of the others begin to appear as Lords of Parliament⁽¹⁹⁾. Nor does the position seem to have changed after the institution of Lords of Parliament.

For instance, the members of the assize that tried and acquitted the Earl of Bothwell on 12 April 1567 were George Sinclair, Earl of Caithness; Gilbert Kennedy, Earl of Cassillis; Lord John Hamilton, Commendator of Arbroath (younger son of the Duke of Chatelherault and afterwards first Marquis of Hamilton); James Ross, Lord Ross; Robert Sempill, Lord Sempill, hereditary Sheriff of Renfrew; Robert Boyd, Lord Boyd; John Maxwell, Lord Herries jure uxoris (also Master of Maxwell until c. 1586); Laurence Oliphant,^{Lord Oliphant;} William Forbes, Master of Forbes; Sir John Gordon of Lochinvar, Justiciar of Galloway (grandfather of the first Viscount of Kenmure); Sir James Cockburn

of Langton, hereditary Usher of the White Rod; James Somerville of Cambusnethan; Sir John Moubray of Barnboughe; and Alexander Ogilvie of Boyne⁽²⁰⁾. Lochinvar, Langton, Cambusnethan, Barnboughe and Boyne all held feudal baronies of the Crown, but none of them were Lords of Parliament. There was no question of attempting to humiliate Bothwell by denying him trial by his peers, since the object of the trial was to secure his acquittal and the assize was packed with the Queen's friends⁽²¹⁾. Again, during 1661 the trial of the Marquis of Argyll took place before the High Court of Parliament, i.e. the representative body of the whole tenants-in-chief of the Crown⁽²²⁾, and the following year the same body tried Sir Archibald Johnston of Warriston who (though styled Lord Warriston as a Lord of Session) was not a Lord of Parliament⁽²³⁾, but simply a fellow tenant-in-chief, with Argyll, of the Crown.

It seems, therefore, that although even before the Union it had become customary to refer to the lords as peers (in ^{the} English mode), they were hardly Peers of the Realm in any sense that excluded the lairds as well: although their importance was specially recognised. It might perhaps be argued that if they were not peculiarly Peers of the Realm, they were at least Peers of Parliament. But even this is scarcely true until at least the last decade of the 16th century, for until then (although it is true that the lords received individual summonses) the lairds retained the right to attend the Sovereign's High Court of Parliament: and indeed thereafter they still sent representatives who took part inter alia in the trial of lords. Since, however, the Lords of Parliament had come to be known as "the Peers of Scotland", in the Treaty of Union they are referred to as such (see Articles XXII and XXIII). It was then expressly provided that "all Peers of Scotland, and their successors to their Honours and Dignities, shall from and after the Union be Peers of Great Britain, and have Rank and Precedency next ~~and~~ immediately after the Peers of the like orders and degrees in England at the time of the Union, ~~and~~ before all Peers of Great Britain of the like orders and degrees, who may be Created after the Union, and shall be tryed as Peers of Great Britain ..." It was in 1707, then, that the Scottish lords finally ceased to be the peers of the lairds.

Although the Lords were simply those greater barons whose attendance in

Parliament after 1428 was required by the King personally (added to the earls, and supplemented by subsequent creations), in a sense it might be said that a lord like Keith had always been a lord of Parliament (and the 1428 Act seems to imply that such already existed) for the King was not then arranging his first attendance, but merely requiring of him that he should continue his ancestral attendance. Indeed, the whole system of dating peerages, both in England and in Scotland, seems to be based on retrospective history. It seems absurd to write, as some peerage writers do, that Lord Nevill was first "ennobled" by being summoned to parliament at Westminster in 1295, or that Lord Keith was first "enobled" by being "created" a lord of Parliament in Scotland during the 15th century. Both were of course already nobles in the 12th century, and neither country gives a realistic picture of the antiquity of their peers; although the English test of dating peerages accords an extra century and a half of "antiquity" for their peerage barons over Scottish peerage lords⁽²⁴⁾. In 1428 then, it was not so much the greater barons who were being promoted, as the "smal baronnis and fre tenandis" who were being demoted (albeit, for their own convenience). This is an important feature of the background to the first Scottish lordships of parliament after the 1428 Act, from the point of view of understanding the law governing succession to these peerages⁽²⁵⁾. The first Lords were simply the holders of the greater territorial baronies (whose succession laws have been discussed in the chapter on "Heirs at Law to Baronies"), who had always attended parliament, and whose presence there the King continued to require after 1428, when an attempt was made to relieve the minor barons of the burden of attendance.

There would therefore be no reason to expect that the law governing succession to lordships of Parliament should have differed, in its 15th century beginnings, from the then law governing succession to baronies in general. This, as has been shown in an earlier chapter, had always been in favour of heirs general, unless otherwise tailzied. It might perhaps be argued that the effect of the 1428 Act was to promote the greater barons, away from the minor barons and towards the earls. But, as has been shown in another earlier chapter, the law

the law governing succession to earldoms was also in favour of heirs general, unless otherwise tailzied. It might next be argued that these new lordships, being primarily parliamentary in character, required a male heir to sit in Parliament, from which females were rigorously excluded. However, the Scottish feudal principle, that already applied to earldoms and baronies, allowed the representation of a wife by her husband. This principle applied equally to lordships of Parliament, and for instance the Master of Maxwell, who married Agnes, suo jure Lady Herries of Terregles, became Lord Herries as a result of the marriage⁽²⁶⁾. Finally, it might be argued that some of these new lordships were not purely territorial in character, but represented the chiefship of great Names, such as Boyd or Hamilton, and were therefore essentially different from territorial earldoms and baronies. But, during the formative period 1429-50 and indeed in the very first written destination that has survived of any lordship of parliament, namely the Hamilton grant of 3 July 1445, the peerage is destined to Lord Hamilton and "heredibus suis", i.e. to heirs general.

From the very first evolution of lordships of parliament, therefore, the heir at law has been the heir female. Of course, by the 15th century the growth of Names had led to the practice of trying to secure tailzies on heirs male, about which so many statutes complained⁽²⁷⁾. Such tailzies, and others varying the succession in some other way, were frequently granted, as in the case of earldoms and baronies (and indeed, as in the case of the throne itself). When marquises and viscountcies were introduced, they were accompanied in each grant by a destination that most usually excluded the legal heirs in favour of heirs male or of a given line of heirs. But from the point of view of this paper, which is concerned with demonstrating the unbroken historico-legal continuity of the heir general as the heir at law, peerages form no exception to the general rule: that the heir at law (when not specifically excluded by a special destination to heirs male or other heirs of tailzie) has always been the heir female, from the very origin of the institution in question, whatever the form of Scottish dignity.

NOTES TO CHAPTER ON HEIRS AT LAW TO PEERAGES.

(1) A number of charters were granted by the Crown of the dignity of chief of a cenel (the old Gaelic word for a land-owning kindred, as in Cenel Eoghain and Cenel Conaill, the more modern word being clan): i.e. ceann cineal or head of the kindred, spelt phonetically "kenkynol". Other charters style the chief "captain" (for which see A. Macbain's notes to his edition of Skene's "Highlanders of Scotland", 1902, pp. 406, 413). Examples are King David II's confirmation to Donald Edgar of the captaincy of Clan MacGowin in 1343 (Reg. Mag. Sig. vol i app. ii no. 882), his charter "anent the Clan of Clanconnan and who should be captain thereof" in 1344 (ibid. no 912), his "carta anent the clan of Kenelman" also in 1344 to Michael McGorth quod sit capitaneus de parentela de Kenelman (ibid. no. 913), and his confirmation c. 1345-1346 to John McKennedy (the ancestor of the present Lord Ailsa) as captain of the "clan of Muntercasduf" (ibid. no. 914), which is of special interest as there is reason to suppose that he had inherited the position from Roland de Carrick (of the old royal house of Galloway) who before 1256 was recognised as a "kenkynol" by the Earl of Carrick (see "Scots Peerage", vol ii pp. 424, 443, 445) and whose office descended to John McKennedy (this writ was confirmed for him by King Robert II in 1372: Reg. Mag. Sig., no. 114).

Chiefs were also styled "captain" in Ireland, and all such were dynasts, many of them kings, in the Gaelic world. Henry VIII in 1515 was told that it was necessary "first of all, to make His Grace understande that ther byn more than 60 countryes, called Regyons, in Ireland, inhabytyd with the Kinges Irishe enymyes, some regions as bygge as a shyre, some more, some lesse; where reygneith more than 60 Chyef Capytaynes, wherof some callyth themselffes Kynges, some Kynges Peyres, in their langage, some Prynceis, some Dukes, some Archedukes, ... and every of the said Capytaynes makeyth warre and peace for hymself, ... and hathe imperiall jurysdyction within his rome ..." (State Papers, Henry VIII, vol. ii pt. 3, p. 1 et seq.).

(2) The Duke of Burgundy, the Duke of Normandy, the Duke of Aquitaine, the Count of Flanders, the Count of Toulouse and the Count of Champagne; also

the Archbishop-Duke of Rheims, the Bishop-Duke of Langres, the Bishop-Duke of Laon, the Bishop-Count of Beauvais, the Bishop-Count of Noyon and the Bishop-Count of Chalons. This body was in existence by the 12th century, and traditionally dated from before the accession of the Capetian dynasty.

(3) France, that is, in the sense of "our brother France" or "our cousin Artois".

(4) See chapter on Heirs at Law to Earldoms, note . Between 1154 and 1177, one of the Seven Earls styled himself "Duncan, by the Grace of God Earl of Fife" (Cart. Mon. de Northberwic, Bannatyne Club, 4); and in 1200 Gilbert styled himself Dei Indulgentia Earl of Strathearn (Charters of Inchaffray, Scot. Hist. Soc., charter no. ix), while the King himself on occasion was not above acting as witness to a charter granted by such an earl (see Reg. of Dunfermline, no. 154). These were "Peers of Scotland" indeed.

(5) The word peer simply means equal, and to "disparage" somebody is to degrade them in some way, as for instance when a ward was disparaged by marrying him or her to somebody of lower rank (this was illegal). "Trial by peers" simply means "trial by equals", so that a tenant-in-chief should be tried in the King's court by his fellow tenants-in-chief, and a vavassor in his lord's court by his fellow vassals.

(6) In 1164, King Henry II obliged Thomas Becket, Archbishop of Canterbury, to await a summons through the sheriff with the ordinary freeholders, and refused him the usual courtesy already accorded to the greater barons of a personal summons to the Curia Regis.

(7) "Baron" originally simply meant "man", a "king's baron" being a man who held directly of a king: but see chapter on "Heirs at Law to Baronies".

(8) These English majores barones may perhaps be compared to the Scottish magnates of the 13th century.

(9) See Vernon Harcourt, "His Grace the Steward and Trial of Peers".

(10) Apart from the creation of two royal dukedoms in 1398. The Dukedom of Rothesay, then erected for the king's eldest son, was significantly named after the caput of the island fief inherited by the Stewarts (before they became Kings of Scots) through the heiress of a branch of the royal house of Argyll and the Isles: by the end of the following century, the style of Lord of the Isles itself had been secured for the subsequent holders of the Dukedom of Rothesay. At the same time as the erection of the Dukedom of Rothesay, the king's brother was created Duke of Albany. This was perhaps an even more remarkably significant title, the more so since the first Duke was Regent of Scotland at the time: for it means nothing less than Duke of the Scots or Duke of old Scotland. It is not clear whether it is to be taken as an Anglicisation of the Gaelic "Alban-nach" (Scots) or whether it is a word, formed on the same lines as "Muscovy" from Moscow, taken from the Gaelic genitive "Albann" (meaning "of Scotland"). In either case, it was a very all-embracing style for a subject of the Scottish Crown.

(11) "Early Records of the Burgh of Aberdeen", ed. by Professor W. Croft Dickinson, Scot. Hist. Soc. 3rd series xlix, p. 219 (for "terra domini de Haya" in 1406, see p. 224). The style seems deliberate, for others in the same entry are called "the lord of Marr, Sir W. of Keth Malcolm Marchel, Sir Jon of Nevy Alexander Fraser of Porcok". Where a lord or laird still held the lands from which he took his name, it is not certain at so early a date that he is being styled "lord" rather than "laird", for the "dominus de Erskine" could equally be Lord Erskine or the Laird of Erskine (though "dominus ... de Erskine de eodem" would be the more usual form for a laird). But there were no lands of Hay in Scotland: "The Hay" from which the Lord ~~the~~ Hay took his name ("de La Haye" in Norman-French and "de Haia" in charter-Latin) has been identified as La Haye Hue, now La Haye-Bellefond, near St. Lo in the Cotentin peninsula of Normandy (see Anthony Wagner, Richmond Herald, "The Origin of the Hays of Erroll", Genealogists Magazine Dec. 1954 and March 1955).

But the use by the head of a great Scots family of the surname rather than a territorial designation, did not so much mark the beginning of any transition from the principle of territorial representation, as serve to emphasise the Scottish conception of the kindred as represented by its chief. During the 15th and 16th centuries, when Lordships were becoming more clearly separated from Lairdships by the test of Parliamentary ranking, the political cohesion of the different Scottish Names was perhaps at its highest stage of development. Examples of the functioning of that cohesion, in the lowlands as well as the highlands (where the instances are better known because the system lasted longer there), may be given from the Name of Hay itself. For instance, in 1450 a certain Gilbert the Hay gave a bond that on he was in peaceable possession of the parsonage of Turriff, "of love and kyndnes that I haf to do honour and proffit to the stock that I am a branch of", he would oblige himself to pay towards the education of "my Lord the Constable of Scotlandis bretheren" a fixed sum to them or their deutes or to "wham that my said Cheiff and Lord charges me be his writte to pay it till" (Spalding Club, "Antiquities of the Shires of Aberdeen and Banff", vol. ii pp. 343-344). Again, on 28 Oct. 1591, the Privy Council received a "Complaint by Frances, Earl of Errole, as chief, and James, Lord Hay of Yester, Williame Hay of Gourdie, and others, as kin and friends, of the late James Hay, son of the said Williame: the said James having been murdered ..." (Reg. P.C., vol. iv p. 680), and it should be noted that the families of Erroll and Yester had not only branched apart as early as the 12th century (although still acting collectively four hundred years later) but also were settled in completely different parts of the country: Erroll's main power being then in Buchan, Yester's in Tweed-dale, while Gourdie is in Perthshire. In 1616 a Hay slew Gordon of Gight's brother, and was beheaded by the Gordons: both Names sprang to arms, and in Jan. 1617 the Privy Council in Edinburgh ordered "George, Marquis of Huntly, as chief of the said Laird of Gight, and Francis, Earl of Erroll, as chief of the late Francis Hay, ... and all the noblemen, barons, and gentlemen of their Name, and all their servants, followers, and dependents, who are already come to this burgh ... that they immediately proceed to their lodgings within this burgh and continue therein".

Chiefship of a Name was thus a position of responsibility beyond the ordinary feudal duty, and the succession to chiefship of considerable importance.

Where a Lord of Parliament was chief of his whole Name, therefore, he was styled by it alone, and not by a territorial designation: e.g. Lord Hamilton, Lord Forbes, Lord Boyd. Where the chiefs were earls, the style was borne by their eldest sons after the use of courtesy titles infiltrated from England (the real title of an earl's son being the Master). Thus "in 1661 the Earl of Roxburghe challenged the right of Lord Ker of Newbattle to bear the family name as a title" (Newbattle was Lothian's heir, and was calling himself plain "Lord Ker") "which he" (Roxburghe) "alleged was never borne except by the eldest son of the chief of the name. This the Earl of Lothian denied, and produced his patent, in which the second title stands 'Lord Kerr of Newbattle'. Parliament, however, decreed that the title 'Lord Ker' belonged only to the eldest son of the Earl of Roxburghe, and was not to be borne by the eldest son of the Earl of Lothian" (Scots Peerage, vol. v, p. 476: see also Act. Parl. Scot. vii c. 197, 190, App. 62-63). In this particular case, from the chiefship succession point of view, it may be worth observing that in 1661 Sir Walter Kerr of Fawdonside (see "Scots Peerage", vol. vii p. 330, vol v. p. 457) was heir male of the Kerrs, but Parliament (and evidently Lothian himself, from the character of his pleading) agreed that Roxburghe was the chief of the Name of Kerr. The following tree illustrates the succession:

Andrew Kerr, baron of Cessford, Chief of the Kerrs d. c. 1481

Walter Kerr of Cessford, Chief of the Kerrs, Warden of the Middle Marches, d. 1501

Sir Robert Kerr, yr. of Cessford, Warden of the Middle Marches, killed 1500.

Sir Andrew Kerr of Cessford, Chief of the Kerrs, Warden of the Middle Marches, k. 1526

Robert Ker, 1st Earl of Roxburghe, Chief of the Kerrs, d. 1650

Lady Jean Ker md. John Drummond,
2nd Earl of Perth

Harry, Lord Ker, d. 1643

James Drummond
3rd Earl of Perth
(and two Drummond
brothers).

William Ker, married Jean Ker.

2nd Earl of
Roxburghe, Chief
of the Kerrs, in
1661.

Dukes of Perth.

Dukes of Roxburghe, no longer chiefs
of the Kerrs as now called Innes-Ker.

Thomas Kerr of Ferniehurst

George Kerr
of Faudonside

Sir Walter Kerr
of Faudonside,
heir male of the
Kerrs in 1661.

William Kerr, Earl of Lothian
in 1661.

Robert Kerr (afterwards 1st
Marquis of Lothian), told by
Parliament not to style him-
self "Lord Kerr" 1661, as
that was Roxburghe's right
(as chief).

Marquises of Lothian, now
Chiefs of the Kerrs.

(12) See "A Source Book of Scottish History", ed. by Professor W. Croft Dickinson, Dr. Gordon Donaldson & Isabel A. Milne, vol ii p. 35. The statute could perhaps imply that "lordes of parliament and banrents", like "dukis erlis", already existed. In this connection, see Archibald A.M. Duncan, "Councils-General 1404-1423", in Scot. Hist. Review, xxxv 2, no. 120 (Oct. 1956), pp. 132 et seq. Since, for example, John Stewart of Darnley was a more important personage than Robert Normanville, and since James Douglas does not appear to have been a knight, the division between "Cokburne" and "Militibus, Jacabo de Douglas" seems at first sight unwarranted. But if we have here an early distinction between barones in the English parliamentary sense of "lords" and "milites" in a sense vaguely approximating to the English "knights of the shire", as it were an early division of the Scottish baronage into lords who were summoned and lairds who came as they pleased, the explanation of such unlikely lords as William de Dalzell and John de Cockburn (in juxtaposition to lairds like James "the Gross" de Douglas and Sir John Stewart of Darnley) may lie in the word "banrents" in the 1428 Act. To be a banneret was a personal distinction, conferring powers of command (together with the right to a square banner like a great lord's) and only to be won by a knight on the field of battle. It is just possible that Albany may have summoned by special precept a mixed group of hereditary magnates and personal bannerets (such as he wished), leaving the ordinary baronage of lairds to come or not as they pleased if the news of the Council-General reached them. In the later peerage creations, the rank of baron-banrent is conferred hereditarily on the new lord of parliament.

(13) A.P.S., vol. ii, 15 c. 2.

(14) During the formative period, which may be taken as 1429-1450 or even later, it seems clear the new Lords of Parliament were not fully conscious of the importance this style would have for future generations. A group of possible Lords of Parliament appear as early as the Parliament at Perth in March 1429/30: when the case of Philippe de Moubray was remitted by the Chancellor to the following "dominis de parleamento", viz. the Bishops of Dunkeld, Aberdeen, Galloway, Caithness, Dunblane, Lismore and

Sodor, the Earls of Atholl, Douglas, Angus, Mar, Crawford and Caithness, "necnon constabulario marscallo regni nostri, dominis de Abircorne de Dalketh de Erskyne de lochaw de gordon de Drylton de Somerville de maxwel et de Mongumbry" and many other prelates, barons, gentlemen ("nobilibus") and burgesses (A.P.S. i. p. 28, 1814 ed.). This would give us Lords Hay, Keith, Balvenie, Dalkeith, Erskine, Campbell, Gordon, Dirleton, Somerville, Maxwell and Montgomery: all of whom appear as Lords of Parliament before the end of the formative period. The point about this list (in 1429/30) is that whilst all members of parliament were called "domini", it should be stressed that (1) these are the only domini to be personally named in the long list of other members to whom the case was also being remitted, (2) these named domini were all magnates who undoubtedly held peerages (as families) from the first clear appearance of such dignities, and (3) the clear emergence of this group of lords of parliament, named in distinction to others, follows here immediately on the 1428 Act. By 1437 an eldest son was styled "Master of Gordon" (Gray Charter-chest, see Riddell, pp. 274 and 349), and in 1439/40 and 1445/4 the Marischal's heir is styled "Master of Keith" (see Thomas Innes of Learney, "The First Earl Marischal", Scot. Hist. Review, July 1927, p. 296).

But great confusion is caused modern peerage lawyers by inconsistency of styles during the formative years, and it is solemnly argued that "Thomas Dominus Somerville" who was conservator of a truce with England in 1430 (Rymer's Foedera x. 487), could not have been a Lord of Parliament as his son was styled "Willelmus, dominus de Summerville, armiger" on 28 June 1445 and therefore must only just have been "elevated" to peerage rank by 3 July 1445 when he appears as a Lord of Parliament in the Hamilton charter. It seems to the writer that there were Lords of Parliament from at least 1429 onwards (when the 1428 Act was first implemented), and that the inconsistencies in nomenclature are simply caused by the fact that their contemporaries had not grasped how important this fact (which was no more than a parliamentary recognition of the status quo, the ancestral importance of the magnates) would be to later generations. There may just possibly have been some uncertainty about whether Lordship of Parliament would be hereditary, or whether it would

vary with the fluctuating importance of the individual magnates and with the king's will ("the quhilkis the king wil ... be his special precep"). Lord Hamilton in 1445, on this view, took the precaution in a novodamus of his lordships and baronies, of having them erected into the Lordship of Hamilton with a clause ensuring that he was an hereditary Lord of Parliament (A.P.S., ii. 59): He was already styled Lord Hamilton in 1444 (see note 19 below). The Act was witnessed by various prelates and earls, but also by "Duncan, Patricio, Willeilmo, Harberto et Alexandro de Cambell Graham Sommerveil Maxwell et Montgomerie et parliamenti nostri Domini": and from this time onwards peerage writers accept them all as proper lords. There seems to be no other reason why no Scottish lordships of Parliament are accorded an earlier date than 1445 (except in some half-hearted cases with reservations: see for instance Gordon in G.E.C.): nor why such lordships of Parliament as Lindsay of the Byres, Maxwell, Campbell, Forbes, Gray, Hamilton, Glamis, Somerville, Graham and (Abernethy of) Saltoun should all have been erected by a fifteen year old king in 1445, as peerage writers suggest, although their ancestors were as important as themselves, and although nothing so significant is reported as having occurred in that year.

A typical case is that of Maxwell. In 1427/8 the Act was passed. In 1429/30 Lord Maxwell appears among the lords of Parliament. In 1440/1, the idea that he was somehow a different person being unrealised by his contemporaries, he witnessed a charter as "Herbert de Maxwel, dominus de Carlaverock, miles". In 1445 he is in the list of lords in Parliament who witnessed the Hamilton grant. The present writer's conclusion is that he became a Lord of Parliament so soon as that order was instituted by the 1428 Act. The standard peerage writer's view may be summarised by that in the "Scots Peerage", vol vi at p. 475: "'Dominus de Maxvel' was present in Parliament in March 1429-30, but probably not as one of the then new order of Lords of Parliament, for he witnessed, 8 January 1440-41, a charter of John Lockhart as 'Herbert de Maxwel, dominus de Carlaverock, miles'. James II, however, calls Maxwell a Lord of Parliament in an instrument granting that dignity to Sir James Hamilton, 3 July 1445". If Lord Maxwell was not a Lord of Parliament

from its institution, it may perhaps be asked, who was? It is not to be supposed that the king, who had insisted on summoning the greater barons personally because their attendance was important to him (it was a burden to them), only summoned two or three (? Gordon, ? Lorne, ? Erskine, ? Keith) during the whole period 1429-1445.

(14a) Apart from the royal Marquisite of Ormond, conferred at his baptism in c. 1469-1476 on King James III's second son, the infant James, who was afterwards erected Duke of Ross while still a youth (see "Scots Peerage", vol. vii pp. 245-246).

(15) The Viscounty of Fentoun is held by the Erskine family, Earls of Mar & Kellie.

(16) Thus Dukes, Marquesses and Earls all have the formal style of "Prince", and are addressed by the Sovereign as "Cousin". Viscounts are not Princes, but are also addressed as "Cousin" by the Sovereign. Lords (in England called Barons) are neither Princes nor Cousins of the Sovereign. Dukes, Marquesses and Earls have strawberry leaves on their coronets, Viscounts and Lords do not (indeed, Lords-Baron were first allowed coronets only as late as the reign of Charles II, and before that had merely caps-of-maintenance like Scottish feudal barons).

(17) Probably Master Maurice Buchanan (see Felix J.H. Skene, preface to Liber Pluscardensis, Hist. of Scot. Series vii; citing Dr. W.F. Skene), son of Sir Walter Buchanan of that Ilk by his wife Isabel, daughter of Murdac, Duke of Albany. Buchanan was thus reporting the trial of his own grandfather, held when he was old enough to know what was going on (for he was a "maitre" by 1427), and as a Scot (and a highlander at that) would not be likely to forget who sat on the assize that convicted his grandfather, his great-grandfather, and his two uncles.

(18) Liber Pluscardensis book xl cap. iii (Hist. of Scot. Series vii, pp. 372-373; trans. in vol. x, p. 281). He gives the names as "dominus

Walterus Steuwart comes Atholiae, patruus regis; comes de Douglas Archibaldus tercius; comes de Mar Alexander Steuwart; Willelmus de Douglas comes Angus; Alexander comes de Ross et dominus Insularum; Georgius de Dunbar comes Marchiarum; Willelmus Synclare comes Orgadiae; Jacobus Douglas de Balvany et Abbercornne, comes postea de Avindale; Gilbertus de Haya, constabularius Scociae; dominus Johannes de Montegomorre; dominus de Lorne; dominus de Somerville; dominus de Torriculis; dominus de Dalkeith; dominus de Kilmawris; dominus de Kalendare; Thomas de Haya de Zestir; Patricius de Ogylby, vicecomes de Angus; Johannes Forstare de Curstorfyn; Walterus de Ogylby de Luncrethin. Hii vero domini comites et magni barones pares erant regni, majores eciam domini ... quia par per parem judicari debet! In fact, the Constable was Sir William (died 1437) and not his son Gilbert, who was a hostage in England for King James I's ransom and who predeceased his father in 1436.

(19) It should perhaps be observed, however, that the writer of the Liber Plusc., who was contemporary with the period during which lordships of parliament came into being, obviously regarded all those who sat in trial on Albany as "peers of the realm", and shows no awareness of the parliamentary distinction that seemed so important to later generations. Apart from the officials (the Hereditary Sheriffs of Angus and Peebles, also the Chamberlain and Treasurer of Scotland), all the other barons belong to families the date of whose "elevation" to lordship of Parliament has been disputed on account of its antiquity. A close examination of their family histories shows that in each case, they were probably lords of parliament so soon as that order was instituted, but that modern peerage lawyers have bedevilled the issue by looking for consistency in the style "Lord X".

Thus we are told that Kilmaurs' son only became a lord in 1463, because a royal letter merely styles him "Alexander Cunynghame, Lord of Kilmaurs" in Feb. 1462/3, and because he made a complaint in Parliament as "Lord Kilmaurs" in Jan. 1463/4. Again, we are told by the "Scots Peerage", vol vi p. 350, that "it is said this Laird of Dalkeith" (the assessor at Albany's trial) "was made a Lord of Parliament as Lord Dalkeith,

but there is no evidence of this fact" (the 1429 list is ignored) "and in royal charters before and after his death he is described as James, Lord of Dalkeith, knight." That no value whatsoever can be placed on contemporary designation as the test, may be demonstrated by the seals of William, 4th Lord Borthwick (called 3rd Lord by peerage writers, because the 1st Lord's daughter happens to be described as "filia quonadam Wilelmi de Borthwick de eodem militis" in a charter). That the 4th (or 3rd) Lord Borthwick inherited a Lordship of Parliament by 1503 is not disputed, and his seal in 1516 complies with the correct modern fashion "S. WILLELMI DNI BORTHYK"; but his seal in 1522 is inscribed in a more old-fashioned way "S. WILELMI DE BORTHWYK" (W.R. Macdonald, "Scottish Armorial Seals", 1904, nos. 209, 210), and had the 1st Lord done this, he would have been excluded retrospectively from any lordship of parliament by modern peerage writers. The second of these two seals is illustrated in Henry Laing's "Supplemental Descriptive Catalogue of Ancient Scottish Seals" (1866, at p. 22), from which it is clear that the legend has "DE" and not "DNI": the seal itself is appended to a precept of sasine by Lord Borthwick in favour of Lord Home, among the Home Charters. On the other hand, Lord Hamilton is generally supposed to have first become a Lord of Parliament by the comprehensive novodamus of 1445 (and this may possibly be the case, though it may equally have been a confirmation of the existing position), but his seal on 28 Aug. 1444 already complied with the modern peerage lawyers' qualifications about a peer's proper style, and is inscribed "S. IACOBI DNI HAMILTON" (Macdonald, op. cit., no. 1201).

The Constable and Marischal sat in parliament uninterruptedly before and after the 1428 Act. A moment's reflection will shew that they were either always lords of parliament or never so: for their presence in parliament was evidently essential to its proper constitution and deputies had to be appointed to substitute for them when they failed to appear (A.P.S., ii, 288a., ibid. 445b., Privy Council Reg. 2nd series iii, 128). As the unicameral Scottish Parliament house was an extension of the King's Great Hall, the duties of guarding it and maintaining order within the verge of the parliament fell to the Constable and the Marischal (see "Notes on the Powers and Privileges of the Lord High Constable of Scotland",

appended to James D. Marwick's "History of the High Constables of Edinburgh", 1865, especially pp. 37-39). But a further reason why the presence of the Constable and Marischal in parliament was essential, is to be found in an unpublished lecture by Professor W. Croft Dickinson on "the Scottish Parliament and the Trial of Treason": wherein he demonstrates the close parallel between Trial by Combat, at which the presence of the Constable and Marischal was equally essential, and a trial of treason in the Scottish Parliament, and observes how large a proportion of parliamentary business was occupied by such trials as late as the fifteenth and sixteenth centuries. From at least 1524, the Constable and the Marischal always appear in the rubric, in the official rolment of parliament itself; they sat in parliament separately from everybody else, on either side of the Honours of Scotland, in their quality of Lord Constable and Lord Marischal - not among their fellow earls. Since their presence in parliament was essential, there can never have been any intention of withholding personal writs from them under the 1428 Act: empty titles simply as titles were meaningless at this date, and so they must have become Lord Hay and Lord Keith by virtue of their essential presence in parliament from the very first moment that lordships of parliament came into being.

The Constable was being called "Lord the Hay" intermittently some years before the 1428 Act (see note 11 above), in 1429/30 the case remitted to a number of "dominis de parleamento" included "constabulario marscallo regni nostri" before the other named lords in the list that precedes the general body of unnamed members to consider the remit (see note 14 above), in 1436 his Baron Bailie of Slains refers to him in the same document both as "a nobil lorde and mychti Schyr Wilyam the Hay Constabil of Scotlande" and as "the saide Lorde Constabil" ("Coll. for a Hist. of Aberdeen & Banff", Spalding Club, 1843, pp. 393-4), but the peerage lawyers solemnly confer a 1449 peerage on him because he is found styled "Lord the Hay" on 17 March 1449/50 (see G.E.C., v p. 95, which slightly improves on the date offered by "Scots Peerage", ix p. 86). The "Scots Peerage" writes of the Marischal that "between 1446 and July 1451 he was made a Lord of Parliament as LORD KEITH. The date of creation can only be approximately

ascertained. In an official report of evidence regarding a dispute between the family of Skene of Skene and that of the Marischal, held before a Court in the Cathedral of Aberdeen on 22 September 1446, he is styled Sir William Keith, Marischal. In a series of charters granted by King James II on 6 July 1451, he is styled Lord Keith, and appears as the latest on the list of Peers after William, Lord Hay, the Constable, who was created before 10 April 1450. His creation therefore was probably of recent date" (Scots Peerage, vi pp. 39-40). G.E.C., vol. vii, p. 98, is more in accord with what appears to have been the real position: "SIR WILLIAM KEITH, Great Marischal of Scotland, was cr., possibly before 1430, and certainly before 20 Feb. 1439/40, LORD KEITH". It would of course have been pointless at some intermediary date during the period 1428-50 to have conferred an empty "title" of Lord on nobles like the Constable and the Marischal who had been "nobil lordes and mychti" by inheritance all their lives, and it could hardly have been the intention of the 1428 Act that these Great Officers should be excluded from their usual places in Parliament until they received papers creating them "lords of parliament". Nor is it conceivable that the Crown could have "elevated" the Marischal before his senior colleague, the Constable, without a memorable dispute that would have reached us. It seems obvious that the 1428 Act was not intended to relieve the Hay and Keith lords of that day of their places in parliament, and that they were in fact (as the 1429/30 list shews) already the premier "lords of parliament", after the earls, under the new dispensation. As usual, the issue has apparently been obscured by peerage writers' pedantic insistence on the consistent use of modern peerage styles by the great barons of the first half of the 15th century, who had no idea how important such styles would become.

G.E.C.'s editors are not always able to be well acquainted with Scottish forms (see, for instance, vol ix p. 174n., where they dispute the names of certain witnesses to an agreement on the assumption that Scottish deeds are drawn in English form: "The agreement was in form of an indenture names of witnesses to its execution would have been entered on the dorse of both parts"), and in vol. viii at pp. 464-465n. they retract their previous (and it appears, sound) opinion about the lordship of Keith cited

above: "Since the publication of volume vii the Editors, in examining the history of the Barony (sic) of Keith, have come to the conclusion that the date of the creation of this Barony as given sub KEITH needs modification ... For the statement that the barony was created 'probably in 1430' no proof is offered" (the Editors are clearly unaware of the 1427/8 Act, followed by the 1429/30 list with a group within it of certain named lords of parliament, including the Marischal). "The assertion that it was created 'certainly prior to 1439' is based on the fact that Robert de Keith, who is shown to have succeeded his father William in 1444, was on 20 Feb. 1439/40 designated Master of Keith - Dominus Robertus de Keth, magister eiusdem. A peerage in the father is inferred from the style applied to the son, but it is inference and no more. It is true that for several centuries the term 'Master' has been confined to the son and heir of a Scottish hereditary peer, but the subject has not yet been investigated with sufficient thoroughness to place it altogether beyond doubt that the term had the same signification in the middle of the fifteenth century as it has now." (The note continues by citing the unsubstantiated obiter dicta, not even of the judges but merely of the counsel opposing the Gordon Peerage claim, that early Masters were simply Fiars, and that early Scottish baronies, by which are meant lordships, were not titles of honour). "The Complete Peerage has possibly erred in allowing too early a date for some of the Scottish baronies (sic) the creation of which is not established by documentary evidence. In the case of the Barony (sic) of Keith there is authority for saying that it was an hereditary barony in 1451; it may have been so a few years earlier, but the date cannot be fixed with certainty. This article is by Miss Ethel Stokes".

Quite apart from the rather unnecessary suppositions that the Crown did not think the Marischal important enough to summon to parliament by precept (when in fact his presence was essential), that the 1429/30 list with a specially named group of lords of parliament is nothing to do with the specially summoned group of lords of parliament in terms of the 1427/8 Act, and that (despite the years between 1428 and 1437 during which the mature King James I could have implemented his own Act) the Scottish

peerage was mysteriously invented by a boy of fifteen in 1445, the foregoing passage introduces yet a new supposition into Scottish nobiliary law: that there were Masters "in the middle (sic) of the fifteenth century" who were not heirs to peerages. After much search, the writer has not been able to trace any of these mysterious Masters: i.e. a Master whose family do not appear as Lords of Parliament ab initio (within the formative period 1429-50) and yet who appears on record himself before his family appear as peers, or whose family indeed never became peers. Apart from one exception (to be noted and explained below), the only Masters the writer has been able to discover who are not recognised as peerage heirs by all peerage writers are (1) the Master of Keith, who is G.E.C.'s case in point above and who appears as Master in Feb. 1439/40 (Keith Murray charters) and again in Jan. 1443/4 (Arbuthmott charter, 27), and whose father is in the 1429/30 list among the named lords of parliament; and (2) the Master of Gordon, who appears as "a noble and potent Lord, Alexander Seton, Master of Gordon" in 1437 (Gray charters), and whose father Alexander Seton is in the specially named group as Dominus de Gordon in the 1429/30 list of lords of parliament. Moreover, after the creation of the Earldom of Huntly in 1445, the heir to the earldom is usually styled "Lord Gordon and Master of Huntly", and therefore such a lordship (since empty titles can hardly be expected to have preceded real ones) must presumably have existed before the erection of the earldom. Even if it be supposed that the Masters of Gordon and Keith in 1437 and 1439 were (apart from the solitary case to be noted below) the only exceptions to the general rule that Masters were heirs to peerages, and this although the styles of Lord Gordon and Lord Keith are found so soon as peerages are recognised by peerage writers, and although an Act providing for lords of parliament was passed in 1427/8 and Lord Gordon and the Marischal appear among the specially named lords of parliament in 1429/30; it still remains necessary to explain why a fifteen year old boy should have invented the whole peerage and reserved the title of Master for the heirs, in the otherwise uneventful year 1445; when a statute had provided for Lords of Parliament as early as 1428.

The solitary exception (referred to above) is that of the Master of

Duart. Until the sixteenth century, the old Gaelic-Norse kingdom of the Isles struggled to maintain its identity as against the ever-encroaching suzerainty of the kingdom of Scots. The Norse kings of Man had claimed sovereignty over all the Western Isles from the middle of the tenth until the middle of the thirteenth century (see Basil & Eleanor Megaw, "The Norse Heritage of Man", p. 161), but from 1156 onwards the Hebrides south of Ardnamurchan point had become a separate local kingdom in the house of Somerled of Argyll (who had married the King of Man's daughter) and after the middle of the thirteenth century the house of Somerled held sway over all the Hebrides under Scottish over-kingship. To the Gaelic world of Ireland and the West, the house of Somerled were kings: in their dealings with the Scottish central government they were usually wise enough to style themselves Lords of the Isles. Professor Croft Dickinson (introduction to the "Court Book of the Barony of Carnwath", pp. xvi-xvii) points out that Somerled's son styled himself "Rex Insularum dominus de Ergile et Kyntyre" (Reg. Mag. Sig. ii 370); and as late as 1499 the Annals of Ulster chronicle the execution of what the Scots government would have called Sir John Macdonald with his son John and his grandsons Ranald and Donald: "A sad deed was done in this year by the king of Scotland, James Stewart. Eoin Mac Domhnaill, king of the Foreigners' Isles, and Eoin Cathanach his son, and Raghmall the Red and Domhnall the Freckled, sons of Eoin Cathanach, were executed on one gallows the month before Lammas" (Professor Eoin MacNeill, "Phases of Irish History", p. 220). The ruler of the Isles had his own baronage, and just as he was sometimes obliged to defer to the King of Scots (even in 1476 to the extent of accepting a lordship of parliament as Lord of the Isles), so were his great barons sometimes obliged to accept Crown baronies for greater security (as when Maclean accepted a Crown charter of the barony of Duart in 1496). But, whenever it was possible to assert some sort of independence, the Isles did so: and it seems clear that the greater barons within the sub-kingdom of the Isles regarded themselves as Lords after the same fashion as the greater barons within the kingdom of Scotland were Lords. This attitude is very marked in the proceedings of 1545, when the Council of the Isles supported Domhnall Dubh in his last attempt to reassert their ancient independence,

and sent commissioners to negotiate with the King of England and his Council: "Quhairfor, your Lordships sall consider we have beyne auld enemies to the realme of Scotland". They complained inter alia that "In likewise, the Lord Maclain's fader was cruellie murdressit" (this was a reference to the slaying of Lachlan Maclean of Duart in 1523). Domnall Dubh therefore gave his commission: "Be it kend till all men be ye pnt wryt We Donald Lord of ye Ilis and erll of Roiss" (the order shews that an earldom of Scotland was regarded as inferior to the principality denoted by the style "Lord of the Isles") "with advise and consent of our barronis and counsaill of y Ilis that is to say Hector Maclane Lord of Doward Jhonn Macalister Capitane of Clanranald Lord Macleod of Lewiss Alex Macleod of Dunbeggane Murdoch Maclane of Lochbuoy Angus Maconill brudirgerman to James Maconill Allan Maclane of Torloske bruder to ye Lord Maclane Archibald Maconill Capitane of Clan Hustein Alex Mackane of Ardnamurchan Jhonn Maclaine of Coll Gilliganan Mac Neill of barray Mackiynan of straquhordill John Macquore of Ulwy Jhonn Maclane of Ardgorrannoldson of Glengarrie Angus ronaldson of Cnoeddart Donald Maclean of Kengarloch ... giffand our full power express bidding and command to honorable personis and our kynnsmen yat is to say Rore Makalester elect to ye bishoppe of the Isles in Scotland and deyn of Moruairin and mr Patric Maclain brudir german to ye said Lord McLain bailzie of ycomkill and iustice clerk of ye South Ilis ... and for better secuorite of yis present we ye said Donald has affixit our proper seill wit our hand at ye pen becaus we canot writ and has causit ye baronis aboun writtin becaus thai cod not writ to cause ane notar to subscribe for yame wt yair hand at ye pen ..."

(28 July 1545, printed by Macneil in "The Clan Macneil" at pp. 53-55). In sixteenth century armorials, too, are to be found such island entries as "The Lorde of Lewes . maccloyd" when all the other lords entered are Scottish peers of parliament (see, for example, the Sunderland Hall MS., R.R. Stodart's "Scottish Arms", vol. i pp. v, 23). In this context, then, it is not surprising to find Maclean of Duart and his heir appearing after 1449 (perhaps c. 1470) as witnesses to a charter "granted by the Lord of the Isles with the consent of his whole council, as if he were a sovereign prince", and in which they are styled Lachlano M'Gilleoin Domino de Doward and Lachlano juvine M'Gilleoin Magistro de Doward, just like a

mainland peer and his son. So far as the writer is aware, the only greater barons of the Isles who were styled "lord" in the writs of their ruler (Macdonald) were the Lord of Dunniveg and the Glens (Sheriff Macphail, "Highland Papers", i. pp. 97-99); the Lord of Duart and his son the Master (ibid.), which Lord of Duart is sometimes also styled the Lord Maclean (Macneil, supra); and the Lord of Lewis (ibid., and Stodart). Curiously enough, Duart also holds one of the abortive Jacobite peerages as Lord Maclean, created 17 Dec. 1716 (see Ruvigny's "Jacobite Peerage", pp. 101-102). In the charter witnessed by the Master of Duart c. 1470, the ruler of the Isles styles his own half-brother Hugh "Domino de Slete", but this may have been an old-fashioned territorial description and not have been aping Scottish peerage styles, since Hugh's representative in 1545 is only styled "Archibald Maconill Capitane of Clan Hustain" (see above).

To revert to the "peers of the realm" who tried Albany in 1425, as for the other assessors (or their successors): Balvenie appears (as Abercorn) in the 1429 list, as might be expected, but the "Scots Peerage" (vol. iii p. 173) likes to think that the "title" of Lord Balveny was invented in the modern way as an addition to that of Earl of Avandale when he was granted an earldom in 1437. Montgomery appears in the 1429/30 list (son of the assessor), but the "Scots Peerage" (vol. iii pp. 431-432) and G.E.C. (vol. ix p. 134) will only allow that he was "created a Lord of Parliament" sometime in 1444-1445, because of his designation at different times before he appears immoveably as Lord Montgomerie in the Hamilton grant of 3 July 1445 (an epoch-making date to modern peerage writers, yet their presumed mass creation of practically all the earliest lords of parliament in that year passed unnoticed by the contemporary historians). The Lord of Lorne could hardly have been among the "smal baronnis and fre tenandis" referred to in the 1428 Act, as any historian will realise, and the date of "creation" of the parliamentary Lordship of Lorne is quietly passed over in the "Scots Peerage" (vol. v p. 3), yet G.E.C. (vol. viii p. 138) will only put it at "before 5 Sep. 1439" and then bases this date on a designation. Somerville appears in the 1429 list, as might be expected, and was referred to as Lord Somerville by the older writers, but G.E.C.

(vol. xii p. 92) ignores (or more probably is unaware of) the 1428 Act and writes that "although Sir Thomas has usually been described as 1st Lord Somerville (Scotland), so cr. 143?, there is no evidence that any Scottish territorial baron was cr. a hereditary Lord of Parliament prior to 1445", while the "Scots Peerage" (vol. viii p. 9) assumes that his son was the 1st Lord on its usual designation theory: "He was created a Lord of Parliament between 28 June 1445, when he is styled William, Lord of Summerville, squire, and 3 July 1445, when he is described as DOMINUS SOMERVILLE".

Herries, whom Lib. Plusc. calls simply "dominus de Torriculis" at Albany's trial in 1424, was not apparently present in the 1429/30 Parliament, and his son was presumably not summoned to the now important 1445 Parliament as he was probably of unsound mind (he was "incompos mentis" in 1458/9) if of age, but his grandson was in Parliament as "Trariglis" in 1471/2 ("Scots Peerage", vol. iv p. 403, advances its usual designation argument that the Reg. Mag. Sig. 24 April 1478 has him as "David Heris de Trareglis, miles", and that therefore he was not a peer, although in 1495 the Lords of Council refer to him as the "old lord terragilis"); however, the Herries family seem to have had some congenital unsoundness of mind during the 15th century (see Reg. Mag. Sig. 24 Jan. 1458/9 and 20 Nov. 1495, and Acta. Dom. Conc. 385, 379) and may therefore have been in a state as it were of suspended peerage during the formative period of lordships of Parliament although not "smal baronnis and fre tenandis" within the intention of the 1428 Act (c.f. Reg. Mag. Sig. i, no. 192). Dalkeith and Kilmaurs have been discussed above (so far from being small barons, their families were granted earldoms during the 15th century); and although "Scots Peerage" (vol. v p. 430) and G.E.C. (vol. viii p. 90) disagree about whether Livingston of Callendar's son was "created a Peer" before 7 July 1455 or before 30 April 1458, it should be observed that this period (1455-58) simply marks the restoration of a family that had been infinitely more powerful before its forfeiture in the previous generation, and that Albany's assessor, so far from being a smaller baron than his contemporaries such as Somerville and Montgomerie, was one of the three or four most powerful nobles in Scotland during the period 1439-49.

The remaining assessors at Albany's trial were officials: the

Hereditary Sheriff of Peebles's nephew and eventual successor is said to have been created a Lord of Parliament "by solemn investiture" in 1487/8 (Lord Hay of Yester was ancestor of the Marquises of Tweeddale: see "Scots Peerage" vol. viii); the Hereditary Sheriff of Angus (whose brother was ancestor of the Earls of Seafield) had a grand-daughter and heiress who married the Earl of Buchan; the Chamberlain of Scotland was ancestor of the Lords Forrester of Corstorphine (who did not become Lords of Parliament until 1633); and the Treasurer of Scotland was grandfather of the 1st Lord Ogilvy of Airlie, so created 1491 (ancestor of the Earls of Airlie).

(20) See John Knox's "History of the Reformation in Scotland", ed. David Laing (1846) vol. i p. 552. The same work, at pp. 560-561, gives an interesting account of the challenge issued by Bothwell before the battle of Carberry Hill, where he appears to have put forward English-style views of peerage that were inconsistent with the composition of the assize of his presumed peers at his trial. Bothwell evidently issued a challenge to single combat, which was promptly accepted by Tullibardine's brother, James Murray, who was not a baronial laird. "Bothwell refused to fight with James Murray, alleading that he was not his equall. Upon this the elder brother, William Murray, Laird of Tullibardin, answered, That he would fight with him, as being his better in estate, and in antiquitie of house many degrees above him; yet Bothwell refused him, saying, That he was not a Peer of the Kingdom, as he was; then sundry Lords would have gone to fight with Bothwell; but the Lord Lindsey namely, who said to the rest of the Lords and Gentlemen, That he would take it as a singular favour of them, and as a recompence of his service done to the State, if they would suffer him to fight with the braggadocio. Bothwell seeing that there was no more subterfuge nor excuse, under-hand made the Queen to forbid him". From the foregoing it seems clear that at that date a great Laird like Tullibardine regarded himself as the peer or equal of an Earl, and that Bothwell was simply seeking an excuse to avoid committing himself to combat (and no doubt, to irritate Tullibardine). The true test appears in Bothwell's attitude towards Lairds of his own party, whom he accepted

as his peers in the trial that acquitted him.

(21) Ogilvie of Boyne, for instance, was married to Mary Beaton, one of the "Queen's Maries".

(22) "Scots Peerage", vol. i pp. 358-359.

(23) He had, however, been an active Member of Cromwell's House of Peers at Westminster during the Protectorate.

(24) It might be argued theoretically that, by English law (and Scotland was a conquered English province 1296-1306), such Scottish barons as Nicholas de la Haye of Erroll who were summoned to King Edward I's Parliament at St. Andrews on 5 March 1303/4, thereby (on proof of sitting) became Peers of Anglo-Scotland. This point is only made, to demonstrate that the Scottish peerage were of equal standing and antiquity to the English, although their dating system has resulted in an apparent juniority of "creation". Many of the Scottish magnates, now accorded merely 15th century peerages, belong to families that sat in the Parliaments of Scotland ab initio: that is, who attended the Curia Regis or the Great Council in the days of the ancient Celtic dynasty.

(25) However, from the point of view of modern peerage law, Scottish peerages (other than earldoms and the Dukedoms of Rothesay and Albany) must reasonably be taken to have their terminus a quo in the 1428 Act.

(26) The Master of Maxwell married Lady Herries (then aged 14) in March 1547/8, and again (by papal dispensation dated 26 May 1555) on account of their relationship within the third degree of affinity. Until 1566, however, the lands of the barony of Herries were not completely in their possession, and it is a mark of how much the peerage lords were still regarded as just the territorial "greater barons", that he was not received as "now lord hereis" until 1566-67, when he and his wife had gained possession of the baronial lands.

(27) See chapter above, on "Heirs at Law to Baronies": statutes of 1476, 1493, 1540, 1555 and 1587.

CHAPTER 11.

THE HEIRS AT LAW TO ARMS.

THE HEIR AT LAW TO ARMS.

Insufficient research has yet been made into the prehistory of Heraldry⁽¹⁾ in general, and of Armory⁽²⁾ in particular: and such research would require to collate sources from many countries⁽³⁾. But the writer's examination of the ritual of sacral kingship throughout the world, has tended to point to certain tentative conclusions, which may perhaps be worth setting out briefly here by way of preface to this chapter.

The ritual of sacral royalty, in which the king and queen embody the whole or part of an ancestral divine spirit of favourable fortune, was widely diffused before the subsequent diffusion of Buddhism, Islam and Christianity: and all the dynasties reigning in the British Isles were of pagan sacral origin⁽⁴⁾. From very ancient times, the spirits incarnated by sacral royalty have tended to be represented by certain emblems. Thus the King was symbolised by a lion⁽⁵⁾, a falcon or eagle⁽⁶⁾, a serpent⁽⁷⁾, also the three combined to form a dragon⁽⁸⁾, or the King was symbolised by the sun⁽⁹⁾, a white horse⁽¹⁰⁾, a black bull⁽¹¹⁾, or a fleur-de-lys⁽¹²⁾. The Queen is represented by lunar curved symbols, in particular the Moon-crescent⁽¹³⁾, the bow⁽¹⁴⁾, the horned cow⁽¹⁵⁾, also by the ship⁽¹⁶⁾ and the boar⁽¹⁷⁾. Coupled with all this, there is often the system of totemism, whereby all the members of a kindred are associated with a certain animal, flower or other object that is sacred to that kindred. Sometimes such kindreds appear to have taken likenesses of their totem with them to war, by way of good luck⁽¹⁸⁾, but they were of course primarily of religious origin.

The ritual of pagan sacral royalty was staffed by assistants, usually hereditary, with a special knowledge of the royal ancestor cult. Their guiding spirit was called Agni in Vedic India, and Hermes in ancient Greece: and Professor A.M. Hocart⁽¹⁹⁾, who has traced the evolution of these assistants into priests and heralds, gives 26 attributes of this spirit and shews that 22 of them are known attributes of Agni while 24 of them are known attributes of Hermes. These herald-priests were hereditary, bore a staff as insignia, were inviolable, assisted at the royal ritual of sacrifice, and acted as messengers of the divine king and of the gods.

After examining the position of these herald-priests in ancient times and in various pagan monarchies as far afield as Fiji, Professor Hocart demonstrates eight points of fundamental comparison between the Vedic brahman and the Greek kerux. He adds: "The divergent evolution of brahman and kerux brings out the different character of the two peoples. The Greeks were never so interested in words as in thought and action; they did not make as good grammarians as the Indians, but more lucid thinkers. Their insatiable curiosity undermined tradition and revolutionized the ritual. Thus while the brahman was mounting to superiority over the king, the herald was sinking from the honourable heredity which he still held in Homeric times, to the despised station of a paid public crier. Athens came very near to the spirit of the modern state"⁽²⁰⁾.

When the Celtic countries were Christianised, the assistants or herald-priests of the royal ancestor-cult appear to have continued as sennachies or bards. "It is said ... that the kings and landed aristocracy of the ancient Gaels 'from the dawn of their history carried standards to distinguish them in battle'. Moreover, their sennachies were like modern heralds, in that their duties included keeping genealogies, and the recognition of devices on these standards. And the devices attributed in early MSS. to the ancient Irish leaders (combinations of red hands, lions, salmon, cats, and hands holding crosses) are very reminiscent of the more typical quarterings of modern Highland families"⁽²¹⁾. The highest degree of bard in Wales was styled the Druid Bard⁽²²⁾. The priestly element of hymn was retained, although its pagan religious significance had almost disappeared: "... the chief of song, that is, a chaired bard, who shall know what is to come in the future, from the lore of Taliesin"⁽²³⁾; "... a chief of song, that is, a bard that shall have gained a chair, and who knows the prophetic song of Taliesin"⁽²⁴⁾. The anthems of the pagan royal ancestor cult were perhaps continued under the guise of songs praising the deeds of kings and their kindred, the nobles⁽²⁵⁾: "When the king shall will to hear a song, let the chief of song sing two songs in the entry of the hall, one of God, and another of the Kings; then let the bard of the household sing the third"⁽²⁶⁾. As with herald-priests everywhere, these Welsh bards were inviolable,

"against whom there is not to be a naked weapon"⁽²⁷⁾, and acted as ambassadors⁽²⁸⁾. As with modern heralds, and so many ancient priesthoods, a college of bards numbered thirteen⁽²⁹⁾; and the old Welsh laws tell us that "There are three privileged sessions, ... a session of the bards of the isle of Britain, ... a session of the king, or lord of a territory, with his justices, and his judges, and his nobles, that is, every Cymro, being a landed proprietor, for the holding of a court and pleadings of law: and a session of federate support, or a conventional session of country and federate country; ... the session of the bards be the most ancient in its origin, from which all sciences emanate ..."⁽³⁰⁾. The old laws also tell us that the privilege and office of the bards, protected by their session, was inter alia "to preserve a warranted record of genealogies, marriages, nobility, privileges, and customs of the kindred of the Cymry"⁽³¹⁾. Again, the Welsh laws lay down that: "There are three records of a kindred: the record of a court of law; the record of a chief of kindred conjointly with his seven elders; and the record of bardism. ... These three records are called the three authenticated records of country and kindred; and upon them depends the authenticating of every degree of descent, and every privilege of arms; for, from the privilege of land originates the privilege of arms; and where the privilege of arms shall be found authenticated by record and symbol, that becomes a testimony in every suit as to land and soil"⁽³²⁾. After the dawn of systematic armory, it became the province of the Welsh herald-bards, and a 17th century letter from Garter King of Arms to Ulster King of Arms tells us "That the Provinciaall King of Armes did auntiently visitt Ex Officio, going to the houses of the chiefs of Familys where they took notice of their Marriages, and Issue with their Armes, as the Bards did heretofore in Wales, and of late time if not still in those parts" (Wagner, op. cit., p. 3).

It cannot so far be established conclusively that there was any continuous office running through from pagan priest to modern herald, but it seems probable that the otherwise illogical combination of functions vested in a mediaeval herald was based on an association of ideas derived from such a bardic priesthood, and indeed it is not impossible that the

combined office was continuous among some of the Teutonic peoples (as with the Celtic bards and sennachies) although deprived of its pagan religious significance by the advent of Christianity. Holiday (holy day) Games originate in pagan ritual contests. A very ancient pagan sacral ritual is the mock combat (sometimes real and sacrificial) in which good vanquishes evil⁽³³⁾: indeed, among the peoples whose religion is that of divine royalty, good can be identified by victory⁽³⁴⁾. It is therefore not surprising, that the earliest appearance on record of mediaeval heralds, in the second half of the twelfth century, is as the vocational messengers, proclaimers and masters of ceremonies at the conduct of the ritual pageantry of elaborate tournaments among the Frankish royalty and nobility⁽³⁵⁾. A mediaeval herald carried a staff, was baptised from a silver chalice of wine and water and given a new name on initiation⁽³⁶⁾, was inviolable⁽³⁷⁾, was an ambassador⁽³⁸⁾, the mouth-piece and messenger of kings⁽³⁹⁾, the assistant at royal ritual and the master of ancient ceremonies⁽⁴⁰⁾, and it was his office to preserve a warranted record of genealogies, nobility and every privilege of arms⁽⁴¹⁾. The hymnal element is found among them, many heralds wandered pilgrim-wise, and at their earliest appearance it is not always easy to distinguish clearly between wandering minstrels and heralds⁽⁴²⁾. Moreover, it has by now been sufficiently established that titular royalty, degenerating through such intermediate stages as the archon basileus and rex sacrorum of the Athenian and Roman republics into mere "Kings of the Wood" or "Queens of the May"⁽⁴³⁾, is a survival derived from the real pagan sacral royalty of ancient times⁽⁴⁴⁾: presiding heralds were called Kings of Herald's from their ^{first recorded} appearance⁽⁴⁵⁾, and are still styled Kings of Arms. It must be remembered that the Teutonic world of the Franks and Northmen remained pagan and retained sacral royalty far later than the Latin countries that were in contact with Christianity from the East: with its own mendicant friars but its priests of peace. Professor Hocart observes: "We shall probably have to recognize two homologies of brahman-kerux ... in our country. A Germanic one has been overlaid and reduced to mere pageantry by another one from the East. The first one still gravitates round the king; the second one had already emancipated itself before it reached these shores"⁽⁴⁶⁾.

It is among the European high nobility (which is to be equated with dynastic kindred) of Teutonic stock that armory, heraldry as we know it, appears suddenly - apparently almost fully-fledged - during the second quarter of the twelfth century. There can be little doubt that the concept of sacrosanct family emblems was derived from the pagan sacral symbolism of the formerly divine dynastic houses. Dr. Anthony Wagner⁽⁴⁷⁾ writes of the origins of heraldry: "Doubtless it had forerunners not in our sense heraldic at all. National and military emblems go back to a remote past. From the predynastic emblems of Upper and Lower Egypt, and the Roman eagles and legionary ensigns, down to the Dragon standard of the English, mentioned as early as Nennius and as late as Edward III, and depicted on the Bayeux tapestry, the descent is probably continuous. On the other side the personal mark or device, as used on seals, traces as long a lineage from Sumeria and Egypt, through Assyria, Greece, Rome, and the Frankish kings, to the date when heraldry first appears on them" (it must be remembered that the kings of Sumeria, Egypt, Greece, Rome and the Franks were all pagan royalty of divine origin). "The manner of this appearance forbids us to derive the heraldic from the seal device. The latter at this date is the owner's own portrait (usually on horseback), and the first appearance of heraldry in seals is not on its own footing, but merely as a part of this portrait, on the shield hanging from the knight's arm or the flag upon his lance". The earliest known coats of arms, as might be expected, are those of dynasts, such as kings and counts⁽⁴⁸⁾; and instead of a vast multiplication of every kind of device, the tendency at first was for a limited number of devices to be concentrated in particular areas, as might have been expected in a world where the landowners tended to be related in a given district, and where nobility was derived from dynastic connection⁽⁴⁹⁾.

Several differing explanations have been advanced to account for the sudden appearance of an evidently co-ordinated science of armory all over western Europe, such as the suggestion that there was a wholesale adoption of armorial devices by the knights of the First Crusade. It may, however, perhaps be suggested that an examination of the genealogical background of the first bearers of heraldic devices would shew that they almost all

belonged to the dynastic nobility of Teutonic origin, who were so closely inter-related by constant inter-marriage across Europe at this period. For example, Professor O. Forst de Battaglia has analysed the genealogical antecedents of St. Louis, whose sixty-four great- great- great-great-grandparents were living during the last quarter of the eleventh century. At this time, the King of Sweden was (until 1083) a pagan sacral royalty sacrificing to his ancestor, the god Woden. A generation later (that of St. Louis's thirty-two great-great-great-grandparents) heraldry was in being, with its systematisation of the old divine royal emblems, the lion and the dragon, the eagle and the fleur-de-lys. Sixty-three of these sixty-four great-great-great-great-grandparents of St. Louis are known⁽⁵⁰⁾, and they are derived from most parts of Europe. But, as Professor Forst de Battaglia points out, "à la seule exception des rois d'Ecosse - aux origines fort probablement celtes - , toutes ces familles sont germaniques: franques, bourguignonnes-burgondes, lombardes, visigothes, saxonnes, frisonnes, scandinaves. Toutes, elles se classent dans l'élite européenne, dont l'accès est strictement et jalousement fermé aux hommes de naissance moins illustre. Mais entre eux, une égalité démocratique dans l'aristocratie rapproche le petit seigneur de l'Ile-Bouchard ou de Chateau-du-Loir des rois de France, d'Angleterre et de Castille. En remontant d'une génération de plus, nous serons arrêtés par un autre fait curieux: l'union illégitime ne déclasse aucunement, à condition de réunir deux partenaires égaux par la naissance. ... Dans les générations supérieures de la table ascendante de saint Louis, on rencontre des bâtards par douzaines, mais tous sont 'bien nés'. Cela ne dérangeait personne, on restait entre gens du même sang, du Portugal à Kiev et de Norvège en Sicile. La France faisait partie d'un monde à direction germanique et aristocratique; elle en acceptait les idées et les institutions sociales"⁽⁵¹⁾. His point, that among the vast inter-married class of the Teutonic dynastic lords of twelfth century Europe (from Portugal to Kiev and from Norway to Sicily), "l'union illégitime ne déclasse aucunement, à condition de réunir deux partenaires égaux par la naissance" (equal in blood though not necessarily in wealth or position), may perhaps be explained by natural sons arising between equals after the imposition of Christian monogamy on a recently

polygamous society⁽⁵²⁾: for bastards by other women were always in a different category⁽⁵³⁾.

It was precisely at the epoch when the whole aristocracy of Europe was welded together by a common Germanic origin and by constant dynastic inter-marriage that embraced the families of great kings and small seigneurs alike, and when constant contact was maintained by tournament and Crusade, by knights errant and by mendicant heralds, that Armory makes its appearance as an organised science. In the east Frankish lands, where the tendency was for the inheritance to be divided equally among all sons, coats of arms retained a totemic quality: in that each member of the kindred was equally entitled to bear the quasi-sacred emblems of their house⁽⁵⁴⁾. But in the west Frankish lands, where there soon tended to be a single heir to the family fief, differencing appears almost at once, and Arms were personal in their detail, although beneath the differences the whole family bore the same basic coat. Moreover, with the advent of scientific armory, the family "beasts" or other emblems were supplemented by partitions or geometric divisions of the shield or banner into different colours and metals⁽⁵⁵⁾. Prince Schwarzenberg writes: "You are aware, of course, how in the first half of the 13th century the princely houses of Central Europe usually had two coats (or, as I believe, originally a shield and a banner): one being a charge, the other a partition or ordinary (e.g. Austria: the eagle and the fess; Bavaria, the lion and the lozenges, etc). Now in Bohemia (beside the eagle, which is something else again) we have documentary evidence only for the lion (argent on gules) though it is almost self-evident that a simpler flag (of the colours) must have been in use too. Now we see that the 13th century royal bastard and his descendants, Dukes of Opava (Troppau) bear per pale, gules and argent: it is, I believe, legitimate to deduce that his royal father must have borne just such a flag (and possibly also a shield) of his colours. Moreover, it would seem quite logical, that upon the fashion of double coats disappearing (in the second half of the 13th century) the charge (the more complicated and significant coat) went to the legitimate line, and the simple coat of the colours went to the bastard, or possibly to a cadet line".

Unfortunately, the heraldic evidence from Scotland, based on a few surviving seals, is not very good for the twelfth century. It seems most improbable that a "very perfect knight" like King David I, steeped in Norman and Frankish ways, did not bear Arms at a time when it is certain that such English families as Mandeville, Earl of Essex, Vere, Earl of Oxford, Say and Clavering and Beauchamp of Bedford⁽⁵⁶⁾ had already adopted them: that is, during the reign of King Stephen of England. It may be noted that King David's elder brother, Ethelred, is said to have been the first Earl of Fife, and that the later Earls of Fife (possibly connected with Ethelred through the female line) bore "Gold a lion Gules", while King David's descendants, the Kings of Scots, bore the same coat with the addition of a flowered double tressure⁽⁵⁷⁾. Now, another line of royal cadets, the Earls of Atholl, bore a paly coat: as did the Earls of Fife as a second coat to their lion. The two paly coats must have been distinguished from each other by colour, and it seems probable that the Fife paling was red and gold (as with their lion coat), while the Atholl paling has always been black and gold. Dr. John Woodward, "A Treatise on Heraldry: British & Foreign" (1896), vol ii, p. 33 and Plate III, demonstrates that "three piles" may sometimes be a differenced form of "paly". For example, in a thirteenth century roll of arms, Rauff Bassett bears "Palée d'or et de gulez in un cantele d'argent un crois patée sable", while at the same time Symon Bassett bears "Or, three piles gules, a canton ermine". The Lords of Brechin, who descended from a natural brother of John le Scot, Earl of Huntingdon, bore "Gold three piles Gules" (see Scots Peerage, vol. ii p. 224), and these arms are usually attributed to his brother, Earl John, as well. Indeed, in Jenyns' Ordinary the arms of John le Scot, Earl of Huntingdon are tricked "Gold three piles meeting in base Gules", but in Glover and Jenyns' Rolls and in a Roll of Henry III's time, his arms are given as "Paly of six Gold and Gules, a bend Sable". There seems little doubt that Earl John inherited such a paly coat from his father, David, Earl in the Garioch (in Scotland) and Earl of Huntingdon (in England): the brother of Kings Malcolm IV and William the Lyon. The Armorial de l'Europe, c. 1450, gives a mysterious coat, "Paly of six Gold and Gules", among the Scottish coats, and attributes it to

le conte de Goriach. Kings Malcolm and William, with their brother Earl David, were the sons of the King-Designate Henry, Earl of Northumberland, whose wife's family certainly bore Arms during his lifetime⁽⁵⁸⁾ and who is unlikely to have been out of the fashion. It may therefore be significant that a paly coat of red and gold, or purple and gold, was retrospectively attributed by the mediaeval heralds to the old kings of Northumbria: and forms the basis of the modern Arms allotted to the Northumberland County Council⁽⁵⁹⁾.

On the whole then, it seems possible that twelfth century Scotland (with its hold on Northumberland) conformed to the pattern described by Prince Schwarzenberg for the princely houses of Central Europe, and that King David and his son, the King-Designate Henry, did not differ from their cognatic kinsmen among the Teutonic dynastic aristocracy of all Europe⁽⁶⁰⁾. In this case, it would appear that the two coats in the Scottish-Northumbrian royal house at the dawn of heraldry were (1) the sacral royal "beast", the Lyon, red on gold (with the addition of the ancient emblem of the living king, the fleur-de-lys, in the case of the actual kingly branch), and (2) the coloured partition coat, divided into vertical palings of red and gold (afterwards differenced by conversion to piles in the Huntingdon-Brechin branch). In Scotland, at any rate, it seems possible that the numerous lion coats were derived from some connection with the royal dynastic kindred, either in the male or female line or by marriage, and it may well be that the well-known preference for lions among early armorial families elsewhere was also due to the natural desire for stressing any connection with the royal fountain of honour⁽⁶¹⁾.

It seems probable, therefore, that at the earliest period of heraldic evolution (the twelfth century), the totemic or sacral royal emblems of the dynastic aristocracy of Europe became adapted for use on shields and banners, were simultaneously overlaid with a system of partitions and geometric "ordinaries" based on the family colours, and (while remaining quasi-totemic among the egalitarian brethren of the East Frankish dynastic kindreds) became personal yet hereditary among the western aristocracies that favoured a single heir. It is scarcely to be doubted that Armory

began at the top, among the royal and comital houses, and spread rapidly downwards throughout the whole land-owning aristocracy of Europe⁽⁶²⁾. It must be remembered that, in the Celtic countries, the land-owning kindreds tended to claim remote dynastic origin themselves. The clan was the kindred of the tosach, the tosach was evidently the head of a cadet branch of the mormaer or earl, who was in turn either the heir of a local royal dynasty or else a relation of the over-kingly line, and the kings were descended from the gods⁽⁶³⁾. Similarly, among the Northmen, the göding families were connected by blood or marriage to the jarls, the jarls were similarly connected with the kings, and the kings descended from the gods⁽⁶⁴⁾. Great difficulties were placed in the way of the acquisition of land by any who did not belong to the noble land-owning kindreds⁽⁶⁵⁾, and such as did soon inter-married with the baronial caste. Lord Raglan writes: "It would be absurd to suppose that all the foot soldiers, grooms, cooks, and so forth who accompanied the Conqueror became feudal barons and knights as soon as Hastings was won, and Professor Douglas has shown (in History, Sept. 1943) that all Normans who are known to have been enfeoffed by him were already noblemen in France".

In this context it is important to make it quite clear that a "noble" in nobiliary law as it is understood in Scotland and on the Continent is not at all the same thing as a peer or even as the bearer of a "title", despite the common usage in English of the word "noble" in these senses. From the point of view of nobiliary law, a noble and a gentleman are the same thing (what in India are called the kshatriya, which may be loosely translated as born into the rank that wields an imperium), and they are to be identified by their possession of hereditary armorial insignia⁽⁶⁶⁾. This was demonstrated even in England during the famous heraldic case of Scrope v. Grosvenor 1385-1390. Sir Richard Scrope came of a line of local gentry from Barton-on-Humber in Lincolnshire, who had settled in Wensleydale by the thirteenth century⁽⁶⁷⁾. When his right to arms was challenged by Sir Robert Grosvenor, many witnesses testified that Sir Richard was a noble, and had hereditary armorial insignia as such⁽⁶⁸⁾.

Sir William Moigne testified that he had always heard the Scropes were

"de graundez gentils homes & de noblez"⁽⁶⁹⁾, Sir William Murrers "que ceux de Scrops feurent venuz dez noblez et gentilx gentz & fesoyent graunt honor a lez ditz armez"⁽⁷⁰⁾, John de Neuland esquire "que les auncestres du Scrop feurent nobles & gentils & venoient ove le Conqueror"⁽⁷¹⁾, Sir Edward Dalyngrigge (builder of Bodiam Castle) testified that "le count Darundell qui mort est recordast sovent que le dit monsieur Richard & cez auncestres estoient toutdys venus de noble et generouse sanc dez gentils homes & de veille auncestrie & qui avoient gardez toutdys lour nons & lour estat toutdys en honor & honeste"⁽⁷²⁾, Sir Robert Clavering "was in his youth informed by his ancestors that the said arms had devolved to Sir Richard lineally and by right from his ancestors, who were nobles and high gentry from the time of the Conquest"⁽⁷³⁾, Sir Walter Tailboys testified for the Scropes that "il ad oy dire de cez auncestres devant luy qils sont venuz dez nobles & de gentils"⁽⁷⁴⁾, Lord Dacre had heard from his own family about the Scropes "qils sont venuz de veux auncestres & dez noblez ... ils ont porteez lor armez ... outre temps de memoire"⁽⁷⁵⁾, Richard de Beaulieu esquire said it was commonly reputed in the north country "que les auncestres du dit monsieur Richard estoient venuz dez noblez & dez graundez gentils homes"⁽⁷⁶⁾, Sir Richard le Zouche had heard from his grandfather Lord Zouche that Azure a bend Or was the coat of Scrope "lez armez dazure ove un bende dor ont este appellez lez armez du Scrop qar ils sont tant auciens & de si veille auncestrie ... qar ils sont devenus dez noblez & gentilx generousez homes & de veille auncestrie"⁽⁷⁷⁾, and Sir Piers de Boketon came forward to say "que lez ditz armez sont descendus au dit monsieur Richard par heritage & par droit lyne & discent" and that the Scropes "sont venuz dez noblez & graundz gentils homes"⁽⁷⁸⁾. These ancestors of Sir Richard Scrope, so clearly described as "nobles" by witness after witness, were not magnates but simple gentry, holding a knight's fee of Earl Simon in 1166, although they intermarried with such famous houses as that of Clare⁽⁷⁹⁾. According to Prince Schwarzenberg, the feudal custom of avoiding disparagement in marriage usually allowed marriage between one grade up or down in the feudal hierarchy (though it was not usual in the case of heirs or heiresses) so that a king's daughter might marry a tenant-in-chief, or a tenant-in-

chief's daughter a vavassor, while younger sons were usually in this country in the position of belonging to the next grade anyway.

It may be of interest to note the context, in which the fourteenth century witnesses held the Scropes to bear their armorial insignia, since it bears on the genealogical and ritual background of nobility. The Abbot of Roche said that "the Arms Azure, a bend Or, had descended to Sir Richard, as chief of the blood of Scrope": "lez armez dazur ove un bende dor appartiegnent de droit de descent de heritage & de droit linee a dit monsieur Richard come a la chief du sanc de Scrop du temps du Conquest"⁽⁸⁰⁾. Canon John de Yeversley and Canon John de Queldrike, celerer and sacristan of the Priory of Bridlington, said "they had heard noble and valiant warlike Knights say, that the Scropes have been armed in the said Arms in presence of kings, princes, dukes, earls, barons, and other lords"⁽⁸¹⁾. Sir Gilbert Talbot "had never heard of any one using or doing honour to the said Arms excepting he were of the name of Scrope"⁽⁸²⁾. Sir Bernard Brocas had always heard that "the Arms Azure, a band Or, belonged to Sir Richard Scrope by right of inheritance. He saw Sir Henry Scrope bear them with a difference, and Sir Richard Scrope in the entire Arms, as well as his cousins armed in them with differences, ... in the presence of Kings, Princes, Dukes, Earls, Barons, and other great lords, knights, and esquires"⁽⁸³⁾. Sir Walter Attlee "had frequently heard very old people say that they had continually used those Arms in the presence of Kings, of the prince, dukes, and earls, and other great lords, and acquired great honour therein"⁽⁸⁴⁾.

The administration of justice was an essential part of a feudal lord's duties, and in Scotland the ancient aristocracy have always been closely associated with the law: from Constantine, Earl of Fife, who was "magnus judex in Scotia" in the twelfth century (Skene, "Celtic Scotland", iii 62, seeks to identify "magnus judex" with "mor maer"), down to the aristocratic dynasties of judges like the Fergussons of Kilkerran and the Dundases of Arniston in recent times. In Scotland, therefore, no distinction ever arose between noblesse de l'épée and noblesse de la robe, for with us both already tended to belong to the immemorial noblesse feudale or even d'allode.

But it is a measure of the breakdown of feudalism in England (especially after the statute Quia Emptores) that these English knights of the Hundred Years War thought the less of Sir Richard Scrope (then Chancellor of England) because his father had been Chief Justice. Sir William Aton, aged eighty-seven, armed sixty-six years, deposed that in his time "Sir Henry Scrope, father to the present Sir Richard Scrope, descended of noble and gentle ancestry, was, by consent of his parents, put to the law (mys al le ley), and became the King's Justice; but nevertheless used in his halls, on his beds, in windows, and on plate, the Arms Azure, a bend Or"⁽⁸⁵⁾. John Thirlewall testified that "the grandfather of the said Sir Richard, who was named William Le Scrope, was made a knight at Falkirk in Scotland under the banner of the good King Edward with the Longshanks, as his (the Deponent's) father told and shewed him before his death, for his father was through old age bedridden, and could not walk for some time before his decease; and whilst he so lay he heard some one say that people said that the father of Sir Richard was no gentleman because he was the King's Justice; and his (the Deponent's) father called his sons before him, of whom he the said John was the youngest of all his brethren, and said, 'My sons, I hear that some say that Sir Henry Scrope is no great gentleman because he is a man of the law, but I tell you certainly, that his father was made a knight at Falkirk in those Arms, Azure, a bend Or, and they are descended from great and noble gentlemen; and if any one say otherwise, do ye testify that I have said so of truth, upon faith and loyalty; and if I were young I would hold and maintain my saying to the death'"⁽⁸⁶⁾.

Although, by Tudor times, the English began to forget that "nobility" and "gentry" are the same, and to distinguish between titled noblemen and untitled gentlemen (so that even in Scotland the word "nobility" often came to be used in a limited sense to mean "peerage"), the Scots followed Continental practice the more readily because Scottish cadets valued the opportunity their noble birth gave them of special employment abroad. A Scots laird's son was adel as any German "von" (note that adel comes from the same root as aethel in Anglo-Saxon, where its meaning was still nearer

to the source of nobility, i.e. royalty, as in the style Aetheling applied to the king's son: also that von originally indicates membership of a noble land-owning kindred). The extent to which Scots gentlemen were employed in noble commissions abroad can be gauged from Forbes Leith's "The Scots Guards in France", the Scot. Hist. Soc.'s "Scots Brigade in Holland", and Th. A. Fischer's "The Scots in Sweden", "The Scots in Germany", and "The Scots in Eastern and Western Prussia". The Kings of Scots and their officers ^{of Arms} were continually certifying the nobility of some Scots laird's (often remote) cadet, so that he could be ranked properly abroad, with the result that some modern writers in this country, ill-informed about nobiliary law, scoff mistakenly at these certificates as "boastful" or even "bogus". In the true sense of nobility, as understood both in Scotland and in the Continental countries to which these certificates were addressed, a remote and penniless untitled cadet of Robertson of Struan (a dynastic kindred of immemorially ancient pagan sacral royal descent) was theoretically far more noble than a British or German or French novus homo who had been created a Baron on account of his vast wealth or influence.

In countries where rights to dignities and land could be inherited through females, as in Normandy, England and Scotland, families at the dawn of heraldry nearly as often adopted the same device as their mother's kin, or their wife's kin, as their father's⁽⁸⁷⁾. During this formative period, this was also to a lesser extent true of surnames⁽⁸⁸⁾. The twelfth and thirteenth centuries appear to have been a period of flux in these matters, afterwards to become so important. Sometimes a man would keep his own name, but take the Arms that came to him by female inheritance. Thus Sir Philip de Carteret, seigneur de St. Ouen in Jersey c. 1279, married Margaret, niece and heiress of Philip d'Aubenev, bailly of Jersey, a cadet of the Daubeney's of Belvoir in England (whose male line in England still bear "Gules four fusils in fess Silver"): and although the Carterets kept their own surname, they adopted the originally Daubenev Arms of "Gules four fusils in fess Silver", which they still bear in the Channel Islands⁽⁸⁹⁾. Sometimes a man would keep his paternal Arms, but assume the surname of his heiress mother. Thus Geoffrey de Nevill, ancestor of the great continuing

English peerage family of that name, was a son of Robert fitz Maldred, lord of Raby, whose seal shows their famous Saltire, by the Nevill heiress Isabel de Nevill: here the family (probably descended in the male line from King Duncan I's brother Maldred) continued to bear their paternal coat of "Gules a saltire Silver", but adopted the surname of Nevill through the female line⁽⁹⁰⁾. Sometimes a younger son, on becoming established on a part of the family inheritance, retained the family arms (duly differenced) but assumed a new surname from his particular estate. Thus Alan of Swinton (probably a scion of the old Edulfing ruling house of Beornicia), who held the lands of Elphinstone as well as Swinton before 1238, had an elder son Alan (who inherited Swinton) and a younger son John, who is almost certainly to be identified with the John of Elphinstone who succeeded Alan of Swinton there, and whose descendants bore the same arms as Swinton, differenced only by colour⁽⁹¹⁾. Eventually, a man took his heiress-mother's coat alone, only when he also took her surname. An early example of this was in the case of the great Anglo-Norman house of Stafford (a branch of the famous family of Toesni, probably related in the female line to the Ynglingar ducal house of Normandy), which ended in the male line in 1193-4. The Stafford heiress, Millicent, was married to Hervey Bagot, who assumed the name of Stafford on becoming seised of her barony, and whose descendants continued the original arms of Stafford: "Gold a chevron Gules"⁽⁹²⁾.

Even today, a man might hesitate to consider his agnatic fourteenth cousin three times removed as more a member of his family than his own mother's brother, were it not for the discipline imposed by the surname. A man is a Macdonald or a Ramsay: his mother's brother does not belong to that family. No such discipline inhibited the twelfth century magnates at the dawn of heraldry, as we have seen, except no doubt in the case of the Irish who (like the Rajputs) adhered to a strictly patrilinear system. But the surname became established during the early heraldic period, and heraldic law gradually came to associate the arms of a family with the surname of that family: so that in time the two became indivisible. By the fourteenth century, a man who inherited his mother's arms, quartered

them with his paternal coat if he did not take his mother's surname⁽⁹³⁾. The plain Arms of a family thus became the essential insignia of the Chief of that Name⁽⁹⁴⁾, and cannot be borne unquartered by anybody who does not belong to that Name as its Chief, whether as heir general, or as heir male because the heir general has not assumed the surname, or as heir of tailzie: that is to say, the Arms of a given land-owning kindred's chief became attached to the surname assumed by that kindred after the dawn of heraldry.⁽⁹⁵⁾ For example, in the well-known "Memorial anent the true State of the Highlands as to their Chieftenaries, Followings & Dependances before the late Rebellion" (1745), attributed to Lord President Forbes of Culloden⁽⁹⁶⁾, we are told of the SUTHERLANDS that "The Earl of Sutherland is their Chief, Can raise 700 Men". The chief of this period was the grandson and successor of John Sutherland, 16th Earl of Sutherland, who in 1719 matriculated the ancient arms of the Name of which he was Chief, "Gules three stars Gold", specially augmented by royal warrant by a golden bordure with the ruddy royal tressure. This coat had originally been that of Moray, now "Azure three stars Silver", but in its colours of red and gold it had become separated together with the surname of Sutherland⁽⁹⁷⁾, which had descended to Earl John through the female line. In the male line, John Sutherland (Earl of Sutherland) was a cadet of the family of Gordon, Marquis of Huntly. As Chief of the Gordons, Lord Huntly bears the Name and Arms of Gordon, "Azure three boar's heads Gold", which descended to him through the female line. In the male line, the Gordon earls and marquises of Huntly have always been cadets of the family of Seton of that Ilk, afterwards Lords Seton and Earls of Winton. As Chief of the Setons, Lord Seton bore "Gold three crescents within a royal tressure Gules", which the later Setons of that Ilk (of whom the Gordons and Sutherlands in question were male-line cadets) had inherited through the female line. In the male line, these later Setons of that Ilk (afterwards Lords Seton) were descended from Alan of Winton, who married in about 1347 Margaret of Seton, heiress of the Name and Arms of that family (with their fief of Seton), whose grandfather, Sir Alexander Seton of that Ilk, sealed with "three crescents within a royal tressure" in 1337⁽⁹⁸⁾. It will thus be seen that the eighteenth century Chiefs of the Name and Arms of Sutherland

were male-line cadets of the fifteenth century Chiefs of the Name and Arms of Gordon, who were male-line cadets of the fourteenth century Chiefs of the Name and Arms of Seton, who belonged in the male-line to a family whose surname was Winton. Since the Arms of the Chief of a kindred have come to depend on his bearing the surname, so too do the differenced versions borne by his cadets depend on their bearing the surname. A man may have Scott blood by the male or the female line, but he cannot inherit or bear the chief or a differenced version of the Scott arms, unquartered, unless he bears or assumes the surname of Scott.

This discipline of the surname is not imposed upon the Sovereign, the chief of chiefs and head of the whole kindred of all surnames of the nation, who bears the arms of Scotland plain and undifferenced; and whose original family name (despite the popular usage of patrilinear names like Bruce and Stewart, and before the assumption of the surname Windsor) was simply "of Scotland", later "of the United Kingdom". As might have been expected, the Royal Arms are among the first to demonstrate succession by the heir at law, followed by succession by heirs of tailzie: since they passed first to King John, and then to King Robert I and his successors. The Seton case cited above gives a fourteenth century example of the heir at law succeeding to the Name and Arms alike: and the practice became more common in the following centuries. In the fifteenth century, the Gordon inheritance of Huntly passed to the heir general (a Seton) who was made Earl of Huntly and whose earldom was settled on his second son: with the result that from 1470 the Chief of the Name and Arms of Gordon was a female-line heir of tailzie. In 1527 Robert Barton, yr. of Overbarnton, married Barbara Moubray, heiress of the barony of Barnbogle (which had descended to the Moubrays through an heiress of the line of King Duncan's brother Maldred: see "Scots Peerage" sub DUNBAR); and at the instance of the Moubrays, the King in Parliament imposed the surname of Moubray on Robert Barton, whose descendants bore the plain Name and Arms of Moubray of Barnbogle⁽⁹⁹⁾. In 1581, Parliament accorded a similar protection to the Baillies of Lamington, whose heiress was marrying a Maxwell (younger son of Lord Herries), against their principal fief being lost to their surname: the statute 1581, cap. 40, lays down that

William Maxwell should be called William Baillie, "and all his posteritie thaireftir to be callit Baillies of their surname. And nevir to rewoke the samyn nor to retaine any other surname heirefter". Other families where the principal Name and Arms passed through the female line to the heir general were Leslie, Earl of Rothes (1681, 1773, 1817, 1886), Scott, Duke of Buccleuch (1651), Napier, Lord Napier of Merchiston (1699), Hay, Earl of Erroll (1758, 1941), Farquharson of Invercauld (1815), Rattray of Craighall (1817), and such twentieth century cases as Munro of Foulis, Macleod of Macleod, Rose of Kilravock, and MacLachlan of Strathlachlan: to cite only a few examples.

The law of succession to Arms in Scotland at the present day is set out by the present Lord Lyon at pp. 111-128 of his "Scots Heraldry" (1956 ed.). Briefly, it may be summarised as follows: in cases of intestacy, or where there is no tailzie defining the succession, Arms pass to the nearest heir-at-law bearing or assuming the Surname associated with those Arms - but so long as there is a settlement, by tailzie or otherwise, of the Arms or of the principal inheritance (whether land or dignity) of the Surname associated with those Arms, then the Arms will prima facie follow the destination or accompany the principal inheritance, provided always that the heir of tailzie bears or takes the Surname. "It is as a result of this practical system, which combines continuity with reality, that English students of Scottish genealogy are so often puzzled to find chiefs of highland and lowland families, bearing the undifferenced arms, who are neither heirs general nor heirs male of the founder. This has applied to the Macdonalds since 1387, to the Clan Chattan and the Mackintoshes since 1409, to the Wemysses since 1428 and to the Gordons since 1470, to the Haigs since 1610 and the Hays since 1717, the Colquhouns since 1732 and the Rattrays since 1816, the Macleods since 1935 and the Farquharsons since 1949, to cite only a few examples"⁽¹⁰⁰⁾. To this list, might have been added the Montgomeries since 1612, the Leslies after 1558, and the Kers from 1650 to 1804.

Arms are incorporeal feudal heritage⁽¹⁰¹⁾, vested in a single heir, but a right to a differenced version (subject to matriculation of the

difference appointed by the Sovereign's King of Arms, the Lord Lyon) is vested in all the descendants of the bearer of such Arms, provided they bear or take the Surname. The ownership of any given coat of arms can be ascertained from Lyon Register, which is a record of all validly owned Arms in exactly the same way as the Sasine Register is a record of all validly owned land in Scotland (both Registers were established by statute during the seventeenth century). The law of succession to Arms follows very closely that of succession to other heritage, with the exceptions that (1) a right to unquartered Arms can only be inherited (in the male or female line) subject to bearing or taking the Surname associated with those Arms; (2) all the next of kin have a right to a differenced version of the Arms, subject to the qualification noted at (1) above; and (3) where Arms are associated with a particular dignity or fief, they will pass with that dignity or fief so long as it remains within the Blood and Surname. But, subject to the discipline of the surname, the heir general has always been the heir at law to Arms in Scotland.

NOTES TO THE CHAPTER ON THE HEIRS AT LAW TO ARMS.

- (1) Heraldry is the complete function of a herald, which included acting as the royal mouth-piece (proclamations), acting as an inviolable emissary (diplomacy), keeping the royal and noble genealogies, and marshalling their ritual ceremonies and their ancestral emblems.
- (2) Armory is the science of heraldic Arms, now commonly known as heraldry, and defined by Dr. Anthony Wagner, Richmond Herald, as "the systematic use of hereditary devices centred on the shield" ("Heralds & Heraldry in the Middle Ages", by Dr. Anthony Wagner, 1956, p. 12).
- (3) Such a work was undertaken by William Smith Ellis, "The Antiquities of Heraldry", 1869, and it contains much useful pioneer work, but unfortunately much of his information has proved to be faulty in the light of modern research, and the whole work requires careful checking.
- (4) See chapter on Succession among the Picts, Succession among the Gaels, Succession among the Cymry, and Succession among the Northmen.
- (5) The sphinxes are portraits of successive Pharaohs as lions.
- (6) The falcon symbolised Horus, the spirit that entered Pharaoh at his inauguration. The eagle symbolised Indra, the similar spirit in Vedic Indian kings; also Zeus or Jupiter, the spirit represented by the Greek or Latin kings; and after a long history came to symbolise the Holy Roman and Byzantine Emperors, from whom it was adopted by the Caesars (Czars or Kaisers) of Austria, Russia and in Germany, and by the Napoleonic Emperors of the French (who copied the Ptolemaic form of this ancient emblem of pagan sacral royalty). The Holy Ghost, called down by prayer upon a Christian sovereign at his Coronation, is symbolised by the dove: although the English ampulla for the actual anointing is still shaped like an eagle. The word Sky Bird is sometimes used to summarise the single origin of the concept: which is that of a part of the divine spirit, embodied, living

and fluttering, within a noble and unblemished human vessel, originally the King. Coupled with the idea of spiritual life or honour, it may perhaps be traced even in the dying words of the gallant Sir Ralph Percy, who had scorned to flee from the White Rose onfall at Hedgeley Moor in 1461, though deserted by his fellow Lancastrians: "I have saved the bird in my bosom" (Gerald Brenan, "The House of Percy", vol i pp. 118-120, citing Holinshed).

- (7) But not among Christian kings, because of the story of the serpent in the Garden of Eden.
- (8) Or other combinations, such as the bird-bull with the king's portrait-head in ancient Persia.
- (9) Certainly from c. 2776 B.C., when the sun calendar was introduced by the 5th dynasty of Pharaohs in Egypt: "Sons of Rē the Sun".
- (10) From Vedic India to modern Hanover.
- (11) From Ancient Egypt, to modern Mecklenburg and Zululand.
- (12) The symbol that became the conventionalised fleur-de-lys was already an emblem of Horus, the nascent godhead in the living king, in Ancient Egypt.
- (13) See chapter on Succession among the Picts, note 38.
- (14) It may perhaps be tentatively suggested that the famous Pictish "Crescent and V-rod" emblem (probably a tattoo-mark of birth or rank in that matrilinear community) depicts a stylised moon that is also a bow and arrow: the arrow being either a broken arrow, as at first sight, or else an arrow-flight depicted by bending the arrow with a curve as well as an angle. The appearance of an arrow is given very clearly by fig. 1 at p. 35 of Francis C. Diack's "The Inscriptions of Pictland" (Third Spalding

Club, 1944); the more usual stylised version at p. 10 still resembling a floriated arrow fairly closely. The moon with the bow and arrow are well known to classical scholars as attributes of Diana who, however, is a form of Juno, the goddess embodied in the queen.

(15) C.f. Hathor, embodied like Isis in the Queen of Egypt.

(16) The ship was alike the symbol of Isis (incarnate in the Queen of Egypt) and of Nerthus, divine ancestress of the Ynglingar dynasty of Uppsala.

(17) It may be observed that the Campbells have both the ship and the boar, but it is uncertain whether they inherited both from the same (possibly Ynglingar) source. For the ship and the boar as emblems in the cult of Nerthus, Niðrdr and Frey, see H.M. Chadwick, "Origin of the English Nation", pp. 233-234.

(18) For the nearest approach to this in recent Scotland, see W.R. Kermack, "Emblems of the Gael" (Scottish Gaelic Studies, vol. vii, 1953, part 2, pages 184-192), in which he discusses the plant-badges of the highland clans (and also the sacred tribal trees of ancient Gaeldom), and comes to the conclusion that they were intended not so much for distinction as for magic. The mistletoe of the Hays is referred to by Professor Frazer in "The Golden Bough"; and in The Grameid in 1691, James Philip writes of the Macdonald leaders in Dundee's army: "These all being chiefs sprung from the blood of Donald, they ... carry into battle, as the emblem of their race, a branch of wild heather hung from the point of a quivering spear".

(19) Professor A.M. Hocart, "Kings & Councillors" (Cairo 1936).

(20) ibid. p. 190.

(21) See the present writer's "Genealogical Introduction" to Burke's Landed Gentry, 1952 ed., p. lvii n. The Irish MS. account of the battle of Moyrath affords good examples of this: see Dr. John O'Donovan, "The Battle of Moyrath", Irish Archaeological Society.

(22) "Ancient Laws & Institutes of Wales", ed. Aneurin Owen, p. 649.

(23) ibid., p. 688.

(24) ibid., p. 689.

(25) C.f. the Norse sagas. For the close connection between heralds and minstrels, see G.E.C., vol. xi app. C; Wagner, op. cit., p. 27. An interesting example of a herald's paean of praise is Lord Lyon Sir David Lindsay of the Mount's elegy on "Squyer Meldrum", which contains much interesting material. For some pagan aspects of Scottish heraldic funerals as late as the sixteenth century: see Sir Thomas Innes of Learney, "Processional Roll of a Scottish Armorial Funeral" (Proc. Soc. Antiq. Scot., 1942-3, vol. lxxvii (vol. v., SEVENTH SERIES), p. 154 et seq.). According to Lindsay's poem, the "great man of may awin kynrent" passes before my corpse to the church, riding on a white horse, while my corpse-present of horse and harness and spear "salbe ofered with ane gay garment to Mars, his priest, at my interment". Sir Thomas comments: "The phraseology is somewhat peculiar; the offering being apparently not to Holy Church, but to the god of War. Who represented this pagan deity at a mediaeval funeral? The point offers an interesting field for further investigation, and suggests the survival of some very primitive rites in the funerals of even the sixteenth century" (ibid., p. 162).

(26) "Ancient Laws & Institutes of Wales", p. 331 (Gwentian Code).

(27) ibid., pp. 639-640.

(28) ibid., p. 652.

(29) The significance of this number in ancient religious ritual is sometimes ascribed to a primitive calendar of thirteen lunar months, and sometimes to the sun and twelve solar months. Its significance in Christian ritual is obvious. The College of Arms in England still consists

of thirteen royal officers-of-arms (Garter, Clarenceux, Norroy, Lancaster, Chester, York, Richmond, Windsor, Somerset, Rouge Croix, Bluemantle, Portcullis and Rouge Dragon), and until long after the Union the Scottish royal officers-of-arms in attendance on Lyon Court also constituted thirteen (the Lord Lyon, Albany, Islay, Marchmont, Ross, Rothesay, Snowdon, Bute, Carrick, Dingwall, Kintyre, Ormond and Unicorn). But by statute in 1867, the Scottish (though, as might be expected, not the English) establishment was cut by three heralds and three pursuivants: doubtless by politicians and bureaucrats who had no understanding whatsoever of the traditions with which they were dealing. For similar bodies of a King of Arms and twelve heralds on the Continent, see the letter written by a mediaeval Anjou King of Arms (who was appointed to office in 1389), now in the Bodleian Library (Rawlinson MS.C. 399, fols 76-80), and referred to by Dr. Wagner, "Heralds & Heraldry in the Middle Ages", p. 44.

(30) "Ancient Laws & Institutes of Wales", p. 640.

(31) ibid., p. 641.

(32) ibid., p. 674. Compare the old Scottish custom whereby the Lord Lyon King of Arms, in granting a birth-brief to a cadet of some Name, will take into account a certificate of ancestry given by the chief of that Name.

(33) See Professor A.M. Hocart, "Kingship", chapter iii; also "Blood Royal", p. 27.

(34) For the pagan custom of kings succeeding by predecessor-slaying, or by right of conquest, see chapters on Succession among the Gaels and Succession among the Northmen. Might is right, according to this view. God was identified with the spirit of favourable fortune, of which the king was the casket - a sort of national mascot - and it was often found to be true that God was on the side of the big battalions.

(35) See Wagner, op. cit., p. 25 et seq.

(36) The herald kept the cup afterwards. G.E.C. vol. xi, app. C p. 43; also "Armorial de l'Europe", ed. Loredan Larchey, intr. In the sacral monarchy of ancient China (where the divine king was sacrificed as elsewhere, in the early period) upon the emperor's lower robe was depicted "the cup symbolizing his priesthood" (see Dr. Kenneth Saunders, "A Pageant of Asia: a Study of three Civilizations", 1934, p. 210): the chalice was also an emblem of priesthood in ancient Mesopotamia and in Christian Europe. The names given to heralds on their new baptism were drawn from attributes of their lord, whose coat he and they alone were entitled to wear, since it represented himself at his most sacrosanct. When a noble was forfeited for treason against the king's Majesty, his Arms were riven at the Mercat Cross and expunged from the national records: for, as primitive kindred are thought to be bound up with the life of their totem, so a noble was held to be bound up with the honour of his Arms.

(37) From 1515 to 1518, Lord Drummond was forfeited and imprisoned for striking the Lord Lyon King of Arms.

(38) Until William Cecil, Lord Burghley organised the nucleus of a regular diplomatic service, the sixteenth-century English kings of Arms were as much occupied with diplomatic affairs as with armorial business. Dr. Wagner writes of Thomas Benolt, Clarenceux King of Arms (under King Henry VIII) that "he showed himself a discreet and able diplomat, Benolt was much employed in foreign embassies ... embassies of the first importance. With Benolt, however, duties of this kind filled so large a part of his life that the wonder is that he found time to concern himself with matters of armory" (Wagner, op. cit., p. 85).

(39) See above, for Hocart's comparison of brahman and kerux. Before Christianity, royal ritual was divine ritual: and there was originally no clear-cut distinction between the god in the king and the god in the sky.

(40) See previous note. It must be remembered that the kings, whose messengers and masters of ritual the heralds were, had recently been the repositories of godhead.

(41) See above, notes 31 and 32.

(42) Compare the mendicant holy men of the East, also inviolable. In Wales, the old laws lay down a duty "of support to bards in their circuit of minstrelsy" (A.L.W. p. 631). These holy beggars, still sacrosanct centuries after the arrival of Christianity, could be a burden. The Dimetian Code lays down that: "A chief of song is a bard who shall have gained a chair. A bard is to solicit nothing, in his jurisdiction, without his consent, unless he be a bard of a border-country; for such is free" (A.L.W. p. 188). The warriors of Powys were free from the duty of giving gifts to mendicant bards (A.L.W. p. 770). In Scotland, such bards were struck at by the Statutes of Iona in 1609, directed by the Edinburgh Government against the particularist, indeed separatist, tradition of the Islesmen: "it being considerit that amangis the remanent abuses quhilkis without reformatioun hes defylit the hail lles hes bene the intertenyment and beiring with idill belleis, speciallie vagaboundis, bairdis, idill and sturdie beggaris, expres contrair the lawis and loveable Actis of Parliament, for remeid quhairof it is lykwyse inactit ... that na vagabound, baird, nor profest pleisant pretending libertie to baird and flattir, be ressavit within the boundis of the saidis Yllis be ony of the saidis special barronis and gentilmen or ony utheris inhabitantis thairof ..." (Source Book of Scottish History, vol. iii p. 269).

(43) See "Blood Royal", p. 26. A British example is "the King of Misrule" (see Sir Thomas Urquhart, "The Discovery of a most Exquisite Jewel", 1774, p. 146), whom Professor Frazer, "the Golden Bough", vol. ix p. 332 equates with the ancient pagan King of the Saturnalia: latterly called the Lord of Misrule (and, at Oxford, the "King of the Bean" or rex fabarum). The allied office of the Master of the Revels remained a royal household appointment into the seventeenth century. C.f. the English chronicler's

statement that in 1306 at his crowning, Robert Bruce's queen said: "We are like to be a King and Queen of the May, whom children crown in their play".

(44) See the works of Professor Frazer, Professor Hocart and Lord Raglan.

(45) Wagner, op. cit., pp. 31, 47. G.E.C., vol. xi app. C, p. 39. Significantly enough, in the duchy of "Normandie, on trouvait un duc d'armes ayant rang de roi d'armes" (Rémi Mathieu, "Le Système Héraldique Français", ed. J.B. Janin, 1946, p. 62).

(46) Hocart, "Kings & Councillors", p. 294. He continues: "We are all familiar with such duplicates in language. Compare Germanic begin and Latin commence. In such cases either the duplicates specialize in different directions like chaise and chair: or one drives out the other as napkin has done to serviette,"

(47) Wagner, op. cit., p. 12.

(48) Arms appear on the seals, for example, of Ralf, Count of Vermandois (a member of the royal house of France) c. 1116-52, of Gilbert, Earl of Pembroke (a member of the ducal house of Normandy) c. 1141-46, of Amadeus, Duke of Savoy (ancestor of the royal house of Italy) 1143, of Ramon Berengar IV of Barcelona, King of Aragon 1157, and of Welf VI, Marquis of Tuscany and Prince of Sardinia 1152 (see Wagner, op. cit., pp. 14-15).

(49) This is one of the more important points made by Smith Ellis, op. cit.

(50) See "Table Ascendante de 64 Quartiers de Saint Louis IX Roi de France", at Table V annexed to Professor O. Forst de Battaglia's "Traité de Généalogie" (Lausanne 1949).

(51) Forst de Battaglia, op. cit. pp. 77-78. It may be worth, for a moment, comparing this Teutonic dynastic twelfth-century aristocracy with

their equivalents at the other end of the Aryan-speaking world. The kshatriya caste in India, that is, the dynastic kindreds that were ritually qualified by birth to wield the imperium, give a very similar picture: especially among the Rajput group who have kept kshatriya traditions alive in their most archaic form (see Tod's "Rajasthan"). The word Rajput means, literally, "king's son" (see derivation of king, in chapter on Succession among the Northmen, note 13, and derivation of "edling", in chapter on Succession among the Cymry, note 35), and is applied to all the descendants of the ancient Hindu sacral kings, so long as the mothers as well as the fathers were equally of royal kshatriya stock (for some of these clans, see "Chiefs & Leading Families of Rajputana"). A Rajput may be succeeded by an adopted son, but he can only adopt a pure-bred Rajput of his own agnatic kindred or clan. Wealth and position have nothing to do with being a Rajput, and according to the Census of 1901 there were then 9,712,156 Rajputs living in India: yet a great king like the Maharana of Udaipur (ritually, the greatest royalty in the Hindu world) could marry the daughter of the merest man-at-arms if she was a Rajput, but cannot receive his own cadet, the King of Nepal, as a pure-bred Rajput because that branch of his royal house have married outside the dynastic caste (the recent marriage of the Maharaja of Jaipur to a princess of the ancient but not Rajput house of Cooch-Bihar, has caused a great stir in the Rajput world, yet his marriage to a simple thakur's daughter of Rajput stock would have aroused no comment). The Rajputs, like the Teutonic royal houses, are descended from the gods: and they too have a system of hereditary emblems akin to Teutonic heraldry.

The writer has not yet been able to ascertain the genealogical traditions of the bulk of the bushi families of Japan (who numbered nearly two million samurai by 1868), but some of the nuclear families within this caste, such as the famous Taira and Minamoto clans (the Ashikaga and Tokugawa were Minamoto cadets) certainly claimed to be branches of the imperial dynasty, which was of divine sacral origin. These samurai families had their own emblematic badges called mon (with which they marked their civil belongings and martial accoutrements) from long before the twelfth century (R.H. McClutchie, "Japanese Heraldry", Transactions of

the Asiatic Society of Japan, 1876). In Japan, too, marriage into the same caste was of the first importance: and the Emperors from the seventh century until 1924 never married outside the Fujiwara clan (Professor Herbert G. Gowen, "Outline History of Japan", 1928, p. 100).

Dr. Wagner (op. cit.) refers to "the strikingly similar system of family devices prevalent in Athens in the sixth and fifth centuries before Christ" (for which, see C.T. Seltman, "Athens: Its History and Coinage before the Persian Invasion", 1924; and Chase, "Shield Devices of the Greeks", in Harvard Studies, vol. xiii, 1902). In this context, it may be worth observing that the eupatridae, or aristocratic families of early semi-republican Athens, were all descendants of royal stock: and that from 712 B.C. the office of archon basileus was open to all eupatrids ("sons of noble fathers"). Typical eupatrids were Plato and Solon, who both belonged to families descended from King Codrus, last ruling King of Athens.

Generalising very broadly, the fundamental pattern among some at least of the Celtic and Teutonic peoples in early times, points towards a picture in which (1) kingship consisted of (a) royal birth, which meant sacral descent from the pagan gods, (b) being the repository of the law, the custom that had come down from the gods, and (c) having a picked comitatus of aristocratic warriors; (2) all members of the dynasty were kings, at least potentially, but one ancestral shrine tends to be more important than the rest, and the king who lives there tends to be regarded very vaguely as head of the family (politically, his power rarely extends beyond his own local kingdom, often his cadets war against him, he is no more than primus inter pares, but in historic times he or some other member of the dynasty may consolidate the shadowy seniority into a real suzerainty); (3) though all males of royal houses tended to be kings; (4) sometimes, for reasons not yet clear, some of them were peer-class nobles instead; (5) the other peer-class nobles were female-line relations of royal houses; (6) and there was a wide knight-class nobility of free-born gentlemen by birth who held all the land, had an immemorially gentle ancestry and only theoretically joined up with the royal house in some legendary eponymous forefather (or foremother) of the whole race; (7) the

whole nobility, from king to knight's remote cadet, had sacred family emblems akin to totems; (8) beneath them was a wide class who were originally excluded from the race, but gradually became as it were adopted members of the race as economic and marriage barriers broke down over the centuries. The principal respect in which such a picture differs from the majority of other sacral kingships, is in the multiple divisibility of the kingship.

(52) For the tenth-century polygamous Norse king Harald Fairhair, see chapter on Succession among the Northmen, note 26. Dr. Ameer Ali, "A Short History of the Saracens", 1921, p. 626, takes the view that: "Polygamy was in vogue among the Merovingian kings of France. Gontran, Segibert, and Chilperic had several wives at one time. Gontran had within his palace acknowledged as his legitimate wives, Mercritrude, Ostregilde and Veneranda. Caribert had Merflida, Marconesa and Theodogilda. Dagobert I had three wives. Theodobert married Dentary during the lifetime of his wife Visigelde. Clotaire, Aeribartus, Hypercius and his sons all had several wives. Pepin, Charlemagne, Lothaire and his son, as also Arnulf VII, Frederick Barbarossa, and Philip Theodatus king of France, took advantage of similar privileges. Charlemagne is said to have had nine wives at a time". It will be recalled that, as late as 1540, the Protestant theologians Martin Luther and Melanchthon pronounced in favour of Philip of Hesse's bigamous second marriage on the grounds that it was not forbidden by Holy Writ, and though perhaps inexpedient for ordinary folk was allowable for princes.

(53) In Scotland, the social distinction between natural sons by equals, and ordinary bastards, was perhaps originally maintained by the system known as "handfast marriage". See also J.L. Campbell, "The Book of Barra" (1936) p. 47. Lord Lyon Sir Thomas Innes of Learney tells the writer that the children of handfast marriages between equals were regarded as socially legitimate, although not canonically legitimate: and certainly great fiefs were settled on such children (e.g. the Dunbar of Westfield and Sinclair of Thurso cases). In the Papal Applications, natural sons set out that they were of baronial race on the mother's as well as the father's side.

Until the 13th century, the Germanic laws ranked a bastard according to the status of its inferior parent, unless they were equals. The old heralds distinguished carefully between several different degrees of bastardy, according to the status of the parents. The Brehon Laws allow for modified polygamy with wives of different status (see Dr. Cameron, "Celtic Law", pp. 85, 196).

(54) See appendix on "The Single Heir". The immemorial but untitled nobility (uradel) of Scandinavia, Russia, France, Belgium, Italy and (unofficially) of Austria and Germany (e.g. von Rundstedt) are still entitled to display open crowns (coronets) above their Arms: see A.C. Fox-Davies, "The Art of Heraldry" (1904), p. 278 and plate LIV.

(55) The "beasts" often continued, though not displayed on the shield, to re-emerge as crests or badges or supporters. Dr. Wagner is engaged in tracing the use of the Swan as a "beast" by mediaeval families in England and on the Continent, all claiming descent from that ritual figure: the Swan Knight of legend.

(56) J.H. Round, "Geoffrey de Mandeville", p. 392. These families formed a related group, who all adopted Arms based on those of Mandeville: "quarterly Gold and Gules". To this group should be added Lacy and Sackville (see Geoffrey H. White, "Vere, Lacy and Sackville", Genealogists' Magazine, vol. vii no. 9, March 1937, pp. 469-472).

(57) The Royal Arms of Scotland have not yet been traced earlier than the reign of Alexander II, though the name of William the Lyon indicates the likelihood of their existence at least a generation earlier.

(58) See chapter on Succession among the Northmen, note 37.

(59) See the present writer's "Simple Heraldry", p. 33.

(60) For their Teutonic blood, see genealogical table in the chapter on Succession among the Northmen.

(61) The large number of lion coats in England during the early period of heraldry (see for example, those in the Roll of Caerlaverock alone), and

the lack of information about the female-line ancestry of their bearers, makes it impossible so far to attempt any analysis of the possible inter-connection of these lions: though, for example, in such a case as that of the three lions of the Giffards of Brimsfield, it may be noted that these Giffards were cousins of the ducal house of Normandy (and thus of the English kings). Nor is the writer's attempted analysis of the origin of early lion coats in Scotland yet complete, though certain groups begin to emerge, such as possibly (1) Scotland, Buchanan, Galythly, Lundin, (2) Fife, Abernethy, Wemyss, Spens, Middleton, ? Mackintosh, ? Farquharson, (3) Dunbar, Dundas, Moncreiffe, Home, ? Gray, (4) Galloway, Macdowall, ? Fergusson, (5) ? Loarn, MacDougall, Macdonald, Maclean, (6) ? Cowall, Maclachlan, MacEwan, MacNeill, Lamont, Glassary, Scrymgeour, Lyon, ? McGilchrist, (7) Ross, (8) Angus, Ogilvy, ? Guthrie: and the tendency seems to point to descent in the male or female line from the Dalriadic dynasts. It must be remembered that Arms may be assumed as a result of a subsequently disproved traditional descent, but that this does not affect the origin of the Arms themselves. In grouping coats, a genealogical difficulty is the question whether similar Arms reflect blood relationship or simply vassalage - Smith Ellis argues convincingly against a link only by tenure, and the writer is inclined to agree with him (in the Empire, families could marry up or down within one degree of the feudal hierarchy, and the tenants-in-chief of the Emperor, who were allowed to incorporate the imperial eagle in their Arms, were usually of Carolingian descent in the female line) - but from the point of view of the origin of a group-coat, it does not signify whether the links are by blood or by tenure. Even today, the Lord Lyon may not grant Arms to anybody, without Royal Warrant, that include any part of the Royal Arms (e.g. the royal tressure). At the dawn of heraldry, when differencing by colour within a family was very usual (e.g. Hay of Yester bore "Azure three scutcheons Silver" as a difference on Hay of Erroll's "Silver three scutcheons Gules"), it must be remembered that the lion was the principal charge of the Kings of Scots. That the lion could not be assumed at will, anyway towards the close of the Middle Ages, is demonstrated by the terms of an indenture between Sir Duncan Campbell and Sir John Scrymgeour, Constable of Dundee, for an

excambion (which was not effectual) of the Campbell lands of Menstrie for the Scrymgeour lands of Glassary, in 1443: "it is accordit that the said Sr Duncan na his ayris sal nevir mak clayme na lettyng in tyme to cum to the said Sr John Skrymgeour or his ayris in the beryng of the lioun in thair armys, bot at the said Sr John Skrymgeour and his ayris sal oyse and bere the lioun in thair armys frele as thair eldris did befor" (Macphail, "Highland Papers" vol. ii p. 179). Stodart's "Scottish Arms" give two early Scrymgeour coats which suggest that the Scrymgeour element in the Royal Banner Bearer's arms ("Gules a lyon Gold holding a scimitar") was the scimitar rather than the lion, and there seems little doubt that their lion was in fact inherited from the heiress of Glassary, whose ancestors sealed with a lion. The Glassary family had evidently inherited its great barony in the female line from Gillascop MacGilchrist, living in 1240, whose tenures and whose family onomastics make it likely that he belonged to the neighbouring family group of the Lamonts and Maclachlans, who also bore the lion and whose genealogies are given by Skene, in "Celtic Scotland", vol. iii, app. viii pp. 472-474. According to the standard Irish genealogies, this family group were eleventh century cadets of the O'Neill dynasts of Tir Eoghain, but it may be suggested that their great holding in Cowal could only have been obtained at so late a date by marriage into a branch of the local Dalriadic dynasts. But in either case, their lion would have a royal source, as befits the king of beasts, one of the most ancient of the emblems of royalty.

(62) See note 48 above.

(63) See chapters on the Heir at Law to Earldoms, the Heir at Law to Baronies, and Succession among the Gaels.

(64) See chapter on Succession among the Northmen.

(65) See the udal system among the Norse, and also the Welsh system of land-ownership: in the chapters on Succession among the Northmen and Succession among the Cymry. A similar system appears to have prevailed among the Gaels of Ireland (see Professor Eoin MacNeill, "Celtic Ireland").

(66) In his "Freehold in Scots Law" (Juridical Review, Dec. 1945), at pp. 141-142, Professor Croft Dickinson writes: "The rationing regulations of 1552 limited 'barons and freeholders' to four dishes of meat while other 'substantious men' could have but three (A.P.S. ii 488, c. 22). And in 1625 the 'small barons and freeholders' protested against the precedence granted to the 'new erectit ordour of barronettis' of Nova Scotia, and the great prejudice to them 'in thair priviledgis and dignityis' - a protest supported by the Scottish Parliament, but one which makes us ask whereinlay the freeholder's dignity and precedence (A.P.S. v 184b, 187b). Perhaps the answer to that question is to be found in an Act of 1401 which prescribes that at the sheriff's court 'quilibet baro et alius tenens de rege' must appear with his proper seal 'ad serviendum regi': and it must be a seal and not a signet (A.P.S. i 575b). And when the stipulation was re-enacted under James I, in 1430, the wording ran that 'all frehaldaris duelland within ony serefdomes comper at the hede courtis in thair propir personis with thar selis" (A.P.S. ii 19, c. 21). A freeholder with a proper seal is assuredly a holder of arms; and arms are an indication of noble rank. We are tempted to say, with Ross, that the very holding in chief of the Crown was at first "an unerring and essential badge of nobility" (Lectures, 1792, ii 254). Certainly the early freeholder of the king, through his very nearness to the Crown, was a person of some 'precedence' and 'dignity'; though in the eventual multiplicity of such holdings, and in the rise of the few and the great, much of that early precedence was lost". C.f. the use of the style Dominus to describe freeholders (Professor Croft Dickikson's intr. to "The Court Book of the Barony of Carnwath", p. xlv, note 2).

Once a family had acquired the status of gentility (by land-holding or by service to God or king, usually combined with gentle marriage), this status was confirmed to them by a grant of Arms from the Sovereign, as the fountain of Honour, acting through the Kings of Arms of the Royal Household. Even so, the status seems to have been uneasy until it had lasted throughout the generations of a "true family" (see also chapter on Succession among the Cymry, notes 14 and 29). King James VI is reputed to have said, "I can make a lord, but I cannot make a gentleman": and when he instituted

the Order of Baronets, he would (at first) only sell baronetcies to those whose paternal grandfathers had had Arms.

Abroad, the insistence on service to the king (i.e. the State) was such, that families sometimes forfeited their nobility (i.e. gentility) on seeking to serve themselves through commerce. In Italy, on the other hand, the urban patrician came to be the pattern of nobility in the city-states. In clannish Scotland, as in Wales, gentility was a matter of birth, and could be forfeited neither by burgess wealth nor by crofter poverty. In England, after the Whig Revolution, the idea of kinship almost disappeared, and the following extract from "The Observer" newspaper of 13 April 1806 may perhaps summarise what became the popular (as opposed to the strictly heraldic official) attitude: "Singular Conviction - A Curate of a village near town and one of the Overseers of the Parish, a gentleman farmer, had a dispute respecting some private business, and the Farmer d-----d the Clergyman's eyes. For this offence he was brought before the Magistrates of Marlborough Street, and convicted in the penalty of 5s. The Farmer contended that he was not a gentleman, and that he ought to pay no more than 1s. This objection was over-ruled, as it appeared that he kept his sporting dogs, and took his wine after dinner. It happened, however, that the Clergyman had omitted reading the Act against profane swearing, etc.; the Farmer, therefore, returned the compliment, by informing against him, and the Clergyman was obliged to pay the penalty of £5".

(67) See the writer's article on Scrope of Danby in Burke's Landed Gentry, 1952 ed.

(68) See the records of the case, edited by Sir Harris Nicholas, "The Controversy between Sir Richard Scrope and Sir Robert Grosvenor in the Court of Chivalry", 1832.

(69) Nicolas, op. cit., i. 165.

(70) ibid., i. 135.

(71) ibid., i. 138.

(72) ibid., i. 164.

(73) ibid., ii. 381: "qar ils sount de veille auncestrie & dez noblez & dez graundz gentils homes devenuz du temps de Conquest", ibid., i. 167.

(74) ibid., i. 177.

(75) ibid., i. 179.

(76) ibid., i. 187.

(77) ibid., i. 190.

(78) ibid., i. 196.

(79) see G.E.C., xi. pp. 531-533.

(80) ibid., ii 276; i. 97.

(81) ibid., ii. 282.

(82) ibid., ii. 398.

(83) ibid., ii 423.

(84) ibid., ii 391.

(85) Nicolas, ii. 349; i. 142.

(86) ibid., ii. 427.

(87) A certain amount might be established about the genealogical background of twelfth century nobles, by following the system of analysing the

connection at the dawn of heraldry, between families that later appear bearing similar devices: on the lines followed by Round in his "Geoffrey de Mandeville", and by Geoffrey H. White in "The Warenne Group of Checkered Shields", printed at appendix J to G.E.C. vol. xii. Such a group in Scotland, for example, may be found in the families bearing the Galley as their main or as a quartered coat.

The galley or lymphad appears or has appeared in the Arms or quarterings of a number of historic Scottish houses: notably the Earls of Orkney and Caithness (ancient and modern), Macdonald of the Isles, MacLeod of Dunvegan, MacDougall of Dunollie, Macalester of Loup, Stewart of Appin, Hamilton of Arran, Campbell of Argyll, Campbell of Breadalbane, Maclean of Duart, Mackinnon of Mackinnon, Macneil of Barra, MacLachlan of Strathlachlan, Macfie, MacGillivray, Mackintosh of Mackintosh, Farquharson of Invercauld, Mapherson of Cluny and Cameron of Lochiel.

In Lord Lyon Sir James Balfour Paul's "Ordinary of Scottish Arms" (Edinburgh 1903), which lists all coats matriculated in the Public Register of All Arms and Bearings in Scotland between 1672 and 1901, there are one hundred and seventeen entries under "Galley". These can be broken down into the following groups:

1. Ninety-six coats belonging to people of the names above mentioned, namely 42 Campbells (including M'Iver-Campbell, Iverach, Campbell-M'Iver, Campbell Swinton, Campbell Hooke and Campbell Douglas), 17 Macdonalds (including Donaldson, Macdonell, Macdonald Bowie, &c.), 9 Stewarts (including Steuart Moncreiffe and Steuart Fotheringham), 5 Hamiltons (including Hamilton Dalrymple), 4 Mackintoshes (including Toash), 5 MacNeills, 4 Macleans, 3 Mackinnons, 2 Farquharsons (including Farquhar), 2 MacLachlans, a MacGillivray, a MacLeod (but of the Lewis line), and a Macpherson.
2. Seven coats belonging to families abovementioned, but quartered (through heiresses) by other families, namely Macdonald quartered by Lockhart of Lee and by MacGregor alias Murray of Napier Ruskie, Hamilton quartered by Douglas of Selkirk also by Buchan of Auchmacoy and by Hope of St. Mary's Isle, Stewart of Appin

quartered by Moir of Leckie and Campbell of Breadalbane quartered by Pentland of that Ilk.

3. Six burgh or county coats, namely those of the county of Renfrew and the burghs of Queensferry, Pittenweem, Leith, Rutherglen and Oban. In the case of the Queensferry, the galley alludes to the actual ferry, and the galleys of Pittenweem and Leith doubtless refer to the harbours there. But the county of Renfrew was in the sphere of influence of the Stewarts from whom the Hamiltons derived Arran with its galley coat; Rutherglen is in the Hamilton territory; and at Oban the spheres of influence of Campbell, Macdonald, Maclean and MacDougall, all meet.
4. Eight miscellaneous coats, namely Keith of Ravelston, Whyte of Stockbrigs, Macvicar, MacLarty, M'Lardy, MacLaurin Gillies, Bald, and Scott of Kelly. In the case of Keith of Ravelston, the galley is employed as a difference on the chief Arms of Keith: such differences were often chosen from a maternal line, and a study of the Ravelston history would no doubt reveal (besides the sorrows of his line) a marriage into one of the families whose principal charge was the galley. About Whyte of Stockbrigs and Bald the writer has no information; nor about Scott of Kelly (who matriculated in 1863) except that it may be noted that since 1794 the Scotts of Buccleuch have been heirs general of the Campbells of Argyll (from whom they inherited inter alia the port and harbour of Granton, as proprietor of which the Duke of Buccleuch was granted special Arms in 1866 including the Campbell galley). Macvicar may or may not fall within the sphere of influence of any of the great highland houses abovementioned: it depends on the origin of the eponymous vicar. The Clan Labhran of Balquhidder differenced the Arms of Strathearn with a galley, and doubtless their close alliance with the Stewarts of Appin was confirmed by marriage at an early date; and Stodart points out that Gillis is armorially alias Macpherson. - As for MacLarty and M'Lardy, we are told "the Maclaverties were the 'speakers', i.e. Heralds of the Lords of the Isles, and were

accordingly settled in the neighbourhood of their Court at Islay" (Frank Adam, revised by Innes of Learney, "The Clans, Septs and Regiments of the Scottish Highlands", 1952, p. 314), and this is borne out by Macdonald & Macdonald in "The Clan Donald" (Inverness 1896), vol. iii at p. 550, where they also add that the MacLavertys "are descended from the Family of the Isles ... They broke out early from the main stem, and claim descent from the founder of the Monastery of Saddell" (i.e. from a brother of the eponymous ancestor of the Macdonalds).

Of the 117 coats whose principal charge was the galley, therefore, there are only 8 that cannot be definitely deduced from the historic Scottish houses listed in the first paragraph. Three of these eight are burgh coats that appear to be genuine exceptions, deriving their galleys only from a local connection with the sea. It cannot be said of any of the remaining five (Keith of Ravelston, Whyte of Stockbrigs, Scott of Kelly, Bald and Macvicar) that they are genuine exceptions, without an exhaustive study of their family histories and marriage alliances.

These 117 coats, of which at least 109 can certainly be deduced from our list of historic Scottish houses abovementioned, are those that survived to be matriculated or were granted after the establishment of the present Lyon Register by statute in 1672. There are two main sources for such Arms as did not survive until 1672, or which have never since been matriculated. One of these is seals, and the other is armorials. The most complete Scottish armorial to have been published is that of Lord Lyon Sir David Lindsay of the Mount, compiled in 1542 and authenticated by the subscription of Sir James Balfour, a later Lord Lyon, after having been "approvine be ye Lordis of his Maietis most honorable Privie Counsale at Halierudehous, 9. Decemb: 1630": this armorial is of equal authority with Lyon Register itself, according to the decision of the Court of Session in the case of Dundas v. Dundas on 22 January 1762 (Brown's Supp. v. 493).

This armorial of Sir David Lindsay of the Mount includes the Arms of 114 Scots peers and 194 other Scots families: 308 shields in all, not counting quarterings (and besides certain foreign royal coats). Among these 308 Scottish shields the galley only appears twelve times. Four

golden galleys can be deduced from the Orkney (including Caithness) earls. Seven black galleys belong to the historic families of MacDougall of Lorn, Macdonald, Arran, Hamilton, Campbell and Stewart abovementioned. The remaining galley is quartered beneath three Stirling buckles with the Arms of Menteith, by the family of Menteith of Kerse that descended from the marriage of Sir John Menteith (a cadet of the Stewart Earls of Menteith by way of Wallace's captor) to Marjorie Stirling, daughter and heir-portioner of Sir John Stirling by his second wife, Mary of Lorn (of the Clan Dougall abovementioned): it was through this marriage that the Menteiths acquired Kerse. All the galleys to be found among Lord Lyon Lindsay of the Mount's 308 Scottish shields are therefore to be deduced from the historic Scottish houses listed in the first paragraph.

As some Scottish coats appear in early armorials, but not necessarily in the Lindsay armorial nor in Lyon Register, facsimiles of such Scottish coats from the majority of surviving armorials were published in 1881, edited by R.R. Stodart in his "Scottish Arms: Being a Collection of Armorial Bearings A.D. 1370-1678, Reproduced in Facsimile from Contemporary Manuscripts". These include several hundred coats, of which the following are the only ones charged with galleys:

1. Armorial de Berry, c. 1450-55: three galley coats. Two of these, the Earls of Angus and Orkney (who are placed together), are readily attributable to the Orkney connection (c.f. SCOTS PEERAGE, i. p. 162, ii. p. 315). The third is more difficult: it is a red galley charged on the usual Arms of Graham and labelled "le sr de Grain". None of the seals of the Graham lords at this or any other period shew the usual coat charged in this way, nor are their mediaeval marriages all so well known as to shew whether or not they had any connection with a "galley" family. It may, however, possibly be relevant that one of their near cadets, Sir Patrick Graham (one of the Barons who sealed the Declaration of Independence at Arbroath in 1320) married a daughter of John of Argyll, Lord of Lorn (the then Chief of Clan Dougall), and that there are some grounds for believing that he may have left descendants surviving in the male line into the 15th century

- (see SCOTS PEERAGE, vi. pp. 203-204). This Graham galley is unusual in being red.
2. Lord Lyon Sir James Balfour's copy, executed c. 1630-54, of Lord Lyon Sir Robert Forman's Roll of c. 1562: one galley coat, namely that of Steuart of Grandtully, of the house of the Stewarts of Lorn.
 3. An armorial of the late 16th century, belonging in 1881 to the representative of the Kers of Yair (Charles Scott-Plummer of Sunderland Hall) and known as the Sunderland Hall MS.: two galley coats, namely the black galleys of Lorn (Clan Dougall) and the Isles (Clan Donald).
 4. Additions made by the 17th century to Lord Lyon Lindsay of the Mount's authoritative armorial cited above: three coats, namely the golden galley of Orkney, and the black galleys of the Isles and of Arran.
 5. An armorial compiled c. 1565-6, that belonged in 1623 to Herald Painter James Workman and is therefore known as Workman's MS.: four coats, three of which clearly belong to the historic families abovementioned (namely, the Lords of Lorn and the Isles, and "Clanchattan"). The fourth coat is that of Richesoun, apparently Richardson of Smeaton, which family bore a saltire (usually on a fess) between a bull's or boar's head in chief and a black galley in base: but their history is not sufficiently well known for these charges to be explicable.
 6. An armorial compiled between 1603 and 1605 by Lord Lyon Sir David Lindsay of the Mount, the second of that name: two coats, the black galleys of Macdonald and Maclean.
 7. A small folio volume in Lyon Office, known as Gentlemen's Arms and evidently compiled during the reign of King Charles I: two coats, one for Donaldson and the other for Farquharson. The Donaldson coat, though attributable to the Macdonald group, is unusual in that it is white on black.
 8. Funeral Escutcheons from the volumes in Lyon Office: one coat, that of Mackintosh of that ilk.

9. From the funeral escutcheon of Mary Oliphant, Countess of Strathmore: one coat, namely a galley quartered with the Arms of Echlin of Pittadro (Argent a stag Gules). Since the galley is Sable on Argent, and the Echlin quarterings also include Stewart (Or a fess chequy Azure and Argent), this coat can without hesitation be assigned as for Stewart of Lorn.

Thus, among the hundreds of coats printed in facsimile from the majority of Scottish armorials (in Stodart's work), the galley appears nineteen times. Seventeen of these nineteen coats can be ascribed to historic families listed in our first paragraph; while of the two exceptions, the history of Richardson of Smeaton is not sufficiently well ascertained for an opinion to be formed, while "le sr de Grain" may well have been a cadet descended of the Clan Dougall marriage since no Lords Graham ever sealed with a galley.

In Workman's MS., cited above, there appears a three-masted ship in the Arms of Craik, but (although a number of three-masted ships, especially those quartered by Caithness Sinclairs, may descend from the golden galley of Orkney) such ships have been excluded from this inquiry, which has been limited to the more usual single-masted galley or lymphad. Indeed, "Ship" is entered quite separately from "Galley" in Lord Lyon Balfour Paul's Ordinary, and is of course blazoned differently in Lyon Register.

Two thousand nine hundred and eighty-nine seals are described in "Scottish Armorial Seals", by William Rae Macdonald, Carrick Pursuivant (Edinburgh 1904). Of these nearly 3,000 seals, eighty-two have shields or quarterings charged with galleys. These galleys are as follows:

MacDougall galleys of Alexander of Argyll, Lord of Lorn 1296,
and of Alan of Argyll 1319.

Galley of Earl of Caithness 1296.

19 Campbell galleys from 1495 onwards.

18 Hamilton galleys from 1517 onwards.

Galley of Andrew Maccoull (i.e. MacDougall) 1524.

20 Macdonald galleys from 1292 onwards.

5 Mackintosh galleys from 1490 onwards.

Galley of Hector Maclean of Duart 1546.

Galley within a royal tressure impaled with the Murray stars by Thomas Murray, Bishop of Caithness, presumably for his see of Caithness.

4 Richardson galleys between 1556 and 1588.

4 Sinclair galleys from 1407 onwards.

Galley of Patrick Stewart, Master of Orkney 1592.

5 Stewart galleys of the house of Lorn from 1448 onwards.

Galley quartered by Stewart of Baldorran, descended from the Regent Albany's son Sir James Mor Stewart by his liaison with a Macdonald (see SCOTS PEERAGE i, p. 151 and John Stewart of Ardvorlich's "The Stewarts").

Thus all these 82 galley coats can be deduced from the historic Scottish families listed in the first paragraph, with the possible exception of the four Richardson coats, to which the same remarks apply as those under the Workman MS. cited above in the examination of Scottish armorials.

Another source of emblematic galleys, sometimes on shields but often used badgewise, is on the stone tombs of their bearers. Although galleys are to be found on the tombs of members of the historic families above-mentioned all over Scotland (e.g. the Chapel of Moncreiffe in Perthshire contains a Steuart of Grandtully tombstone carved with the Lorⁿ galley), the great majority of tombstones carved with galleys are to be found in the ancient sphere of influence of the royal house of Argyll and the Isles: notably in Argyllshire itself. In "Argyllshire Galleys" (London 1906), Lord Archibald Campbell illustrates twenty-three galleys from such tombstones, and one from a font formerly at Kilmorich in Ardkinglas (which Lord Archibald connects with the MacNaughtons, although it may equally have been connected with the Campbells). Fifteen of these twenty-three tombstone galleys belong to unidentifiable graves, but all were those of men of rank within a territory dominated by the historic "galley" families. The remaining eight galleys belong to the tombstones of a Macleod, of Angus Og Macdonald of Islay (Lord of the Isles, died 1330), of Iain MacIain of Ardnamurchan (the family of Angus Og's brother Iain Sprangach, and an important branch of Clan Donald), of a Mackinnon abbot of Iona (presumably the well-known tomb of Abbot John Mackinnon who died in 1500: for the

Mackinnons at Iona from the time of "the Green Abbot" Mackinnon, whose daughter mothered the first Macdonald of Sleat, see Sheriff J.R.N. Macphail's "Highland Papers" i. p. 32 and pp. 83-92), of Terence Maclean of the hunt of Kilma-carraig, of a Maclean of Ross, of a Macquarie (of Ulva), and of a Macdonald of Largie. These galleys are therefore those of three Macdonalds, two Macleans, a Macleod, a Mackinnon and a Macquarie. The Macquaries were important feudatories of the Macdonald rulers of the Isles, and inherited the island of Ulva in particular. Their genealogy as given by MacFirbis and in the Gaelic MS. of 1467 printed by Skene as an appendix to his "Celtic Scotland", shows their eponymous ancestor Guaire to have lived at no very remote period and to have had a grandson Torkill (Turcaill); while Douglas's "Baronage of Scotland" cites a Macquarie MS. history of 1648-9 for the family tradition that their ancestor of the 14th century "married Giles, daughter of Mactorquil ... descended of the Norwegian kings of Man". In any case, the Macquaries of Ulva were very closely inter-related with the Macleans, a great "galley" family: the Macquarie chiefs for five generations up to 1740 had married Macleans, so that the later Macquaries of Ulva had more Maclean than Macquarie ancestry. The other families represented by galleys on tombstones all belong to the historic houses listed in the first paragraph.

These historic houses were the source of at least 224 out of the 238 galleys that appear among the thousands of Scottish coats of Arms examined, nor (with the exception of three burghal allusive coats) is there any evidence that the fourteen other galleys were necessarily exceptions from this source. The historic houses themselves can be divided into three groups:

1. The Orkney group of golden galleys. To this group belong the galleys of the Earls of Orkney, Caithness and Angus, together with that of the Sinclairs.
2. The Isles group of black galleys. To this group belong the galleys of the rulers of the Isles, the lords of Lorn, the Earls of Argyll, Arran and Breadalbane, together with the Macdonalds, MacDougalls, Macalesters, Macleans, Mackinnons, Macfies, Macneils, MacLachlans, MacLeods, and Stewarts of Appin.

3. The Clan Chattan group of galleys. This galley is sometimes depicted black, gold, or even Proper (as in Workman's MS.): but has now been legally determined for the future to be blue (Matriculation of the Chief of Clan Chattan, Lyon Register 9 April 1947). To this group belong the galleys of Mackintosh, Macpherson, MacGillivray, Farquharson, and Cameron of Lochiel.

An examination of the inheritance of the galley within each group may point to the original source whence it was derived.

The earliest surviving Sinclair galley is perhaps that which appears quarterly with the Cross engrailed (the old Arms of Sinclair, known from at least the 13th century) on the seal of Henry Sinclair, Jarl of Orkney, appended to a charter of 26 Nov. 1407 (Laing's "Ancient Scottish Seals", i. 745, and "British Museum Catalogue of Seals" 16877). Here it is depicted as a dragon ship with sails furled: pointing to its Norse origin. Jarl Henry was son of another Henry Sinclair, Jarl of Orkney, the discoverer of Greenland (see "The Voyages of the Venetian Brothers Nicolo and Antonio Zeno", Hakluyt Soc. 1873), who had inherited the semi-independent principality of Orkney (held of the Norwegian Crown) through his mother, daughter of Malise, Jarl of Orkney and Earl of Strathearn, who was the heir (through the female line) of the old Norse jarls. Before the Earl of Strathearn inherited Orkney, it had been held (also through female descent from the old Norse jarls) by the Earls of Angus. The Scottish earldom of Caithness was originally an appanage of the Norse jarls of Orkney. These jarls were of sacral royal Ynglingar descent, and their ancestor-deities' emblem was the Boat of Frey and Nerthus, so often represented in Scandinavian rock-carvings (see above, note 17, and chapter on Succession among the Northmen, note 4), i.e. the Galley.

The common ancestor of the Isles group of Galley families, in the male or female line, was King Olaf Morsel of Mann and the Isles, who was killed in 1153. The earliest known seals of his male-line descendants, the later Kings of Mann, shew the Galley (see Speaker A.W. Moore, "A History of the Isle of Man", 1900, vol. i, pp. 136-138, app. on "The Armorial Bearings of the Isle of Man"). The MacLeods of Dunvegan, who claim a male-line descent

from him, quartered the galley until the seventeenth century (see Stodart's "Scottish Arms"), when they changed the quartering into the famous "three legs of Mann" under the impression that this was the correct coat to demonstrate their claim. The MacLeods of Cadboll, cadets of the fallen MacLeods of Lewis, who made a similar claim, recorded their quartering of the Galley in Lyon Register. King Olaf Morsel's daughter Ragnhild married Somerled of Argyll, whose family obtained the kingship of the Southern Isles, and whose male-line descendants, the Macdonalds, MacDougalls, Macalesters, &c., all bear the Galley (it appears on their earliest seals). The Macleans owed their great position in the Hebrides to the marriage of Lachlan Maclean of Duart to a daughter of Macdonald himself in the 14th century (see Macphail's "Highland Papers"), and thereafter the Galley appears in their Arms, quartered with the more purely Maclean charges. The Mackinnons and Macfies were also great feudatories of Macdonald, intermarried with his family, and obviously derived their Galleys through him. The Maclachlans, who quartered the Galley, certainly descended from King Olaf through Macdonald and MacRuairi marriages (see Skene, "Celtic Scotland" iii pp. 474-474), and were no doubt proud of it since they lay on the fringes of the island sphere of influence, but it is not clear how they actually shared in the Hebridean inheritance, though they quartered the Galley. The same applies to the MacNeills of Gigha. In the case of the Macneils of Barra, there is of course no doubt that they lay in Macdonald's sphere of influence and that they descended from Macdonald himself through repeated Maclean marriages. Indeed, at one time the writer suspected that they were in fact male-line kinsmen of the Macleans, and descended from a different son of the Maclean ancestor Niall, son of Conduilig, abbot of Lismore. But, on the whole, the probability seems to be that the Macneils were (as they claim, though not in the form in which they claim) of the same stock as the MacNeills of Gigha, and that they acquired Barra about the close of the 14th century by marriage to a MacRuairi daughter. The MacRuairis, whose Arms were a Galley, descended in the male line from Ragnhild, daughter of King Olaf Morsel, and held Barra in 1343, while in 1372/3 the superiority of Barra was still vested in Ranald (ancestor of Clanranald, and son of the great MacRuairi heiress). There was a tradition that the Macneils of Barra descended from "thirty-three Rodericks" (i.e. Ruaris) before Gileonan son of Ruari son of Murdach MacNeill obtained a

confirmation charter of Barra in 1427 (see Macneil of Barra, "The Clan Macneil", p. 183), yet no previous Ruari appears in any traditional Macneil genealogy and Gileonan's predecessors in Barra were the MacRuaris: it seems probable therefore that these thirty-three Ruaris are a tradition from the MacRuari tenure of Barra, and that the name Ruari (afterwards so characteristic of the Macneil chiefs of Barra) came to them, with their Galley quartering and the island itself, through the marriage of Murdach MacNeill to a MacRuari (indeed, it is hard otherwise to account for the powerful Clanranald allowing this island inheritance to leave the family). The Galley of Arran, quartered by the Hamiltons, was inherited by them with the island of Arran, the dowry of King James III's sister who married the 1st Lord Hamilton. King James III himself had inherited Arran as the result of the marriage in the 13th century of the Steward of Scotland to the heiress of a son of the House of Somerled: so once again, this Galley is derived through King Olaf Morsel. The MacDougalls, lords of Lorn, who descended in the male line from Olaf's daughter Ragnhild, had an heiress who carried their main inheritance to the Stewarts of Lorn (ex quo the Stewarts of Appin), whose heirs portioners in turn carried it to the Campbells of Argyll and Breadalbane. The exact origin of the Hebridean royal house to which King Olaf Morsel belonged is uncertain (see the chapter on Succession among the Northmen, note 5, where it is suggested that they descended from King Harald Graycloak, son of Eric Blood-Axe of Norway), but there seems little doubt that they were Ynglings. As such, they were of sacral royal descent, and their ancestor-deities' emblem was the Boat of Frey and Nerthus: the Galley.

The third group of Galley coats are the Clan Chattan, and their rivals in Lochaber, the Camerons of Lochiel. These clans were certainly at one time or another feudatories or followers of Macdonald: and Sir Aeneas Macpherson (in "The Loyal Dissuasive", Scot. Hist. Soc., p. 33) refers to the command of Clan Chattan being "unjustly wrested from" Cluny "by the Great McDonnell in favour of McIntoshe who was his nephew at that time"; while Lochiel's famous ancestor Domnall Dubh is said to have fought for Macdonald at Harlaw. But it is not possible so far to say for certain why or whence they inherited their Galley.

COMMON ANCESTRY OF THE BLACK GALLEY

THE GALLEY OF MANN.

OLAF MORSEL, King of Mann & the Hebrides, d. 1153.

GODFREY, King of Mann & the Hebrides RAGNHILD SOMERLED, ruler of Argyll, killed 1164.

Norse Kings of Mann (whose Arms were the Galley): from whom the Macleods (who quartered the Galley claim descent.

THE GALLEY OF LORN

THE GALLEY OF THE ISLES.

King DUGALL

ANGUS, lord of Bute & Arran

RAVALD, King of the Isles

heiress m. MacDougalls of Dumollic (who quarter the Galley).
Stewart of Innermeath

JAMES, killed 1210. heiress m. ALEXANDER Great Steward of Scotland.

EOIN, Lord of the Isles
RUAIRI, ancestor of the MacRuairis (whose appanage included Barra & whose Arms were the Galley), possibly female-line ancestor of the MacNeills of Barra (who favoured the name Ruairi, & quartered the Galley)

heiress m. Lord Campbell of Glenorchy.
Campbells of Argyll (who quarter the Galley).
Campbells of Breadalbane (who quarter the Galley).

Stewarts of Appin (who quarter the Galley).
King ROBERT III Sir JOHN (natural son) of Bute
King ROBERT II

THE GALLEY OF ARRAN.
Macdonalds of the Isles (who quarter the Galley).
ELISABETH m. LACHLAN Maclean of Duart, Steward of the Isles.

King JAMES III sister m. Lord Hamilton (her dowry was Arran)
present Royal House (Prince Charles is Duke of Rothesay & Lord of the Isles.)

Macleans of Duart (who quarter the Galley)

(PRESENT DUKE OF ARGYLL).

(PRESENT LORD OF THE ISLES).

(PRESENT EARL OF ARRAN).

(LORD MACDONALD. PRESENT LORD LIEUTENANT OF INVERNESS-SHIRE).

(MACLEAN OF DUART, PRESENT LORD LIEUTENANT OF ARGYLL).

(88) For example, in 1198 and 1199 the English Pipe Rolls style the widow of John of Chester (John de Lacy, Constable of Chester) "Alice de Vere": she was the issue of Roger fitz Richard of Warkworth's marriage to the sister of Aubrey de Vere, Earl of Oxford, and was thus using her mother's family surname (see Geoffrey H. White, in *Genealogists' Magazine*, vol. vii no. 9, March 1937, pp. 469-472). For the practice in general, see Dr. J.H. Round, "Feudal England", pp. 475-476. An almost astonishing example from Scotland is that of William de Warenne (better known as King William the Lyon), who was styled by his mother's surname, as apparently also was his elder brother Malcolm IV (see Professor Ritchie, "The Normans in Scotland", pp. 345-346).

(89) For their genealogies, see Burke's *Landed Gentry*, 1952 ed., sub DAUBENEY and MALET DE CARTERET. Other examples, are the assumption by the Lumleys of the arms (but not the name) of Thweng; and the assumption by the Talbots of the arms (there was of course no surname) of the Princes of South Wales: in each case through marriage to a thirteenth or early fourteenth-century heiress.

(90) G.E.C. vol. ix p. 494.

(91) *Scots Peerage*, vol. iii, pp. 525-526.

(92) See G.E.C., vol. xii p. 170. For the Toesni line, see ibid. pp. 168, 755 note (b). For the Bagots, see Burke's *Peerage* sub Lord BAGOT.

(93) The earliest quartered coat in England was that of King Edward III, who quartered France with England. One of the earliest coats in Scotland to be quartered was Abernethy, quartered by the Earls of Angus and Crawford as a result of fourteenth-century marriages to heirs-portioners of the old abbatial house of Abernethy: which demonstrates its prime importance (see appendix on Succession to the Crown Bearing).

(94) The word "chief" was introduced into Scotland by the Normans. The French equivalent was styled "chef du nom et d'armes".

(95) Thus the kindred who, but for the assumption of surnames, would have been known collectively as branches of the Royal or Ducal House of Argyll, and would all have borne variations of "Silver a galley Sable" (just as the equally female-line Royal House of Scotland all bore variations of "Gold a lion within a royal tressure Gules"), have come to be divided into separate families, called MacDougall, Stewart, and Campbell: each quartering emblems of their own paternal kindred with the original Arms.

(96) See Johnston & Robertson, "Historical Geography of the Clans of Scotland" (1899) pp. 31, 35.

(97) See G. Harvey Johnston, "The Heraldry of the Murrays" (1910).

(98) W.R. Macdonald, "Scottish Armorial Seals", p. 306, np. 2425.

(99) A.P.S. ii, pp. 320-321.

(100) The ^awriter's "Genealogical Introduction" to Burke's Landed Gentry 1952 ed. Lyon, however, may withhold the Crown's consent, and refuse to give effect to manifestly malicious settlements.

(101) Lord Justice Clark in Maclean of Ardgour v Maclean, 1941 S.C., p. 683, line 35.

APPENDICES.

APPENDIX A.

THE SINGLE HEIR.

THE SINGLE HEIR.

In a paper about the general laws whereby a series of single heirs take in succession to heritage, it may perhaps be useful to consider why the single heir in heritable succession is distinguished from the other nearest kindred who partake equally in the moveable succession. In this connection, it is necessary to consider first the succession to land, which is corporeal heritage, before going on to consider incorporeal heritage, such as Arms and dignities - because the learned judges cited in the introductory chapter above linked the origin of the law of succession to Arms and dignities with the early inheritance of land.

The Single Heir to Land.

There are many reasons for the existence of laws of succession to landed heritage that differ from those of succession to ordinary moveables. For example, the land of any realm is limited in quantity, and is as necessary to the people in general as is the air. It is scarcely a chattel to be owned outright in the same way as a set of china⁽¹⁾. Again, "in the countryside, the rewards of effort are long deferred and planning is by the generation rather than the year. Therefore hereditary security of tenure is all-important"⁽²⁾. Land owes its condition to the work, not of one man, but of many generations. "Continuity in the administration of the nation's land has served a good purpose, for a man will plant acorns more readily when he knows that his own children's children will one day have the benefit of the oaks. Hereditary administrators have the added advantage of being from birth acquainted and associated with the particular problems of local folk"⁽³⁾. Most systems of succession to land, therefore, provide both for the public interest and for some security of tenure in the posterity of those who devote their lives to administering the development of the land.

Allodial and udal law, by which land is held "under God alone"⁽⁴⁾, recognises the long-term interest of a free family who settle and develop a piece of territory. For, after a certain number of generations of development by the family, if the individual life owner of any fragment

parts with his inherited portion, it may (at any time for many years thereafter) be redeemed on specially advantageous terms by any member of the kindred who chooses to take advantage of this inherent family option. Thus, by the old Norse law, land became udal when it had been held by a family for three generations, and a fourth generation had inherited it⁽⁵⁾. Once land had become udal, "if sold to any one outside the family, the latter had a right of redemption at a price one-fifth less than the appraised value, if they or one of them gave public notice of a claim within twenty years to the Thing, and this right to redeem did not become forfeited till after the expiration of sixty years' undisputed possession in the new owner without notice of any claim given"⁽⁶⁾. All the children succeeded to portions of the udal land on their parent's death, although during one period in Norway this is said to have been limited to all the sons. The idea of a single heir, when it arises at all among allodial communities, occurs principally in connection with lands annexed to the support of an office: e.g. the lands annexed to such offices as king or bard in ancient Ireland. Such offices tend to be of ritual origin⁽⁷⁾, and to be hereditary, at least in the broad sense that they are usually confined to particular families, if not in the narrower sense of passing automatically to a particular series of heirs. It is perhaps noteworthy that those offices that required a single heir to their mensal land even in allodial communities, most nearly correspond to the category of incorporeal heritage with which this paper deals.

By contrast with the allodial emphasis on family ownership of property in land, feudal law is more concerned with the interests of the rest of the community in efficient land administration, and so with keeping together in economic units land developed by particular families. There is therefore a single heir, chosen when all things are equal by the accident of prior birth⁽⁸⁾ but subject to special diversions of the succession in special circumstances. Comparisons within a family may be invidious, and it is not essential that the eldest son be its most capable member provided he is up to its average standard and able to fulfil his duties adequately, for his succession has the advantages of certainty and his longer training⁽⁹⁾. But where he is below standard, or other considerations militate against

him, the law has always provided a remedy⁽¹⁰⁾. Formerly, alterations in the succession to feudal land required the superior's consent, but this consent is now presumed by statute, and the Scots law of testacy has been extended to allow heritage to pass by testament, as the head of a family is taken to be normally⁽¹¹⁾ the best judge of his children's capacity or his family's best interests.

It is periodically affirmed by distinguished judges that feudalism was simply a method of raising armed men in time of war⁽¹²⁾. Yet mediaeval life was perhaps no more exclusively geared to war than is life today, with our military conscription and our vast defence budget. The civil work of the baronial courts, which formed as it were district councils in which the ordinary country folk took part, included local administration and attention to details of husbandry, quite apart from their criminal jurisdiction and police duties⁽¹³⁾. In fact, under the feudal law, landholding is subjected to a number of qualifications, to safeguard both the interest of the people (as represented by the sovereign or other superior) and the interest of the posterity of the family who have developed it (as represented by the future heirs). These basic principles have underlain our own laws of succession to heritage since Scotland was first united into a single realm during the twelfth century. They depend on two complementary notions of stewardship⁽¹⁴⁾. The holder of heritage is steward for the Nation in the administration of that heritage, and is bound by stringent duties: with the stress formerly on civil administration and police jurisdiction⁽¹⁵⁾ but nowadays on good husbandry and adequate maintenance. The holder of heritage is also steward for the past and succeeding generations of the Family, as their progenitors' responsible heir and representative: so no one generation is allowed, on intestacy, to treat the heritage as a common fund to be added to the moveables for their purely personal benefit, irresponsible in the context of the land. The land is thus treated as a public office for which the heir is to be trained if possible (the baronial parliament of 1496 enacted that lairds' heirs were to be adequately educated), while any other children are expected to be provided for out of the late official's personal moveable savings. The heir-at-law inherits the landed responsibilities, whereas

the heirs in mobilibus inherit no corresponding duties. (These principles are well understood when applied to the Crown, the greatest heritage of all). The feudal emphasis is throughout on Tenure as opposed to Property, and so the land in Scotland has remained "nationalised" since the twelfth century. All the land belongs in principle to the Nation, as represented by the Crown⁽¹⁶⁾, and it is held of their representative the Sovereign by tenants who have been given a certain security of tenure. There is therefore no general law of trespass known to Scots Law. This hereditary security of tenure is called holding in fee or in feu, whence the word "feudal", and has always been subject to certain conditions⁽¹⁷⁾.

Early capitalism had continued to recognise the special position of land from the point of view of succession, through the system of entails. But by the twentieth century, with the liberal shift of emphasis from status to contract and from public duties to individual rights, capitalist⁽¹⁸⁾ modifications of the feudal law had tended to treat land more and more as an individual's temporarily convenient investment, capable of absolute ownership by him or her. The single heir is perhaps an object of envy rather than understanding, to the outlook that sees land in terms of comfortable assets and cash value alone. However, the emphasis now seems to be shifting back again, to duties vis-a-vis the State and status within some corporate body⁽¹⁹⁾, for public opinion appears to be changing markedly in favour of (what is little understood to be in fact) the older view. In this context, New Socialism is but Old Feudalism writ large. Socialist administrations in Scotland have certainly tended to revert to the feudal principles, although expressed in very different terms. The interest of the people is safeguarded by new legislation empowering state supervision of landholders, and the continuity of administration in the posterity of landholders (anyway at the farm level) has been remarkably safeguarded by Socialist legislation giving tenant farmers permanent hereditary security of tenure. In effect, the Agriculture (Scotland) Act 1948 converted most tenanted farms in Scotland into feus, from the point of view of succession⁽²⁰⁾.

But the urban capitalists who triumphed on the Continent as a result of

the French Revolution were less equipped to understand these principles, for "feudalism, being essentially stable and rural, often clashes with the dynamism of commercial cities during the growth of trade". The Code Napoleon treated land as though it were any other investment, and abolished the single heir: with disastrous effects that are now being increasingly felt as the remorseless generations of sub-division accumulate. As a result, in both France and Western Germany, the law has had to be amended again and "special provisions have been made in the matter of agricultural holdings with a view to retaining families on the land and preventing excessive sub-division of holdings"⁽²¹⁾. A trust in the administrator of an intestate estate for sale of land like any other investment, and distribution to all children equally, formed the basis of the essentially capitalist Administration of Estates Act 1925 in England, framed when the Conservatives had begun to conserve Liberalism, and were consolidating the victory of what they believed to be "sound business principles". The English law of testacy is not limited by any automatic "bairns' part", so the worst effects of this statute on the rural economy have so far been largely avoided. Moreover, it has not yet been in force a sufficient number of generations for its ill-effects to be felt in the same measure as on the Continent.

A modern anomaly in the Scots law of succession to heritage has led to inequitable hardships in the towns. As a result various learned bodies have looked towards England, and have recommended the entire overthrow of what has always been the land law of Scotland in matters of intestate succession. They have found support among reasonably aggrieved townsmen. Their zeal has, however, been opposed by other learned bodies, and also by the country landholders who are chiefly concerned by any abolition of the single heir and who might reasonably be supposed to understand how they wish succession to their heritage to be regulated. The bias of opinion, reasonably enough, seems to vary according to the essential difference between an urban and a rural upbringing⁽²²⁾. Yet the anomaly that has caused this genuine grievance formed no part of our fundamental law. It was never part of the original feudal law to treat "burgage", as urban heritage was called, in the same way as rural land. In feudal France, for

instance, burgage was treated as allodial and all daughters succeeded share and share alike with all sons⁽²³⁾; while in Scotland each burgh formerly had its own customary law of succession, and in a number of them the tendency was also for the whole children to succeed equally⁽²⁴⁾. In modern times, however, the Scots law of succession to burgage was assimilated to that governing rural heritage, partly for conveyancing convenience but with undoubtedly unhappy results in many cases.

Although there are arguments in favour of the descent of a shop or factory to a single responsible heir, they are not so cogent as in the case of the continuity of development and administration of the land; and it seems for example manifestly unfair that when someone dies intestate leaving cash worth only £500 together with a town flat worth £3,000, that the heir in heritage who inherits no responsibilities with it should inherit the flat (and promptly sell it) while the rest of the next-of-kin get so little money. This could, however, be very simply remedied by a statute enacting that where the total heritage passing on intestacy does not exceed the statutory acre of curtilage, the heir-at-law would be obliged to collate, or that where the total corporeal heritage does not exceed an acre in extent it should be called burgage and treated as moveable for purposes of intestate succession. No economic unit of rural heritage is likely to be less than an acre in extent, and burgage rarely exceeds an acre. But the 1951 Committee of Inquiry into the law of succession in Scotland made much wider suggestions about intestate succession in general, that would leave the single heir unburdened only in cases of leasehold, that would retain the single responsible heir to freehold only in certain very limited cases of agricultural succession (but would burden the freehold very heavily for the other next-of-kin although they would not share any landed responsibilities), and that would abolish the single heir altogether in all other cases of freehold and especially in the balanced country estate that comprises forestry and other rural enterprises besides agriculture.

The Single Heir to Incorporeal Heritage.

The report of this committee added the recommendation "That the succession to hereditary titles, coats of arms and similar rights should continue as heretofore, i.e. the law of primogeniture would continue to apply thereto. These subjects by their very nature must devolve on a single person". It has therefore seemed an appropriate time to undertake an examination of these categories of incorporeal feudal heritage, excluded by the committee from its suggested experiments, with particular reference to the law and practice of succession.

It is noteworthy that these categories are those that most nearly coincide with the group which we have seen are associated with the idea of the single heir even (on occasion) among allodial communities. The allod is in general a more primitive type of holding than the feu, and it has been demonstrated in recent years that the focus of the most primitive civilised communities tends to be ritual⁽²⁵⁾. The survival of national ritual, when separated from irrelevant accumulations of political power, is now realised to satisfy lasting emotional and psychological needs in the community. That this is part of the fascination that our civilisation has for the relatively ritual-starved peoples such as the Americans is perhaps made clear enough by the subject-matter of their daily Press and will be readily understood by any royal officer of arms who has had the pleasure of welcoming American visitors to this country or of visiting the American continent. Ritual dignities and Arms, now that they are increasingly divorced in our democracy from ideas of political supremacy, evidently serve this lasting social purpose in a way that has led to their popular survival despite the changes of the centuries, for it is usually "logical" intellectuals rather than the people who are opposed to their continuance. Certainly "the custom of granting such titles has enabled us, through our Sovereign, to reward public service without cost to the taxpayer, and their hereditary nature increases their value to the recipient, as it crowns his achievements with a lasting memorial"⁽²⁶⁾.

But the 1951 Committee were mistaken in their assumption that "these subjects by their very nature must devolve on a single person". With the

general exception of chiefship, which by its very nature is almost indivisible⁽²⁷⁾, hereditary titles and other dignities as well as coats of arms are in many countries inherited by the whole kindred and not by a single heir.

We are told by B.S. Philpotts that among the semi-feudalising conquests of King Harald Fairhair, "royal birth and the possession of a hird (or company of warriors sworn to his service), and not land or subjects, were the essential attributes of a king"⁽²⁸⁾. Each son was a king, and set forth with his own share and his own hird to make his fortune. Even Harald Fairhair himself was so imbued with the idea of inheritance by the whole kindred that he made about twenty of his sons into kings, only seeking to maintain his new centralisation by installing one of them as over-king. Indeed, the very word "king" is derived from kin-ing, that is "Son of the Kindred" of the Blood Royal, and is closely connected with the style knaes used by every member of the Woden-born Rurikid family of royal Danes in Russia, where each son was styled by the title knaes (now translated "prince") and inherited a part of the general family sovereignty⁽²⁹⁾. Rank among the pagan Norse was so much a part of the inheritance of the whole kindred, that their sacred myth tells how in the beginning, at the Creation of Mankind, jarl and karl and thrall were created separately.⁽³⁰⁾

In the Germanic countries of the Empire, too, despite the introduction of feudal fiefs and later the fideicommiss, such dignities as hereditary titles tended to be inherited by the whole descendants. Ernst, Herzog zu Braunschweig und Lüneburg is brother of Georg, Herzog zu Braunschweig und Lüneburg and uncle of Welf, Herzog zu Braunschweig und Lüneburg: in fact there are at present no less than seven living Dukes of Brunswick and Lueneburg, though this perhaps becomes more comprehensible when zu is translated in its proper sense of "at"⁽³¹⁾, which is also more in accordance with the ancient allodial view of dignities. Of course, since the introduction of feudalism and the fideicommiss there have been Germanic dignities that pass only to the single heir, and in particular the title of Fürst, but all the cadets of a fuerst often inherit the title of Prinz (e.g. in the Hohenlohe family), and they may also inherit other dignities jointly:

thus the cadet prinzen of the Schwarzenberg fürsten all inherit equally the titles of "Princely Landgrave in the Kleggau and Count of Sulz".

In Germany also, Arms are undifferenced and are inherited equally by the whole kindred. For example, every legitimate male of the House of Wettin (to whom our own Sovereign belongs, and who were already gräfen when they first appear on record in 892, i.e. of the ancient Teutonic "jarl" category) is a joint heir to the title of Herzog zu Sachsen, translated "Duke of Saxony", and is also a joint heir to the famous family Arms: "Barry of ten Sable and Gold, over all bendwise a rue crown Vert". There can be little doubt that this attitude to Arms and dignities was an allodial survival into feudal Germany, as their family Arms serve a purpose more akin to family totems than to our devices for individual recognition, and their family dignities are nearer to the ancient Teutonic idea of a ritual kindred than to our feudal idea of a single office inherited by the single heir; although new styles and fief-coats were also introduced into feudal Germany for the single heir.

Finally, it may seem that the 1951 Committee must have been right if they intended to indicate hereditary offices in their category of subjects which "by their very nature must devolve on a single person", but it will be found on examination that even offices may be divided among several heirs: as a half-way case from the point of view of inheritance (as opposed to actual exercise) the recent history of the office of Lord Great Chamberlain of England will repay study, and from a single hereditary priest there may evolve a whole kindred of priesthood⁽³²⁾.

Nevertheless, in assuming that hereditary titles and Arms required the single heir, the 1951 Committee were expressing a Scottish outlook that has proved of value to our national cohesion. For where dignities are limited to the single heir, popular ritual requirements and family historic tradition can be satisfied without the creation of caste differences. All Habsburgs and Schwarzenbergs and Pappenheims are ebenburtig in a princely caste set apart from the rest of the community. But although the Campbells have a ritual head in the Duke of Argyll, and Lords Saltoun and Lovat are both Frasers, the names of Campbell and Fraser and kinship to

these peers do not mark off these kindreds in any separate class from their fellow Scots: so that the traditional Scottish ritual divisions are vertical rather than horizontal between kindreds. In England, on the other hand, the doctrine of the single heir to titles has been carried so far away from the idea of kindred that nearly all sense of kinship with any general community has been lost - if it survived the Conquest save in the North and West - and so the concept of Arms and dignities there has apparently less of a broad basis in popular sentiment than up here. "Lyon Clerk tells us that more new coats of arms have been registered in Scotland since 1930 than in the previous three hundred years" (33). At the same time Scottish peers and chiefs have found the demand for their work of integrating communal goodwill (as tribal or local mascots, in a sense) greatly increased: so much so, that they have found it necessary to establish the Standing Council of Scottish Chiefs to co-ordinate their activities. An almost unconscious continuance of very ancient feeling leads to a constant demand for ritual figures to confer their blessing on communal occasions: from launching ships to opening sales of work - and many bodies besides clan societies prefer to be presided over by such a figure. This is especially worthy of remark, as too often the central political significance of these ritual figures is exaggerated by urban writers and their local homely social significance forgotten. It is with the broad principles of law and main methods of practice whereby these single heirs came to be selected in succession, that this paper has been concerned.

NOTES TO APPENDIX ON THE SINGLE HEIR.

(1) In "Celtic Ireland" (1921) Professor Eoin MacNeill writes, at p. 147: "No man can ever possess a thousand acres of land in the same sense as he can possess a pocket-knife. Why then can he be truly supposed to have the same kind or degree of property in both?" But it is an interesting commentary on the bitterness of Anglo-Irish history that he continues: "If the modern feudal and legal notion of absolute ownership in land did not exist in ancient Ireland, instead of seeking an explanation in unauthenticated theories, may we not rather ask why on earth such a notion should have existed?" This passage is typical of a widespread confusion between true feudal tenure and the use of feudal charters for political expropriation, that has long bedevilled the understanding of feudalism by the unhappy Celtic fringe, and has even led to the apparently paradoxical usage of modern journalism whereby "feudal" is regularly employed as a synonym for "despotic" although the whole concept of true feudalism was a limitation on absolute property.

For any "modern legal notion of absolute ownership of land" is of course utterly alien to feudal thought, and in Ireland as in England seems to have been evolved in Tudor times. In Scotland, such notions seem to have received their main impetus during and after the reign of King James VI, in so far as they were applied to the West Highlands. In Ireland, the truly feudal settlers soon tended to become indistinguishable from the native Irish: this was especially so of those families who settled in Ireland before English feudalism received its death-wound in the statute Quia Emptores of 1290. The Fitzmaurice lords of Kerry, for example, were soon styling themselves "Mac Morrish" and their country and people became known as Clanmaurice (indeed, the present 29th Lord of Kerry, the Marquess of Lansdowne, is actually holder of a Georgian peerage as "Viscount Clanmaurice"); yet this in no way conflicted with their feudal duties, and they served the Plantagenet kings against the Scots just as the Ui Cathain followed the Cenél Eoghain kings against the Cenél Conaill. This compatibility between true feudalism and ancient Irish institutions was recognised in practice by the contemporary Irish themselves: for instance,

in 1595 Aedh Ruadh Ua Domhnaill, King of Cenél Conaill (Hugh Roe O'Donnell of Tyrconnell), in virtue of the suzerainty claimed by the Cenél Conaill over Connacht, settled a dispute about the chieftainship of the MacWilliam branch of the Anglo-Norman Burkes (de Burghs) and invested Theobald de Burgh as The Mac William Burke. Yet by the twentieth century even so great an Irish scholar as Professor MacNeill was as emotionally incapable of seeing the nature of feudal law, as have been Professor W.F. Skene and most other modern historians of the West Highlands of Scotland.

The very natural reason for this attitude towards the word "feudal" is that in Ireland, as in Macdonald's fallen kingdom of the western Isles, the written charter that gave feudal security of tenure came increasingly to be used by the conquering Crown to enfeoff strangers, and not to confirm security of tenure to the native aristocracy of Gaelic culture (this native aristocracy was however neither necessarily immemorially ancient locally nor always made up of Milesian Gaels: the dispossessed MacGillemaire dynasty of Waterford and the dispossessed Siol Torquil lords of Lewis were alike of Norse origin). Moreover, as incoming conquerors, these strangers usually recognised no feudal obligations towards the original inhabitants, thereby hastening the process of conversion from community-minded feudalism to eviction-minded capitalism. The feudal history of the Geraldine territories in Ireland and of the Highland earldoms of Atholl and Lennox and Mar in Scotland, in all of which charter feudalism existed from genuinely feudal times, is very different from the advent of capitalism with the Ulster plantation and with the Fife adventurers in the Hebrides. The most valid reason for blaming the downfall of Gaelic culture on the introduction of feudal tenure is perhaps that for which it is also blamed in Orkney: that the feudal law in superseding the udal law failed to make any similar provision for an option by the kindred to redeem any alienated family land.

All the same, "the astonishing thing is the manner in which later historians and constitutionalists have succeeded in misrepresenting the Feudal System. In England it was disliked because it (a) was imposed after the national defeat at Senlac, (b) was inimical to, and inconsistent with, the Tudor despotism, (c) functioned effectually apart from the

central Government; and was accordingly viewed askance by both the English administrators and parliamentarians. (d) In Scotland it was associated with the Jacobite Risings and also a source of National strength. The Hanoverian Government consequently set itself to undermine, not only the system itself, but to inculcate anti-feudal propaganda. It is as a result of this that in the popular mind "Feudalism" has been made a sort of bogey associated with (1) serfdom: whereas Scotland, the most perfect example of a feudal state, was the first to abandon serfdom, and which serfdom was pre-feudal, and had nothing essential to do with the feudal system, or the "family" at all. (2) Peasant Risings, and Oppressions; and the brutal "Free Companies". These had nothing to do with "Feudalism" and were concomitants of the "Hundred Years War" and its train of accompanying misery. Each of these things arose from a breach of the feudal structure and principles. (3) The Noblesse d'orée of Versailles, which was a titular and financial Order built up by Mazarin and Richelieu, after the strength of the old feudal Noblesse had been destroyed in the Fronde. The old feudal Noblesse Champetre continued in poverty alongside, and it was a grievance of the Court officials that these preferred to live amongst the peasants to coming to Versailles. Brentano, Old Regime in France, pp. 107, and 85, 89" (Innes of Learney, Proc. Soc. Antiq. Scot., lxxix, 122n.).

(2) The writer and Don Pottinger, "Blood Royal" (1956) p. 34.

(3) The writer's genealogical introduction to Burke's "Landed Gentry" (1952 ed.) p. lxvi.

(4) Among allodial landholders, although the people may adhere to some local dynast, their land is not held of him: the king is a ritual figure who reigns among his people rather than rules over their land. A survival of this idea lingered in the style "King of Scots" that was preferred to that of "King of Scotland" right up to the Union of the Crowns. Under early feudalism, on the other hand, a man might hold different lands from as many different dynasts. An allodial landholder would say: "I am of

the Cenél Eoghain, and the king among my kindred is Ua Néill". But a feudal landholder could say: "I am a man of King Erik of Norway for my jarldom of Orkney, and a man of Robert King of Scots for my barony of Rosslyn", or "I am a man of the King of Scots for my lands in Lothian, and a man of the King of England for my lands in Northumberland, but a man of the Bishop of Durham for my lands of Staindrop held of St. Cuthbert".

(5) That is, when it came by inheritance to the founder's great-grandchildren. The establishment of a new family by the group descended from a common great-grandfather is a feature of the ancient succession laws of various Indo-European peoples as widely dispersed as India and Ireland, and appears among the Gaels as the derb-fine: see chapter above on Succession among the Gaels.

(6) Deemster R.D. Farrant, "Mann" (1937) p. 9. For convenience, this is recapitulated here, but see also above, chapter on Succession among the Northmen, note 9.

(7) For an examination of the fundamental importance of ritual to the organisation of society, including customs of succession, by the comparative method, see the pioneer works of the late Professor A.M. Hocart. Lord Raglan, present President of the Royal Anthropological Institute, writes in his introduction to Professor Hocart's "Caste" (1950) that Hocart found early religion and social organisation to be but two aspects of the same thing. Lord Raglan continues, at p. vi: "he showed that priests, nobles, and officials, wherever found, originally owed their position to the parts which they played in a ritual of which the king was the head ... Hocart's theory in essence is, then, that all human communities were originally bodies of persons organized for ritual purposes. ... At the head of the rites, from very early times, stood the divine king". It must perhaps be stressed that all Britain was pagan within the span of our recorded history, and that the various dynasties that combined to form the present British monarchy are no exceptions to this general rule of sacral kingship. The royal houses of the Gaels, the

Britons, the Northumbrians and the Norse all traced their descent from gods, i.e. from sacred families who embodied a lucky spirit, usually of abundance or weather (see the British royal genealogies printed in "Blood Royal"). Primitive dignities tend to originate in the ritual companionship of the sacral king, as also the totemic germ of the idea of sacred family emblems that grew into the elaborate technique of heraldry (and in this context it is important to remember the allodial heraldry of Germany). In "Social Origins" (pub. posthumously 1954) Hocart himself observed: "All rituals, so far as we have been able to trace them, began with the chief of the society, whether totemic headman or king and were later extended to private individuals". Raglan (op. cit.) adds: "Since the divine king was god as well as man, the whole of his service was a ritual service, and his cook, barber, drummer, etc., were sacred persons, and the families which furnished them ... received, as a reward for their services to the king, and through him to the community as a whole, lands and other privileges. ... The king's cook, in fact, need not actually cook at all, but merely supervise the preparation of the king's food. In England there is a family which used to provide the King's Champion at his coronation, but it did not consist of professional duellists". The hereditary Lord High Constable of Scotland was the ritual head of our army, not necessarily its everyday commander, and the hereditary Chief Butler of Ireland rarely had occasion to wait at the royal table. What is not always realised is that although Hocart and Raglan may have overstressed the importance of ritual, it cannot be ignored, for this ritual concept of dignities has nearly always been so, in all parts of the world, and is not the result of any modern change of outlook. That is to say, it is a mistake to think of modern ceremonial dignities merely as emasculated survivals from past political power. This fundamental ritual undertone to the background of Arms and dignities must be borne in mind when considering the laws of succession governing them.

(8) It is an accident of birth that one son is older than another. Thus it can truly be called an accident of birth that the Duke of Edinburgh is not King of Denmark, that Field-Marshal Alexander is not Earl of Caledon,

that Sir Winston Churchill is not Duke of Marlborough or that Bertrand Russell is not Duke of Bedford. But it is of course no accident that the nuptials of a Duke of Bedford produce Russells and not Alexanders, and it is in fact quite absurd to say that it was an "accident of birth" that Lord David Cecil was not produced by the nuptials of the late Kabaka of Buganda.

(9) Primogeniture, or at least the doctrine of the single heir, has a further unintentional advantage in that it tends to promote the growth of civilisation, in so far as our civilisation is our accumulated inheritance from the past. Before Estate Duties and other taxation ended the rise in our leading standards of living, each provident generation of a talented great house was able to improve on the highest standards of the past, and an ever-increasing number of what might be called local family treasure-houses grew up throughout the country. Great palaces like Lord Lansdowne's Bowood and small houses like Macquarie's Ulva were alike able to keep alive and expanding the culture that is now shrinking into museums, which should nevertheless be looked on as invaluable local treasure-houses too. This ever-rising standard at the top raised the competitive target for ambitious cadets and able new men from among the rest of the community from generation to generation, until halted at the time of the first World War. Moreover, younger sons were brought up in surroundings which their families could never have afforded under the system of sub-division which has always prevailed almost everywhere else, and they were then sent out into the world to try and achieve or maintain a similar standard for themselves. Many sank as "remittance men", but the State and the Empire profitted from the rest. The writer is therefore of the considered opinion that primogeniture (however apparently unjust to the individual) was one of the many factors that contributed to the unprecedented expansion of Western Europe throughout the whole world, and that its abolition in many European countries has played a part (however small) in their decline.

(10) Except that since the Union the English seventeenth-century peerage law has been applied to prevent any diversion of our peerages from the

line of heirs that happened to be indicated at the time of the Act of Union. The purpose of this English rule of peerage law was apparently to prevent corruption between the Crown and any peer desirous of altering his succession.

(11) In the case of incorporeal heritage, however, such as Arms, the Lord Lyon still reserves the right of the Crown to refuse to give effect to testaments that are manifestly malicious, by declining to authorise rematriculation in terms of such a testament.

(12) See the introductory chapter above.

(13) See Professor W. Croft Dickinson, "The Court Book of the Barony of Carnwath" (Scot. Hist. Soc. 1937) pp. lix-lxix.

(14) These notions of stewardship were very clearly expounded to the writer at the age of fourteen by his uncle the late 22nd laird of Moncreiffe, in case he should ever chance to succeed to Sir Guy's territorial responsibilities. Other lairds have addressed the writer in similar terms. This is thought worthy of mention, because the writer is often assured by cynics who are not in a position to know, that no such notions are ever held by landowners.

(15) Quite the reverse of the popular conception of baronial life as exemplified through the cinema. As Professor Dickinson (op. cit. p. lxxiii) observes: "The maintenance of the local castle was regarded as essential for the economic, military, and governmental welfare of the kingdom. The Act of 1426 shows that the King and parliament did not regard the baronial castle as a robbers' stronghold from which the baron and his retainers might sally forth to harass and oppress the poor men upon the land, or in which the baron might put to defiance the officers of the King. Exceptions there might be, but in general the barony with its castle was 'the proper residence of a landed gentleman, a centre of local government, a precaution against thieves and pirates, a place to hold local disturbances in check'."

(16) Exceptions are the udal lands in Orkney and Shetland, and certain church lands of the established Church of Scotland, still held directly under God alone. Much land in the west of Scotland and elsewhere is technically held of the Prince and Steward of Scotland. This office of hereditary Great Steward of Scotland is now vested in Prince Charles, Duke of Cornwall and Rothesay. It was granted to his ancestor Walter fitz Alan before 1153, and merged with the Crown when the then Steward acceded to the throne as King Robert II in 1370/1, when it gave its name to the Stewart dynasty. Since then it has been vested in King Robert's descendants, the successive Heirs Apparent to the Throne. In strict theory, however, as well as in practice, the Heir Apparent's appanage comes under ultimate national ownership through the homage and service due by the Great Steward to the Crown, the state embodiment of the people.

(17) Perhaps the most onerous condition on security of tenure nowadays is the burden of Estate Duty, although the public importance of preserving the continuity of succession to rural heritage has been recognised by a special reduction of 40% in this duty in the case of agricultural subjects and by further concessions in the case of afforested land. Formerly, the conditions that most affected security of tenure were rather different, but nonetheless they existed. For example, in 1547 David Moncreiffe of Easter Rynd was slain at Pinkie. His lands were held of the Priory of Pittenweem, and his heir was his next brother Peter. But Peter was incapable of military service, although aged 22, and so was obliged to resign the lands of Easter Rynd to the youngest brother, James, after first appearing in the Chapter-house of Pittenweem where he "showed himself to be impotent and feeble in his limbs (and unfit) to serve our Sovereign Lady the Queen, the State, and our Lord Superior": et ibidem palam exposuit se membris impotentem, inhabilem, et debilem, ad serviendum Supremae Dominae Nostrae Reginae, Reipublicae, et nobis domino Superiori (Registrum of Pittenweem p. 196). The use of the word Respublica in this connection illustrates the present writer's point about the feudal nationalisation of land in Scotland.

(18) "Capitalist" is not used here as a political term of abuse, but to describe the historical and economic post-feudal outlook that tended to assimilate land to moveable capital as little more than another form of capital investment for profit. It is often noticed that progressive reformers will do unkind things in the present because they believe it may lead to future good, and in the early days of rural capitalism progressive landowners carried the new capitalist anti-feudal theories to their logical conclusion in the Clearances (for an unusually balanced analysis of this problem, see James Macintyre's review in "The Scottish Landowner" No. 76, July 1954, at pp. 127-135). This left-wing experimental practice of that day was of course opposed by the contemporary right-wing die-hards: thus the reforming ideas of the dynamically progressive Whig Sutherlands, who evicted most of their clansmen with the best intentions of thereby raising the local standard of living of the remainder, were anathema to the reactionary Tory Robertsons of Struan, who evicted nobody. This only seems worth mention because modern writers sometimes refer to the Clearances as though they were an essentially conservative practice in some way connected with feudalism (see also note 1 above), although large-scale clearances were only possible in those highland areas where feudal tenures had not penetrated as deeply as in the lowlands: tacksmen and mailers would have been safe from eviction had they held mid-superiorities and feus. In considering the history of laws of succession, therefore, it is important to distinguish between the feudal and the capitalist outlook. But capital and the land are of course nowadays linked even more closely than ever before. Moveable capital is an ever-growing necessity to the adequate modern development of land, but so far from affording any grounds for weakening or abandoning the single heir in freehold while strengthening his position in leasehold, it rather tends instead to support an argument for the restoration and extension of the former rural concept of "heirship moveables" that used to pass with the responsibility for the land to the heir in heritage.

(19) E.g. the Scottish Landowners Federation or the National Farmers Union of Scotland. The technical memoranda or reports of such bodies may

often be the work or embody principally the views of only one or two vigorous members, but such opinions naturally carry greater weight when presented to government departments in this form.

(20) This trend, from the point of view of succession, is to be observed as far back as the Crofters Act 1911, the Small Landholders Act 1919 and the Agricultural Holdings Act 1923.

(21) "Law of Succession in Scotland: Report of the Committee of Inquiry" (1951) p. 11.

(22) This distinction was very marked in the memoranda submitted to the 1951 Committee, as an analysis of the views advanced by the organisations and people listed at pp. 5-6 in their report would show.

(23) See Sir Thomas Craig, Jus Feudale 1. 11. 36., Lord President Clyde's trans. (1934), i. p. 200.

(24) Craig, op. cit. 1. 11. 19., writes: "In some of these burghs for example the youngest born succeeds to the property to the exclusion of the first born and all his elder brothers. This seems strange; but it has the advantage of protecting the interests of the youngest child who is often more in need of help and support than the older ones who are better able to look after themselves. In other burghs again the whole children succeed 'per capita'."

The special character of burgage was also recognised by the ease with which it could be disposed of (unlike rural heritage): "we find that the burgess holds his land as freely as he holds his goods, with freedom to alienate or to bequeath subject only to certain limitations which may be imposed mainly to protect his family and his kin" (Professor W. Croft Dickinson's intr. to "Early Records of Aberdeen", Scot. Hist. Soc. 3rd series, p. xxxviii). The principal limitations were those on the alienation of land imposed by the retrait lignager (for which see D. Baird Smith, "The Retrait Lignager in Scotland", Scot. Hist. Review, xxi (1923-4),

pp. 193-206).

(25) See note 7 above. The theatre, for example, originated in sacred ritual, and has kept a special connection with the monarchy to this day (see "Blood Royal" passim). A modern development of this immemorial theme is the playing of "God Save the Queen" after the main film, at the end of cinema performances, to the accompaniment of short films depicting the Coronation procession, the Sovereign at a Garter ceremony, the Colour Trooping or other occasions of national ritual (with which our topic of Arms and dignities is so closely associated). The crowd usually hurries out before the end of the main film, in order to save a few seconds of lifetime, but in moments of national crisis it may be noticed that they tend to remain for the National Anthem.

(26) "Simple Custom" p. 43. It must however be observed that certain other passages in this book require revision in the light of subsequent research.

(27) Cases of divided chiefship have occurred, especially in its highest form: i.e. "the Chief of Chiefs - the King", as the Chief of Clan Gregor toasted George IV. Quite apart from the fundamental duality of many ancient monarchies, such as the Spartan kingship where two separated lineages were simultaneously represented at the head of the nation, there is the institution of collegial sovereignty where co-kings share in the patriarchal representation of the royal founder, e.g. the chiefship of the Bagratids in fifteenth century Georgia (Toumanoff, Traditio vii. pp. 169-221: in this context, the present writer was able to help unravel the reasons for the partition of Georgia at the end of this period by the suggestions about the relationship of the co-kings Constantine II and Bagrat VI, accepted by Professor Toumanoff in "The Mother of King Bagrat VI of Georgia, 1465-1478", Le Muséeon, Louvain 1956, lxix. pp. 86-90). Perhaps as good examples as any are furnished by the Gaels, to whom chiefship has always been of marked importance. Probably the greatest Gaelic chiefs during most of the period 250-1603 were those descended from the

sacral kings of pagan Tara, and during a great part of this period the most prominent of these were the Chiefs of the Cenél Eoghain, the leading clan of the Northern Ui Neill, sprung from King Eoghan, son of the Tara monarch Niall of the Nine Hostages: and reference has been made to them above in the chapter on Succession among the Gaels. The king of Cenél Eoghain, as chief of this clan (cenél is an ancient word of similar meaning to clan, both words being met with in Ireland and Scotland with the meaning of "children" in the sense of "descended kindred"), was styled in English "captain of his nation" and was very much the living representative of their patriarch Eoghan mac Neill. Yet on several occasions there were co-kings; and for one reign three brothers, King Tadhg mac Conchobair, King Flaithbertach mac Conchobair and King Conn mac Conchobair, shared the chiefship of the Cenél Eoghain from 956 to 962 when all three were killed together. But all these examples of divided kingship or chiefship are only variations on the theme of the single heir, and in no way correspond to succession by the whole next-of-kin.

(28) See also Professor H.M. Chadwick, "The Heroic Age".

(29) A genealogical table of the manifold sovereigns of this house is appended to "The Russian Primary Chronicle: Laurentian Text" as trans. and ed. by S.H. Cross & O.P. Sherbowitz-Wetzor (1953), but only shews their ramifications up to the twelfth century. The whole Rurikid succession is to be found in A.M.H.J. Stokvis, "Manuel d'Histoire et de Genealogic" (Leide), but may require revision in points of detail. See also chapter above on Succession among the Picts, note 52.

Rurik's Scandinavian ancestry has some importance in our study of laws of succession, because the Scandinavian influence on parts of Scotland was as strong as it was on Russia. In the Rurikids, we have a divine royal pagan Scandinavian family whose history is fairly well recorded, and who were by no means out of touch with their kinsmen on the Atlantic seaboard (thus Vladimir II Monomakh, great knaes of Kiev, married the daughter of King Harold of England who fell at Hastings in 1066). There is no reason to suppose that the Rurikids adopted their succession laws


from the Slavs, and their system seems rather to have reflected the allodial kingship of the Scandinavians before centralisation began there: Rurik appears to have been a scion of King Harald Hilditönn, the sacred Skiöldung of Lethra in Sealand who was slain by his nephew Sigurd Ring at the epic battle of Bravalla in about 770: see N.T. Belyayov, Seminarium Kondskovianum, ii (Prague 1929), and ibid., vi (1933).

The results of their system of allodial succession are summed up by Sir Donald Wallace: "In theory the whole Russian land was a gigantic family estate belonging to the Rurik dynasty, and each member of that great family considered himself entitled to a share of it. It had to be divided, therefore, into a number of independent principalities, but it continued to be loosely held together by the dynastic sentiment of the descendants of Rurik and by the patriarchal authority - a sort of patria potestas - of the senior member of the family, called the grand prince, who ruled in Kiev, 'the mother of Russian cities'. His administrative authority was confined to his own principality ... What added to the practical difficulties of this arrangement was that the post of grand prince was not an hereditary dignity in the sense of descending from father to son, but was always to be held by the senior member of the dynasty; and in the subordinate principalities the same principle of succession was applied, so that reigning princes had to be frequently shifted about from one district to another, according as they could establish the strongest claim to principalities. ... During the ... 170 years (1054-1224) no less than 64 principalities had a more or less ephemeral existence, 293 princes put forward succession-claims, and their disputes led to 83 civil wars". George Vernadsky, "A History of Russia" (1945 ed.) writes of this mode of succession: "The princes frequently moved from one town to another. The eldest of the family always tried to occupy the throne of Kiev which was regarded as the highest. Following the death of each Kiev prince, a general movement of princes took place. The power was vested in the whole royal family and was constantly being reallocated between members of the family - a custom that corresponded to the principles of property ownership in ancient Russia. There is much in common between this custom and the later customs of the peasant commune". It is hardly necessary to observe

that ordinary customs are evolved from royal customs, and not the reverse (see note 7 above).

However, the Norse essential attributes of kingship, "royal birth and the possession of a hird, and not land or subjects," form a marked element in the political position of the typical Rurikid knaes, whose hird was called his druzhina (see also, the old Welsh kingships, subdivided among all the royal sons, where each king had his own teulu, described in the chapter above on Succession among the Cymry). When Princess Olga urged her son Sviatoslav of Kiev to become a Christian, in the tenth century, he replied: "How can I alone change my faith? The druzhina would laugh at me!" In the conservative cities like Novgorod, the knaes approximated to the ancient allodial kings who reigned rather than ruled although they were repositories of the law. Vernadsky, op. cit., writes: "The monarchical element was to be found in the person of the prince, who in ancient Russia was, however, not an autocratic ruler. His chief function was military. His duty was to defend the town from enemies outside. Another important function of the prince was judicial". Wallace, op. cit., says that Novgorod "was not so much a principality as a municipal republic ... It always had a prince, no doubt, but he was engaged by formal contract ... while all the political power remained in the hands of the civil officials and ... a popular assembly which was called together in the market-place, as occasion required, by the tolling of the great bell. ... Descendants of Rurik ... who tried to have their own way and came into conflict with the authorities had always to yield in the long run, and they were liable to be treated very unceremoniously, so that the vulgar adage, 'If the prince is bad, into the mud with him!' became a maxim of state policy".

This allodial concept of kingship, in which the office itself is capable of unlimited division among the next-of-kin, was overthrown in Russia by the rise to autocratic supremacy of the knaes of Moscow, who in the fifteenth century proclaimed himself Caesar of the East (it is not strictly relevant to this paper, but may be of interest, to note that Ivan the Terrible was a Scandinavian royalty, Woden-born, in the direct male

line, and that his mother was a Mongol princess of the imperial house of Genghis Khan: the writer does not know of any Slav blood in this famous Slav ruler). But even under Muscovite rule, all Rurikids continued to succeed equally to the dignity of knaes, which was only allowed also to the descendants of Guedimin of Lithuania (e.g. the Princes  Galitzine) and of various other subjugated ruling houses (especially Tatar mirzas) until Peter the Great began to confer the title on leading nobles by letters patent. Today, every member of a Rurikid house, such as those of Dolgorouky or Obolensky, still inherits equally the title of knaes that originated in their family more than a thousand years ago.

The allodial idea of a ritual royal kindred whose title does not depend on wealth or power is so alien to feudalised and modern thought, that in 1911 W.A. Phillips wrote: "The Russian title of 'prince' (knyaz) implies undoubted descent from the great reigning houses of Russia, Lithuania and Poland; but the title descends to all male children, none of whom is entitled to represent it par excellence. There may be three or four hundred princes bearing the same distinguished name; of these some may be great nobles, but others are not seldom found in quite humble capacities - waiters or droshky-drivers. The title in itself has little social value". It is interesting to observe that long before the Revolution, Russian princes were already following their well-known avocation as restaurateurs and taxi-drivers, but Mr. Phillips's use of the word "social" seems to indicate Edwardian smartness rather than society in the anthropological sense: Islam is full of sharifs descended in the male line from Ali who married the Prophet's daughter and who himself belonged to the Koraish, but the title still has social value in that the Blood of the Prophet is respected even without wealth or power.

(30) See chapter above on Succession among the Northmen, note 23 . For references to a similar system among the Homeric Greeks, see Hocart's "Caste" p. 134, where he comments, "Homeric society, so far as we can gather from stray hints, was divided into nobles, commons and serfs. A threefold division still commended itself to Hippodamos of Miletus. He classified the citizens of his Utopia into arms-bearers, farmers and

artisans. The nobility was of royal descent. Even in historical times we are told that those were called nobles who inhabited the city and partook of the royal lineage (Etym. Magnum, ap. O. Schrader, Reallexikon der indogermanischen Altertumskunde, new ed., Strassburg 1927-8, s.v. Stände). The title of king, basileus, seems to be applied by Homer to all the members of the aristocracy, like the title turaha in Fiji. This was the practice in Ephesus and Skepsis in historical times (Pauly-Wissowa, V., 66. Gilbert, ii. 272. Strabo, xiv, 1, 3). ... The title had thus had the same downward career as in Ceylon; and when Homer speaks of kings it is sometimes doubtful, as in Fiji, whether he means kings or nobles". In this context, it must be pointed out that it is not suggested that kingship was not originally a single office occupied by a single heir among primitive allodial communities, but merely noted that the office of king together with other dignities is capable of division equally among the whole next-of-kin in some advanced allodial communities: though it tends to revert to the single heir once feudalism is established.

(31) The Germanic styles of von and zu are both really mistranslated "of". In this context, von properly means "from" in the sense of belonging to the former seignorial family of the name-place. Zu means "at" in the sense that the family are still lords of their name-place, rather like the Scots designation "of that ilk" except that zu is used by the whole family so long as their name-place is still in the possession of any member of their house (thus all the Counts zu Sternberg are still so styled although Sternberg has long been held by a cadet line). The style "Duke at Brunswick" would convey the allodial concept of a local ritual kindred far more clearly than does the usual translation "Duke of Brunswick". Some families needlessly reduplicate by using the style von und zu, which is quite unnecessary as zu comprehends von in any case.

(32) Such an ancient hereditary office, immemorially sub-divided, can leave traces that survive for a remarkable number of centuries. For example, all bearers of the name of Levy claim descent from the patriarch Levi, and in particular the true Levitical priesthood was confined to the

Cohens who claimed descent from his chief descendant Aaron: these claims are undoubtedly of very ancient date, and although there may have been some redaction of genealogies in ancient times, nobody could have assumed either of these distinguished names without considerable Jewish comment in historic times. "In the most proper sense, therefore, the names Cohen and Levi are family names which we find everywhere, through all the centuries unto this day throughout the world, wherever there are Synagogues of Jews. The name Levi (but never that of Cohen) is also sometimes a purely personal forename ... The name is, however, clearly recognised as a family name when a personal name precedes it, as, for instance, in the case of the old Spanish-Jewish name Juda Hallevi (which signifies 'from the tribe of Levi'), or, in France today, the name Michel Levy. Both of these family names may be found among Jews who belong to the poorest and the richest classes. The name of Cohen carries in all the Synagogues of the world a hereditary right, which cannot be taken away nor imparted to any one not of that name.

All the male members of the Cohen family, having reached years of discretion and personal obligation under the law of Moses, congregate on the Sabbath and religious feast-days, in the Synagogue, to pronounce collectively the solemn Priest's blessing of Numbers vi. 25-7. All the male members of the Levis assist the Cohens at that function with the water-can and basin for the washing of hands before the ceremony. There is yet another distinction which was conferred formerly in the Synagogue on all Cohens and Levis irrespectively of social rank. Of the seven men of the Community called upon on the Sabbath to stand beside the Reader when reading the Law of Moses (properly and originally, a seventh part of the section of the Law, Parascha, every week, before the lesson), the first always must be a Cohen and the second a Levi" (Dr. Isaac da Costa's "Noble Families among the Sephardic Jews" 1936, p. 133). In this connection, it may be of interest to observe that the present Lord Rosebery, a Scottish peer and former Secretary of State for Scotland, is the grandson of a Cohen (the late Baroness Mayer Amschel de Rothschild) who moreover belonged to the same talented branch of that distinguished kindred as the present Lord Cohen and Sir Andrew Cohen, Governor of Uganda. Dr. Isaac da Costa

continues: "In this custom, or rather legal regulation, steadfastly continued from time immemorial, may be found the unchallengeable proof of the actual descent of those families from Aaron and Levi: all the more so since there is no imaginable reason why this ceremony, in itself so insignificant, should not have been open to others. The hereditary succession to this right, however, though depending only on custom, is as firmly established as the noble descent of any Christian family. ... The de Pinto family, who, as a consequence of their age-long adherence to the Roman Catholic religion in Spain and Belgium, could only assert, not prove, their priestly descent, were wont to remove themselves from the Synagogue, by way of protest, when the priestly blessing was pronounced. On ancient tombstones of the de Pintos we find portrayed, above their usual escutcheon, also the extended hands or ten fingers, connected two by two, in the manner in which the priests pronounced the blessing in the Synagogue. This remarkable conservation of ancient claims and observances in the two families is truly significant when we compare it with the moving paragraph in Jeremiah xxxiii. 19-26. ... Cohen de Azevedo ... used for crest or arms, above the black wolf of the Azevedos, the above-mentioned extended priests' hands (manos abiertas)".

There seems no doubt that, from the point of view of the Hebraic laws of succession to these Synagogue rights, Cohens are taken to descend equally from Aaron and with the Levys from Levi himself. In actual practice, there can be less certainty. It is not known to what extent Cohens among the Ashkenazi in particular were descended from Aaronite missionaries, or whether any families of shamans were allowed to continue as a converted hereditary priesthood when the great Khazar empire adopted Judaism, just as a number of the pagan divine or sacred families of Ireland supplied early Christian saints whose kindred then continued as hereditary abbots. Certainly "the Judaism of the Khaqan did not lead him to uproot old customs to which the populace was attached" (D.M. Dunlop, "History of the Jewish Khazars" 1954, p. 115), but it is not clear whether their pre-Judaic shamans had had any hereditary rights. Even among the Sephardim, who appear to have been established in the Spanish peninsula before the Christian era, the kinship of all Levites may have originated in a ritual

rather than a biological relationship. S.A. Cook, author of "Critical Notes on Old Testament History", observed: "(a) that the Levites of post-exilic literature represent only the result of a long and intricate development, (b) that the name 'Levite', in the later stages at least, was extended to include all priestly servants, and (c) that the priesthoods, in tending to become hereditary, included priests who were Levites by adoption and not by descent".

However, the hard chore of the Cohens and Levys presumably have a male-line Aaronite or Levitical descent, and since this status does not seem to have been ritually obtainable since long before the fall of the Temple, some two thousand years of inter-marriage must have given all the others a true blood-relationship to their founder-family. The collective inheritance of the ancient office of the solemn Priest's Blessing by this widespread kindred of Cohens is a notable example of succession by inheritance.

(33) "Simple Heraldry" (1953) preface.

APPENDIX B.

COARBS AND THE SUCCESSION TO THE CROWN BEARING.

Coarbs and
the Succession to the Crown Bearing

"The worship of the divine king is the earliest religion of which we have any certain knowledge"⁽¹⁾. In this religion, perhaps the most important ritual is the royal inauguration ceremony. In his "Kingship" (Oxford 1927), Professor A.M. Hocart demonstrated by the comparative method that the greater part of the same twenty-six features were to be found in the royal inauguration ceremonies of peoples as widely separated as Europe, Africa, Asia and Polynesia. It is not necessary to go all the way with Professor Hocart in some of his later theories (published posthumously), to accept his views in general on the diffusion of sacral kingship and the fundamental similarity of royal inauguration rituals, since any student of royal ritual could add a number of other common features that Hocart omitted, such as the carpet and the umbrella or canopy. A detailed analysis of the inauguration rituals of the kings of sixty-two different peoples drawn from all parts of the African Continent, is given by Tor Irstam in "The King of Ganda" (Uppsala 1944), at pp. 56-78, with the result that he draws up a list of twenty-seven features which agree with Hocart's "in nearly all points".

A feature of royal inauguration rituals that has not yet been so carefully analysed, is the character of the assistants,

the inaugurator or inaugurators, and the other royal companions
 in the ritual ⁽²⁾. But since the essence of the ritual is the
 imbuing of the king with divine spirit ⁽³⁾, it is to be expected
 that at least one (if not all) of the principal inaugurators will
 have a priestly character, either in practice or in origin. This
 is not the place for a comparative study of the inaugurating
 dignitaries in general who are found participating in the investi-
 ture of kings: such as the great dignitaries who deliver certain
 regalia ⁽⁴⁾, and the priest, bard, semachie or king of heralds who
 is the royal mouth-piece and has genealogical knowledge of the new
 king's blood-right ⁽⁵⁾. In this paper we are concerned with the
 dignitary who enthrones or crowns the king. He is often the
 principal dignitary, sometimes a great prince of the Blood or
 hereditary officer of the Household, but where a new faith such as
 Christianity has superseded the actual divinity of the kings, he is
 more usually the principal priestly functionary.

In Christian Europe, the crown was usually placed on the
 king's head by the leading Christian priest of the realm, and
 these crowns were often named after the principal saint of the
 Blood Royal: the Crown of St. Edward the Confessor in England,
 the Crown of St. Stephen in Hungary, the Crown of St. Louis in
 France, the Crown of St. Olaf in Norway, the Crown of St.
 Wenceslas in Bohemia. In 800 Charles the Great was crowned as
 Caesar at Rome by the Pope, and the last Caesar to be so crowned

was Frederick III in 1440. The German crown was also placed on these East Frankish emperors' heads at Aachen by the three Archbishop Electors of Cologne, Mainz and Trier (once their electorate had become established), and this ceremony was continued after the coronations at Rome had been discontinued. The Kings of France were crowned by the Archbishops of Rheims. The Kings of England were crowned by the Archbishops of Canterbury, as are the British monarchs today. The Kings of Sweden were crowned by the Archbishops of Uppsala. But no King of Scots was ceremonially crowned at his inauguration until the fourteenth century ⁽⁶⁾, after the Stone of Destiny had been taken from the realm. Moreover, although Pope John XXII's Bull of 1329 said that the Bishop of St. Andrews, when failing the Bishop of Glasgow, was to take part in David II's Coronation and give unction (which, as a result, was done for the first time in 1331); and although the Archbishop of St. Andrews crowned Charles I in a ceremony that derived several features from England ⁽⁷⁾; the right of crowning the king was very far from being vested with any certainty in the principal or any other archbishop of the realm ⁽⁸⁾. There are grounds for believing that this doubt about the crowning derived from certain very ancient rights founded on the earlier ritual of enthroning.

The pagan ritual of enthroning on stone is both ancient and widespread. In Ancient Egypt, stone was associated with the divine dead and the royal gods, while the living inhabited

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 mud or brick . Stone pillars were very early associated with royal inauguration places: e.g. Abimelech was "made king by the plain of the pillar that was in Schechem". There is evidence of stone thrones from the African kingdoms of Ganda, Ibo and Shona, and from the empire of Abyssinia (10) . The oldest stone throne in Europe is perhaps that which is still to be seen in the palace of the Minoan kings of Crete at Knossos. The ancient kings of Denmark were inaugurated in a circle of stones, and at his installation the ancient King of Sweden was placed on the sacred Mora stone near Uppsala. The Woden-born kings of Lethra in Sealand are said to have sat on a sacred stone (11) , and even in Christian times the Woden-born kings of the Anglo-Saxons had their inauguration stone at Kingston in Surrey, where it is still preserved (12). The ritual of enthroning on stone was widespread among the Gaels of Ireland and Scotland, and survived from pagan sacral royalty into Christian times. Indeed, the British monarchs are still set on the Stone of Destiny for their crowning.

No doubt any pagan sacral family that managed to retain the right of enthroning any Irish kings after the arrival of Christianity, must necessarily have had to play down its pagan priestly origin. But a number of the more famous Irish kingdoms were only founded shortly before the introduction of Christianity, and in these kingdoms the genealogy of the inaugurators as separate families does not tend to go back much

before the Christian period (if at all). Thus Ua Neill, king of Tir Eoghain, was set on the stone at Tulach Og by his chief ur-ri (under-king), Ua Cathain, and by the hereditary guardian of "the flagstone of the kings", Ua hOgain, chieftain of Tulach Og and "Lawgiver to Ua Neill", i.e. mouth-piece of the immemorial custom of the realm⁽¹³⁾. Ua Cathain was chief of a great branch of the Cenel Eoghain, the reigning kindred, and his line had only branched off from that of the kings after the arrival of Christianity: so his position could only be a pagan survival in so far as it may have always been accorded to the premier noble of the realm or to the greatest hereditary officer of the king's household⁽¹⁴⁾. Ua hOgain, on the other hand, was chief of a family that had been separate since pagan times (his ancestor Fergus had been brother of King Eogan, the founder of Tir Eoghain early in the 5th century), and his offices of guardian of the sacred stone⁽¹⁵⁾ and of Lawgiver⁽¹⁶⁾ may possibly have been of pagan priestly origin, though it is equally possible that his family had held some Christian hereditary office and it may be noted that the first Ua hOgain's father was called Giolla Easbuig ("the bishop's devotee")⁽¹⁷⁾.

A Christian element may certainly be found in the inauguration of some Irish dynasties, and even Ua Neill sought such an element on occasion. In 933 Muirecan, the coarb of St. Patrick and abbot of Armagh⁽¹⁸⁾, conferred the rank of King of Ailech on Aedh Ua Neill.

When Ua Conchobair was to be inaugurated (the Ui Conchobair were Kings of Connacht) there had to be present twelve chiefs of the royal kindred, and also twelve coarbs of St. Patrick, being (19) abbots in Connacht . An hereditary Christian element is to be found in the inauguration ritual of Ua Domhnaill, the King of Tir Conaill and temporal head of the kindred of St. Columba (20) . As with Ua Neill, there were two inaugurators, both royal agnates, one perhaps originally the premier ur-ri (sub-king) and the other the hereditary guardian of the inauguration place. These were Ua Gallchubair (O'Gallaher), chief of the family sprung from the high-king Maelcobha (who was grandfather of Duncan, 11th abbot of Iona, and grandson of the high-king Ainmire, St. Columba's first cousin); and Ua Firghil (O'Freel), the hereditary guardian of the rock sanctuary where the Ua Domhnaill kings were inaugurated. This was at Cell mac n-enain (Kilmacrenan), where Ua Firghil was head of the monastic church and local coarb of St. Columba, as aircinnech or erenach with hereditary custody of the saint's lands (21) within the inaugural district of Tir Conaill . Ua Firghil occupied a very special genealogical position within the kindred of St. Columba, as the descendant and representative of the saint's only brother Eogan (22) , and a tribute was payable by the abbots of Iona (the principal coarbs of St. Columba) to Cell mac n-enain (called by its older name of Doire Eithne and said to have been the saint's boyhood home) (23) .

The other royal house to be most closely connected with

St. Columba were the Kings of the Scots of Dal Riada. They were nearly related to the saint, as his grandmother had been of their family, and it was within their little realm that his principal abbey of Iona was established. In about 574 St. Columba ordained Aedan (ancestor of Kenneth mac Alpin) as King of the Scots of Dal Riada, and thenceforth he was the principal saint of the Scottish Gaels. If these kings allowed the Celtic church a foothold in their inauguration ritual, therefore, we might reasonably expect it to have taken the form of enthroning on their sacred stone by a coarb of St. Columba in their own country. Bishop Reeves writes of the Abbots of Iona: "The founder inaugurated the first independent king of Scotch Dalriada in Hy, and the ceremony was probably continued as an honorary function of the abbot"⁽²⁴⁾.

In the words of Skene, the Celtic Church of this period "must be viewed as consisting rather of different groups of monasteries, founded by the respective saints, ... each group recognising the monastery over which the founder of the group personally presided, or which possessed his relics, as having jurisdiction over those which emanated from him and followed his rule. It was ... an aggregate of separate communities in federal union. ... The abbots of each monastery, whether bishops or presbyters, were not elected by the brethren forming the community, but succeeded one another by a kind of inheritance

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 assimilated to that" of the founder's kin . The Brehon Laws distinguished between abbacies limited to the fine grin or kin of the ruling house who had originally granted the abbey-lands to the service of God, and abbacies limited to the fine erluma or kin of the founder Saint or patron Saint to whom with God the lands had been dedicated. The lands given "to God and St. Columba" were very much in the second category, and held to the rule of Brehon Law that "as long as there shall be a person fit to be abbot, of the family of the saint, even though there should be but a psalm-singer of these, it is he that will obtain the abbacy"⁽²⁶⁾ .

For a long time Iona remained the principal abbacy of the kindred of St. Columba, the Cenel Conaill. Bishop Reeves prints a useful tabular pedigree illustrating the agnatic relationship to St. Columba of the early abbots of Iona, his chief coarbs, though the list is fairly complete only for the first two⁽²⁷⁾ centuries . Among them the name Donnchadh or Duncan (eleventh abbot of Iona, 710-717) is perhaps of interest. For the name appears more than once among the kindred of St. Columba: Duncan, abbot of Dunkeld (then the principal Columban abbacy in Alba)⁽²⁸⁾ was killed in 965 and another Duncan, abbot of Kells (then the principal Columban abbacy in Ireland)⁽²⁹⁾ was chief coarb of SS. Columba and Adamnan 986-989 . St. Adamnan, ninth abbot of Iona in the Isles and chief coarb of his kinsman

St. Columba, founded the abbacy of Dull in Atholl.

Bishop Reeves describes how the centre of the Columban abbey-lands in Alba gradually shifted from Iona in the Isles to Dunkeld in Atholl. "The Danish descents on Hy in the early part of the ninth century, and the rise of Kells in Ireland, had caused a diversion in the administration of the Columbian brotherhood; and when, soon after, the Pictish nation yielded to Scotie rule, and Kenneth Mac Alpin transferred the seat of government to the eastern side of the kingdom, a collateral movement took place in the ecclesiastical economy of his dominions; and accordingly, circ. 849, he founded a church at the seat of government, which was to be an inland Hy, and the representative of the Columbian institution for the united kingdom. In furtherance of this project, St. Columkille was named the patron saint, and a portion of his relics, real or alleged, were deposited in the site, as a material guarantee of the dedication. Hence the 9th of June became the proper festival of Dunkeld, and St. Columba's memory associated with its future history. As the new foundation was essentially Columbian, the intercourse which previously existed between the mother church and Ireland was extended to the east of Scotland; and for this reason the few names of the early abbots of Dunkeld which are preserved are strictly Irish, and found in Irish Annals only. Hy continued to decline, and Dunkeld to rise in importance" (30) .

Although there is some reason for supposing the church of Dunkeld to have been founded by Constantine, King of Picts, early in the ninth century ⁽³¹⁾, it undoubtedly acquired the character of a Columban monastic church after the saint's relics were brought there under Kenneth Mac Alpin, King of Picts and Scots. ⁽³²⁾ A. O. Anderson commenting on an entry in the Annals of Ulster that relates to 849, "Indrechtach, abbot of Iona, came to Ireland with the relics of Columcille", writes: "With Columba's relics went the authority of Columba's successor. Their removal to Ireland was so important a step that it could hardly have been taken without previous arrangement; and in the oldest Chronicle of the Kings (version A) we find that "in the seventh year of his reign (Kenneth) transported the relics of St. Columba to a church that he had built"; that is, to Dunkeld. Probably a division of the relics had been made, and both shares were removed at the same time; one to Scotland, the other to Ireland". Certainly some of the Saint's relics remained in Alba, for in 918 the men of Fortriu (Strathearn) under Kenneth Mac Alpin's grandson Constantine II defeated the Scandinavian invaders after having "promised to do every good thing according to the best instructions of their priests, and that Columcille's staff should be their standard in front of every battle. (This staff) was therefore called Cathbuaid ("Battle-victory") from that time onwards; and it was a fitting name, because they often gained victory in battles through it"⁽³³⁾. This crozier,

together with another martial reliquary of St. Columba, the
 Breckennoch⁽³⁴⁾, was presumably among the relics that were not
 sent to Kells, but were entrusted instead to the abbots of
 Dunkeld. Skene ("Celtic Scotland", ii, p. 308) writes of
 Bishop Tuathal Mac Artgusa, who died in 865: "As abbot of
 Dunkeld, a church dedicated to St. Columba and possessing part
 of his relics, he thus occupied towards the Columban monasteries
 in Scotland the same position as had belonged to Iona, and would
 be regarded by them as coarb of Columcille".

Of the relics of St. Columba in Ireland, one of the most
 celebrated was the enshrined psalter known as the Cathach or
 "Battler", which is enshrined in a silver case that was made for
 Donnall Mac Robhartaigh, coarb of St. Columba at Kells, who became
 chief coarb of the Saint in Ireland in 1062 and died in 1098.
 This martial reliquary was in the hereditary custody of a branch
 of the Saint's family, the Mac Robhartaigh erenachs of Baile-mecc-
 Rabhartaich (MacRaverty of Ballymagroarty), who held certain
 abbey-lands near Derry and more especially others near Rath-Cunga,
 and were thus local coarbs of St. Columba, by virtue of their
 sacred tenure as its keepers. They bore the style of Maor of the
Cathach, and they kept it in the chapel of St. Columcille near
 Rath-Cunga except when they were required to carry it into battle
 for the kings of Tir Conaill (Ua Maoldoraidh or Ua Domhnaill)⁽³⁵⁾.
 In his life of his kinsman St. Columba, written in about 1532,

Manus Ua Domhnaill, king of Tir Conaill, tells us that this Cathach "is the chief relic of Columcille in the territory of Cenel Conaill Gulban, and it is covered with silver under gold; and it is not lawful to open it; and if it be sent thrice rightwise around the army of the Cenel Conaill when they are going to battle, they will return safe with victory, and it is on the breast of a coarb or a cleric who to the best of his power is free from mortal sin that the Cathach should be when it is brought round the army" (36). After the solemn procession desiol (sunwise), the hereditary ecclesiastic was expected by the Gaels to bear the ensign-reliquary in the vaward of the battle, rather as the Israelites followed the Ark of the Covenant into battle (37). It could of course be dangerous if the enemy did not respect its sanctity. When Conn Ua Domhnaill, king of Tir Conaill, was defeated by Mac Diarmaid at the battle of Bealach-buidhe in Connacht in 1497, poor Mac Robhartaigh was slain bearing the Cathach, which was captured from the Cenel Conaill and not restored for two years (38).

In Alba, where the Columban family held the rich abbacies of Iona, Dunkeld and Dull (39), with many other scattered abbey-lands and churches, it was also the martial duty of a Gaelic coarb to lead the vaward or vanguard of the local army into battle, with a reliquary of the saint in his hand or hung around his neck (40). Abbot Duncan of Dunkeld was killed in battle in 964 (41). Abbot

Crinan of Dunkeld, perhaps his grandson (since by this time Celtic abbacies were tending to descend from father to son, instead of merely being hereditary within the whole kindred represented by a chosen heir), was killed in battle in 1045 (42). "with nine times twenty heroes" The position in Scottish Gaeldom of this Abbot Crinan is of great historico-genealogical importance, since he was father of King Duncan I and thus ancestor of the present royal house.

The Rev. John Anderson pointed out that Abbot Crinan was "of the kin of St. Columba" (43), and indeed as abbot of Dunkeld he was presumably that Saint's chief coarb in Alba. As the married (44) abbot of a Columban monastery, the principal Columban inheritance in Scotia after the relics were sent there from Iona (45), he was in effect a great chief (46) or noble, deriving a specially high precedence from the sanctity of his hereditary office (47). He was hereditary abbot, and his descendants held the abbacy (the last abbot was his great-grandson). They also inherited from him the Columban abbey-lands of Dull (the revenues of which were annexed to Dunkeld) founded by Columba's kinsman St. Adamnan. Abbot Crinan also seems to have inherited some authority in the isles around Iona, perhaps as erenach or abbey-steward (48). The relics of St. Columba were also inherited by Abbot Crinan's descendants, and he himself was killed in battle, doubtless leading the van with a talisman of the Saint. We know nothing of inaugural ritual among

the kings of the line of Aedan, but if anybody succeeded St. Columba in the right or duty of inaugurating the king, it may reasonably be expected to have been the Columban abbots of Iona and then of Dunkeld. It is these successors of St. Columba, too, who may be expected to have ranked ritually first among the hereditary nobles of the realm: before all other abbots and certainly before mormaers, whose character was evidently lay. Abbot Crinan's position was such, that it was he who was selected to marry King Malcolm II's ⁽⁴⁹⁾ daughter Bethoc, the heiress of the throne itself.

Abbot Crinan's son became king as Duncan I in 1034, and after being slain by Macbeth, was buried with his ancestors at Iona in ⁽⁵⁰⁾ 1040. His descendants on the throne inherited a number of Columban possessions, and the name Duncan became popular among scions of the royal house ⁽⁵¹⁾. In particular, Duncan I's great-great-grandson, King William the Lyon, gave the "Brecbennoch" itself to his new foundation, the monastery of Arbroath, and "with the Brecbennoch the lands of Forglen given to God and St. Columba and to the Brecbennoch" ⁽⁵²⁾. Much of the old Columban inheritance of church-lands was used by successive kings descended from Abbot Crinan to endow new Catholic monastic foundations or bishoprics ⁽⁵³⁾, for they completed the assimilation of the Celtic Church to Continental practice that their kinsman St. Adamnan had tried to begin. But although the kings of the Saint's kindred first made Scotland look to the Continent rather than to Ireland, Alexander III's privy seal alluded proudly to his Columban origin, with the

pun esto prudens ut serpens et simplex sicut columba: "be wise
 as the serpent and gentle as the dove"⁽⁵⁴⁾ . Part of the Columban
 abbey-lands of Dull passed into the possession of the Earls of
 Atholl, the family of King Duncan I's youngest son, and their
 descendants continued there as the Robertson chiefs of Clan
 Donnachaidh, whose armorial supporters are still a serpent and a
 dove or columba⁽⁵⁵⁾ . The last hereditary abbot of Dunkeld was
 Duncan I's grandson, Aethelred, who was also first Earl of Fife⁽⁵⁶⁾ .

Abbot Aethelred, as holder of the family abbacy of Dunkeld,
 was a coarb of St. Columba; and he appears also to have been con-
 nected with the Columban abbacy of Abernethy. He gave to "God
 and St. Serf and the Culdees of the island of Lochleven" certain
 lands "given him by his parents while he was yet in boyhood"; and
 this grant was confirmed sometime during the period 1107 - 1124 by
 his brothers David and Alexander, in the presence of Constantine,
 Earl of Fife (Aethelred's successor) and the whole monastic com-
 munity of Abernethy⁽⁵⁷⁾ . We are not told that Aethelred, "a man
 of venerated memory, son of Malcolm king of Scotia, abbot of
 Dunkeld and likewise earl of Fife", also held the abbacies of
 Abernethy and Dull; and he may only have exercised authority over
 the lesser Columban monasteries as chief coarb in Scotia of
 St. Columba. But it is not improbable that in the time of Earls
 Aethelred and Constantine the abbacy of Abernethy was held ex
officio by the Earl of Fife, for no other head of the abbey is

named among the witnesses to the confirmation cited above, although two Abernethy priests and the rector of the schools of Abernethy are mentioned by name, and we are told that "the rest of the whole community of Abernethy then living there" were present. It was not unknown before that period for a great earl or count to hold several abbacies, even outside the Celtic Church ⁽⁵⁸⁾. Hugh Capet, Count of Paris (who became King of France in 987) was Abbot of St. Martin at Tours, where he had custody of that saint's celebrated cape ⁽⁵⁹⁾, and also Abbot of St. Denis ⁽⁶⁰⁾. Reginar or Regnier I (died 915), Margrave between the Meuse and the Scheldt, Count of Hainault, la Hesbaye and several other counties in Lotharingia, ⁽⁶¹⁾ was also Abbot of Echternach, of St. Servais at Maastricht, of St. Maximin, of Chevremont and of Stavelot. His family appear to have had a special hereditary connection with Echternach, where his son Giselbert, Duke of Lorraine, succeeded him as Abbot ⁽⁶²⁾.

At least one of the Abbot-Earl Aethelred's successors in the earldom of Fife styled himself c. 1154-1177 "Duncan, by the Grace of God Earl of Fife": ⁽⁶³⁾ and this despite the fact that his father Earl Duncan I had received a feudal confirmation charter of the earldom of Fife from King David I. ⁽⁶⁴⁾ The Earl of Strathearn ⁽⁶⁵⁾ was also styled "Dei Indulgentia", and it may be that all the former local dynasts used such a style, though sufficient charters have not survived. But we know of no Mormaers of Fife, which is traditionally still called "the Kingdom of Fife", so (although it

may well have been anciently a Pictish local kingdom) it may be that Aethelred divided the realm with his brothers, and held Fife independently in the way David held Cumbria while Alexander was king only in Alba.

The relationship of Aethelred, Abbot and Earl, to his successors in the earldom of Fife has not been ascertained, but there are reasons for believing it to have been close ⁽⁶⁶⁾. It does not follow, however, that they actually descended from him, even in the female line. He obviously derived his name from the family of his mother, St. Margaret, great-granddaughter of the Anglo-Saxon king, Aethelred the Unredy. None of his successors in the earldom of Fife bore this name, and we are told in an extract from the ⁽⁶⁷⁾ Chronicle of the Canons of Huntingdon, made however at the time of the Competition for the Crown two centuries after Abbot Aethelred's time, that "Aethelred ... died without a heir".

Abbot Aethelred was son of King Malcolm Ceann-mor, grandson of King Duncan I, and great-grandson of Abbot Crinan. King Duncan I's younger brother Maldred married into the Beornician comital house and was ancestor of the Earls of Dunbar in Scottish Beornicia. King Malcolm Ceann-mor had two younger brothers, King Donald Ban (who left an only daughter, wife of Uchtred of Tynedale) and Maelmare, ancestor of the Earls of Atholl (and of Harald Maddadson, co-Jarl of Orkney). King Malcolm Ceann-mor married first, perhaps about 1059, Ingibjorg (widow of Jarl Thorfinn of Orkney), daughter of Jarl Finn Arnason, and by her

was father of King Duncan II (killed 1094), leaving descendants that still continue and of Donald (died 1085, apparently leaving a son, Lodmund), half-brothers of Abbot Aethelred. There was possibly a third son, Malcolm. King Malcolm Ceann-mor married secondly, in 1068-9, St. Margaret, and by her was father of Edward (mortally wounded 1093), of Edmund, prince of Cumbria (who became a monk), of Abbot Aethelred himself (who appears to have been the next-born son), of King Edgar (died unmarried 1106/7), of King Alexander I (died without legitimate issue 1124), and of King David I (died 1153). We do not know whether Abbot Aethelred had any half-sisters (his full sisters were the Queen of England and the Countess of Boulogne), but he certainly had nephews and nieces, and cousins of the Blood Royal descended from Abbot Crinan.

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Earl Aethelred's successor⁽⁶⁸⁾, who bore the royal name of Constantine⁽⁶⁹⁾, is known to have left heirs⁽⁷⁰⁾. Earl Constantine was succeeded by Gillemichael Macduff, perhaps his brother, as he himself is called "Constantine Macdufe" in a charter of doubtful authenticity⁽⁷¹⁾. There seems no reason to doubt that Earl Gillemichael Macduff was father of Earl Duncan I,⁽⁷²⁾ his successor, and thus ancestor of the later Earls of Fife. Apart from peculiar privileges suitable only to the heirs of a great Celtic abbacy, the later Earls of Fife bore Arms that were only suitable for a very near and important branch of the royal family: a red lyon on gold. Since the king's own Arms were a

red lion on gold, differenced only from Fife by the addition of a red flowery double-treasure (the fleur-de-lys is a very ancient symbol of the living king), the Arms of the Earls of Fife would actually appear to imply heraldically that the Kings of Scots were cadets of the Earls of Fife, rather than the reverse. It seems inconceivable that the Earls of Fife would have dared to wear such a coat unless their relationship to the royal house was very close indeed. The lords of Abernethy, heirs of the hereditary abbots of the Columban abbacy of Abernethy, bore Arms that were only appropriate to immediate cadets of the Earls of Fife, namely a red lion on gold differenced only by a black riband, and there is good reason for believing them to have been such cadets ⁽⁷³⁾. It is rare among early Scots coats to find the royal colours, red and gold, as the principal tinctures of a house unconnected with the royal family ⁽⁷⁴⁾ and these families of Fife and Abernethy were using the royal lion in the royal colours. Heraldic resemblances can be misleading when unsupported by other evidence, but in this case the other evidence points to the same conclusion. Moreover, it is not a question of mere heraldic resemblance, but of three houses (Scotland, Fife and Abernethy), all of the first importance in the same part of the same country at the same time, all bearing what is fundamentally the same coat.

Earl Gillemichael's successor Duncan carried on the line of the Earls of Fife, who also held North Berwick on the other side

of their own Earl's Ferry across the Forth ⁽⁷⁵⁾. But the abbacy
 of Abernethy passed to the line founded by Earl Gillemichael's
 (younger) son Hugh, who was a man of considerable importance in
 Fife in his time (Mr. Barrow suggests that he held the abbacy of
 Abernethy). Hugh had a son Eochu, "son of Hugh" ⁽⁷⁶⁾, who held
 Markinch in Fife and also part of Yester in East Lothian, during
 the third quarter of the twelfth century. Two sons of Hugh held
 land in Markinch at this time. For there seems no reason to
 doubt that Hugh was also father of Orm, "son of Hugh" ⁽⁷⁷⁾, who
 held Balbirnie in the parish of Markinch in Fife, and whose
 descendants in the thirteenth century appear in possession of
 Saltoun, in the neighbouring parish to Yester in East Lothian ⁽⁷⁸⁾.
 By what appears to have been a family excambion, Orm exchanged
 Balbirnie for other lands with Earl Duncan II of Fife, who
 evidently also had interests in the parish of Markinch. This Orm
 "son of Hugh" also inherited the Columban abbacy of Abernethy, and
 as Abbot of Abernethy he was a great lord, with pit and gallows at
 Abernethy for his tenants in Fife and Gowrie, and with pit and
 gallows at Inverquharity for his tenants in Angus ⁽⁷⁹⁾. Orm's son
 Laurence was the last hereditary Abbot of Abernethy. His abbatial
 revenues were used to endow the monks of the new abbey of Arbroath,
 towards the close of the twelfth century, but he remained in
 possession of the temporal Lordship of Abernethy as a great feudal
 baron ⁽⁸⁰⁾. There seems to have been some bitter family feud

between the rival chieftains of the Clan Macduff, for in 1288 the Abernethys deliberately waylaid and slew young Duncan III, Earl of Fife (81). Perhaps this quarrel arose out of the curious hereditary privileges shared between the Earls of Fife and the Lords of Abernethy in the famous "Law of Clan Macduff". These privileges seem only appropriate to the heirs of the greatest Columban abbacy in Scotland.

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Wyntoun tells us about these privileges, but he attributes their original grant to a gift by King Malcolm Ceann-mor to the "Thane" of Fife, although of course Fife was not a thanage, and for "Thane" or Toisech we should perhaps read Toisech-dior (83) or "Capital of Law" (i.e. Law Chief): anyway "Chief of the Fife Family", i.e. Earl of Fife. The privileges accorded to him and his kindred, according to Wyntoun, were:

"First, to his seat from the altar
(That he should be the King's) leader,
And in that seat there set him down
To take his Coronation,
For him and his posterity,
Whenever the King should crown'd be.
After that, the second thing,
Was, that he ask'd at the King
To have the vaward of his battle,
Whatever they were, would it assail;

That he and his should banner raise.
Or, if the Thane of Fife in war,
Or into host with his power
Ware, the vaward should governed be
By him and his posterity.
After this, the third asking
That he asked at the King,
If any by sudden chaud-melée
Happened so slain to be
By any of the Thane's kin,
Of Fife the kingdom all within,
If he so slain were gentleman,
Four and twenty marks then;
For a yeoman twelve marks ay
The slayer should for kinbought pay,
And have full remission
From then for all that action,
If any happened him to slay,
That to that law were bounden so:
Of that privilege evermore
Partless should be the slayer.
Of this law are three capital;
That is the Black Priest of Wedsle,
The Thane of Fife, and the third syne
Whoever be Lord of Abernethy".

To the late mediaeval mind of Wyntoun, such preeminent privileges vested in a great tenant-in-chief of the Crown naturally suggested a reward for some exceptional feudal service of a military character in a time of crisis, especially when coupled with leadership of the van, which Wyntoun took for command of the vaward battle (though other and earlier accounts merely refer to leadership of the van). We are reminded of the privileges accorded by Genghis Khan to Mongol heroes of the highest rank and the greatest bravery: "To his paladins fell the greatest reward - to those who had aided the khan in some crisis. They were created tar-khans, and raised above all others. They had the right of entering the royal pavilion at any time without ceremony. They could make the first selection of their share of spoil taken in any war, and were exempt from all tithes. More than that, they could do, actually, no wrong. Nine times would the death punishment be forgiven them. Whatever lands they selected, they were to have, and these privileges would be inherited by their children, to nine generations" ⁽⁸⁴⁾. The apparent similarity is increased by Sir John Skene's amplification of the sanctuary privileges of the Law of Clan Macduff, which he tells us belonged to all within the ninth degree of kin and blood to Macduff, earl of Fife ⁽⁸⁵⁾. He says the privilege could be invoked by any manslayer so related to the earl of Fife, coming to the Cross of the Clan Macduff that separates Strathearn from Fife (it stands, or stood, in a pass above Abernethy) and paying in compensation certain cattle, and

he cites a charter of David II to William Ramsay, jure uxoris
 (86)
 Earl of Fife .

Nevertheless, these privileges were not characteristically feudal, and their earliest chroniclers admit that they were derived from before the feudal period. The allowance to an earl (the first holder of whose earldom had been an abbot), to an abbot's heir, and to a priest, of a right of sanctuary extended to their kindred at a sacred Cross, savours of a spiritual rather than a martial origin. The right of inaugurating the king in a Christian land tends to have a similar background. There remains the leading of the vaward battle, and our earliest authority, Walter Bowyer, Abbot of Inchcolm (the interpolator of Fordun), writing c. 1447, makes no mention of command, but merely tells us that the successors of Macduff in Fife had (with the right of placing the king on his royal seat and a privilege of sanctuary for their kindred) the duty of leading the van in every battle in which the
 (87)
 royal banner was raised . In a Gaelic army of pre-feudal times, as we have seen, the vexillum brought to battle was a reliquary of the patron saint born in the van by an hereditary custodian of ecclesiastical origin. He it was who had the leading of the vaward battle, although in no martial sense, and when such a leading is coupled with other rights of obvious sacred origin, it seems reasonable to suppose that it was as the heirs of the greatest family of hereditary abbots in Gaeldom, the kindred of St. Columba,

that these extraordinary privileges were accorded to the Earls of Fife with the Lords of Abernethy (and the Black Priest ⁽⁸⁸⁾).

Professor W.F. Skene gives some examples that prove the existence of the sanctuary privileges of the Law of Clan Macduff, and refers to the statute of 1384 regarding caterans, in which the Earl of Fife agrees to cause certain laws to be observed within his bounds, and is styled capitalis legis de Clen m'Duffe (i.e. Toshachdior or Law Chief of the Clan Macduff); also to "the fragmentary code of laws" (Act. Parl., i. p. 746) whereby "it is enacted that the duellum, or wager of battle, may be remitted in three instances, the second being 'by the law of the Clan Macduff for the slaughter of one of the kin, if the kin of the other party can come in the place of combat when the appellant is proven, and his lance'." ⁽⁸⁹⁾ . Instances are undoubtedly to be found of the privilege of sanctuary being applied to the kindred of the Earls of Fife. Sir John Skene, in De Verborum Significatione, tells us that Spens of Wormeston enjoyed the privileges of Clan Macduff for the slaughter of one Kinninmonth; and Principal Arbuthnott, c. 1567, gives an account in his Originis et incrementi familiae Arbuthnoticas of the liquidation of an unpopular Sheriff of the Mearns c. 1420 by a number of neighbouring barons (they made soup of him and took a spoonful each), several of whom, including Hugh Arbuthnott of that Ilk, were "sib to Makduff Earll of Fyffe the trustie friend of King Malcolme Canmore", and procured letters of remission by invoking the

(90)
privileges of Clan Macduff .

There seems no doubt, too, that the Earls of Fife did in fact exercise the right of setting the king on his inaugural stone. In 1152, it was Duncan I, Earl of Fife who took the boy king, Malcolm IV, through Scotland to show him to the people as heir to the throne. Fordun (91) tells us that at the inauguration of King Alexander III, "the lord Malcolm, Earl of Fife ... and a great many other nobles, ... set him on the royal throne". The extent to which later thought identified the act of installation with the act of coronation (a later addition) is illustrated by Sir James Balfour's "ancient tract" about the same ceremony of Alexander III's in 1249: "Et Comes de Fyffe, Regem in Reguli cathedra locavit, coronaque capite imposita Regem deosculavit et statim Homagium et fidelitatem juramento firmavit" (92) . As Duncan IV, Earl of Fife was aged only seven in 1292, King Edward I appointed John de St. John as Earl Duncan's deputy to instal King John de Baliol on the Stone of Destiny. As is well known, King Robert I underwent a special second inauguration ceremony at Scone at the hands of Earl Duncan IV's sister Isabel, Countess of Buchan, in order that his claim to the throne might be enhanced by the prestige of inauguration by a member of the Clan Macduff. Earl Duncan IV's daughter Isabel, suo jure Countess of Fife, conveyed the fee of the earldom to King Robert II's son Robert (afterwards Duke of Albany), who had married her nearest heir of

(93)
 tailzie . In 1424 Murdac, 2nd Duke of Albany and last Earl
 of Fife, as chief of the Clan Macduff exercised the family
 privilege of placing King James I in the chair of state at his
 coronation at Scone (94) . A year later he was forfeited and
 beheaded, and the Fife rights extinguished.

It is difficult to be certain to whom these rights might
 otherwise have descended. The legitimate male issue of the
 Albany earls of Fife was apparently exterminated, and the
 Buchanans of that ilk, who descended from the last earl-duke's
 only daughter, were barred forever by his forfeiture (95) . If
 her line be thus excluded, the next heirs (by the old rule
maternis materna) would have been the descendants of the last
 earl-duke's unforfeited full sisters. The eldest, who was
 contracted to David de Loen in 1372, does not appear to have left
 heirs. The order of birth and motherhood of the other sisters is
 not entirely certain (Robert, Duke of Albany and Earl of Fife had
 children by a second wife who was not of course an heir of Fife).
 But the Fife heiress appears to have been mother probably to Joan,
 who married the Lord of Lorne, and also of Marjorie, who married
 Lord Campbell (96) . The heir of both these sisters was the first
 Earl of Argyll, and it is perhaps the Argyll family who came to
 regard themselves hopefully as the heirs to any resuscitatable
 residuary rights surviving the Fife forfeiture. In 1515 the Earl
 of Argyll jointly with the Earl of Angus (Lord of Abernethy)

(97)
 placed the crown on the Regent Albany's head at his
 inauguration in the Regency; and when Angus was forfeited in 1528,
 Argyll was prompt in obtaining a charter of the Barony of Abernethy
 for himself (98). The Earls of Argyll secured precedence before
 all other earls except Angus (99), and, although this is often
 attributed to their office of Justice-General of Scotland, this
 too recalls the Earl of Fife who was styled "Magnus Judex in
 Scotia". Whenever the Angus Douglasses (the Abernethy heirs) were
 in political eclipse, the Argyll family seem to have been prompt in
 pressing their own claims. In 1633 and 1641 Argyll carried the
 crown at the Riding of the Parliament. Although the Marquis of
 Douglas (Angus and Abernethy) bore the crown at Charles I's
 coronation, he was not present at Charles II's coronation, where it
 was the Marquis of Argyll who carried the crown.

One further point may perhaps be noted about the Macduff earls
 of Fife. Besides the right of inaugurating the king at his
 coronation, the leading of the van in battle, and sanctuary for
 their kin (including the Abernethys), the earls possibly possessed
 a precedence before their fellow earls, perhaps derived from the
 time when the earl was also an abbot. They tend to be named first,
 and in particular Jordan Fantosme (100) emphasises that in 1175 it
 was Duncan II, Earl of Fife who spoke first in King William's
 council: sun plenier parlement (101). This is the more significant,
 in that after the downfall of the Earls of Fife, the great Douglas

noblemen who were Lords of Abernethy (by inheritance from the old abbotly family who were "capital" with the Earls of Fife in the Law of Clan Macduff) claimed "The first vote in council of parliament, ... to have the leading of the van of the army in the day of battle, and to carry the Crown at coronations" (102) .

These famous privileges of the Red Douglas line are discussed by John Riddell, Advocate, in his "Scottish Peerage and Consistorial Law" (1842), vol. i pp. 155-162; by G.E.C., in the "Complete Peerage", (1910), vol. i pp. 160-161n.; and certain proceedings before the Privy Council in 1823 with regard to the crown-bearing are printed at pp. xxviii-liv of "Balfour's Ancient Heraldic Tracts", pub. 1837. All writers on the subject, however, assume that these curiously combined rights were conceded to the Douglasses because of their preeminent power, and some suppose them to have been taken over by the Red Douglas from the Black. None of them notice that the Red Douglasses were, in Wyntoun's words, "whoever be Lord of Abernethy", and so among the three chieftains who were "capital" of the law of Clan Macduff. Thus, when the Law of Clan Macduff was invoked by Arbuthnott c. 1420, two of the three "capitals of law" must have been the Regent Albany as Earl of Fife and William Douglas, Earl of Angus, as Lord of Abernethy. The combination of the supreme coronation prerogative, of the leading of the van, and of the first vote in council or parliament, appearing in the holders of the Macduff earldom of Fife before their downfall and afterwards in the

Douglas holders of the Macduff lordship of Abernethy, can scarcely be coincidence. It seems, therefore, that some time after the execution of the last Earl of Fife (the second Regent Albany) in 1425, the junior and rival branch of "capitals" of the Clan Macduff (the heirs of the abbatial lords of Abernethy) managed to establish themselves in the exercise of the hereditary prerogatives of the kindred. With the loss of the Stone of Destiny, however, the installing of the king had become less significant than the new rite of crowning, and the inaugurators therefore apparently came to regard the crown rather than the royal seat as the object of their ancient privilege.

The senior male line of the abbatial lords of Abernethy had ended in co-heiresses at the death of Orm's great-grandson, Sir Alexander of Abernethy, c. 1315-1317 ⁽¹⁰³⁾. Sir Alexander had sided with Edward II, whose Ambassador to France and to the Papal Courts he had been, and so the great Abernethy inheritance had been forfeited. Nevertheless, the Bruce dynasty allowed this inheritance to be divided between the husbands of his daughters and co-heiresses, the lordship of Abernethy itself passing to John Stewart of Bonkyl who married Margaret of Abernethy, the elder co-heiress and thus senior heir of line of the old abbots. Her younger sister, Mary of Abernethy, married first Sir Andrew of Leslie (ancestor of the Earls of Rothes) and secondly Sir David Lindsay of Crawford, by whom she was grandmother of the first Earl of Crawford, bringing great

estates in Angus, Fife and Roxburgh to the Lindsays, and indeed endowing them with that power in Angus that caused the district to be styled "the Land of the Lindsays" ⁽¹⁰⁴⁾. It is perhaps significant that the Arms of Abernethy were among the first (if not the very first) ever to be quartered in Scotland, and that before the end of the fourteenth century they were quartered by the junior heir portioner's line (Crawford) as well as the senior heir's line (Angus). These Arms must have been thought to be of very great importance to be quartered at that early date: the earliest quartering in England having been that of the Arms of France by King Edward III, and the Arms of Abernethy being certainly quartered by two of the most powerful earls in Scotland before the end of the same century, and in token of an inheritance that had passed to heiresses before 1317. It may not be a coincidence that the Earls of Angus and Crawford who were so keen to quarter the abbatial coat of Abernethy, also claimed (and were allowed) ⁽¹⁰⁵⁾ precedence before the older earldoms such as Mar and Sutherland.

It was on 24 October 1328 that John Stewart of Bonkyl obtained a Papal dispensation to marry Mary, lady of Abernethy, who brought him a great fief both at Abernethy and in Angus. There seems no doubt that it was in consequence of this marriage that by the following June he had been created Earl of Angus ⁽¹⁰⁶⁾. Mary of Abernethy survived her son, the second earl, and was still living in 1370. Her grandson, the third earl, was an infant in 1361 and

~~and~~ died young in 1377, when the earldom of Angus and lordship of Abernethy passed to his sister Margaret Stewart, widowed Countess of Mar. This Margaret, Countess of Angus and Lady of Abernethy, (107) resided with her lover Douglas at Tantallon Castle hard by the Macduff lands of North Berwick: the castle was afterwards held by the last Earl of Fife (the Regent Albany) before becoming the chief stronghold of the Red Douglas earls of Angus who were Lords Abernethy.

On 9 April 1389 she resigned the earldom of Angus and the lordship of Abernethy to her natural son George Douglas (whose father was William, 1st Earl of Douglas) and his lawful heirs, whom failing to her sister Elizabeth Stewart (wife of Sir Alexander Hamilton) and their heirs, reserving however the liferent to herself (108). This resignation was confirmed by King Robert III on 24 May 1397, in the marriage contract whereby young George Douglas, (109) thereafter styled Earl of Angus, married the king's daughter. George Douglas founded the line known as the Red Douglasses, who were Earls of Angus and lords of Abernethy. On 31 Aug. 1547 his descendant Archibald resigned the earldom and obtained a regrant to (110) "sibi et suis haeredibus masculis et suis assignatis quibuscunque" and as a result the Abernethy/Douglas inheritance passed to the heir male of tailzie in 1588 in spite of a lawsuit brought unsuccessfully by the disinherited heir of line who was none other than King James VI himself (111). In June 1633 the then earl was created Marquis of Douglas, Earl of Angus, Lord of Abernethy and Jedburgh Forest (112)

with a destination to heirs male; and, although as a result of some transactions at the close of the seventeenth century it is now uncertain whether the older earldom of Angus is vested in the heir male of the tailzie of 1547 (the Duke of Hamilton) or in the heir female of a later tailzie (the Earl of Home), the 1633 peerage dignities undoubtedly passed in 1761 (on the death of the only Duke of Douglas) with the marquisate of Douglas to the Dukes of Hamilton as heirs male of the Red Douglas line ⁽¹¹³⁾. The Duke of Hamilton is thus the present Lord Abernethy.

We have seen that the last Earl of Fife (Albany) installed the king in 1424, before the downfall of the Fife house. At the coronation of King James III in 1460, it was the Lord of Abernethy ⁽¹¹⁴⁾ who set the crown on his head. Godscroft tells us that a dispute having arisen about the right between various peers and prelates, Archibald "Bell-the-Cat", Earl of Angus (i.e. Lord of Abernethy) claimed the right very forcibly: "in a substantiall and matiral manner". Having placed the crown on the young king's head, he exclaimed: "There! now that I have set it upon your Grace's head, let me see who will be so bold as to move it". It was in fact Bell-the-Cat himself who was the prime mover in removing it, in 1488, when there can have been nobody so bold as to challenge his right to crown James IV. Who the other claimants were among the peers as opposed to the prelates, may perhaps be guessed from the surprising claim of the Lord High Constable in 1631 "anent the

putting of the crowne vpon the Kings heade the tyme of the coronation" ⁽¹¹⁵⁾, and by the fact that Argyll was joined with Bell-the-Cat's grandson (the next Earl of Angus and Lord of Abernethy) in setting the crown on the Duke of Albany's head when ⁽¹¹⁶⁾ the duke was solemnly inaugurated Regent of Scotland in 1515 .

Earl George, Bell-the-Cat's father, was buried at Abernethy in 1462, and although Bell-the-Cat's grandson, Earl Archibald II died at Tantallon in 1557, he too was taken to Abernethy to be buried with his ancestors ⁽¹¹⁷⁾. Godscroft tells us that on his deathbed one of Earl Archibald II's servants said to him: "My lord, I thought to have seen you die leading the van with many fighting under your standard". Earl Archibald II was succeeded for only a few months by his nephew, who in turn was succeeded by his son, Earl Archibald III. Neither this earl nor Argyll attended the controversial coronation of King James VI (Mary Queen of Scots being then a prisoner) in July 1567, when the "putting the ⁽¹¹⁸⁾ crowne one his head ... was performed by the Earle of Athole", whose grandmother had been Argyll's sister and who was provisionally ⁽¹¹⁹⁾ nominated Regent . But a few months later Earl Archibald III, although aged only twenty, was brought specially to carry the crown ⁽¹²⁰⁾ at the Riding of James VI's first Parliament . Earl Archibald III was succeeded in the earldom of Angus and lordship of Abernethy by his cousin and heir male of tailzie, who in 1591 obtained a charter confirming to himself and his heirs male the ancient

privileges of the family: "The first vote in council or parliament; to be the King's hereditary Lieutenant; to have the leading of the van of the army in the day of battle, and to carry the Crown at coronations" ⁽¹²¹⁾ . After his death very soon afterwards, the Duke of Lennox (the king's nearest agnate) was allowed to bear the crown at the Riding of the Parliament in 1592, but the new Earl of Angus (Lord of Abernethy) protested, and secured an Act of Parliament confirming himself and his successors in their ancestral right to the "first place in first sitting and voting in all Parliaments &c., first place and leading of wanguard in battaillis and bearing the Crown" ⁽¹²²⁾ .

The rest of the story has been carefully gathered together by Riddell ⁽¹²³⁾ . "There is a promise or declaration by James VI, dated 15th of December 1599, in the word of a prince, that William Earl of Angus 'perpetuallie bruik and injoy all the former honoris, privileges, and immunities grantit be ony of our predecessoris to ony of his forbearis, and in speciall, that same place and honour in Parliament, counsaill, and conventioun, and beiring of honour, that he himself and his forbearis hade of before, notwithstanding quhatsumevir new erectiones or dispositiones of new honoris, styllis or titles ...'" (Douglas Charter-chest).

"On the 13th of February 1602, James VI confirmed to William Douglas Earl of Angus in liferent, and to his son William Master

of Angus in fee, together with the 'Comitatum' of Angus, 'omnes honores, immunitates, et dignitates per dictum Comitem suosque predecessores per prius possessos et gavisos, et presertim primum locum in sedendo in omnibus nostris Parliamentis, conventionibus, et conciliis; primum locum et ductionem primae aciei, et gerendi coronam in omnibus nostris Parliamentis'. ... In an account of the nobility of Scotland, by a Frenchman resident in Edinburgh, in 1589, William then Earl of Angus is stated to be 'by inheritance Lieftenant general to ye King (this is obviously the right of leading the vanguard), first Erle of Scotlande, and for ancient service performed by his forbearis, keeper of ye crowns' (Brit. Mus.). This was the father of the noble dispoonee in 1602, which last abjuring his religion, and becoming Papist, past the remainder of his life at Paris, in the odour of sanctity. He was buried in 1611, with great pomp, in St. Christopher's Chapel in the Abbey of Saint Germain des Prez. In the curious antiquarian history of that religious House, published at Paris in 1724, there is an engraving of the monument erected to his memory, with a Latin inscription, in which he characteristically exclaims, - 'Nec qui primus eram Regni Scotorum Comes, et in bellis dux primae aciei, upsiam forem in secundis' ...

"The noble House of Douglas of Angus ... consulted the noted Sir John Skeen, clerk-register to James VI, in respect to the validity of their right, as is proved by the following query and

favourable answer, in the Douglas Charter-chest. 'Quaeritur.
 Iff a duke or Marquis may first sitt and vote in counsall,
 convention, and Parliament, befor an Earl who is speciallie
 infest by his Majestie, in ye first place and vote of parlement,
 Counsell, and conventioun, &c. - The answer is negative,
 especiallie iff the Earle have an authentick charter to that
 effect, of the Soverane Prince, and have been possest therein, by
 himself and his forbearis, of a lange tyme drawne to a prescriptione
 of yeires. (subscribed) Joannes Skene, Clericus Registri'. ...

"In the year 1631, a charter past the Great Seal in favour of
 Archibald, Lord Douglas, in fee, under reservation of the liferent
 of William Earl of Angus his father, (the master of Angus in 1602),
 of the 'Comitatus' of Angus, with the first seat and vote in
 Parliament, and the other high privileges that have been mentioned;
 upon which infestment followed. And, on the 14th of June 1633, the
 same Earl formally resigned into the hands of Charles II (sic) 'for
 him, and his heirs for ever, all claim, title, or pretence of right
 quhatsumevir that we, our predecessors or successors as erles of
 Angus had, hes, or can pretend to the privilege and prerogative of
 the first sitting and voting in his Majesties parliaments,
 conventions of estaits, or uther publick assemblies, and meittings
 quhatsumevir, within his Majesties kingdome of Scotland, ather
 be the infestment grantit to us and our predecessors, erles of
 Angus, or be custome (the use of this term is curious, and, joined

with other circumstances, would induce us to believe that the right originally might not have been grounded on writ), or any other manner of way whatsoever, to the effect that we and our forsaids may be simpliciter denudat thair of in all tyme coming; but prejudice to us, and our forsaids, of our other privileges, honors, and dignities belonging to us, and content in our infestments'. The solemn deed or obligation containing this resignation was registered in the Books of Parliament, on the 20th of June thereafter (Acts of Parl. vol. V p. 10); while the Earl, in virtue of an agreement with the King, that was the cause of it, obtained, in compensation, the dignity of Marquis of Douglas, which was conferred upon him by patent, dated the very day of the resignation, with limitation to his heirs-male (Great Seal Register).

"In terms of this onerous transaction, it might be held, agreeably to our Peerage practice, that the Marquis and his family were fully denuded; but they eventually maintained that the resignation was futile, and continued their protests for the premiership or first seat and vote in Parliament, as before, because the resigner was merely the liferenter, and not fiar of the 'Comitatus' of Angus, (in terms of the crown charter in 1631), to which the high privilege was annexed; the latter character being in his son Archibald Lord Douglas, whose consent therefore was indispensable, but had never been adhibited.

"Immediately at the Restoration, on the 26th of December 1660, there is a protest by James Marquis of Douglas, Earl of Angus, &c. for 'the first seatt and vote' in Parliament, &c., founding upon the charters 1602, and 1631, and Parliamentary confirmation of the first in 1606. - Douglas Charter-chest. Such protests were made down to the Union. The last, dated January 16th, 1707, was by the tutors of Archibald Duke of Douglas, Earl of Angus, &c. then a minor, in his behalf; when a counter one was given in by the Duke of Hamilton, the premier Peer, when he inter alia founds upon the resignation of the right by William Earl of Angus in 1633, and contends that the claim of his opponent was 'altogether groundless'. Certainly it was never admitted, at least after that event. - Acts of Parl. vol. XI p. 404.

"Sir George Mackenzie, in his treatise upon precedence, after alluding to the charter in 1631, says 'But anno 1633, the said Earl (of Angus) being created a Marquis, it is declared by act of Council, that he did quit the privilege of having the first vote in Parliament upon his promotion; and yet the Marquis of Douglas still pretends that any such renunciation could not have prejudiced the family, since the granter of that renunciation was only a liferenter, his son having been in fee'. - Works, vol. II p. 544." Sir George of course uses the word "pretends" in its proper sense of "claims", and the present writer is unable to agree with Riddell that by "our Peerage practice, that the Marquis and his family were fully

denuded". The right of having first seat and vote in Parliament was not a peerage dignity in the sense of an earldom or a marquissate, but an official right akin to that of the Great Officers who had special places in Parliament - or at least, if it was a peerage dignity, then so was the office of Lord High Constable. Moreover, it is hard to see what effect the charter of 1631 could have had, or indeed what purpose it could have had, except to denude the then Earl (afterwards first Marquis) of all right to dispose of the fee of his honours and privileges, and to prevent him from doing exactly what he afterwards purported to do in 1633.

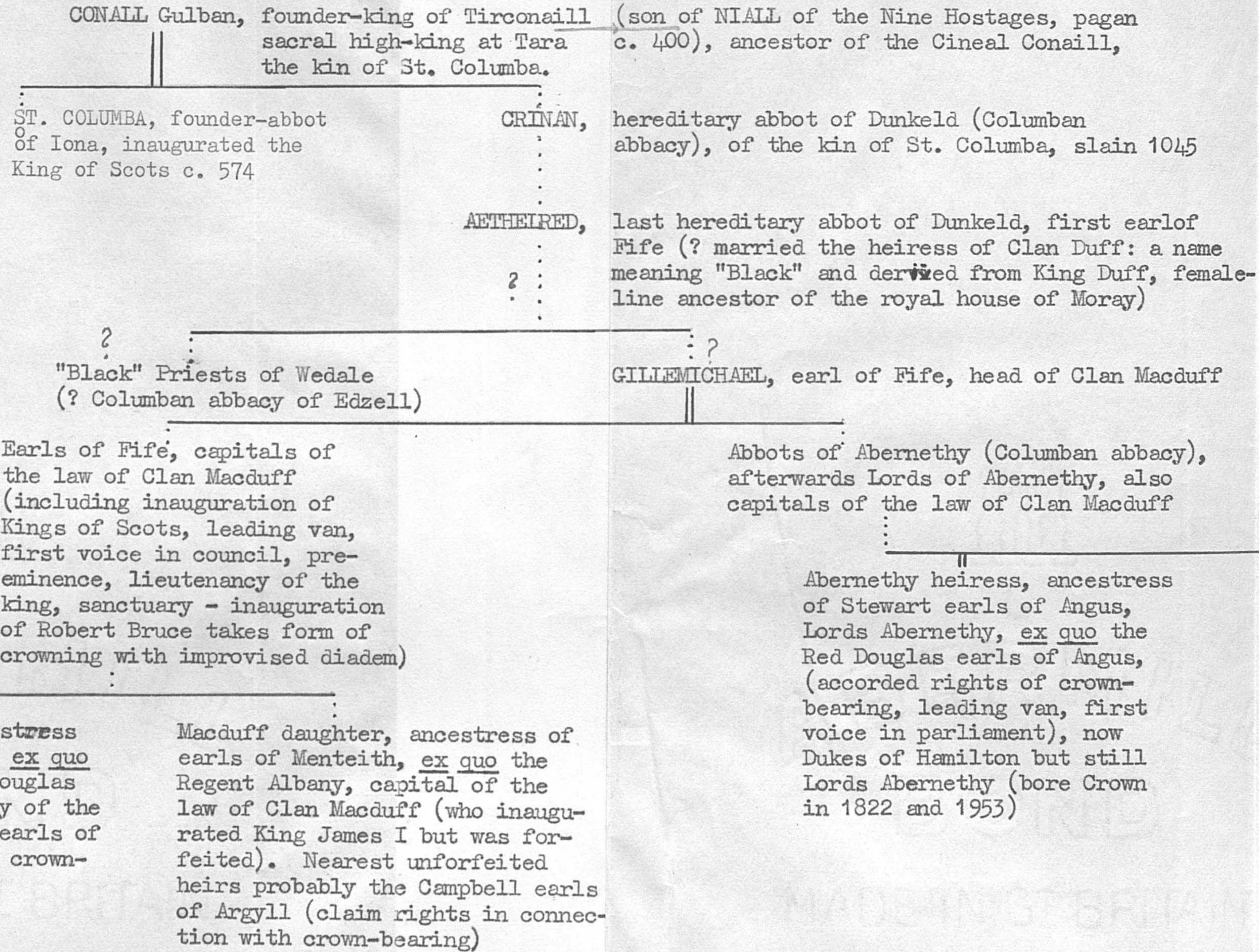
In any case, the purported resignation of the first vote in Parliament by William, Earl of Angus and Lord Abernethy in 1633 (recalling Fantosme's account of the Earl of Fife speaking first in William the Lyon's "plenier parlement" three and a half centuries before), did not affect the right of leading the van or of bearing the crown, and the matter of place in the Scots parliament or council has not arisen since 1707. When the Queen Dowager is said to have proposed to create Huntly a duke, in the middle of the sixteenth century, Earl Archibald II of Angus is said to have told her: "If he is to be a duk, I will be a drake"⁽¹²⁴⁾. As we have seen, during the next century the Marquises of Douglas (Earls of Angus and Lords Abernethy) disputed for first seat in Parliament with the premier dukes of Scotland, the Dukes of Hamilton. By an irony of history, a century later the Dukes of Hamilton inherited

the marquissate of Douglas with the dignities of Earl of Angus and Lord Abernethy. The present Earl of Angus and Lord Abernethy, therefore, as Duke of Hamilton has hereditary place before all other Scottish peers save only the Lord High Constable (Erroll) and the Great Master of the Household (Argyll).

The Marquis of Douglas (Earl of Angus and Lord Abernethy) exercised his hereditary right of bearing the crown at the Coronation of King Charles I, although (following on English and foreign precedent) the king was actually crowned by the officiating archbishop ⁽¹²⁵⁾. Douglas also carried the crown at the Riding and at the Rising of Parliament in that year. But, as we have seen, he did not attend Charles II's coronation by the Covenanting party in 1651, when Argyll bore the crown, as indeed Argyll had done (despite Douglas's statutory right) at the Riding of the Parliament in 1639 and 1641: Douglas being a staunch Royalist. But the second Marquis of Douglas bore the crown at the Riding of Parliament in 1681 and 1685, and as his son (later Duke of Douglas) was only nine years old in 1703, the second Marquis's brother Archibald Douglas, Earl of Forfar, bore the crown at the Riding of the Parliament in 1703. The first Marquis of Douglas (grandfather of the second) had a younger son William, Duke of Hamilton, who married the Hamilton heiress and was ancestor of the present Duke of Hamilton, who is also Marquis of Douglas, Earl of Angus and Lord Abernethy.

Since the Union of 1707, the crown of Scotland has only twice been borne in public. In 1822 it was carried before King George IV (126) by Alexander, Duke of Hamilton, Earl of Angus & Lord Abernethy ; and in 1953 it was borne before the present Sovereign by Douglas, Duke of Hamilton, Earl of Angus & Lord Abernethy. This duty appears to have come to the Dukes of Hamilton through the Earls of Angus as descendants of the Abbots of Abernethy, and to be a survival into the twentieth century from the famous Law of Clan Macduff that endowed the old Earls of Fife and their kin of Abernethy with special privileges (still continuing in this modified form in the representatives of one of the three who were "capital" of that law). The Law of Clan Macduff in its turn may well have arisen because the first Earl of Fife was also the last hereditary Abbot of Dunkeld, of the kin of St. Columba who ordained the present Queen's ancestor, Aidan, as King nearly fourteen centuries ago.

CONJECTURAL TABLE TO ILLUSTRATE THE SUCCESSION TO THE CROWN BEARING



NOTE 1: Huntly was senior heir of the Black Douglasses, but their rights seem to have been settled on the last Black Douglasses (ex quo Erroll), just as King James VI was senior heir of the Red Douglasses, but their rights were settled on the later Red Douglasses (ex quo Hamilton); however, Huntly held high precedence.

NOTE 2: Compare the earl of Fife, magnus judex in Scotia, with the earls of Argyll, hereditary justice-generals of Scotland

NOTES TO APPENDIX ON SUCCESSION TO THE CROWN BEARING

- (1) Lord Raglan, President of the Royal Anthropological Institute, in his intr. to A.M. Hocart's "The Life-Giving Myth" (1952), at p. 6.
- (2) See however, Professor A.M. Hocart's "Kings & Councillors" and his "Caste".
- (3) C.f. the Christian rite of the Coronation in Westminster Abbey in 1953, where the Archbishop acting as Inaugurator prayed before the anointing: "Bless and sanctify thy chosen servant ELIZABETH, who by our office and ministry is now to be anointed with this Oil, and consecrated Queen: Strengthen her, O Lord, with the Holy Ghost the Comforter; Confirm and stablish her with thy free and princely Spirit, the Spirit of wisdom and government, the Spirit of counsel and ghostly strength, the Spirit of knowledge and true godliness, and fill her, O Lord, with the Spirit of thy holy fear, now and for ever; through Jesus Christ our Lord" (The Form and Order of the Service, 2 June 1953, p. 16).
- (4) In Ancient Egypt, these were the priestly kindred of the divine Pharaoh, themselves masked as gods: see A. Moret, "Du caractère religieux de la royauté pharaonique" (Paris 1902). This feature forms points X and Y of Professor Hocart's fundamental inauguration-pattern: "X. Those who take part in the rites are dressed up as gods, sometimes with masks, Y. which may be those of animals, thus identifying the wearer with some kind of beast". The nearest equivalent to survive into the Christian coronation-rite is perhaps the tabard with the royal beast or beasts worn by the heralds who form an essential feature of such coronations even today. Their names remind us that a lion, a unicorn and a red dragon still participated in the most recent coronation.

As for the bearing of regalia, the dignitaries concerned often appear to combine (1) ceremonial or ritual household rank, (2) tenure of a subordinate principality, and (3) kinship with the royal house. The original Seven Electors of the Holy Roman Empire emerge by the thirteenth century ("principes vocem in hujusmodi electione habentes, qui sunt septem numero", they wrote to the Pope in 1257): each held a subordinate principality of the Empire together with a ceremonial Great Office of the imperial household, and Professor O. Forst de Battaglia has pointed out that all the lay Electors were female-line descendants of Charlemagne, the founder-Emperor. The Seven Electors were the Archbishops of Mainz, Cologne and Trier, each of whom held the office of Arch-Chancellor; with the Duke of Bavaria (whose vote was finally vested in the King of Bohemia by the Golden Bull of 1356), the Count Palatine of the Rhine (who as Arch-Steward bore the Orb), the Duke of Saxony (who as Arch-Marshal bore the Sword), and the Margrave of Brandenburg (who as Arch-Chamberlain bore the Sceptre). This is reminiscent of the claim of the Seven Earls of Scotland (who obviously represented a native tradition but, in the thirteenth century, were certainly not out of touch with imperial affairs on the Continent) to settle the succession to the Scottish throne when it was in doubt. It may therefore be worth enquiring whether the Seven Earls were not also royal kinsmen, holders of ceremonial household offices or at least bearers of the regalia.

It is quite possible that each of the Seven Earls bore some part of the regalia, for the two continuing "honours" of the regalia (apart from the Crown, which is the subject of this appendix) in Scotland, namely the Sceptre and the Sword, are still traditionally borne by the two senior Earls "that are upon the place". As for their being royal kinsmen, see

the chapter on the Heirs at Law to Earldoms, above. For their each holding some ancient ritual (ceremonial) Household office, there is no real evidence. The ordinary household offices, by the twelfth century, were certainly held hereditarily or otherwise by barons who were not earls (e.g. the Steward, the Constable and Marshal, besides the Chancellor who was usually an ecclesiastic). It may be noted, however, that King Robert II's son David, on being granted the earldom of Strathearn, was sometimes styled "Earl Palatine of Strathearn" (e.g. on 28 Dec. 1377: see Scots Peerage, ii 321, viii 259) and his daughter and successor Euphame styled herself Countess Palatine of Strathearn: though there is nothing to shew whether or not the ancient Earls of Strathearn had held any palatine office that went with the earldom. The wider (and usual modern English usage) meaning of "palatine" as "invested with special quasi-sovereign powers" is an extension that has tended to obscure its original meaning of "imperial household" (royal palace). Counts from the Household were frequently sent out as special governors by the Emperors, and our word "paladin" is derived from "palatine", but the Count Palatine par excellence was the Count Palatine of the Rhine, who was the senior ceremonial Great Officer of the imperial household (i.e. of the palace). Since most Scottish earls exercised those powers of regality that would be described as "palatine" by English writers, it may perhaps be suggested that the unique style of "Earl Palatine" borne by the Earl of Strathearn may just possibly have related to its literal meaning of "count of the palace". The senior earls according to the Decreet of Ranking of 1606 were apparently placed by virtue of office or some other undefined privilege, rather than date of creation, but the offices in question were not derived from the Seven Earls: although the idea, of ranking

an earl who held household office before an earl who did not, may have come down from their period (similar priority in precedence is accorded in England to earls who hold Great Offices).

An interesting account of the bearing of the Honours of Scotland is given by Sir James Fergusson of Kilkerran, Keeper of the Records of Scotland, in the "Glasgow Herald", 21 Feb. 1953. The Earl of Erroll, "unto whom all the ceremonies of the Sword ... do duely and properly belong" (Spalding Club Misc., ii, p. 231), was prevented by his other Constabular duties from bearing the Sword at the Ridings of the Parliament, but bore it at the Rising of the Parliament, e.g. in 1597.

(5) See the chapter on Heirs at Law to Arms, above; also Professor A.M. Hocart, "Kings & Councillors". In 1551, Ruari Morrison, hereditary bard of Dunvegan, imposed the usurper Iain a Chuil Bhain on the MacLeods as their chief, with the words: "There sits the chief by right of blood and birth of the MacLeods" (A. Morrison, "The Clan Morrison", 1956, p. 26). In the 13th century a Gael, presumably the high sennachie, recited the royal genealogy at the inauguration of King Alexander III, and at the last Scottish Coronation (in 1651) the Lord Lyon (Sir James Balfour of Denmiln, the antiquarian) is known to have recited the royal genealogy. English nobiliary genealogies were recorded by the heralds in their Visitations. The Juge General d'Armes de France, who had jurisdiction in matters of French heraldic nobiliary law, was also "Genealogiste de la Maison du Roi" (see Remi Mathieu, "Le Système Héraldique Français", 1946, planche ix). For the function of the sennachie in Ireland, "the hereditary historian of the tribe", at the inauguration of local kings or chiefs, see Dr. P.W. Joyce, "A Social History of Ancient Ireland", i. p. 46. See also the chapter above on "Succession among the Gaels", note 13.

(6) The crown, although represented and worn as a royal ornament at an earlier period, was not imposed ceremonially as an integral part of the official inaugural solemnities until the Coronation of David II on 24 Nov. 1331: see Lord Bute, "Scottish Coronations", 1902, p. 16. But note that the Earl of Fife's sister (the Countess of Buchan) is said to have placed an improvised diadem on King Robert Bruce's head in 1306, by way of exercising the Clan Macduff right of enthroning him. Here seems to be the beginning of the transition from enthroning, through crowning to crown-bearing.

(7) Ibid., p. 63 et seq.

(8) Apart from the suggestion made in this appendix, that the right of Crown Bearing was derived by the Lords Abernethy (whether Dukes of Hamilton or Earls of Angus) from a rival branch of the original Earls of Fife whose own heirs of tailzie, the Dukes of Albany, had been forfeited (but whose nearest unforfeited heirs may have been the Earls of Argyll); it may be noted that the Earls of Erroll made a curious claim in respect to the Crown.

In 1631 a Royal Commission reported to King Charles I on the Honours and Privileges of the Office of High Constable (in Scotland), and this report was afterwards ratified and given the force of law by the statute 1681, c. 125. The Commissioners referred at the end of their report to a claim of the Constable's, adding: "Wee haif in that regard forborne to delyuer our opinionis concerning the same, as alsua anent the putting of the crowne vpoun the Kings heade the tyme of the coronation; Whiche with sindrie other prevelidges ar acclaymed by The Constable to be due vnto him in the right of his office". No such privilege appears to have ever vested in the Constable, either in Scotland or elsewhere, and it seems possible therefore that the tradition of such a claim

in connection with the Crown had descended to the Earl of Erroll as an heir of the last Earl of Douglas (although Huntly was heir of the last Duc de Touraine).

G.E.C. i. p. 161 suggests that the Red Douglases derived their special privileges, including the Crown Bearing, from having been "tacitly allowed to step into all the privileges of the" Black Douglases. There is no evidence that the Black Douglases ever possessed these privileges, which seem to relate rather to the ancient Earls of Fife and their heirs, the Dukes of Albany. If, after the fall of Albany, the Earls of Douglas did lay claim to these special privileges, it would be more reasonable to seek some common source with the Red Douglases in a Fife connection. A possible line of search might be the Douglas possession of Tantallon.

The first Earl of Douglas had royal blood, as might have been presumed: for his grandmother Eleanor of Louvain belonged to a cadet line of the ruling house of Brabant (see G.E.C. sub LOVAINE) which was much inter-married with the Carolingian imperial house and the Capetian royalhouse (see the writer's article on "Milford Haven" in Burke's Peerage, 1953 ed.). Also a closer connection between the Scottish royal house and the first Earl of Douglas might be found if Eleanor of Louvain's mother could be identified more clearly: she was Helisant, a kinswoman of King Henry III, who gave her 300 marks as her marriage portion (see the authorities cited by G.E.C. at vol. viii p. 179), and King Henry III (himself a descendant of Malcolm Ceann-mor) was closely related to the Scottish royal house. However, the Earls of Douglas after the fall of Albany appear also to have had a Fife connection, for they were lords of Bothwell by succession to the Murrays. See also note 66 below.

Archibald the Grim, 3rd Earl of Douglas, had married Joan Murray, widow of Sir Thomas Murray (last of Bothwell) and daughter and heiress of Maurice Murray, Earl of Strathearn. Most writers on the subject point out that there is no evidence for the assertion in Douglas's "Baronage" that Maurice Murray, Earl of Strathearn's grandfather was younger brother of Sir Thomas Murray of Bothwell's grandfather, yet they go on to express astonishment that the Douglasses should have inherited Bothwell through Joan Murray. It seems obvious that Joan Murray was Sir Thomas's cousin and heir as well as his widow, and that her father Maurice Murray, Earl of Strathearn was therefore indeed a near (the nearest, in his issue) cadet of Bothwell. The Douglasses quartered the arms of Murray of Bothwell, as well as inheriting the barony (see Macdonald, "Scottish Armorial Seals", pp. 76-78). The Murrays of Bothwell were a family of the first rank and special prestige: Sir Andrew Murray of Bothwell was chosen as Regent of Scotland in succession to the Earl of Mar in 1332, and his youthful father's name preceded that of Wallace himself in the well-known letter of 1297 addressed to Lubeck and Hamburg by the two as leaders of the army of the Kingdom of Scotland. It may therefore be significant that it was Sir Andrew Murray (son of the first of Murray of Bothwell) who avenged the murdered Earl of Fife in 1288 (see Wyntoun's Chronicle, book viii, cap. ix); and that the first Murray of Bothwell is said to have been maternal grandson of Malcolm, Earl of Fife (see Scots Peerage, ii. p. 123). If this was the Malcolm, Earl of Fife, who is supposed to have died childless in 1228, it would be necessary to account for some arrangement (such as that made c. 1307 in the case of the earldom of Menteith) whereby the earldom of Fife had been transferred to Malcolm's heir male; but it would certainly explain the prestige of the Murrays of

Bothwell and any claims to Clan Macduff privileges by the Bothwell heirs, the Earls of Douglas. It would also explain the possession of lands, that formed part of Earl Malcolm's wife's maritagium, by the Murrays of Tullibardine, who claimed descent from the Murrays of Bothwell (but see G.W.S. Barrow, "The Earls of Fife in the 12th Century," Proc. Soc. Antiq. Scot., lxxxvii, 1952-3, p. 59, note 7). On the other hand, it may be that Malcolm, Earl of Fife, who died in 1266, is meant. Since we do not know what the relationship was between Isabella, last Countess of Fife of the Clan Macduff, and her heirs of tailzie the Menteiths (Albany and his heiress-wife), it is not possible to say whether her tailzie excluded nearer heirs, nor whether the Douglasses (if their heirship to a daughter of Malcolm, Earl of Fife in 1266, be accepted) were nearer heirs at law to the rights of the Clan Macduff: or at least next heirs after the Albany family.

(9) For other examples of the early importance of stone seats for ritual purposes, see Dr. W.J. Perry, "The Children of the Sun" (1923) pp. 113, 139, 291, 337, 341-343, and his "The Primordial Ocean" (1935) pp. 155-156. For the similar importance of certain trees, see H.M. Chadwick, "The Heroic Age", p. 400, and Tor Irstam, "The King of Ganda", p. 67. The predecessors of King Brian Boroma in Dal gCais, who seem to have retained many pagan sacral traditions into the eleventh century (the hereditary banshee or ban-sith of their dynasty, Aoibhinn or Aoibhill, appeared to warn Brian Boroma of his impending doom on the battlefield of Clontarf in 1014: see Eriu, ed. Kuno Meyer & John Strachan, Dublin 1904, vol. i p. 76), had a Sacred Tree of the Assembly on the Plain of Adhar, that was cut down by the High-King Mael Shechlainn in 981, whereupon another was immediately planted (Professor R.A.S.

Macalister, "Ancient Ireland", 1935, pp. 232-233).

(10) Tor Irstam, "The King of Ganda", p. 112.

(11) William Jones, F.S.A. "Crowns & Coronations", pp. 105, 372.

(12) Ibid., pp.105-107. For the Lia Fail at Tara, see Professor Macalister's "Tara".

(13) Hogan, "Irish Law of Kingship", p. 197. O'Hart, "Irish Pedigrees" (1887 ed.) vol. i p. 661. See also Professor Hocart's "Kings & Councillors".

(14) It was a dispute between the last O'Neill (Tyrone) and his "urragh" (i.e. ur-ri or under-king) O'Cathan, that was made the excuse to bring down the last dynasty of Ireland at the beginning of the seventeenth century (see Sean O'Faolan, "The Great O'Neill").

(15) But note that Tulach Og was the later inauguration place of this line of kings, who were probably originally installed at Ailech. The stone inauguration chair of their cadets, the O'Neill sub-kings of Clanaboy (Clan Aedha Buidhe), is still preserved in the Belfast Museum (see illustration at p. 46 of Dr. P.W. Joyce's "Social History of Ancient Ireland", vol. i).

(16) A pagan royal family's law is sacred, and sacred law is usually expounded by priests. The essential insignia of priests, on which oaths may be taken, are often sacred relics. Similar customs continue into Christian times. For the connection between custody of a saint's relic and custody of the Law, see Professor W. Croft Dickinson, "The Toschederach", Juridical Review, vol. liii (1941), pp. 84-111, at least in the sense of custos pacis.

(17) O'Hart, op.cit., XXXX i p. 660.

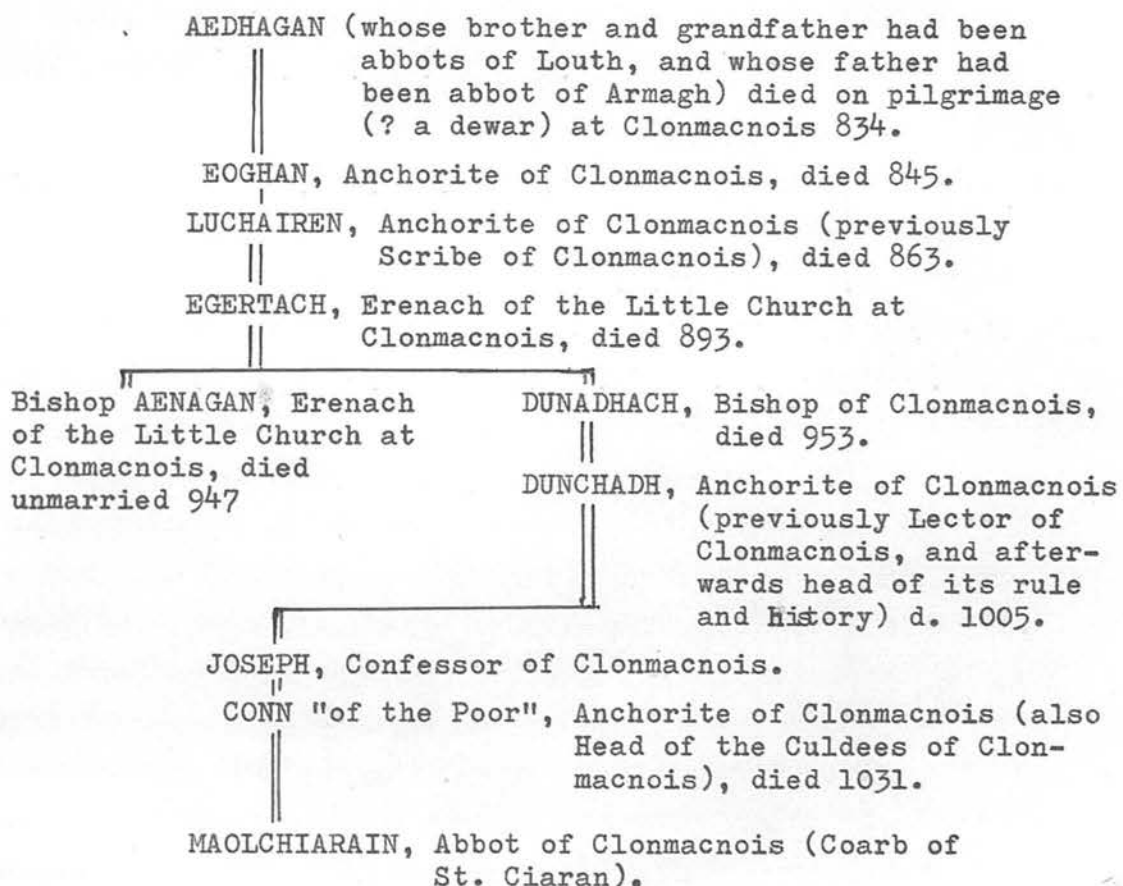
(18) Hogan, op.cit., p. 195, citing Annals of Ulster. Hogan notes: "About the middle of the sixth century the episcopal See of Armagh became a monastic church, and from about the middle of the tenth century to the first half of the twelfth century the abbacy was held in hereditary succession by the family of Ui Sinaich, the incumbents being, almost all, laymen. Vide Kenny, Sources for the Early History of Ireland, Proc. R.I.A., vol. 35, C, p. 316". Actually, the abbacy of Armagh had been founded by the royal house of Oriel, and was therefore normally held by members of this dynasty. The Ui Sinaigh were merely the particular branch (of the dynasty) that monopolised it from the tenth century: see Dr. William Reeves, in Proc. R.I.A., vol. vi (1857) pp. 447-450.

The word comharba or coarb simply means "heir". A devout prince, who founded an abbey community, not only dedicated the lands to the service of God and the saint, but also expected either his own family or the saint's family to continue to administer them personally. Each successive abbot was chosen if available from out of the Founder's family. In the early missionary days few abbots were married, so nephews or cousins tended to succeed them. It appears probable that early Celtic abbots nominated their successors from out of such of their kindred as were qualified, as Columba nominated his cousin Baithene to succeed him as abbot of Iona, and as Cellach nominated St. Malachy O'Morgair to be his successor at Armagh in 1129 (Annals of the Four Masters, ii, p. 1032). Certainly there were tanist abbots, i.e. abbots could have heirs designate (the death of such a tanist-abbot before his succession is recorded in 937; A.O. Anderson, i. p. 428). However, there was an election, presumably by the monastic community, of a new abbot when the succession fell vacant without such a nomination having been made: though the special mention of an

election, which is rare, suggests that such an event was unusual and therefore "news". They were not free to elect whom they pleased, but were obliged to elect a member of the abbatial family if any was even remotely qualified: "as long as there shall be a person fit to be an abbot, of the family of the saint, even though there should be but a psalm-singer of these, it is he that will obtain the abbacy", Skene, "Celtic Scotland", ii. pp. 67-69).

But the Celtic Church allowed churchmen and monks to marry (see however Skene, ii. pp. 338), like Protestant clergy nowadays, and indeed even the English clergy were able to marry until late in the Middle Ages (see W.A.C. Sandford, "Mediaeval Clerical Celibacy in England", *Genealogists' Magazine*, vol. xii, no. 11 (Sept. 1957) pp. 371-375, no. 12 (Dec. 1957) pp. 401-403). The later Celtic abbots tended to marry, and presumably nominated their sons, who tended to succeed them. In this way, the abbey-lands, which had always been hereditary within the Founder's family, gradually tended to become hereditary within the branch that held them when the abbot was married. Sometimes they passed through the female line, though this seems to have been rare in Ireland (see chapter on "Succession among the Gaels", note 11). Younger sons were evidently provided for, either through offices within the monastic community, or by the hereditary custody as local superiors or stewards (erenachs) of outlying abbey-lands, reinforced by hereditary tenure of some of the Founder's relics, the essential insignia of the monastic community. Such younger branches in turn seem to have provided for their own younger sons, through the grant of an outlying toft as dewars with the custody of one of the relics. In such cases, the head of the whole monastic family was the chief coarb (head heir) of the Founder, but the local abbots, erenachs or dewars were also local coarbs (heirs) of the Founder.

In "Celtic Scotland", vol. ii pp. 342, 363, Skene gives an account of the abbatial line of the Cinel Torbaigh that shews how, for instance, the office of Anchorite could provide an hereditary succession for a branch of the family. It may be set out in the following table:



During the 12th century, the headship of the Culdees of Clonmacnois was hereditary in a family called Ua Neachtain (see Annals of the Four Masters), and during the later Middle Ages the coarbs of St. Ciaran or abbots of Clonmacnois were drawn from the family called Malone, who were cadets of the O'Connor kings of Connaught (see Dr. Edward MacLysaght, Chief

Herald of Ireland, "Irish Families", p. 220; O'Hart, "Irish Pedigrees", i. p. 635; The O'Connor Don, "The O'Conors of Connaught", p. 45; King's "Introduction to the Church of Armagh", p. 21; Dr. Petrie, Proc. Royal Irish Academy, vol. vi, p. 451). No doubt the families of Cinel Torbaigh, Ua Neachtain and Malone were all Founder's kin, though it would be interesting to ascertain whether any were so only in the female line.

The abbatial aspect of early Scottish genealogy is of importance in attempting to ascertain the origin of great Gaelic families and to unravel early tenures. The various branches of the kindred of St. Columba, for instance, held very extensive lands at the period before the dawn of feudalism: often dedicated to other saints who had themselves been of his kindred (e.g. St. Adamnan). It should be remembered that widely separated districts were thus connected genealogically, although there was a tendency for particular branches to hold the abbey-lands in particular districts. Besides the abbey-lands of Iona, Dunkeld, Dull, Deer, Turriff, Abernethy and Brechin, for example, the Columban family apparently also held the great abbacy of Applecross, founded by St. Columba's kinsman, St. Maelrubha. About the beginning of the twelfth century the Columban community at Abernethy had a priest called the son of Beollan (Skene, ii. p. 355), and the O'Beollan abbots or erenachs at Drumcliff in Ireland (Vita S. Columbae, Bannatyne ed., 279, 400) and at Applecross in Ross alike belonged to the kin of St. Columba. From the branch of the Columban family holding Applecross at the beginning of the thirteenth century, is believed to have sprung Ferquhard Priest's-son, Earl of Ross, whose descendant the fourth Earl of Ross was killed at Halidon Hill wearing the shirt of St. Duthac

("Scots Peerage", vol. vii p. 234; a St. Duthac was Coarb of St. Columba 927-938, Skene, ii. p. 329, but see also ibid., p. 352).

Professor Croft Dickinson, "The Toschederach" (Juridical Review, vol. liii, at pp. 106-7), suggests that the toschederach was the chief dewar who had under him the dewars in charge of the sacred relics (which, incidentally, were used in the administration of justice). "Such an interpretation would explain, for example, why the duty of seeking stolen goods and cattle in Glendochart fell to the keeper of the Quigrich of St. Fillan when apparently the Abbot of Glendochart would be the officer ultimately responsible". This suggestion is of special importance when taken in conjunction with Bishop Reeve's notes to Adamnan's Vita S. Columbae (Bannatyne Club ed., passim), which shew that local relic-keepers were chosen from the main abbatial kindred. See also, for example, Skene, ii. pp. 489-490: St. Columba "went afterwards to Drumcliff, and blessed that place, and left a man of his people there, viz. Mothairen of Drumcliff; and he left the headship, and the patronage, and the comarbspship, of that place with the Cenel Conaill for ever" (SS. Columba and Mothairen both belonged to the family called Cenel Conaill) ... "He left Mothoria" (i.e. Mothairen) "in Drumcliff, and left with him a bachall which he himself had made". Where local relic-keepers appear, therefore, it may be useful for genealogists to consider (a) whether they are not probably cadets of the abbatial family whose essential insignia included the relics in question, and (b) whether their superiors were not descended, in the male or female line, from the abbots or chiefs of the abbatial family of which the relic-keepers were branches.

A bachall or bachuil (Gaelic, from Latin baculum) was a crozier or pastoral staff, and many such were held by hereditary custodians (usually called dewars) in Scotland: e.g. the "Quigrich" of St. Fillan (Proc. Soc. Antiq. Scot., vol. xxiii, p. 110), the staff of St. Moluag (ibid., vol. ii. p. 13), of St. Mund (Reg. Mag. Sig., 1497, p. 507), of St. Fergus (Brev. Aberd. temp. estiv., fol. clxiii), of St. Duthac (Accounts of Lord High Treasurer, vol. iii, 1506, p. 342), of St. Donnan (Collections of the Shires of Aberdeen & Banff, Spalding Club, p. 505), of St. Lolan (Cart. of Cambuskenneth, p. 166), probably of St. Kentigern (Anderson, "Scotland in Early Christian Times", p. 225), and a crozier called the Arwachyll, formerly preserved at Kilmolrue (? of St. Maelrubha) in Muckairn, where it was used in taking the oaths of the subscribers to a bond of manrent in 1518 ("The Thaness of Cawdor", Spalding Club, p. 129; Proc. Soc. Antiq. Scot., vol. iii, p. 292). See also Proc. Soc. Antiq. Scot., vol. xlv, p. 277. Students of the subject should consult the Lyon Office proceedings in the recent matriculation of arms and insignia by William Jarvis Alastair Livingstone of Bachuil, "Baron of the Bachuil in the isle of Lismore, lordship of Lorne and county of Argyll, Heritable Keeper of the Bachuil or Pastoral Staff of St. Moluag", whose ancestors held a tiny ecclesiastical barony on the island of Lismore (where there is a Tigh-nan-deoir or "dewar's house") as hereditary custodians of St. Moluag's staff on behalf of Argyll as lord of Lorn. In view of the quasi-sacerdotal character both of dewars and of heralds, it may be noted that his ancestor John Mc Melmare Vc Evir, Heritable Keeper of the Bachuil in 1544, is also described as signifer (pursuivant) to Archibald, Earl of Argyll.

The pastoral staff of St. Kessog affords an example of the possible importance of such relics in genealogical problems.

There is an old tradition that the lairds of Luss were a branch of the family of the Earls of the Lennox (who had been Celts before the Lennox was brought by an heiress to her Beornician husband, see G.E.C., new ed., sub LENNOX). Their onomastics seem to connect them, and both have a Cross saltire in their arms (in view of the Beornician connection, the Lennox saltire may possibly fall into a group with those of Maxwell, Annandale and Nevill: on the other hand, St. Kessog was a martyr). In examining the origin of the Earls of Lennox, therefore, it might be worth taking into account that the lairds of Luss (which is perhaps named from the lis or cincture of sanctuary lands, for King Robert Bruce confirmed to God and the Blessed Kessog the ancient "girth" of three miles around the church of Luss) were evidently a priestly family (in 1220 Maldwin of Luss was Dean of the Lennox, while three generations later his descendant, Sir Eoin of Luss, was granted all rights that the Earl of Lennox had previously held as superior over Sir Eoin's lands of Luss, and this the Earl did "for the reverence and honour of our patron, the most holy man, the Blessed Kessog") with hereditary custody (on behalf of the Earls of Lennox) of the pastoral staff of St. Kessog (see Cart. de Levenax).

Of course, many other relics besides croziers were preserved by hereditary dewars or in abbey-churches. St. Fergus's head, in a silver case, was preserved at Scone (Skene, ii. p. 233) in the time of King James IV. The keeper of St. Lolan's bell had a croft of land at Kincardine-on-Forth (as did the keeper of St. Lolan's crozier mentioned above) for its keepership (Cart. of Cambuskenneth, p. 166). At Airlie, Michael David held the bell of St. Medan under Sir John Ogilvy in 1447 (see note 90 below); and at Edzell the Durays of Durayhill, hereditary dempsters of the barony of Edzell, were dewars of the bell of St. Laurence under the Lindsays (see note 88 below).

Dr. W.J. Watson gives a list of lands attached to custody of a relic, in "History of the Celtic Place-Names of Scotland", p. 265. In Glendochart there were five separate hereditary dewars, each with a different relic of St. Fillan (the crozier, the bell, the hand, the missal and the "farg"): they were local coarbs of St. Fillan ("et quod officium gerendi dictam reliquiam dabatur cuidam progenitori Finlai Jore latoris presentium hereditarie, per successorem Sancti Felani, cui officio idam Finlaius est verus et legitimus heres", version in Black Book of Taymouth, p. xxxv; "et quod officium gerendi dictam reliquiam debetur eundam progenitori Finlai Jore latoris presentium hereditarie, pro successori Sancti Felani cum officio, cujus idem Finlaius est verus et legitimus heres", version in Spalding Club Miscellany, vol. iii. pp. 239-240), and were presumably cadets of the hereditary Abbots of Glendochart, whose principal heirs were the Macnabs of Macnab, the "Sons of the Abbot" (for the five dewars of St. Fillan, see Dr. Joseph Anderson, Proc. Soc. Antiq. Scot., vol. xxiii. p. 110).

Such reliquaries were carried into battle (see notes 33-42 below), and the enshrined arm-bone (doubtless the relic in the custody of the dewar of the Hand) of St. Fillan is said to have been at Bannockburn. Such a relic was called a vexillum, and it is perhaps significant that this word later came to be applied to the heraldic banner. Following Professor Croft Dickinson's suggestion that the toschederach was the chief dewar who had under him the dewars in charge of the sacred relics, it may perhaps be suggested that if the Earls of Fife through a Columban abbatial succession (discussed below) were toschederachs of the sanctuary law of Clan Macduff, they might be expected to have had cadets who were in charge of some very special reliquary, indeed the principal battle-reliquary of the Kings of Scots (for

the "capital of law" of Clan Macduff had to lead the van into battle). Now, Wyntoun (book vi cap. xix) specially associates the law of Clan Macduff with Cupar in Fife:

"Gywe thare be ony that lykis
 The lawch for to se led off this,
 Quhen be crye the day is sete,
 As fallys to be done off dete,
 To Cowpyr in Fyffe than cum he:
 Welle led that lawch thare sall he se".

Cupar was probably the original demesne of the Earls of Fife, Chiefs of the Clan Macduff (see G.W.S. Barrow, "The Earls of Fife in the 12th Century", Proc. Soc. Antiq. Scot., vol. lxxxvii, p. 56), but during the thirteenth century it was also associated with a family of special interest: the hereditary bearers of the vexillum of the Kings of Scots. The Scrymgeours, now Earls and formerly Constables of Dundee, hereditary Royal Banner-Bearers of Scotland, descend from Sir Alexander Scrymgeour (hanged by the English in 1306: see Macphail's "Highland Papers", ii. p. 125), who was son of Colin, son of Carun of Cupar (see Maitland Thomson, "Inventory of Scrymgeour Family Documents 1611", no. 782). Sir Alexander (whose surname is usually supposed to mean "the Skirmisher", but see Dr. D.E. Easson, "Charters of the Abbey of Coupar Angus", vol. i. pp. 111-2, charter xlvi) was active in 1293, and 1298 Wallace confirmed him in the constabulary of Dundee "pro fideli servicio et succursu suo predicto regno impenso portando vexillum regium in exercitu Scotie tempore confectionis presentium" (Scots Peerage, iii. p. 304). The hereditary bearing of the vexillum was already held by the family in the days of the old Celtic monarchy, for King Robert Bruce confirmed Sir Alexander's son Nicholas Scrymgeour in the constabulary of Dundee "adeo libere quiete plenarie et honorifice sicut dictum officium et terra predicta teneri solebant liberius tempore bone memorie Domini

Alexandri Regis Scotie predecessoris nostri vltimo defuncti
 ffaciendo inde nobis et heredibus nostris dictus Nicholaus et
 heredes sui seruitium de portando vexillum nostrum in excercitu
 nostro" (Dudhope Peerage Case, 1952, Print of Documents, p. 1).
 In heraldic times, possibly as early as the grant by King
 William the Lyon of the "Brecbennoch" to Arbroath, the royal
vexillum was the king's banner (though in France the sacred
 oriflamme remained the principal royal vexillum in battle).
 But the earlier vexillum must have been a sacred relic, and as
 the bearers of the later (banner) vexillum may well have come
 to do so in place of the earlier (reliquary) vexillum, it may
 be significant that their place of origin should be Cupar,
 centre of the law of Clan Macduff whose chief was apparently
 heir to certain important abbatial duties that included leading
 the vaward of the King's battle.

For coarbs, see inter alia Dr. St. John Seymour, "The
 Coarb in the Mediaeval Irish Church", Proc. Royal Irish Academy,
 vol. xli (1932-4), pp. 219-231; Bishop William Reeves's ed. of
 Adamnan's Vita S. Columbae (preferably the Bannatyne Club ed.,
 1857, which is more fully annotated than that in the Historians
 of Scotland series); Reeves's paper on the early system of
 succession in the Irish monasteries, reported in Proc. Royal
 Irish Academy, vol. vi (1853-7) pp. 447-451; Dr. W.F. Skene,
 "Celtic Scotland", vol. ii; Dr. Joseph Anderson, "Scotland in
 Early Christian Times" (1881); Spalding Club Misc., vol. iii.
 pp. 239-240, vol. v (app. to Preface) p. 75n.; Sheriff J.R.N.
 Macphail, "Highland Papers" (e.g. vol. i. pp. 85-86); Rev. R.
 King (anon.) on hereditary abbots, in "Catholic Layman" (Dublin),
 vol. ii. p. 87, vol. iii. p. 33; Dr. Joseph Anderson's articles
 on dewars and reliquaries in Proc. Soc. Antiq. Scot., vol. xxiii
 p. 110 et seq., vol. xliv. p. 277 et seq.; Professor W. Croft
 Dickinson, "The Toschederach", Juridical Review, vol. liii (1941)

(19) Hogan, op.cit., p. 196. As St. Patrick was not himself a founder-prince, his coarbs were the kin of the kings who dedicated abbeys to him. That is, the coarbs of St. Patrick were drawn from the fine grin, the kin of the grantor; whereas the coarbs of St. Columba were drawn from the fine erluma, the kin of the saint.

(20) Ua Domhnaill was originally only chief of his branch (Cineal Luighdeach) but gradually rose to the kingship of the whole Cineal Conaill. His Arms obviously allude to the great family saint: Gold, issuing from the sinister side of the shield an arm fessways vested Azure cuffed Silver holding in the hand Proper a passion Cross Gules. C.f. the hand holding a Cross that is the crest of Macdonald, and quartered by that great dynastic house, whose ancestor King Somerled was son of Gillebride son of Gille-adamnan, two very Columban names. On establishing his sovereignty over Iona, King Somerled promptly attempted to re-establish the Irish chief coarb of St. Columba there (see Reeves ed. of Admanan's "Life of St. Columba", 1874 ed., p. clxxxii). It seems probable that the family of Somerled were related, no doubt in the female line, to the dynastic house of St. Columba: Cineal Conaill. For the close connection of St. Columba's family with the original dynastic house of Loarn (Lorne), see Reeves, p. 281.

(21) Ibid., p. 196, and Reeves, p. xxxiv. O'Hart, i. p. 825 says O'Gallagher had the castles of Ballyshannon and Lifford, and the hereditary command of Ua Domhnaill's cavalry. Ua Maeldoraigh and Ua Canannan were doubtless greater chiefs, in the kingdom of Tir Conaill, but they long remained candidates for the throne rather than ordinary nobles. Ua Firghil is called "coarb of Kilmacrenan" as late as 1609 (Reeves, Proc. R.I.A., vol. vi, p. lxxi).

- (22) Reeves, pp. clxxxv and lxxii.
- (23) Reeves, pp. xxxiv and lv. Awley O'Freel, of this family, was the last Columban abbot of Iona (Reeves, p. 247).
- (24) Reeves, p. 81 (Admanan, lib. iii cap. vi).
- (25) Skene, "Celtic Scotland", ii (Church & Culture) p. 67. Skene confuses the issue by using the word "tribe" for fine, which really means "family" in the sense of "agnatic kindred". Only if nobody of the fine was qualified, could a stop-gap abbot (selected from certain categories whose priorities are given by Skene) be introduced, and ^{the} abbacy could never become hereditary in the family of such a stop-gap abbot. Indeed, he himself only held office "until a person fit to be an abbot, of the family of the saint or of the family of the land, shall be found" (Skene, "Celtic Scotland", ii. p. 69).
- (26) Skene, op.cit., ii. pp. 67-69. Skene's translation "tribe" has been altered to "family" in this and similar quotations, in order to convey the true sense of the original.
- (27) Reeves, p. clxxxv. When no member of the Cenel Conaill was available, a stop-gap abbot was sometimes chosen, usually from the Ui Neill who were only one generation further removed from the Saint (though as a result they did not descend from his actual derb-fine kin), but it was inconceivable that an interloper could found any hereditary succession in a Columban abbacy.
- (28) Annals of Ulster, i. p. 480.
- (29) Reeves, pp. clxxii, clxxvi. Annals of Ulster, i. p. 496.
- (30) Reeves, pp. lxiv-lxx.
- (31) A.O. Anderson, "Early Sources of Scottish History", i. p. 262n., citing "Chronicles of the Picts". See also p. 288.

(32) Ibid., i. p. 279n. See also pp. 259, 265 and 266, for the foundation of Kells in Ireland c. 807, and the movement to Scotland and Ireland of St. Columba's relics in 829 and 831. More relics of St. Columba were taken to Ireland in 878 (ibid., p. 356).

(33) Duaid MacFirbis, Fragment III, pp. 228-230. See A.O. Anderson, i. pp. 407-408; also Proc. Soc. Antiq. Scot. xliv, p. 280n. A bone of St. Columba was still among the relics at Dunkeld in 1500 (Skene, "Celtic Scotland", ii. p. 308n).

(34) For the Brechbennoch, see Joseph Anderson, "Scotland in Early Christian Times", i. pp. 241-251. See Proc. Soc. Antiq. Scot., xliv, pp. 259-281, and Reeves, pp. xcvi-xcix.

(35) Dr. P.W. Joyce, "A Social History of Ancient Ireland", i. p. 138. Reeves, pp. lix-lx, lxxxv-lxxxvii. Skene, "Celtic Scotland", ii pp. 360-362. O'Hart, "Irish Pedigrees", ii p. 573n. Mac Robhurtaigh was also keeper of the Cross of St. Columba c. 1542: see Dict. Nat. Biog. vol. xii. p. 452 sub MACCONMIDNE, Gillabrighe). Cathach is translated "proeliator". C.f. Spalding Club Misc., v., App. to Preface, p. 75n.: "If the Earls of Fife had any privilege or place of honour in the armies of Scotland, it may possibly have been as the hereditary keepers of some consecrated banner, such as the 'Brechbennach' of St. Columkille ... The judicial function of 'Mair of the King' appears to have been hereditary in the Earl of Fife, in the reign of King Alexander II (Act. Parl, Scot., vol. i. p. 68)".

(36) Joseph Anderson, op.cit., i. p. 148n.

(37) Joyce, op.cit., i. pp. 137-138. Even saints were known to perform this dangerous task. "When the king of Ulster invaded Munster, St. Findchua of Brigown marched at the head of the king of Munster's forces against him from Bruree, with the

cenncathach, i.e. his crozier in his hand: and before the battle began, he walked thrice deisiull with it round the Munster host. In the ensuing battle the Ulster forces were routed".

(38) Reeves, lxxxvii, citing the Four Masters.

(39) They were expelled from Dull by the Picts, but restored after a Gael inherited the Pictish throne in the ninth century (see the writer's "The Robertsons: Clan Donnachaidh of Atholl", 1954).

(40) For an account of such reliquaries in Scotland, "used ... for procuring victory ... in the day of battle", see Joseph Anderson, "Architecturally Shaped Shrines and other Reliquaries", Proc. Soc. Antiq. Scot., xliv. p. 280, where he remarks especially the Cath-bhuaidh or "Brecbennoch" of St. Columba. This is probably the manner in which the Good Sir James Douglas carried King Robert I's heart on Crusade against the Saracens in Spain: when he himself was slain fulfilling Bruce's last request. The Robertson Clach na Brataich or "ensign stone" of rock crystal, probably part of some reliquary (the Robertsons descended from the abbatial family of Dunkeld), was carried into battle by Robertson of Struan as late as 1715.

(41) A.O. Anderson, i. p. 471. Annals of Ulster, i. p. 480.

(42) Ibid., i. p. 583. Annals of Tighernach, Revue Celtique, xvii p. 385. Rev. John Anderson, Assistant Curator Hist. Dept., H.M. General Register House, in "Scots Peerage", vol. iii p. 240n.

(43) Rev. John Anderson, ibid., p. 239. It is unfortunate that we are so far unable today to trace the exact links whereby the hereditary abbots of Dunkeld descended from King Conall Gulban, ancestor of the kindred of St. Columba (and thus

descended through Niall of the Nine Hostages from the pagan sacral kings of Tara). It is as though we knew the terms of the Act of Settlement, that the Electress Sophia's Protestant descendants had not become extinct, and that the Church of England had not been disestablished - but had no exact knowledge of the links between the Electress Sophia and Queen Victoria.

It might, however be worth investigating any Irish MS. genealogies of the branch of St. Columba's kindred called the Cenel Lugdach, and referred to as "in Scotland" by Dr. A.O. Anderson ("Early Sources of Scottish History", vol. i p. 3) citing Todd's Irish Nennius (ci-cix) and other sources.

(44) A.O. Anderson, i. p. 576.

(45) That the relics of their Founder Saint were the essential insignia of a Gaelic monastic community, is demonstrated by the incident in the life of St. Malachy O'Morgair (died 1148) when his rival Niall seized certain relics of St. Patrick, the essential insignia of the coarbs of St. Patrick at Armagh (see Dict. Nat. Biog., vol. xii p. 837).

(46) He is called "Crinan the Thane", i.e. toisech or chief, in De Obsessione Dunelmi (R.S. 75, i. 216): see A.O. Anderson, i. p. 577n. Presumably he was chief of the kindred of St. Columba in Alba, and perhaps his thanage was Scone, with the custody of the royal inauguration-place, just as O'Freel held the Tirconaille kings' inauguration-place at Kilmacrenan (see note 21 above) and just as the O'Neill kings' inauguration-place at Tulach Og was also held by the hereditary inaugurator (see note 13 above). For the thanage of Scone, which during the twelfth and thirteenth centuries was in the hands of the royal house descended from Abbot Crinan the Thane, see Skene, "Celtic Scotland", iii pp. 275-276.

(47) Reeves, p. 287, writes of the Dalriadic monarchy: "Conventual, not episcopal, rank was what conferred importance on ecclesiastics in the eyes of the Scots at that day". It must be remembered that as late as the twelfth century, hereditary abbots were great nobles of dynastic stock, with precedence before earls (see the preamble to charters), and the genealogical succession to such abbatial families must be considered in any examination of ancient privileges among the Scottish nobility.

In his Glossary appended to Admnan's Vita S. Columbae (Bannatyne Club ed., 1857), Bishop Reeves writes at p. 451: "The ancient Irish Annals and Canons frequently used princeps to denote a religious superior, as equivalent to abbas or aircinnech. Saran, who is styled aircinnech in Tighernach 605, is termed comes in Vit. S. Maidaci, c. 47 (Colg. Act. SS p. 213)".

(48) Fordun calls Crinan "Abthane of Dull", a misnomer for holder of the abbey-lands of Dull (another Columban inheritance), and also "Steward of the Isles", perhaps denoting some authority as erenach or aircinnech (hereditary steward or local superior of abbey-lands) in the isles around Iona (part of the Columban inheritance in Alba).

The writer of the "Vision of Admnan" refers to "Aircinnechs, who, in the presence of the relics of the saints, administer the gifts and tithes of God" (Vita S. Columbae, Bannatyne Club ed., p. lii). See also *ibid.*, pp. 364, 342n., 404.

(49) The devotion of the house of Kenneth mac Alpin to St. Columba is shown by their use of the name Malcolm: Mael Colum or the Devotee of Columba.

(50) A.O. Anderson, i. p. 581: Chronicle of the Kings of Scotland version D, Skene's Picts & Scots, p. 152.

- (51) . e.g. King Duncan II and his Mac Dhonnachaidh descendants (the "FitzDuncan" line), and the royal Earls of Atholl, ancestors of the Clan Donnachaidh, with which the surnames Duncan and Duncanson are still principally associated.
- (52) Reg. Vet. de Aberbrothock (Bannatyne Club), pp. 10, 73, 296.
- (53) For the giving away, by the Crown, of Columban possessions: see Skene, "Celtic Scotland" ii pp. 355-402. King David I (great-grandson of Abbot Crinan, and brother of the last hereditary Abbot Dunkeld) was so active in endowing the Catholic Church with his family lands, that he became known as David the Saint - "a sore Sanct for the Croune", as his descendant James VI put it.
- (54) Henry Laing, "Ancient Scottish Seals", Bannatyne Club 1850, p. 5, no. 15: also illustrated at Plate I, fig. 1.
- (55) See J.A. Robertson, "Comitatus de Atholia", passim. Skene, iii. p. 271, notes that Malcolm, Earl of Atholl (Abbot Crinan's descendant) gave the church of Dull to the priory of St. Andrews; though the main abbey-lands of Dull remained in the possession of the royal house (the senior line descended from Abbot Crinan). Some generations later, St. Andrews infieffed Earl Malcolm's descendant Duncan of Atholl (ancestor of the Robertsons of Struan) in Dull. The serpent and dove are still to be seen with the Robertson arms on an eighteenth-century tombstone in Moulin churchyard, and are illustrated (from the dirk of the then Robertson chief in 1822) in Sir Noël Paton's "The Descendants of Conan of Glenerochie" (1873). They are recorded in Lyon Register for Robertson of Struan. It may perhaps be noted that the dove or columba is also the heraldic "beast" of the Dunbars, descended from Abbot Crinan's son

Maldred: their chief, Dunbar of Mochrum, having two crowned doves for supporters. The dove is otherwise rare in Scots heraldry, although significantly enough it appears in the arms of Dunkeld.

Incidentally, since wolves' heads appear in the Robertson arms, it may be significant that on the counter-seal of the Chapter of Dunkeld, St. Columba was depicted sitting on a throne formed of two wolves, the head and forelegs of which project at the sides (Laing, op.cit., p. 181, no. 1018): also that the first Earl of Atholl was called Madach or more properly Madadh (the Icelandic writers call his son Harald "Maddad's-son"), a word sometimes used to mean "Wolf" in Gaelic (e.g. the local Atholl tradition of a wolf and a miller's wife at Moulinvadie: "the mill of the wolf") although it has a more general meaning of "dog" according to the dictionaries, which prefer madadh-allaidh for "wolf". But the writer has not been able to discover the basis of any association of wolves with St. Columba.

(56) A.O. Anderson, ii. p. 56n, summarises the references to Aethelred.

(57) See Skene's translation in "Celtic Scotland", ii p. 355, but note the remarks in "Scots Peerage", iv p. 2. Abernethy was certainly a Columban abbacy (Skene, ibid., ii. p. 398).

(58) Charlemagne's friend and biographer, Einhard (c. 770-840), a great married nobleman, was apparently simultaneously Abbot of St. Peter at Mont Blandin, of St. Bavon at Ghent, of St. Servais at Maastricht, of St. Cloud at Paris, and of Fontenelle at Rouen. For a case of the style comes being ^{actually} ~~usually~~ applied to an hereditary abbot among the Gaels, see note 47 above.

(59) St. Martin is said to have divided his cape with a beggar.

(60) The abbacy of St. Denis was a Merovingian foundation. The precise blood relationship between the Merovingians and the Carolingians is uncertain, though its existence may perhaps be presumed. Hugh Capet's mother was a Carolingian in the female line (according to one account her grandmother was a daughter of the Emperor Arnulf); his paternal grandmother appears to have been a Carolingian of the senior (Vermandois) line; and his father Hugh the Great became Count of the Vexin. The abbacy of St. Denis was inherited by the Counts of the Vexin, and as purely spiritual abbots came to be appointed, the Counts continued as Vidames of St. Denis, with custody of the famous Oriflamme. When the county of Vexin merged with the crown of France in the twelfth century, the Kings of France became themselves Vidames of St. Denis, "avoués et protecteurs de l'abbaye" (Ludovic Lalanne, "Dict. Hist. de la France", 12th ed., pp. 158, 1382, 1604, 1762, 1783, 1788, 1791). Compare the French vidame with the Gaelic aircinnech.

Hugh Capet is now held to have descended in the male line from Rutupert I, Count in the Oberrheingau, whose widow founded Lorsch in 764 ("Genealogisches Handbuch des Adels: Fuerstliche Häuser Band II", 1953 p. 2). A study of such abbeys as St. Martin and St. Dennis, however, might well shew that they were reserved for founder's kin if the female line be included.

(61) Reginar's mother had been a Carolingian princess: see the forthcoming history of his family by Lord Mountbatten (President of the Genealogists' Society), the MS. of which has kindly been shown to the writer; see also Biographie Nationale de Belgique under GISLEBERT.

(62) See Biog. Nationale de Belgique under REGNIER; also Stokvis, "Manuel d'Histoire et de Généalogie", iii. p. 459. These abbot-counts are of historico-genealogical interest as

the direct male-line ancestors of Harry Hotspur, Lord Percy, of the Reformation leader Philip of Hesse, and of Earl Mountbatten of Burma. Count Reginar was Abbot of Echternach 897-915, and his son Duke Gisilbert was Abbot of Echternach 915-939. Count Reginar's father, Count Gisilbert, was probably brother of Reginar, Abbot of Echternach 864-871. Count Reginar had a brother, Bishop Richwin, and another brother who is believed to have become Count in the Ardennes. It may be suggested that Count Sigfried, Abbot ^{of} Echternach 957-971, who is said to have been son of a Richwin, Count in the Ardennes, and who had a son Gisilbert, belonged to this family. The point is of some importance, as Count Abbot Sigfried was the founder of the Imperial House of Luxembourg.

(63) Cart. Mon de Northberwic (Bannatyne Club), 4. See chapters above on the Heir at Law to Earldoms and to Peerages.

(64) Nat. MSS. Scot. (1867), I. pl. L. See G.W.S. Barrow, "The Beginnings of Feudalism in Scotland", Bulletin of Inst. of Hist. Research, vol. xxix (1956) p. 4.

(65) In this connection, the seal of the Monastery of Scone (illustrated as a frontispiece to Liber de Scon, Bannatyne Club) is perhaps of special interest. It represents the inauguration of the King of Scots, "who is sitting with an open crown on his head, holding in his right hand a sceptre or rod of office, his left on the fastening of the robe with which he is being invested by a Bishop on his dexter, and a Priest on his sinister side. There are five other figures engaged in various duties connected with the solemnity" (Laing, op.cit., p. 203, no.1125). The identification of these five other figures might help in determining the point raised in note 4 above, whether each of the Seven Earls had duties in connection with the regalia or inauguration of the sovereign. Three shields are given on

this seal (1) the Royal Arms of Scotland, (2) three pales, identified by Laing as Atholl, but more probably Fife (see chapter above on the Heirs at Law to Arms, where it is suggested that the royal house originally had a paly coat as well as a lyon coat), and (3) Strathearn. Ritualists will observe that the background to this seal depicting the royal inauguration is semé with roses.

The arms of the royal inaugurator, Fife, might be expected on a seal depicting the royal inauguration. If this is the reason for their appearance, it may be worth considering why the arms of Strathearn should accompany them, and whether the explanation is connected (a) with the style "Earl Palatine" applied to a fourteenth century Earl of Strathearn, and (b) with the style "Dei Gratia" or "~~Dei~~ Indulgentia", so far only found applied to the Earls of Fife and Strathearn. It may also perhaps be worth considering whether both the Earls of Fife and Strathearn held hereditary abbacies at one time. The evidence in the case of the Earls of Fife is examined briefly in this appendix. In the case of the Earls of Strathearn, it may be noticed that the MacLarens of Achtoo in Balquhiddy, who bear Arms indicative of cadency from the dynasts of Strathearn, have an unproved tradition of descent from these dynasts by way of an hereditary abbot, Lawrence, who is said to have held abbey-lands at Achtoo (see also notes 75, 86 and 88 below). Moreover, the Earls of Strathearn, extraordinarily, were superiors of the Bishop and Chapter of Dunblane.

On the other hand, abbeys sometimes included on their seals the Arms of their founder or principal benefactors. Thus the seal of the Chapter of Coupar Angus, a foundation of Malcolm IV but of which the Erroll family were the principal benefactors, displays two shields (1) the Royal Arms of Scotland, and (2) the coat of Hay of Erroll (Laing, ibid., p. 177, no. 1001).

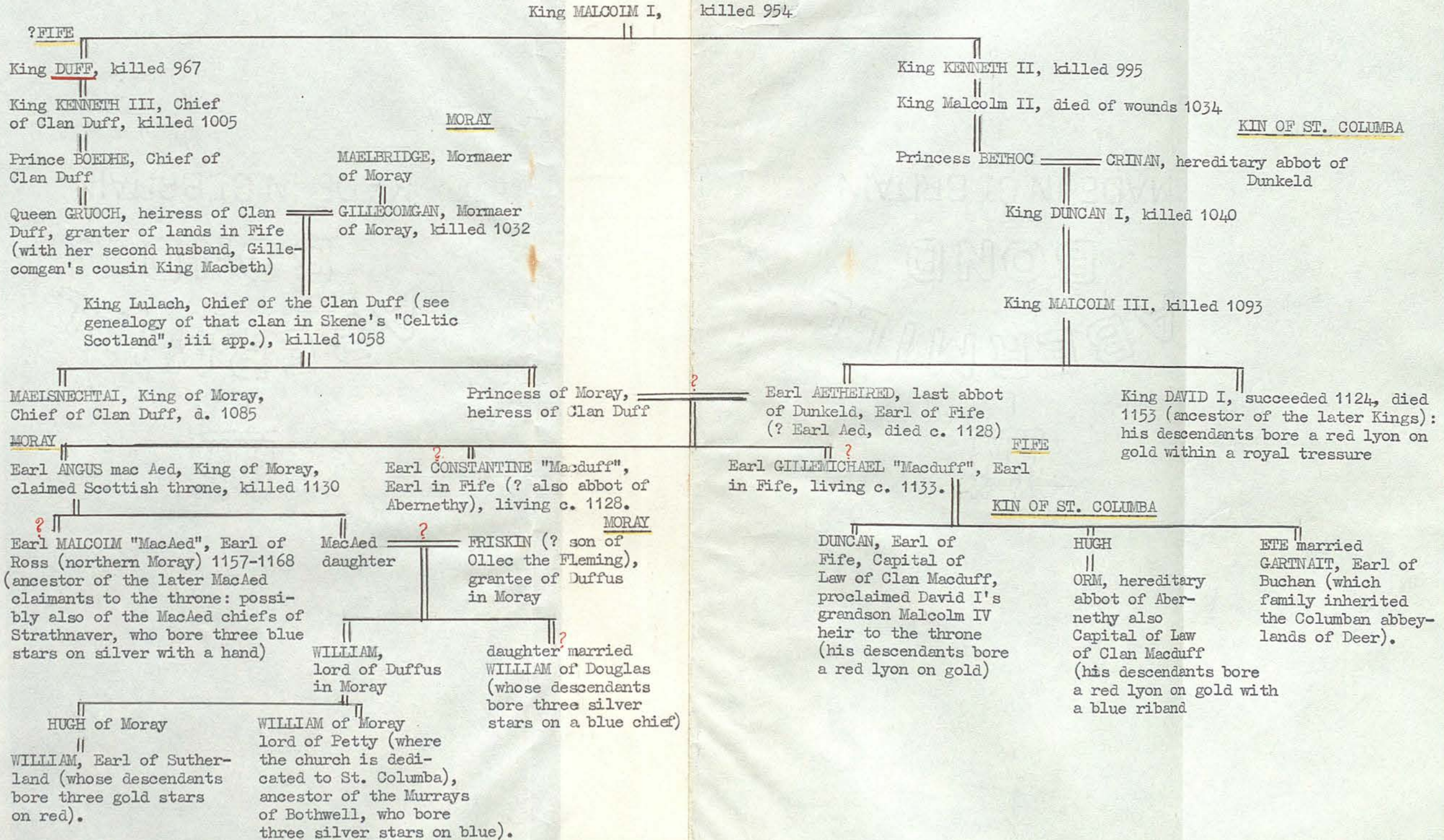
(66) The later Earls of Fife and the Abbots of Abernethy bore Arms that could only have been worn by very close relatives of the Blood Royal, and they held privileges that were only appropriate to the kindred of St. Columba, who were the royal house. Abernethy was latterly a Columban abbey. See also G.W.S. Barrow, "The Beginnings of Feudalism in Scotland", p. 4: "Duncan of Fife belonged to a family which was closely allied to the royal house by personal loyalty and probably by blood-relationship. This is suggested by the earls' personal names, and by the fact that Malcolm Canmore's son Ethelred was earl of Fife (Lawrie, E.S.C., no. 14). ... The prevailing names were in fact Duncan and Malcolm".

It is tempting to accept the suggestion that Earl Ethelred is to be identified with "Ed Comes" (see "Scots Peerage", iv. p. 2n., vi. pp. 284-285; Skene, "Celtic Scotland", iii p. 62n.), since it would explain so much that is otherwise difficult in Scottish genealogical history at that period. King Macbeth's wife, Queen Gruoch, the heiress of Clan Duff, appears to have been specially associated with Fife (Skene, "Celtic Scotland", i. p. 406 note 37), and it could perhaps be suggested that if Earl Ethelred was Earl Ed (husband of the heiress of Clan Duff), Fife may have been the appanage of the kings of the house of Duff: and that we have there the origin of the "kingdom of Fife". King Duff is said to have had an ancestor, necessarily in the female line, who was abbot of St. Andrews in Fife (A.O. Anderson, i. p. 473 note 3), and so it may be that he was connected in the female line with the Fife family descended from Conall Cerr, brother of King Domnall Brecc (ibid, i. pp. cliv-clv). It seems more than probable that Freskin or his son, ancestor of the later (Murray) lords of Moray, married into the older ruling house of Moray: and it may be taken as almost certain that the house of Douglas was related by marriage to that of Murray (St. Brice of Douglas was a maternal nephew

of Freskin of Kerdal, probably a son of the first Freskin, and for the Douglas arms, which are a differenced form of those of Moray or Murray, see G. Harvey Johnston, "The Heraldry of the Murrays", 1910). If Earl Ethelred, of the kin of St. Columba and royal house of Alba, was really the Earl Ed who married the heiress of Moray and of Clan Duff (with its Fife connection), it would explain (a) the connection between Fife and the Clan Macduff, (b) the importance of the name Macduff, (c) the strength of the Mac Heth (Mac Ed) claims to the throne, (d) the connection between the Macduff Earls of Fife and the Kings of Scots, (e) the abbatial privileges of the Macduff Earls of Fife, and the apparent connection of the Murrays and Douglases with these privileges.

But there are great difficulties in the way of accepting such an identification, and it doubtless represents an oversimplification of the genealogical problem. It would be necessary to suppose that, of Earl Ethelred's descendants, the senior branch were bitterly opposed to the line of King David I, whereas the junior branch were the closest supporters of David I's line: but such divisions of policy between branches are not unusual, especially when the junior branch stands to gain, or retain, privileges at the expense of the elder. As Earl Ed apparently survived until 1128, it would be necessary to suppose that he had some blemish that prevented him from becoming king (see chapter on Succession among the Gaels), but in this context it may be worth noting that Earl Ed's son appears to have led a rising in an attempt to gain the throne directly after his father's death (the rising that failed at Strathcathro in 1130). Finally, it would also be necessary to suppose, not that "Ed." is an abbreviation for "Ethelred", but that the Anglo-Saxon name Aethelred was rendered into Gaelic as Aed, an old Royal name (just as Aed was sometimes Englished "Hugh", and has latterly been Englished "Aeneas").

The conjectural simplified genealogy would run thus:



In this context, it may be worth noting that the Stirlings of Glenesk, who held Edzell (? as heirs of the Black Priest of Wedale: see note 88 below) bore three stars; and that in the reign of David II the "small thanage of Newdosk, which once formed a parish, now united to Edzell", was held by Reinald Cheyne, one of the co-heirs of the Morays or Murrays of Duffus (see Skene's "Celtic Scotland", iii. p. 259; also "Scots Peerage", ii. p. 122, vi. p. 343).

(67) A.O. Anderson, "Early Sources of Scottish History", p. 28.

(68) It has been suggested that his immediate successor was Earl Dufugan, a witness to the spurious foundation charter of Scone in 1114, and that Macduff is a contraction of Macdufugan (Dufugan was also the name of a tenth-century mormaer of Angus). On the other hand, Duff was a name in the royal house: and from King Duff (Dubh), who reigned 962-967 and was elder brother of King Kenneth II, there descended an important line of claimants to the throne (see chapter above, on Succession among the Gaels). Professor Croft Dickinson writes: "the question arises whether Dufugan Comes, in Alexander I's charter to Scone, is historic in a genuine charter. Further, Malcolm IV's charter to Dunfermline (certainly forged) mentions MacDuff, Comes. Now even if both charters (both in Lawrie's Early Scottish Charters) are forged, why should the forger use unknown names. Surely he would use known names" (letter of 19 Dec. 1953).

(69) This name is almost, if not entirely, unknown outside the royal house, although a Constantine, abbot of Newbattle, resigned that office in 1236 (Chron. Melrose, p. 147).

(70) Reg. de Dunfermelyn, 16.

(71) Lawrie, "Early Scottish Charters", ix. p. 245. Macduff presumably means "son of Duff" rather than "black son" (but see

also note 68 above). On the other hand "Constantine comes" and "Gillemichel Macduff" appear together in a charter of David I without any suggestion of relationship (see Hist. of Scot. series, Fordun, ii. p. 422), though this is not necessarily significant.

(72) Gillemichael certainly had a surviving son Hugh, presumably Duncan's younger brother.

(75) This identification of the Abernethys as cadets of Fife occurred simultaneously and quite separately, on different grounds, to Mr. G.W.S. Barrow: who sets it out in an unpublished appendix to his "The Earls of Fife in the 12th Century" (Proc. Soc. Antiq. Scot., lxxxvii, 1952-53, p. 53 et seq.).

(74) The writer has spent some time analysing the genealogical background of Scots families whose principal tinctures were red and gold, but although (among the early coats at least) there seems to be some tendency towards connection with the royal house (e.g. the Drummond red and gold instead of the older Menteith tinctures), the evidence is not so far by any means conclusive.

(75) It may be significant that when the last Earl of Fife (the Regent Albany) was forfeited by King James I, and executed, his castle of Tantallon (in which his widowed duchess was imprisoned) was given to the then lord of Abernethy (Angus): see Sir Herbert Maxwell, "A History of the House of Douglas" (1902), ii. p. 10, also Reg. Mag. Sig. ii. no. 127. Forfeited lands were often bestowed on those who had some family connection with them: e.g. Slains in Buchan to Hay of Erroll (whose grandmother had been a Cummin) on the downfall of the Cummins, and Douglas to the Red Douglas on the downfall of the Black Douglas. Tantallon adjoined the old Fife lands of North Berwick, and the Black Douglases were also connected with it:

if the origin of their tenure there could be ascertained, it might throw light on their possible Fife connection (see note 8 above). The lord of Abernethy, held responsible for the Earl of Fife's murder in 1288, was warded in the custody of William of Douglas at Douglas Castle. Of course, if the Douglasses and Murrays had a female-line descent from the old ruling house of Moray, the heirs of Clan Duff, their connection with Fife may have been very ancient (see chapter above on Succession among the Gaels).

(76) "Egius filius Hugonis". Egius and Hugh are both presumably forms of the old royal name Eochu or Eochaid. Hugh was perhaps also father of Michael of Methil, ancestor of the Wemyss family, who have long claimed descent from Earl Gille-michael, and who bear the red lion on gold of the Clan Macduff. Early armorials give their difference as an orle sable around the lion, but it should perhaps be remarked that Michael of Methil's son, John of Wemyss, c. 1230 sealed with Arms suggestive of a connection with Strathearn or Logie (Macdonald, "Scottish Armorial Seals", p. 365, no. 2859), doubtless a maternal connection but of interest in view of note 65 above. The Christian name Michael, used by the Abernethy and Wemyss families from the end of the 12th century, follows on the earlier form Gille-michael: just as in the Dunbar ^{and Nevill families,} family, the form Gospatrick of the early 12th century was succeeded by the form Patrick from the second half of the same century.

(77) Brit. Mus., Portland MSSS. on loan, Ancient Charters, File 1, no.1 and one unnumbered charter; Nat. Library, MS. Adv. 35.4.12a, no.3; Inverness Museum, charter of William I penes W. Mackay, on loan. See Barrow, "The Beginnings of Feudalism in Scotland", p. 24.

(78) See "Scots Peerage" sub SALTOUN.

(79) See note 77 above.

(80) Skene, "Celtic Scotland", ii. p. 399.

(81) Fordun's Annals, lxxxii. Wyntoun's Chronicle, book viii, cap. ix. Wyntoun's account of the Earl of Fife's murder by the Abernethys, significantly enough, immediately precedes his account "Off Ballyollis Coronatioune": that a coronation was imminent, was already clear at the time of the young Earl's murder, though the expected sovereign was then the Maid of Norway. Perhaps the Abernethys hoped to do the enthroning in Fife's place: but Sir Andrew Murray quickly avenged the earl. As the murdered Earl's son was under age, King Edward I appointed John de St. John to officiate as the boy's proxy at King John Balliol's inauguration (Scots Peerage, iv. pp. 11-12).

(82) Wyntoun's Chronicle, book vi. cap. xix.

(83) In 1304 the Earl of Fife claimed privileges "tamquam capitalis legis de Clenm^cduffe" (A.P.S., i. 551a). Skene's derivation of the second part of toisech-deoradh from dior, an old word signifying 'of or belonging to law' ("Celtic Scotland", iii. p. 280) fits very well the translation "capital of law"; and see also note 16 above. Toisech-deoradh probably means "chief of the dewars", custodes pacis. But deoradh is usually associated with the idea of exile or pilgrimage, and (apart from the obvious association with the custody of relics, the object of pilgrimage) might possibly allude to the fact that the dewar, as opposed to the main body of the monastic community, lived out on his own toft. For the office of toisech-deoradh or toschederach, see Professor W. Croft Dickinson, "The Toschederach", Juridical Review, vol. liii, June 1941, pp. 85-109, and Appendix at pp. 110-111.

(84) H. Lamb, "Genghis Khan" (1933 ed.), p. 71.

(85) Sir John Skene, De Verborum Significatione, under CLAN MACDUFF.

(86) Sir William Ramsay of Colluthie, married before 1358, Isabella, suo jure Countess of Fife (see G.E.C., Dict. Nat. Biog. and "Scots Peerage"). Girth crosses are well known: the Cross of Macduff in Fife stood (near Newburgh) in a pass overlooking the lands of Abernethy. For this Cross, see Alexander Laing, "Lindores and its Abbey and Burgh of Newburgh". Professor W. Croft Dickinson has pointed out that the verses which are said to have appeared on the Cross, or its base, seem to point to consecration to some saint, apparently St. Macdryn (whose feast is 9 June: the same day as that of St. Columba). This would seem probable, since the Clan Macduff privilege of sanctuary appears to have been of ecclesiastical origin and their Cross thus be dedicated to a saint, although it has never been suggested that their namefather Dubh or Macduff was a saint himself.

There was also a Cross of Macduff near Brechin ("Croce M^cDuff", see Ref. Mag. Sig., v). Abernethy was dedicated to St. Bride, and a Panbride in the diocese of Brechin probably formed part of the old Pictish bishopric of Abernethy (Skene, "Celtic Scotland", ii. p. 397). Brechin was a Columban abbey, and like Abernethy possesses a characteristically Irish ecclesiastical Round Tower (see Duncan Keith, "History of Scotland", vol. ii). The hereditary Abbots of Brechin, therefore, doubtless also belonged to the kindred of St. Columba. For this family, who took the surname of Abbe, see Skene, "Celtic Scotland", ii. pp. 400-402. The name Malise, so popular in the family of the Earls of Strathearn, was also used by this family. The lordship of Brechin was afterwards settled by the royal house (heads of the kindred of St. Columba in Scotland)

on Henry of Brechin, natural son of King William the Lion's brother, Earl David (see "Scots Peerage", ii. p. 216, sub BRECHIN). Henry's descendants, the lords of Brechin, bore three piles (apparently a differenced version of the royal paly coat: see chapter above, on Heirs at Law to Arms). Such a coat, as yet unexplained, was quartered (a) by the Douglasses, Earls of Angus and Lords Abernethy, and (b) by the Lords Abernethy of Saltoun.

(87) Scotichronicon, ii. p. 252. But note that in contemporary accounts of the battle of the Standard in 1138, the men of Galloway claimed, and were given, the right of forming the van (in the 14th and 15th centuries, the lordship of Galloway was held by the Earls of Douglas, after their marriage to the heiress of the Murrays of Bothwell). The Cart. Mon. de Northberwic shews that the Galloway (Carrick) family as well as the Fife family were benefactors of North Berwick. Sheriff Macphail, "Highland Papers" i. p. 86n., points out that William the Lyon c. 1175 granted to Holyrood four churches in Galloway, "quae ad Jus Abbatie de Hii Columchille pertinet". Macphail overlooks the fact that King William the Lyon was himself a member of the kindred of St. Columba.

(88) Three judges are common in the old Welsh laws, and Wyntoun certainly implies that there were three "capitals" of the law of Clan Macduff: Fife, Abernethy and "the Black Priest of Wedale", presumably all heads of branches of that clan. Perhaps "Black" is simply a literal translation of "Duff" (Dubh). It seems unlikely that Wedale in this context has much connection with the place of that name near Stow in Midlothian, and it may perhaps be suggested that it refers more probably to Edale or Edzell in Angus.

Abbot Orm of Abernethy held Dunlappie, which marches with Edzell (Nat. Library MS. Adv. 35.4.12a, no. 3: see Barrow,

"The Beginnings of Feudalism in Scotland", p. 24). The Lindsays, as co-heirs of the Abernethys, inherited great estates from them in Angus (Lord Lindsay, "Lives of the Lindsays", i. p. 48). Skene, "Celtic Scotland", ii. p. 395, tells us that "the church of Edale, now Edzell, was dedicated to St. Drostan, the founder of the church of Deer; and there, too, we find one of the old Columban foundations in the possession of a lay family, who seem to have adopted Abbe as a surname". The instances given by Skene, include a grant to the monks of Arbroath of the privilege of taking charcoal in the wood of Edale (Edzell), given by John Abbe, son of Malise, and confirmed by Morgund, son of John Abbe. A comparison with Skene's own text at p. 400 following, will shew that this grant at Edale (Edzell) was in fact made by the Columban abbatial family of Brechin (referred to in note 86 above), where there was a Macduff's Cross. It seems likely, therefore, that the "Black Priest of Wedale", who was one of the chieftains of the Clan Macduff, belonged to a branch that held abbey-lands at Edzell, originally with the abbacy of Brechin.

As co-heirs of the Abernethy branch, the 14th century Lindsays were neighbours of the Stirlings of Glenesk (who bore three stars like the Douglasses and Murrays), and married their senior heiress, with whom they acquired Glenesk. Lord Lindsay, *ibid.*, p. 51, says that Edzell formed part of the Glenesk inheritance, in which case the Stirlings of Glenesk may have been the successors of the "Black Priest" there. Whether as co-heirs of the Abernethys, or as co-heirs of Glenesk, the Lindsays of Crawford certainly held Edzell from the end of the 14th century. They thought the Abernethy arms so important that they quartered them at that early date (the Abernethy lyon is quartered with the Lindsay chequers on the seal of the 1st Earl of Crawford in 1399: see Macdonald, "Scottish Armorial Seals", p. 207 no. 1637), and the Glenesk stars appear on Lindsay seals from 1371

(ibid., p. 206 no.1635) though always used by cadets (such as Edzell and Balcarres). If the Earls of Crawford were the representatives of the "Black Priest of Wedale", either as heirs portioners of Abernethy or of Glenesk, it would account for their special precedence before older earldoms: a precedence rivalled only by earls who, as this appendix attempts to shew, may have represented Fife or Abernethy, the two colleagues of the "Black Priest" within the Clan Macduff. See also Spalding Club Misc., v., App. to Preface, p. 74n. et seq.

We are told (Dr. George F. Black, "The Surnames of Scotland", New York 1946) that the Angus family of Duray of that Ilk (or Durayhill) derived its name from the office of dereth ("hoc est officium sergiandi"), as hereditary dempsters of the lairds of Edzell, and in special charge of the bell of St. Laurence (note that the last hereditary Abbot of Abernethy, who held the neighbouring lands of Dunlappie, was called Laurence). See also Black, ibid., sub DEMPSTER, DEWAR, MACINDEOR and MACJARROW. Durayhill is on the North Esk.

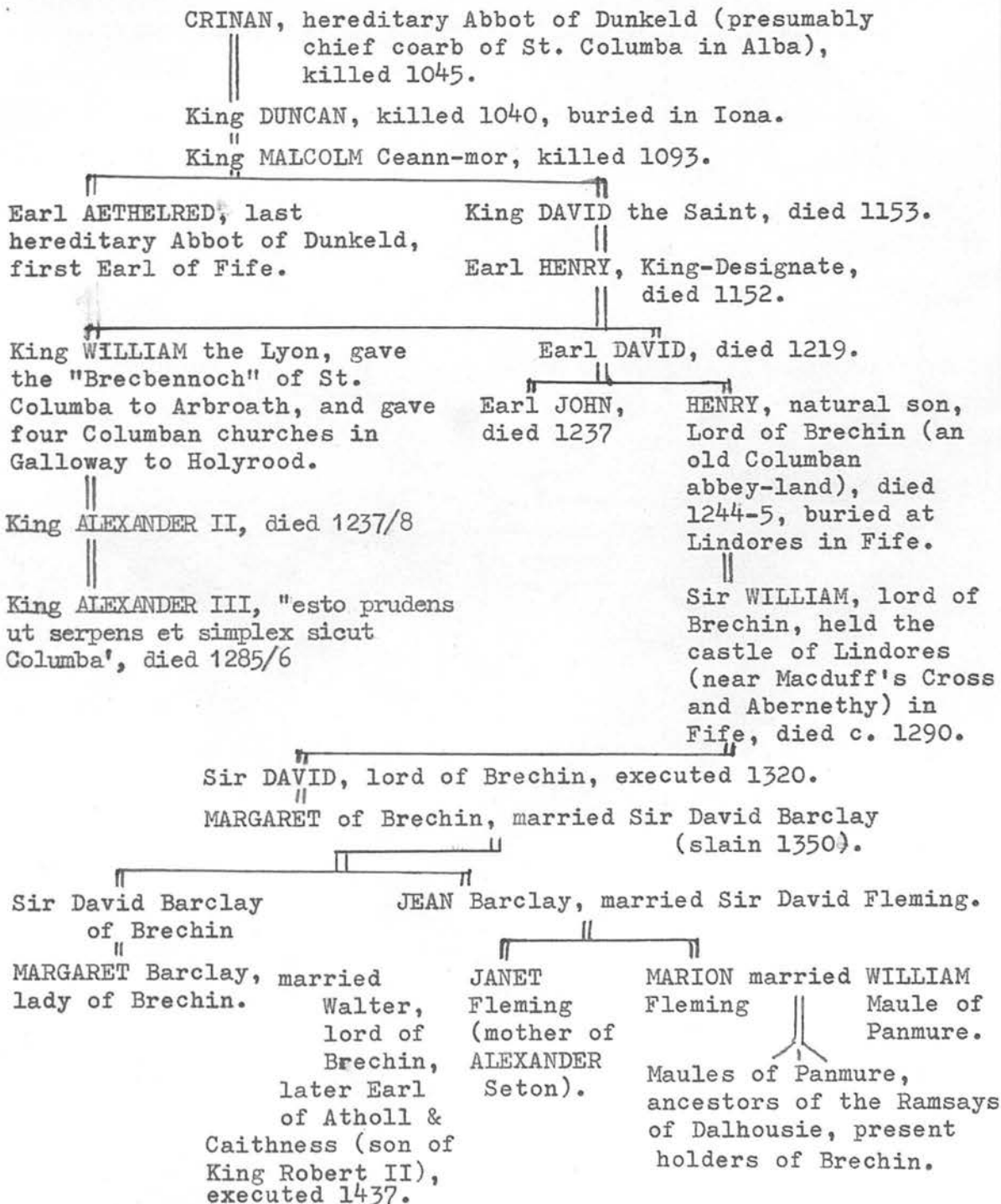
(89) Skene, "Celtic Scotland", iii. p. 305.

(90) See "Scots Peerage", i. pp. 278-299. The Arbuthnott family appear to descend in the male line from the Swintons of that Ilk (probably a branch of the Edulfingar ruling house of Beornicia), and their connection with the Clan Macduff was doubtless in the female line. Skene, "Celtic Scotland", iii p. 306, suggests a connection between the Clan Macduff and the old ruling house of Moray (for whom, see "Scots Peerage", vi. pp. 280-285), and observes that the Earls of Fife from an early period held large possessions in the North, including the district of Strathavon. The Arbuthnott supporters are two wyverns: c.f. the curious stabbed-wyvern coat attributed

to Macbeth in Workman's MS. (illustrated by R.R. Stodart in "Scottish Arms"). Perhaps the wyvern was a beast of the Clan Duff, whose heirs were the ruling house of Moray. In 1372, the superior of the thanage of Arbuthnott was Archibald Douglas, lord of Galloway, apparently in right of his wife Joan Murray, heiress of the Murrays or Morays of Bothwell. ("Scots Peerage", i. p. 277). A peacock's head was the crest of the Murrays of Tullibardine (probably cadets of Bothwell) and is still the crest of the Viscounts of Arbuthnott.

It is not easy to say why Hugh Arbuthnott of that Ilk should have been entitled to the privileges of the Law of Clan Macduff. His mother was a Douglas of the Dalkeith branch, and his wife was a daughter of the Marischal of Scotland (one of whose wives, on doubtful authority, is said to have been a daughter of the 1st Earl of Crawford, who was of course one of the Abernethy co-heirs). Along with Hugh Arbuthnott, a number of others, including George Barclay, Alexander Falconer, William Graham, Gilbert Middleton, Patrick Barclay and Alexander Graham, were also accorded the privileges of the Law of Clan Macduff for the same slaying, according to the garbled version of the remission, printed in Maidment's Analecta Scotica, 2nd series, at pp. 30-31. Insufficient is known about the early marriages of these families (see, for example, Falconer of Halkerton sub EARL OF KINTORE and Middleton of that Ilk sub EARL OF MIDDLETON in the "Scots Peerage") to know what was their blood connection with the Clan Macduff. The arms of Middleton are perhaps significantly a lyon, most royally augmented in the 17th century. The interpolator of the remission printed by Maidment, takes the view that the two Grahams belonged to the Morpie family, and that the Barclays were cadets, through Mathers, of the Barclay lords of Brechin. However, "Scots Peerage", ii. p. 223, implies that the Barclays of

Brechin had no male descendants (unless illegitimate). Sir David Barclay was granted Brechin by King Robert Bruce after the execution in 1320 of his father-in-law, Sir David of Brechin, who belonged to an illegitimate branch of the royal dynasty of the kindred of St. Columba. His line were as follows:



Since relationships in the female line were as important as those in the male line, it is very difficult to disentangle the ramifications of the inter-married ruling houses of Scotland (Alba) and Moray, the kin of St. Columba, and the Clan or Clans Duff and Macduff. But, besides the links between Fife and the North, referred to in the chapter on Succession among the Gaels (see also note 75 above), there appears also to have been some intermediate connection between these houses and the district of Angus and the Mearns, on the fringes of which lived the group of Arbuthnots, Barclays, Grahams, Middletons and Falconers who claimed the privileges of membership of the Clan Macduff in 1421. The Abernethys held extensively in Angus, including (besides the lands that passed to their heirs portioners) the chapel of Airlie, which Abbot Laurence of Abernethy gave to Arbroath (Skene, "Celtic Scotland", p. 399). Later, the lands of Airlie were held by the Ogilvys, a cadet branch of the original Earls of Angus. In 1447 Sir John Ogilvy was superior of the Bell of St. Medan, which was resigned into his hands by Michael David, tenant and hereditary custodian of the Bell, by an instrument dated at Airlie, 5 June 1447 ("Scots Peerage", ii. p. 113). See also note 88 above.

The name Dufugan (Dubhacan) is associated both with Angus and with the Columban monastery of Deer in Buchan, of which the old ruling house of Moray were benefactors (e.g. Malcolm Ceannmor's contemporary, King Maelsnechtai mac Lulach of Moray, who granted Deer certain lands which he dedicated to St. Drostan). The Earls of Buchan themselves must have been related to the Columban kindred, since they appear to have eventually inherited the Celtic abbey-lands of Deer. A Dufugan was mormaer of Angus in the tenth century (see also note 68 above), and one of the benefactors of the monastery of Deer was called Donald, son of Mac Dufugan (Domnall mac méic dubbacin), which Donald "mortified all the offerings to Drostan" (The Book of Deer, Spalding

Club ed., p. lii). Edzell in Angus was dedicated to St. Drostan (note 88 above) and was apparently held by the Columban abbatial family of Brechin (note 86 above): there was a Donald, Abbot of Brechin in the twelfth century. See also note 66 above.

It is possible to reconstruct the following tabular pedigree of this family (the predecessors at Brechin of the lords above, who descended from another branch of the Columban kindred) from Skene, "Celtic Scotland", ii. pp. 395, 400-402, and Dr. John Stuart, "The Book of Deer", p. lv. It could possibly be amplified by further research among early charter witnesses.

LEOD, hereditary Abbot of Brechin (where there is a Columban round tower and a Cross of Macduff) c. 1132.

SAMSON, Bishop of Brechin, probably also hereditary Abbot of Brechin.

DONALD, hereditary Abbot of Brechin.

MALISE: connection with Donald unknown(? son or brother).

JOHN, hereditary Abbot of Brechin (<u>alias</u> John Abbe), held at Edale or Edzell (dedicated to St. Drostan), ? possibly one of the three Capitals of Law of Clan Macduff as the Black Priest of Wedale.	MALCOLM
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MORGUND, held at Edzell, the dempsters of which were hereditary guardians of the bell of St. Laurence.	JOHN
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(Laurence, last Columban ^{abbot} of Abernethy, another of the three Capitals of Law of Clan Macduff, held Dunlappie adjoining Edzell).

The name Leod (Leot) is the same as the Icelandic Liot: there was a Jarl Liot in Orkney in the tenth century, and the MacLeods claim descent from a Liot who is said to have belonged to the Norse royal house of Mann. According to W.A. Philipps, the Anglo-Saxon word Léod (masculine) meant "Prince", Léod (feminine) meant "Race" or gens. Compare the equally Scandinavian

or Anglo-Saxon name Orm, borne by the Abbot of Abernethy two generations after Abbot Leod's time. These names presumably entered the abbatial kindred of St. Columba through Norse or Beornician marriages.

For the Law of Clan Macduff, see also Hist. MSS. Comm., 3rd Report, 417; 8th Report, 297-8; "Liber Insule Missarum" (Bannatyne Club 1847), pp. xii, xiii, xlix; Innes' "Sketches", p. 214; Fraser Papers (Scot. Hist. Soc.) pp. 63-64; Alexander Laing, "Lindores and its Abbey and Burgh of Newburgh"; Sir James Balfour's "Practicks" (1745), p. 511; Sir John Skene's De Verborum Significatione; Maidment's Analecta Scotica, 2nd series, pp. 30-31; John Stuart, "Sculptured Stones", ii, lxvii-lxxvi; Skene's "Celtic Scotland", vol. iii. pp. 303, 306; Proc. Soc. Antiq. Scot., xi (1874-5) p. 163 et seq.

(91) Fordun, ii. p. 289.

(92) Balfour, p. 34.

(93) "Scots Peerage", iv. p. 14.

(94) Goodall's Fordun, ii. p. 474.

(95) Note that the old Buchanan coat of boar's heads was changed to "Gold a Lyon within a royal treasure Sable", the Royal Arms differenced only by colour. There is an unlikely Buchanan family legend to account for this remarkable change.

(96) See G.E.C., sub INNERMEATH and CAMPBELL.

(97) Dict. Nat. Biog. v. p. 1176.

(98) Reg. Mag. Sig. 6 Dec. 1528.

(99) By the Decreet of Ranking, 1606. Besides being hereditary Justice-General of Scotland, Argyll from the 15th century was also hereditary Great Master of the Household, an office that still gives him precedence before all dukes. The Earl of Fife was "Mair of the King": see Spalding Club Misc., v., App. to Preface, p. 75 (also A.P.S. i. p. 68).

MARGARET, Countess of Fife and Menteith, heiress of tailzie of the Clan Macduff, died c. 1380

1361

ROBERT, Duke of Albany, Earl of Fife and Menteith, Regent of Scotland

1380

MURIEL Keith (daughter of the Marischal of Scotland)

MACDUFF, ALBANY AND ARGYLL

MURDAC, Duke of Albany, Earl of Fife and Menteith, Regent of Scotland, head of Clan Macduff inaugurated King James I, FORFEITED 1425

JANET contracted to David de Loen (no known issue)

MARJORIE married Duncan, 1st Lord Campbell

JOAN (probably by first wife) married 1397 Robert, lord of Lorne

Alexander Leslie, Earl of Ross

before 1398

ISABEL (possibly by first wife)

Walter Haliburton of Dirleton

MARGARET (uncertain by which wife) married Sir John Swinton of that ilk, killed 1402

MARY (uncertain by which wife) married Sir William Abernethy of Saltoun

ELISABETH (probably by second wife) married c. 1413 Sir Malcolm Fleming of Biggar

JOHN Earl of Buchan

2 SONS

4 SONS, all FORFEITED left no (openly) legitimate issue: though there are doubts about the alleged illegitimacy wisely claimed by Duke Murdac's grandson, Walter Stewart of Morphie (to whose grandson, Lord Avondale, certain rights were renounced by the Earl of Erroll as an heir of the Earls of Douglas in 1512).

ISABEL married Sir Walter Buchanan of that ilk (her rights fell by her father's forfeiture, but her descendants bore the Royal Arms differenced only by changing the red to black)

CELESTIN Campbell, d.v.p. before 1440

JOHN, lord of Lorne

EUPHAME, Countess of Ross, died without issue

Haliburtons, Lords Dirleton, whose heirs were the Ruthven earls of Gowrie, Lords Dirleton (? perhaps this explains the famous but mysterious extra armorial supporters of the last Earl of Gowrie: a Ruthven in full armour reaching up towards the Crown with the words TIBI SOLI - after inheriting Dirleton, the Ruthvens not only quartered Haliburton but eventually surrounded the quartered coats with a royal tressure)

Swintons of that ilk

Abernethys Lords Saltoun

Lords Fleming, afterwards Earls of Wigtoun

MARGARET married George, 1st Lord Seton
Lords Seton, afterwards Earls of Winton (who quartered the arms of the earldom of Buchan)

COLIN 1st Earl of Argyll

ISABEL (apparently senior heiress)

2 DAUGHTERS (both married Campbells)

Campbell earls of Argyll, hereditary Masters of the Household and Justice-Generals of Scotland, who claimed rights in connection with the Crown-Bearing

- (100) Jordan Fantosme, Chronicle of the War between the English and the Scots (ed. F. Michel, Surtees Soc. 1840), lines 288-301.
- (101) Barrow, "The Earls of Fife in the 12th Century", p. 54.
- (102) Charter of 1591 to the Earl of Angus, Lord Douglas & Abernethy. See John Riddell, "Inquiry into the Law & Practice in Scottish Peerages", 1842, pp. 156-157. See below, note 124, how Archibald II, Earl of Angus, claimed precedence even before dukes.
- (103) A younger branch long continued in the male line of the Abernethys, Lords Saltoun, whose peerage still continues in the female line.
- (104) Lord Lindsay, "Lives of the Lindsays", i. p. 48. "Scots Peerage", iii. p. 13. It may be questioned whether Mary of Abernethy was mother of Sir Andrew Leslie's son: although the Rothes family later quartered Abernethy, their earlier lion quartering appears to have been "Silver a Lion Sable" (see Stodart's "Scottish Arms"). Mary's great inheritance seems to have passed to the heir of her second marriage, to Sir David Lindsay of Crawford.
- (105) But, in the case of Crawford, see also note 88 above.
- (106) He is styled Earl of Angus in a charter of 15 June 1329. Fraser, "The Douglas Book", iii. p. 391.
- (107) It is not clear what was the connection between the "Black" Earls of Douglas at Tantallon, and their North Berwick neighbours there, the Earls of Fife, afterwards Dukes of Albany: but see also note 66 above. Their successors there were the Dukes of Albany, after whose forfeiture Tantallon was given to the Earls of Angus, who were both lords of Douglas and of Abernethy. The church of Douglas, like the church of Abernethy,

was dedicated to St. Bride. Both the Fife and Douglas families had interests at Calder in Lothian.

- (108) "Scots Peerage", i. p. 172. G.E.C. i. p. 153.
- (109) Antiquities of Aberdeenshire, 724. "Scots Peerage", i. pp. 172-3. G.E.C. i. p. 154.
- (110) G.E.C. i. p. 157.
- (111) "Scots Peerage", i. p. 197.
- (112) Reg. Mag. Sig. 14 June 1633.
- (113) G.E.C. i. p. 161n.; vi. pp. 271, and 276.
- (114) Sir Herbert Maxwell, "History of the House of Douglas", ii. p. 126.
- (115) Erroll Papers, Spalding Club Misc., ii. p. 227. Report of Royal Commission to enquire into the Office of Constable, 27 July 1631. See above, note 8.
- (116) Dict. Nat. Biog., v. p. 1176.
- (117) G.E.C. i. pp. 156, 158. Maxwell, op.cit., ii. p. 17.
- (118) Balfour's Heraldic Tracts, p. 50.
- (119) P.C. Reg., i. 537-538, 540.
- (120) G.E.C., i. p. 158.
- (121) Ibid., i. p. 160n.
- (122) AP.S., iii. p. 588.
- (123) Riddell, op.cit., pp. 156-160
- (124) Dict. Nat. Biog., v. p. 1184.
- (125) Lord Bute, "Scottish Coronations", pp. 125-126
- (126) "Historical Account of His Majesty's Visit to Scotland" (Edinburgh 1822), pp. 111, 198. This 1822 Royal Visit was the first occasion on which the Sovereign had visited Scotland since 1651: if the visit of James VIII during the '15 Rising be excepted. See also Balfour's Heraldic Tracts, p. liv.