Annandale and Hartfell Peerage Claim HOUSE OF LORDS COMMITTEE FOR

PRIVILEGES
LORD ABERDARE, LORD BESWICK, LORD BRIGHTMAN, LORD CACCIA, LORD CAMPBELL OF ALLOWAY, LORD KEITH OF KINKEL, LORD SCARMAN AND LORD TEMPLEMAN

17, 18, 19, 20 JUNE, 23 JULY 1985

Peerage - Creation - Title - Grant of title - Grant in same name as earlier title - Concurrent grant or grant on more than one occasion - Whether Sovereign can grant same title of nobility to more than one person concurrently - Whether Sovereign can grant title to individual on more than one occasion without resignation of *prior grant.*

Precedent - House of Lords - Committee for Privileges - Claim to peerage - Findings - Whether findings of committee adopted by House in earlier claim binding on committee in later claim.

In 1643 the Earldom of Hartfell in the Scottish peerage was created by letters patent. In 1661 the then Earl of Hartfell was created the first Earl of Annandale by letters patent, the destination of the new earldom being limited to the first earl's `heirs male whom failing the eldest born heir **female ... and the heirs male ... of the said eldest born heirs female ... and all** of which failing the nearest heirs whatsoever' of the first earl. The 1661 letters patent also accorded the Earldom of Annandale the same precedence as the Earldom of Hartfell. In 1662 a charter under the Great Seal of Scotland (which followed a signature under the sign manual of the same date) recited that the first earl's lands were united in a barony, lordship and earldom to be called the Earldom of Annandale and Hartfell and were then granted anew to the first earl and `his heirs male ... whom failing to his heirs female ... and the heirs male ... of the eldest heir female ... whom all failing the nearest heirs and assignees whomsoever' of the first earl. In 1792 the heirs male of the first earl died out. Thereafter, between 1792 and 1879 various claims to the title founded on the 1661 letters patent were made. Those claims depended on establishing that the words `heirs male' in the destination of the peerage created by the 1661 letters patent meant heirs male of the body of the first earl, not his heirs male general, so that on the extinction of the heirs male of the body the succession was opened up to the eldest heir female of his body and the heirs male of the body of the eldest female. In 1844 and 1879 the Committee for Privileges rejected **that construction and the claims based** on it. In 1983 the petitioner-, who was descended from the first earl partly through females, lodged a petition claiming to be entitled to succeed to the title of the Earl of Annandale and Hartfell. He founded his claim on the 1662 sign manual and charter, contending that the charter had made a new creation of the Earldom of Annandale and Hartfell in favour of the first earl, separate and independent of the creation made by the 1661 letters patent, and that he was the heir under the second branch of destination contained in the charter, namely that in favour of the heirs male of the body of the eldest heir female of the body of the first earl. The questions arose (i) whether a second title of nobility could lawfully be created in the same name as a title which had been created earlier, (ii) whether the 1662 **signature and charter were effective** to grant the peerage claimed and (iii) whether the

findings of the Committee for Privileges adopted by the House of Lords in the proceedings concluded in 1844 and 1879 constituted a bar to the petitioner's claim.

Held - (I) The Sovereign could lawfully grant the same title of nobility to more than one person concurrently, or grant a title of nobility to an individual on more than one occasion without there having been any resignation of the prior grant, and the subsequent grant could be on a different destination from the earlier one (see p 578 h, p 581 b e f and p 583 a b, post); Mar *Peerage Case* (187 5) 1 App Cas I applied.

(2) On their true construction the 1662 signature and charter were effective to create a new territorial earldom and title of the Earl of Annandale and Hartfell, separate and distinct from the titles and dignities of Earl of Hartfell and Earl of Annandale created respectively by the 1643 and 1661 letters patent, even though the three titles had the same precedence (see p 578 h p 582 c, p 584 c to *e* and p 585 a b, post).

(3) The findings of the Committee for **Privileges adopted by the** House of Lords in the proceedings concluded in 1844 and 1879 did not constitute a bar to the petitioner's claim, because the claims then presented by the petitioner's ancestors were founded on the 1661 letters patent, and the 1662 signature and charter were not relied on as having created a title and dignity separate and distinct from that created by the 1661 letters patent. Accordingly, since the petitioner was the heir male of the body of the eldest heir female of the body of the first earl he was entitled to succeed to the title **and dignity of the Earl of Annandale and Hartfell created by the 1662 signature and charter (see** p 578 *h, p* 584f to *h* and p 585 a *b,* post).

Notes

For claims to peerages, see 35 Halsbury's Laws (4th edn) paras 851-862, **and for cases on the subject, see** 37(1) Digest (Reissue) 18-25, 203-293

Case referred to in opinions

Mar Peerage Case (18 7 5) 1 App Cas I, HL. Petition

On 1 I July 1983 Patrick Andrew Wentworth Hope Johnstone of Annandale and of that Ilk, chief of the name and arms of Johnstone, petitioned Her Majesty The Queen to admit his claim to succeed to, and declare him entitled to, the title, honour and dignity of Earl of Annandale. and Hartfell in the peerage of Scotland, and to direct that a writ of summons to Parliament be issued to him by the name and style of Earl of Annandale and Hartfell. Following the report of the Lord Advocate **thereon dated** 14 September 1984 in which he expressed the opinion that there were sufficient grounds to justify the reference of the petition for the consideration of the House of **Lords, Her Majesty The Queen, on 3 December** 1984, referred the petition to the House of Lords and the House referred it to the Committee for Privileges to report thereon. The facts are set out in the opinion of Lord Keith.

John Murray QC and *Sir Crispin Agnew of Lochnaw* (both of the Scottish Bar) for the petitioner.

The Lord Advocate (Rt Hon Lord Cameron of Lochbroom QC) and J *G Reid* (of the Scottish Bar) for the Crown.

Their Lordships took time for consideration.

23 July. The following opinions were delivered.

LORD SCARMAN. My Lords, I have had the benefit of reading in draft the opinion of my noble and learned friend Lord Keith. I agree with it, and with the proposal that the committee should report that in its opinion the petitioner is entitled to succeed to the title and dignity of the Earl of Annandale and Hartfell in the peerage of Scotland.

LORD KEITH OF KINKEL. My Lords, the petition with which your Lordships are concerned was presented to Her Majesty by Patrick Andrew Wentworth Hope Johnstone of Annandale and of that Ilk, praying that Her Majesty might admit his succession to, and declare him entitled to, the title, style and dignity of Earl of Annandale and Hartfell in the peerage of Scotland. Following a report by the Lord Advocate expressing the opinion that the petitioner had made out a prima facie case to the earldom, Her Majesty referred the petition to the House of Lords and the House has referred it to this committee.

The petitioner is a descendant, partly through females, of James, first Earl of Annandale and second Earl of Hartfell, whom I shall hereinafter call `the first earl'. I shall have occasion to consider the petitioner's detailed pedigree at a later stage. The first earl's father was by Charles I created Lord Johnstone of Lochwood in 1633 and Earl of Hartfell by letters patent dated 18 March 1643, the destination of the latter being to the grantee `and his.heirs male'. The first earl was created Earl of Annandale by letters patent of Charles I I dated 13 February 1661, with precedence according to the date of the letters patent creating his father Earl of Hartfell. These proceeded on the narrative, inter alia, that the deceased James, Earl of Annandale had died without heirs male of his body so that a patent of the title and dignity of the same (granted in 1624) had come to the King's hands, and that no one was so worthy as the first earl to enjoy that title. The letters accordingly bore to create as Earls of Annandale and Hartfell, Viscounts of Annand and Lords of Johnstone and Lochwood, Lochmaben and Evandale the first earl -

> `and his heirs male whom failing the eldest born heir female without division of [his] body ... so far begotten or to be begotten and the heirs male of the body of the said eldest born heirs female legitimately begotten ... and all which failing the nearest heirs whatsoever of the said [first earl].'

The first earl died in 1672 and was succeeded by his son William, who was created Marquis of Annandale in 1701. He died in 1721 and was succeeded by his son James, who died in 1730 and was in turn succeeded by his half brother George, the third and last Marquis of Annandale. On his death in 1792 the heirs male of the body of the first earl became extinct. A claim to the title was thereupon advanced by James, third Earl of Hopetoun who was the grandson of the eldest daughter of William, first Marquis of Annandale. This claim was referred to the Committee for Privileges, but no procedure seems to have followed. Following

the death in 1816 of this claimant, a claim was presented by his daughter Lady Anne Hope Johnstone. She died in 1818 and the claim was taken up by her son, John James Hope Johnstone. The Committee for Privileges gave consideration to his claim over a period of many years and finally, on 11 June 1844, resolved that it had not been made out (see *Annandale Peerage* Speeches, p 13), the resolution being confirmed by this House on 25 June 1844. John James Hope Johnstone made further efforts to establish his right, founding on fresh evidence, but he died before any decision had been arrived at and the matter was taken up by his grandson, who bore the same name. On 30 May 1879 the Committee for Privileges expressed the opinion that no reason had been shown for departing from the resolution of 25 June 1844, and so resolved (see *Annandale Peerage* Speeches, p 1).

The claims which I have described were all founded on the 1661 letters patent. They depended for their success on establishing that, on a true construction, the words `heirs male' in the destination of the peerage thereby created meant heirs male of the body of the first earl, not his heirs male general, with the consequence that on the extinction of heirs male of the body the succession opened to the eldest heir female of his body and the heirs male of the body of such eldest heir female. The Committee for Privileges rejected that as being the true construction in 1844 and again in 1879.

The present claimant does not found on the letters patent of 1661. He relies instead on a signature under the sign manual of Charles I l dated 23 April 1662 and a charter under the Great Seal of Scotland following thereon and bearing the same date. His contention is that this charter brought about a new creation in favour of the first earl of the Earldom of Annandale and Hartfell; separate from and independent of the creation brought about by the letters patent of 1661. The charter is a charter of novodamus. It details a great many lands, some of which were held by the first earl directly of the Crown and others of which he had acquired by purchase, and recites that these have been resigned for new infeftment. It then proceeds of new to grant all these lands to the first earl and heirs male lawfully begotten or to be begotten of his body, whom failing to his heirs female without division already procreated or to be procreated of his body, and the heirs male lawfully to be procreated of the body of the said eldest heir female carrying the name and arms of Johnstone, whom all failing the nearest heirs and assignees whomsoever of the first earl. The charter is in Latin, and the description of the destination which I have expressed is an English translation closely following the language of the signature, which is a draft in English of the charter and constitutes the royal authority for the issue of it. Having made this new grant of the specified lands the charter goes on to unite and erect these lands into a territorial earldom (comitatum) in favour of the first earl and his heirs and assignees foresaid -

> `nuncupatum et omni futuro tempore numcupandum comitatum de Annandaill et Hartfell et dominium de Johnston cum titulo stylo et dignitate comitis secundum datas diplomatum dicto consangineo et consiliario nostro Jacobo comiti de Annandaill et Hartfell et quondam ejus patri desuper concessorum' (called and to be called in all time coming the Earldom of Annandale and Hartfell and lordship of Johnstone with the title style and dignity of an earl according to the dates of the patents of the said James Earl of Annandale and Hartfell and his said deceased father granted to them thereupon).

It is to be observed that whereas in the charter there appears in relation to the earlier patents the plural `datas' the signature has the singular `date'. The 1661 letters patent back dated the

precedence of the Earldom of Annandale to the creation of the Earldom of Hartfell by the 1643 letters patent, so the singular would appear more appropriate.

The petitioner has produced a pedigree indicating that he is the heir called under the second branch of the destination contained in the charter, that in favour of heirs female of the body and the heirs male of the body of the eldest heir female, and also indicating that the heirs male of the body of the first earl are extinct. The Lord Lyon King of Arms, on petition by the claimant, examined the evidence in support of this pedigree and issued an interlocutor dated 8 February 1984, finding it satisfactorily proved that the heirs male of the body of the first earl were extinct and also that the claimant was heir male of the body of Lady Anne Hope Johnstone (mentioned above), who was herself heir female of the body of the first earl following the death of her father James, third Earl of Hopetoun. The interlocutor also ordered the recording of the pedigree in the Public Register of all Genealogies and Birthbrieves in Scotland, and this has been done. It is to be noted also that in 1834 Lord Brougham LC, in a preliminary opinion given in the Committee for Privileges, expressed himself as satisfied that the then claimant, John James Hope Johnstone, great-great-greatgrandfather of the present claimant, had proved his pedigree (see *Annandale Peerage* Speeches, 15 May 1834, p 3). In the circumstances, I consider that the petitioner's pedigree and status as heir male of the body of the eldest heir female of the body of the first earl, and also the fact of extinction of heirs male of the first earl's body, may be accepted without the requirement of formal proof, as suggested by the Lord Advocate in his report to Her Majesty. It may be mentioned at this stage that there are before the committee a number of letters, addressed to the principal clerk, from persons claiming to have some interest in the earldom of Annandale and Hartfell, and commenting on the petitioner's claim. The interest of most of these persons would appear to be as possible: heirs male general of the first earl by descent from one of his ancestors. Heirs male general could not succeed under the destination in the 1662 charter unless and until heirs female of the body became extinct, and accordingly could have no present interest. In one of the letters there is a suggestion of succession through descent from Major-General John Johnstone, younger son of the first earl. The Lord Lyon was satisfied, however, on sufficient evidence which is also before your Lordships, that Major-General John Johnstone died in 1714 survived by no issue other than a daughter who died in infancy. It follows that no more detailed consideration need be given to these letters.

So the crucial issue comes to be whether the charter of 1662 made a new creation of an Earldom of Annandale and Hartfell. The petitioner does not contend that the earldom created by the 1661 letters patent, following a resignation, was granted anew by the 1662 charter. Although some evidence was adduced suggesting that a lawyer acting for the first earl had prepared an instrument, of resignation of the earldom in the hands of the Lords of Exchequer and had indeed recorded and obtained an extract of the instrument, no trace of such an instrument has been found in the official records of the time, though it has to be observed that a considerable number of these records were destroyed in a fire at Edinburgh in 1811. Further, contrary to what would be expected if such an instrument had in fact been recorded, no mention of a resignation of the earldom appears in the 1662 charter itself. It is also significant that the words of regrant `de novo. Dedimus' govern only the described lands. The charter then embarks on a new clause, introduced by `et similiter', which-contains the erection of the lands into a territorial earldom `cum titulo stylo et. dignitate comitis'.

The first matter to be considered in resolving this crucial issue is whether or not any precedent exists for the royal creation of a second title of nobility in the same name as that of an earlier creation. This question must be answered affirmatively. In the case of the Lordship of Balfour of Burley and Kilwinning (HLRO Peerage Records, Speeches 21 July 1868, vol l, p 27) Lord

Chelmsford, presiding in the Committee for Privileges, said: `there can be no objection to two persons having the same title of nobility, of which many instances might be adduced.' The best known example is perhaps that of the Earldoms of Mar. In 187 5 the Committee for Privileges held that the Earl of Kellie had made out his claim to an Earldom of Mar created by Mary Queen of Scots in 1565, and descendible to heirs male (see Mar *Peerage* Case (1875) 1 App Cas I). The Earldom of Mar Restitution Act 1885 restored John Francis Erskine Goodeve Erskine to the ancient Earldom of Mar descendible to the lawful heirs on either side of Isabel, Countess of Mar, who died in 1408. There are thus now two holders of a title of the same name recognised as eligible to sit in your Lordships' House. James, second Lord Hamilton was created Earl of Arran by charter dated II August 1503, and James, third Marquis of Hamilton was created, inter alia, Earl of Arran by letters patent dated 12 August 164 3 (see *The Complete Peerage vol l, P* 224). A number of other similar instances are cited in the petitioner's case. An instance of the same title of nobility being granted twice to the same individual, the destination being different in such case, is that of the Dukedom of Fife, which was by Queen Victoria granted to the first duke by letters patent in 1889 and again in 1899. The first creation became extinct on his death through failure of heirs male of the body. But the second descended to his eldest daughter, whose mother was the Princess Royal.

It is to be concluded that it is within the legal competence of the Sovereign to grant the same title of nobility to more than one person concurrently, or to grant a title of nobility to an individual on more than one occasion without there" having been any resignation of the prior grant, and that the subsequent grant may be on a different destination from the earlier one.

The next matter for consideration is whether or not the signature and charter of 1662, on their true construction, demonstrate the royal intention of making a new grant of the title and dignity of Earl of Annandale and Hartfell. It is to be recognised, in the first place, that the conveyancing procedure followed was, in accordance with the practice of the time, apposite for the grant of a title of nobility. The signature was superscribed by the royal sign manual and there was appended to it a docquet signed by the Secretary of State, the Earl of Lauderdale, summarising its effect and mentioning in particular that the lands specified in the signature were to be united in a free barony, lordship and earldom to be called the Earldom of Annandale and Hartfell with the dignity of an earl having the precedence of the earlier patents in favour of the first earl and his deceased father. The charter itself followed the terms of the signature and duly passed the Great Seal of Scotland. There can be no doubt whatever that if there had been no earlier creation of the peerage dignities of Earl of Annandale and Earl of Hartfell this charter would have been completely effective to make a first creation of Earl of Annandale and Hartfell. Many charters of the period contained a grant of lands; followed by the erection of these lands into a territorial barony or earldom under a particular name, followed by the grant of a title of nobility of that name. In a number of charters of James VI and I which follow this pattern the grant of the title of nobility is accomplished by the word `concedendo' (there being granted) followed by the accusative `titulum et honorem', and other forms of words are also used on occasion. There are, however, precedents of earlier and later date where, following a grant of lands later expressed as being erected into a territorial lordship, mention of title and dignity is introduced by the preposition `cum'. In Mar *Peerage Case* (187 5) 1 App Cas t at 26 Lord Redesdale mentions that in a charter of Robert I, granting to his brother Edward Bruce `totum Comitatum de Carrick', he is made an earl by the words `cum nomine, jure et dignitate Comitis'. A charter of 1615 bore to grant to Sir James Stewart of Killeith and his heirs male `terras dominium et baroniam de uchiltrie unitas in unum dominium et baroniam cum omnibus honoribus et titulis.' The lands and title had been resigned by the previous Lord Ochittree, and the royal intention that Sir James should enjoy the title of nobility, was clearly signified by a letter to the Privy Council dated 27 May 1615.

A consideration of the general conveyancing practice of those times indicates that the preposition `cum', though it commonly introduces no more than a reference to subjects which are merely pertinents of the principal object of a grant, is quite regularly used to add to what is earlier granted further heritable subjects of considerable importance. A common example is salmon fishings.

I conclude that in the present case the circumstance that mention of the title and dignity of an earl is introduced by 'cum' and that the title and dignity is not directly made the object of words connoting a grant is not inconsistent with the intention to create a peerage dignity. Read literally, the words used are capable of bearing that interpretation: `we have created (creavimus) a territorial earldom (comitatum) with the title, style and dignity of an earl.' The petitioner adduced evidence of a considerable number of instances of the creation of a territorial lordship without any reference to a peerage dignity. It is a general rule of construction that particular words in a written instrument are presumed to have been introduced for some purpose and are intended to have some practical effect. If the words under consideration in the present charter are not intended to have the effect of conferring a title of nobility it is difficult to see what purpose they **serve.** It might be suggested that they do no more than recognise the existence of the peerage earldom previously granted as running with the territorial earldom which the charter clearly creates. But the destination of that peerage earldom was different from that attached by the charter to the territorial earldom, so plainly the two might diverge in circumstances which were quite likely to happen. It is also of considerable significance that the title and dignity are mentioned in the docquet appended to the signature. If the mention of a title and dignity were intended to have no operative effect, it might not be expected to be referred to in the docquet, which is quite a short document designed to bring to the notice of the King all the material features of the signature, which it is very likely that he would not read in full. The reference to the date of precedence of the title and dignity of earl is also important. The date of precedence of the pre-existing title and dignity were fixed and known. If no new title and dignity were being created there would be no need whatever to refer to the date of precedence of original creation. If, on the other hand, the intention was to make a new creation, the reference to the precedence serves a definite and obvious purpose, namely to bring about that the new creation was to be back dated so as to give it an earlier precedence than it would otherwise have had. It is to be observed that the matter; of precedence finds mention in the docquet.

The strongest argument against the petitioner's case is perhaps that it is an unlikely and unreasonable intention to attribute to the King that, having created the first earl Earl of Annandale in 1661, he should create him again Earl of Hartfell and Annandale in 1662. It may be said that if there were special reasons which led him to form this inherently improbable intention it would reasonably be expected that they would be set out in a narrative to the charter. But narratives of the nature that are familiar in modern instruments are not a feature of charters of that period, which tended to be very much formalised. The family circumstances of the first earl are well authenticated. He was married, probably about 1650, to Henrietta, daughter of William, Marquess of Douglas. In 1660 he had two surviving daughters, born respectively in 1652 and 1654. Three other daughters had died in infancy. His only brother, Lt-Col William Johnstone of Blacklaws, had died without issue in 1656. A number. of collateral lines had died out without male issue by 1656, so that his nearest heirs male general were fourth cousins. In the circumstances it is natural that he should have been very concerned, about the succession to his lands and also to his title of Earl of Hartfell. It is known that in 1657 he executed an instrument of resignation of his lands and also of his title in the hands of the Commissioners of the Exchequer, for new infeftment in favour of the heirs male of his body, whom failing the heirs female of his body therein specified, whom failing

on certain other destinations. This was during the Protectorate and nothing followed on the instrument. A son was born to the first earl on 17 December i 66o, and baptised on 23 December 1661. He too died in infancy, certainly before the beginning of 1664 and most probably not long after his baptism. He may have been still living on 13 February 1661, the date of the letters patent creating the first earl Earl of Annandale, but if so it is highly improbable, having regard to the incidence of infant mortality at that time, that the first earl would have regarded as secure the succession through heirs male of his body. In the circumstances it is perhaps surprising that the initial destination of the letters patent of 1661 was to his heirs male general, but one can only speculate as to how this may have come about. At this time the administrative state of affairs in Scotland, and no doubt in England also, was in considerable confusion, and many important officials were yet to be appointed. Charles 11 had been proclaimed King on 5 May 166o, but did not arrive in London until 29 May 1660. There was no keeper of the Great Seal of Scotland until 19 January 1661, no Privy Council until 13 February 1661 and no Commissioners of Exchequer until the beginning of March. Plainly the first earl continued to be concerned that, failing heirs male of his body, his lands should pass to heirs female of his body, and this was secured by the charter of 23 April 1662, which was probably as soon as could reasonably be expected after the necessary administrative machinery had been put in place. It would be surprising if the first earl were not equally concerned about the succession to his title and dignity, and the question is whether or not the 1662 charter evidences that he secured the King's consent to the creation of a new earldom following the same line of descent as the territorial earldom thereby plainly created. There is no inherent improbability about the prospects of his having been able to do so, having regard to the many tributes paid by the King to his father's and his own loyalty and valuable services during the Civil War and the Protectorate, and the finding by the Scottish Parliament on 15 June 1661 that by reason of that loyalty and those services his father had suffered losses in excess of £24,000 English, to say nothing of having narrowly escaped execution and been confined for some years in the castles of Edinburgh, Glasgow, Dumbarton and St Andrews. Having regard to the aftermath of the preceding troubled years and the lack of precision seen from time to time as regards the grant of a new title and dignity in the same name as an existing one, without insisting on any resignation of the old one with a view to regrant, it is not possible to regard a new creation in the old names as surprising. This is particularly so when careful consideration is given to the earlier history of the titles and dignities of this family. As has been noted above; the creation of Earl of Hartfell in 1643 was in favour of the first earl's father and his heirs male. The 1661 letters patent did not follow on any resignation of the Earldom of Hartfell.

They proceeded on the narrative that the Earldom of Annandale (which is known to have been originally created in 1624) had become extinct, so as to be at the King's disposition. In so far as the letters patent bore to create the first earl Earl of Hartfell as well as Earl of Annandale they were conferring on him anew an earldom which had not been resigned. Furthermore, the Earldom of Hartfell thereby conferred was on a different destination from the original one, in respect that the eldest born heir female and the heirs male of her body were called to the succession failing heirs male of the grantee. The extinction for practical purposes of heirs male general was recognised as a possibility by the Committee for Privileges in the proceedings of 1844 concerned with the 1661 peerage. Lord Lyndhurst LC said ***(Annandale Peerage*** Speeches, 11 June 1844, p 14);

> `In the first place it is not true practically, and in the view of a Court of Law, that heirs male general can never become extinct. The existence of an heir is

> a matter of proof--a matter of evidence. Heirs male general have in many cases become extinct, even in great families, in the progress of time. All trace of them has been lost, and if, after diligent and cautious enquiry, no heir male can be found, and there is sufficient ground to believe that no such heir can be discovered, this will let in the next limitation.'

The committee then took- the view that the 1661 letters patent did not create a new Earldom of Hartfell. In conformity with this view Earl Cairns LC said in the course of the 1879 proceedings (Speeches 30 May 1879, p 3) that the 1661 patent created `an entirely new and apparently larger and more important honour-the title of Annandale.' This is consistent with the fact that it was only the Earldom of Annandale which the King had at his disposition at the time. So at that time the title of Hartfell was held on one destination, that in the 1643 patent, and the title of Annandale on another and different destination. The possibility existed that the titles might diverge. On extinction of heirs male general the title of Hartfell would become extinct with them, but the succession to the title of Annandale would open to heirs female of the body of the grantee. The title of Earl of Annandale and Hartfell is something new. It is the title neither of Hartfell nor of Annandale but of both. The territorial earldom of Annandale and Hartfell created by the 1662 charter was also something new. I have come to be of the clear opinion, after some initial doubts, that the King by the 1662 charter intended to and did create, not only the territorial Earldom of Annandale and Hartfell, but also the new title, style and dignity of Earl of Annandale and Hartfell to go with it on the same destination. It follows that just as the title of Annandale might have followed a different destination from that of Hartfell so might that of Annandale and Hartfell have followed a different destination from one at least of the others. I do not regard the circumstances that all three titles have the same precedence as creating any difficulty in the way of that view. The title of Hartfell and that of Annandale have the same precedence yet might diverge. It makes matters little worse that there is a third title of Annandale and Hartfell, of which the same is true. In the unlikely event of a conflict of precedence arising I have no-doubt that a method of resolving it would be found, probably on the basis that the earlier creation, albeit deemed to be of the same date as the later, would have preference.

The final matter for consideration is whether or not the findings of the Committee for Privileges, adopted by the House, in the proceedings concluded in 1844 and in 1879 constitute a bar to the petitioner's claim. It is important to note that the claims then presented by the petitioner's ancestors, John James Hope Johnstone and his grandson of the same name, were founded exclusively on the 1661 letters patent. Although the 1662 signature and charter were laid befor the committee (see Minutes 14 May 1844), no attempt was made to rely on these as having created a title and dignity separate and distinct from that created by the 1661 patent, as the petitioner now does. The only use sought to be made of them was as an aid to the construction of the destination in the 1661 patent, and they were not mentioned in any of the speeches delivered by members of the committee. In the circumstances the question now at issue was not then considered or decided by the committee. Indeed, the subject matter of the nineteenth century proceedings is properly to be treated as different from that of the present claim. It is, in any event, well settled in the law of Scotland that heritable rights and rights of blood do not prescribe unless there has been adverse possession. The correct view, in' my opinion, is that all that was decided in 1844 and again in 1879 was a point of construction on the destination contained in the 1661 patent. I am accordingly of the opinion that these earlier decisions are not a bar to the petitioner's claim.

My Lords, the conclusion I have reached is that the petitioner has made out his claim. I would suggest that your. Lordships report to the House that the opinion of the committee is that the

signature and charter of 1662 created a title and dignity of Earl of Annandale and Hartfell separate and distinct from the titles and dignitaries of Earl of Hartfell and Earl of Annandale created respectively by the 1643 patent and the 1661 patent, that the petitioner is the heir male of the body of Lady Anne Hope Johnstone, who was the eldest heir female of the body of the first earl and that, as such, he is the person now entitled to succeed to the title and dignity of the Earl of Annandale and Hartfell in the peerage of Scotland, created by the 1662 signature and charter.

LORD BRIGHTMAN. My Lords, for the reasons given by my noble and learned friend Lord Keith, I too have reached the conclusion that the petitioner has made out his claim, and would propose that your Lordships should report to the House accordingly.

LORD TEMPLEMAN. My Lords, I defer to the views expressed by my noble and learned friend Lord Keith.

21 November. The House of Lords accepted the ruling of the Committee for Privileges.

Solicitors: *Martin & Co*, parliamentary agents for .I C & A *Steuart WS*, Edinburgh (for the petitioner); Solicitor to *the Secretary of State for Scotland.*

Mary Rose Plummer Barrister.