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PEERAGE
AND PEDIGREE

PEERAGE AND PEDIGREE

STUDIES IN PEERAGE LAW AND FAMILY HISTORY

BY

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VOLUME ONE

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ERRATA ET ADDENDA

Vol. I, 31, note 1. The Bertie grant now at Grimsthorpe appears to be a copy "in the handwriting of Sir William Dugdale" (13th Report, App. VI, p. 206).

Vol. II, 97, l. 14. *For* "It they can make" *Read* "If they could make".

Vol. II, 155, l. 4, and 156, l. 11. Henry Tyes is named as the *Vexillifer* in 1192, but in Sept. 1191, Hoveden expressly states (III, 129) that Richard, having fixed his *signum* in the midst, entrusted his 'dragon' (banner) to Peter de Préaux, in spite of the claim of Robert Trusbut to bear it by ancestral right. The alleged 'Sir Michael' is ignored. This mention of the 'dragon' flag is important, as anticipating the better known 'dragon' flown by Henry III.

Vol. II, 186 last line. *For* "Sir Francis Smith" *Read* "Francis Smith".

Vol. II, 213, l. 5. *For* "Francis" *Read* "William".

Vol. II, 213, l. 6. *For* "1749" *Read* "1759".

Vol. II, 232-3. In the suit brought by Edward Carlos against William Smith, the trial began in 1754. William Smith died early in 1758, and Edward Carlos died in 1764. The Carlos pedigree spoken of in the text seems to have been drawn up after Edward's death, for his sisters. But the "pedigree on behalf of William Smith" must, it will be seen, have been drawn up in 1754-8, not in 1764. Dr. Copinger states that the defendant sold "several estates" "fearing the issue of the lawsuit", as well he might, in view of his fictitious pedigree (see p. 236).

Vol. II, 234. It is extremely difficult to convey to the reader the points of agreement and of difference in the conflicting

*

pedigrees for Carlos and for Smith, both of which are erroneous. But it is essential to grasp them. Both pedigrees recognise the existence of Thomas Smith of Earl Shilton, whose daughter mar. a Yaxley; but his brother *Robert*, who is claimed as the ancestor of the Smith-Caringtons, is stated by the Carlos pedigree to have died s.p., while the Smith pedigree knows nothing of his alleged marriage. If it be claimed that the Robert of the previous generation in the Carlos pedigree is the one from whom descent is alleged, then that pedigree distinctly states his issue to be extinct.

Vol. II, 239, l. 29. *For* "Commitee" *Read* "Committee".

Vol. II, pp. 314, 321, etc. I may have inadvertently attributed to Mr. Fox-Davies expressions employed by 'X', as one cannot always distinguish between these two writers, who not only advance the same contentions, but frequently employ the same words. Their literary style also has much resemblance, though one speaks of "a rotten argument" (*Armorial Families*, 1895, p. XXIX), and the other of a "rotten idea" (*Geneal. Mag.* I, 603.)

Vol. II, p. 321. I find that my comparison with a peerage (which "few can obtain") is strangely supported by 'X' himself, who justly points out (*The Right to bear arms*, 1900, p. 12) that coronets are valued "simply because the possession of a coronet is still recognised as a matter of privilege", and that "the very few" ancient families "who still possess 'badges' use them because it is now impossible to get a badge". Unfortunately, the College of Arms has ruined, since then, even this exclusive distinction by starting the practice of granting badges (as we learn from Mr. Fox-Davies).

PREFACE

Of the two chief subjects which are dealt with in these volumes—Peerage law and family history—the former occupies most of the first, and the latter most of the second. The opening article, however, illustrates their close connexion, for the claim of Richard Bertie to his wife's ancient barony raised, in addition to a question of law, that of his own origin.

Although not only the history of the peerage, but the law affecting the descent of dignities, has been with me for many years an object of frequent study, certain notable cases which have lately come before the House, and on sundry points of which my opinion has been sought, have led me to give that law more especially my attention and to believe that there is room for its treatment on fresh and historical lines. Occupying, as it does, a midway position between law and history, this very interesting department of institutional research has been left mainly to the lawyer. Constitutional historians, such as Hallam, Stubbs, and Gneist, have, it is true, found themselves obliged to include it in the purview of their works, but only for early times. For the later period we are dependent on the labours of legal writers,—the text books of

practical lawyers, such as Cruise or Sir F. Palmer, or Sir William Anson's standard work on the law and custom of the constitution, so far as it deals with these questions,—the Lords' reports on the Dignity of a Peer, or the book which approaches nearest to an historical treatment of the subject, Mr. Pike's 'Constitutional History of the House of Lords'.

Scattered also among the 'cases' presented on behalf of claimants, the arguments of counsel at the bar of the House, the 'judgments' delivered by the Law Lords, and the commentaries on cases by Nicolas, himself a peerage counsel, is a mass of miscellaneous learning. But there is no encouragement for the production of a systematic work that shall deal comprehensively with the points raised and decided in the whole series of cases. The result is that, when a question is raised, it is by no means easy to ascertain what has been decided on the subject, and, as will be seen in these pages, this has led to inconsistent and even conflicting *dicta*. It is the business of counsel to expend their erudition and their labour on the preparation of their clients' cases: it is not their business, after the decision, to record the results of their researches *pro bono publico*.

What was the first valid Parliament, that is to say, the first Parliament writs of summons to which are accounted valid? Must the writ and sitting be proved for the same person, or can a sitting in a later generation be 'referred' to the writ issued to the person first summoned? Did the occurrence of a wife's surname in the style by which her

husband was summoned, or in which he sat, constitute proof that he held a barony vested in his wife? These are some of the points on which, I shall endeavour to show, there has been demonstrable confusion and even contradiction.

But, apart from these questions, which are mainly legal in character, I shall approach the subject of peerage law, and, to some extent, of law generally, from the standpoint of one who is not a lawyer, but only a student of history. In the first place I shall show the importance of the critical use of 'authorities' and shall illustrate the necessity, for research on the history of peerage law, of accuracy in facts and dates. In the first, second and third of my papers will be found surprising instances of the misapprehension caused by failing to arrange documents in their proper order and events in their right sequence (pp. 7-8, 57-8, 76-8). In the fourth the frequent indifference of lawyers to mere facts and dates will receive additional illustration.

I have gone, however, further than this. In the paper entitled "The muddle of the law" I have ventured to contrast the methods employed in law and history and to claim that, in their treatment of 'authorities,' the lawyer is still in the Middle Ages, but the historian is a man of science.

The lawyer's vision is bounded by his "books;" the historian goes behind his books and studies the facts for himself. What is "authority" for the one is absolutely none for the other. As a great scholar has finely said: "What the lawyer wants

is authority, the newer the better; what the historian wants is evidence, the older the better." Against the error, the vulgar error, that a modern book is an "authority" for a medieval event, the historian of to-day is ever on the watch to raise his voice in protest. In the words of Freeman,—

> He must ever bear in mind himself, and he must ever strive to impress on the minds of others, that.... all that the newest German book can tell him will after all be but illustrations of those original authorities without a sound and thorough knowledge of whose texts all our finest talk is but shadow without substance. To the law and to the testimony, to the charter and to the chronicle, to the abiding records of each succeeding age, writ on the parchment or graven on the stone—it is to these that he must go himself and must guide others. [1]

The fact that Mr. Freeman was, notoriously, the very last man to go himself to "records...... writ on the parchment" does not affect the truth of the principle he here proclaims.

As an illustration of the mischievous results of the lawyer's inveterate practice of obtaining information at second, or even third hand through his "books," instead of going to the fountain head, I have selected the use which has been made, in some recent historic cases, of a passage in Coke's 'Institutes.' And I have also subjected to searching criticism Coke's famous report of 'the Lord Abergavenny's case' and the doctrine he has based upon it in his 'Institutes.' Indeed, I have gone so far as to claim that the question at issue in that case and the judges' opinion thereon were wholly different from those which he records, and that

[1] *The office of the historical professor* (inaugural lecture), p. 25.

the doctrine which plays so large a part in the law of 'baronies by writ,'—namely, the necessity of a sitting,—rests on no foundation.

Under 'the Barony of Clifton case' I have dealt with the much-contested doctrine that where a writ and a sitting can be proved, a descendible barony was created, and have endeavoured to trace it from its origin through its later development and growth. The historical treatment of such questions, and indeed the use of such language, have naturally brought me into conflict with the practically convenient maxim that "the law is always the same," that it knows nothing of development or growth. And the rigid application of this doctrine, in its most extreme form, in the Earldom of Norfolk case, is the subject of a somewhat vigorous protest, on historical grounds, in these pages. The sympathy, I hope, of historians will be with me in this protest.

Upon one point I would, in this place, anticipate a possible objection. In the opening paper I have tried to show the importance of the Willoughby d'Eresby case in the history of barony *jure uxoris* or by the courtesy (of England),[1] and have argued, on historical lines, that, as the King's ruling in the Wimbish case had restricted barony *jure uxoris* to cases in which the husband was tenant 'by the courtesy,' so the result of the Willoughby case was a further development or change which eventually excluded, in practice, even tenants 'by the courtesy' themselves (pp. 16, 24). On the other hand, in the paper on 'The muddle of the law,'

[1] i. e. after issue born.

I have applied to this same question the maxim that 'the law is always the same', and have contended, on legal lines, that the law upon this subject before the Tudor age must also be the law now, as, by general admission, it has never formally been altered. Between these two contentions there is no contradiction on my part; for they are avowedly advanced from two conflicting standpoints.

Lastly, if exception should be taken to the phrase 'The muddle of the law,' I would point out that it is used with the intention of provoking and stimulating thought and of challenging the unhistorical methods which have led to so much confusion.

Turning now to family history, I have here further endeavoured, by treating it in the modern critical spirit and on the same principles as other history, to rescue this interesting branch of study from the hands of those pedigree-mongers who made of it a byword and a reproach. Those of us who care for ancient descent and the tenure of ancestral lands view with indignation the ridicule aroused by claims to either, consequent on that jostling of the true by the false which has led at times to the hasty conclusion that all are false together. Although the advance of that truthful genealogy for which the modern school is working [1] must, of necessity, be slow, there is reason to believe that the public are awaking to the very untrustworthy character of much of the informa-

[1] As in Mr. Barron's *Northamptonshire Families* and Mr. Warrand's *Hertfordshire Families* in the 'Victoria County History'.

tion which is put before them as authentic, and would gladly be helped to distinguish true from fictitious claims in the light of modern research. The results of that research are by no means merely destructive: it gives to the ore its true value by purging away the dross.

That the rejection of fabulous pedigrees, the exposure of spurious records, and the substitution of fact for fiction in the realm of family history will, in some quarters, prove distasteful is only what one must expect. In this domain, to say the least, there has never been a passionate devotion to truth for truth's sake; her foes are many, and her knights are few. For truth is deemed a sadly dull and unromantic thing: it is not for the truth that men seek, but for that which is pleasant to believe. Poor, ill-clad, shivering truth stands pitiful by the way; for men have ever passed her by in search of that which they desire.

The only criticism, however, to which exception can justly be taken is that which is careless or ill-informed or which proves to be without foundation. From such, I hope, this work is free. It will, at least, be searched in vain for statements so extraordinary on the bearers of ancient titles and historically famous names, as Mr. Baring-Gould's assertions that "the Earl of Haddington is not a Hamilton, but an Arden," and that "the Earl of Shrewsbury is not a Talbot, but a Chetwynd."[1] If there is fiction to be destroyed, there is also truth to be upheld.

[1] *Family names and their story* (1909), p. 392.

[2] I would invite the reader's attention here to my paper on "The origin of the Shirleys and of the Gresleys" (34 pp.) in *the Derbyshire Archæological*

As an example of that wild and baseless depreciation of the origin of noble houses which is just as much to be avoided as flattering and absurd fiction, I venture to cite this paragraph from the work of Mr. Baring-Gould:—

> The modest Le Boteler was the proto-parent of the family of *Butler*. James Butler, Duke of Ormond, derived in lineal descent from a grave individual, bottle in hand, who stood behind some Prince, or perhaps only petty squire, and said deferentially, in the corresponding terms of the day: "Port or sherry, sir?" Earl Ferrers who shot his valet [1] for showing lack of proper respect, might with advantage have looked back to the founder of his family in a leather apron, shoeing the Bastard's horse before the Battle of Hastings (p. 102).

Of the few great feudal houses still extant among us, the Butlers stand pre-eminent. The Marquesses of Ormonde are the heads of a house which, even from the twelfth century, has ranked among the nobles of the sister isle. On the pages of Irish history, theirs is a mighty name. To say that, because they adopted that name on receiving the great feudal office of Butler of Ireland, they sprang from a mere butler, is as silly a statement as if a man confused the mere parish constable with the Constable of England or of France. Yet its author seems to be proud of making it, for he subsequently claims to "have shown in another chapter that from household domestics...... men have risen to the surface and have flushed our nobility with new and vigorous life...... cooks have......

and Natural History Society's Journal (1903), in which I vindicated the pedigrees of these two most ancient houses from a wanton and baseless attempt to discredit them.

[1] As a matter of fact, it was his land steward.

wiped the gravy from their fingers...... and the butlers have slipped from behind their masters' chairs" (p. 275).

The gibe at the origin of the earls Ferrers is an even stranger blunder. For in the first place the earls are members, not of the house of Ferrers, but of that of Shirley, with a pedigree from the Conqueror's time; and in the second, Henry de Ferrières, the mighty founder of the house of Ferrers, was no mere shoeing-smith, but the Norman lord of Ferrières. One wonders whether the author imagines that 'De Ferrières' means a shoeing smith; for on two pages, by a luckless shot, he identifies a "cordwainer" as a rope-maker (pp. 143, 149), and on another, by a similarly luckless shot, derives "corveiser" from "forced labour"[1] (p. 353)! It is, unfortunately, needful to insist that those who would instruct the public on antiquarian subjects are found at times to stand in need of such instruction themselves.

On the other hand, the same work, in its acceptance of the Grosvenor story, provides us with a notable example of flattering fiction.

It is now more than seven years since, in the first volume of *The Ancestor*—which was widely read at the time,—there appeared a valuable and exhaustive article of more than twenty pages, by Mr. W. H. B. Bird, on 'The Grosvenor myth'. One might have expected that, after this, no repetition of that well-known story would be possible. Yet, only the other day, the visit of the

[1] For the interesting charter of Henry II admitting the cordwainers to the gild of corveisers at Oxford, see *Calendar of Charter Rolls*, II, 34.

King to Eaton produced the inevitable paragraph. We were gravely assured that

> since Norman days the Grosvenors have been landowners in Cheshire, and it was only last month that the Duke, by virtue of his descent from Gilbert le Gross Veneur (a near relative of the Conqueror) took up, as it is called, the freedom of the City of Chester. It was Hugh Lupus (uncle of this same Gilbert) who was one of the first Norman-born earls of Chester... As is fitting, the first thing to strike the eye of the visitor for the first time to Eaton is the splendid equestrian statue of this Hugh Lupus, Earl of Chester, whose distinctive names, by the way, have been carried down from generation to generation in the Grosvenor family, etc. etc.

That Hugh was not called 'Lupus', that he was not uncle of an (imaginary) "Gilbert le Gross Veneur", and that the first Grosvenor to be christened Hugh-Lupus was the late duke himself, are facts which the public at large will probably never grasp. As Mr. Bird justly observed, "the vitality of the legend is remarkable. Not merely has belief in it been kept green at Eaton, as the great equestrian statue before the house and the baptismal names of the late duke testify, but perhaps no other story of the kind is as widely known and credited."

Even in that work which he is pleased to term "A complete guide to Heraldry" (1909) Mr. Fox-Davies prints in full (pp. 278-280), from "The Tauntons of Oxford, by One of Them," the frightful nonsense it contains on this subject. We there read, of "the ancient and almost Royal descent of this illustrious race," that "Hugh Lupus, Earl of Chester, was a son of the Duke of

Britanny,[1] as is plainly stated in his epitaph," and that his nephew Gilbert was, therefore, maternally the Dukes' descendant. "The Grosvenors," we read further, "probably inherited obesity from their relative," the earl, and were thence styled 'Gros' Venour!

The principal genealogical article is that on "some 'Saxon' houses," in which I have set myself to deal on a fairly exhaustive scale with claims to 'Saxon' descent, by which is meant a known descent older than the Norman Conquest. This, I presume, is what Mr. Fox-Davies means when he states, speaking in his own tongue, that "some number of the very older (*sic*) families are Saxon."[2] Both the number and the confidence of these claims will be found somewhat surprising in view of the total lack of evidence adduced by those who make them. The grouping and classifying of these cases will prove, it is hoped, instructive, and among the points I shall endeavour to impress upon the reader's mind I would here specify three. The first is the worthlessness, as authority, of so-called family "tradition" when invoked for facts of the eleventh or even the twelfth century. Such "tradition" usually proves to be merely a guess by some antiquary or member of the family at a period which may not even be remote.[3] The next is that English pedigrees do not begin till the twelfth century, save in the case of a handful of families,

[1] He was, of course, a son of Richard, Vicomte d'Avranches.

[2] *Armorial Families* (1895), p. viii.

[3] Mr. W. H. Stevenson has similarly observed, of local tradition, that "we have in this an instructive instance of the worthlessness of 'tradition,' which is here, as so frequently happens elsewhere, the outcome of the dreams of local antiquaries" (*Asser's Life of Alfred*, p. 262).

who, with more or less certainty, can be carried back as far as the latter part of the eleventh. The third is that the use of surnames began in England later still.[1]

I would here thankfully acknowledge that Mr. Baring-Gould's book, which I have only seen since this paper was in type, insists no less strongly on the late origin of surnames and on the impossibility of their being inherited from days before the Conquest. Yet, quite recently, it was stated, as merely an interesting fact, that a family had been traced back, in England, for no less than two thousand three hundred years! Of an Evesham "vendor of cattle medicines" the *Daily Mail* wrote (27 Nov. 1909):—

> When it is stated that Mr. Balhatchet's family is traced back in Cornwall on the authority of Professor Thorpe F.S.A. to a Phœnician named Baalachet who came over to manage a Cornish tin mine in the year 400 B.C., it will be seen that Mr. Balhatchet may well be described as an interesting personality.

If the learned Professor is correctly cited, which one finds it hard to believe, the Society of Antiquaries may indeed be proud of so unparalleled a feat. But Mr. Baring-Gould—who may here be speaking from local knowledge—asserts that "the name Balhatchet signifies the hatchet (*i.e.* bar, thrown across a gap) giving access to a *bal*, or mine." Thomas Becket, however, in his youth, had a friend nicknamed 'Bail-hache,' and Bailhache is to this day a surname, I believe, in France. Pos-

[1] This, of course, is only a general rule.

sibly therefore, we have here the origin of this English surname.

Again the recently issued history of the Hicks (Beach) family, a house of Tudor origin, in which their history was traced to early Saxon times—on the supposition that their name is identical with that of the Hwiccas—is another illustration of the amazing and almost incredible ideas which prevail upon these subjects. In my opening paper I have shown that the Berties were still believed, little more than thirty years ago, to have come from 'Bertieland' on the borders of Prussia "in company with the Saxons." But in their case, at least, it may be pleaded that this is no modern fable, but rests on a forged pedigree of Elizabeth's day, that great breeding time for these productions, which we are still rending one by one. Not only in Latin, but in Old French and in Old English also, the forger exercised his skill. And, in the case to which we are now coming, the grant of a Royal licence even in the present reign, preserves the memory of his work.

With regard to the paper dealing with 'The great Carington imposture,' I would ask that certain points be borne in mind. The first is that I am criticising a work which the outside public were invited to buy. In a full page advertisement inserted in *Notes and Queries* and in the prospectus that was circulated, they were invited to buy it at five guineas on the ground that it was "of very considerable general historical importance," and that copies "should soon be absorbed in reference libraries." One need not, therefore, scruple to

criticize the statements it contains. The next is that prospectus and advertisement alike describe it as "By Walter Arthur Copinger," and that Dr. Copinger speaks of himself as having "compiled" it. He describes himself as "fully aware of the imperfections of his work," but claims that he "has not written up the subject" and that "the disclosure of facts and verification of evidence have been his main objects." He further commits himself to the statement, of the pedigree "in a direct male line to the Conquest," that "each descent is fully verified." We are doing him, therefore, no injustice in assuming that he takes upon himself full responsibility for the volume.[1] Lastly, if any of my readers should think that I have dwelt upon the book at excessive length, I would ask them to remember that it is not only the most pretentious family history that has appeared for many years, but represents a remarkable revival of that spirit which led the new gentry, when Tudors sat upon the throne, to seek pedigrees of great splendour. Moreover, it receives a *cachet* from Dr. Copinger's name and position which will give this 'Conquest' pedigree, in the eyes of the general public, an appearance of considerable authority.

As I have demolished, once for all, the whole 'Carington' story, I wish, in justice to the College of Arms, to point out that it has not accepted, in its corporate and official capacity, that story as genuine. It is indeed asserted in 'Burke's Landed Gentry,' and the assertion is prominently cited in

[1] Except the two Appendices at the end, which were the work of the late Mr. Smith-'Carington.'

Dr. Copinger's book—that over 700 years of the descent has been "registered" in the College of Arms, but I am assured that the 'Carington' descent has *not* been officially "recorded." With regard to the later pedigree, from Tudor times downwards, it will be found to raise a question of great interest to genealogists, namely the proof of descent, where identity is the main issue.

It will be seen in the pages of these volumes that it is, unhappily, still necessary "to expose many an oft-repeated error",[1] which Burke's 'Peerage' and 'Landed Gentry' steadfastly persist in repeating, with the addition, occasionally, of fresh ones. I am, of course, by no means alone in protesting against the fables with which the name of 'Burke' has been so long associated. Apart from Mr. Freeman's indignant protest in 1877,[2] the 'Peerage' and the 'Landed Gentry' were the subject of the following noteworthy and weighty criticism in 1865.

The reader who has followed me thus far will probably be of opinion that the works which we have been examining are in no respect worthy of the present condition of genealogical science. It is a remarkable circumstance that side by side with the laborious and critical genealogists there should have sprung up a set of venal pedigree-mongers, whose occupation consists in garbling truth and inventing falsehood,—a calling which they pursue with the most untiring assiduity. But it is unfortunate indeed that the easy credulity of Sir Bernard Burke should allow him to be led blindfold by these obscure persons, whose most palpable fictions he seldom

[1] The phrase is actually taken from the Preface to 'Burke's Peerage' for 1909 (see below).

[2] 'Pedigrees and pedigree-makers' in *Cont. Rev.* XXX, 11-41.

shows the least hesitation in adopting. Statements which would never otherwise have obtained a moment's credit, have been allowed to go forth with the imprimatur of the chief herald of Ireland, on the strength of which they are relied on by a large section of the public.[1]

After pointing out that 'Burke's Peerage' and 'The Landed Gentry' "are profusely quoted in books circulating on the Continent as well as Britain," the writer proceeded:

Year by year new fictions, belonging not to respectable legend, but to vulgar imposture, are obtaining general acceptance on their authority; it is therefore high time that the public should be disabused of their faith in these books.

In this passage the stress is laid upon the right point. As Mr. Freeman insisted, the grievance is that "monstrous fictions" should obtain currency and authority by being given to the world under the ægis of a King of Arms.

Although his violent attack proved fatal to some of them, we find the organ of serious genealogists obliged to write as follows, many years later, after referring to Sir Bernard Burke's "uncritical method":—

We may as well at the outset express our regret that in these days, when no genealogist would dream of printing a pedigree without carefully consulting the records, adding exact dates, and giving proper references, Sir Bernard Burke's sons[2] deem it consistent with their rep-

[1] *Popular Genealogists: The Art of Pedigree Making.* Edinburgh. 1865. (The book is known to have been written by Mr. Burnett, who became Lyon King of Arms in 1866).

[2] The reference is to Mr. Ashworth Burke's statement that he could not have brought *The Colonial Gentry* "to a successful issue were it not for the heraldic and genealogical skill of my brother, Mr. H. Farnham Burke, the Somerset Herald of Her Majesty's College of Arms."

utation to issue to the public works of this character, in which the same loose statements, the same unbridged chasms, and often the same apocryphal legends, sometimes, it is true, tempered with the qualifying 'It is said' or 'It is probable,' appear in edition after edition.[1]

The reviewer then proceeded "to enumerate a few of the errors and inconsistencies which have occurred to us in perusing this book, many of which will indeed be patent to the merest tyro in the study of family history." Among them was the statement, under 'Graeme,' that

> This ancient family derives its lineage from Graeme, who was made Governor of Scotland and Guardian to the young king Eugene II in 435. Graeme broke down the famous wall of Antininous.

On which he justly observes that it illustrates "the old-fashioned principle which has done so much to discredit genealogy and heraldry in the eyes of sensible men, that any exploded myth, any rubbish in fact, is good enough for family history.... It is almost incredible that a legend, which would now-a-days raise a laugh even in a Board School, should be gravely offered for the credence of our hard-headed colonial cousins."

I must again insist on the point at issue. If 'Burke' made no profession to be other than a "gorgeous repertory of genealogical mythology," as Mr. Chester Waters termed it,[2] its stories would not matter. But, even as Professor Freeman observed of Sir Bernard Burke, so his successors also have persistently made for it the claim that it keeps pace with the "latest results of genealogical

[1] *The Genealogist* (1896) XII, 66.
[2] *Parish Registers in England.*

research and discovery,"[1] while steadfastly continuing to repeat exploded fictions. That is the grievance, that is the complaint of the historian and the truthful genealogist.

This year (1909), for the first time, there is a change of note. The editor, who had previously defied criticism by proclaiming his work "authoritative," now professes to welcome criticism as a fellow-fighter for truth. This curious passage deserves quoting in full,—

> The editor rejoices in the freedom of the comments and in the genealogical interest the summaries of pedigrees excite. He takes his place by the side of the critics in the fight for truth, though he may not always or altogether agree with the tactics of his comrades. The passion of disbelief, which has been well said to be characteristic of modern scientific criticism, has done much to clear the air of myths and to expose many an oft repeated error. It has, however, when tearing to shreds old family traditions and picturesque legends of the past, done little to preserve the truth which lies hid in most of them, concealed by the exaggerations of our forefathers. It would be more helpful to genealogists if modern scientific methods were applied with a constructive object rather than devoted to the barren triumph of destructive theories.

If we may accept the opening words, it is gratifying to know that these volumes should add to the editor's rejoicings. But, from the latter part of the passage, it is greatly to be feared that he views with no small irritation the "barren triumph" of mere truth. That he stands, therefore, "by the

[1] See Vol. II, pp. 47-8 of this work. *The Landed Gentry* (Ed. 1906) similarly speaks, in its Preface, of "the very careful revision necessitated by the more precise and critical methods of modern research."

side of the critics" and even claims them as "his comrades" is a boast which to students of his work has a somewhat hollow sound.

The truthful genealogist is always glad to establish an ancient pedigree; but, when destroying "monstrous fictions" (as Mr. Freeman terms them), he cannot preserve the truth which they do not contain. Nor can he consent to repeat them with the convenient formula "It is stated," in order to leave their truth an open question for his readers.

Of fictions to which the name of 'Burke' continues to impart authority these volumes contain instances enough and to spare.

The paper on 'The *Geste* of John de Courcy' is intended to illustrate the connexion between family history, general history, and medieval literature. It is proposed to show, not only that John's adventurous career became the subject of a *Geste* or historical romance, but also that it is possible to recover a fragment of a lost *Geste* of Randolf, earl of Chester, which is alluded to by a well-known line in *Piers Plowman*. It is of psychological, as well as literary, interest to study the attribution, in the Middle Ages, of mythical achievements and adventures to real historical personages, and the ready acceptance of these tales, not as fiction, but as fact.

The article on 'Heraldry and the Gent' has three objects in view. Of these the first is to expose the new and absurd pretension that a grant of arms is a "privilege," the claim that it converts the grantee from a "plebeian" into a "noble,"

and the assurance that it is a favour from the Crown similar to the grant of a peerage. The second is to vindicate the value of medieval heraldry, a part of the life of its time, as worthy of serious study and constituting a true branch of archæological science, and, at the same time, to deny the claim, made for the so-called armory of to-day, that it possesses for the student an equal or even a greater interest.[1] It is not easy to understand how any intelligent being can profess interest in the arms supplied, as a matter of routine and *à prix fixe*, to 'Brown, Jones and Robinson,' or can care two straws if they have taken out a grant or not. To the author of *Armorial Families* we may leave such matters as these. But when he entitles his latest work *A complete Guide to Heraldry*, it becomes the concern of those who have made heraldry their study. The third object, therefore, in view is to examine the right of this book to bear the above title and the claim that it is written "with a fulness of knowledge which it is hoped will render the work a *standard* one in time to come".[2] Its author would, doubtless, be the last to complain of such examination, for he himself praises, at the outset, "that critical desire for accuracy which, fortunately, seems to have been the keynote of research during the nineteenth century," and warns us "that the handbooks of Armory professing to

[1] It is significant of the knowledge and of the standpoint of the author that, in *The Right to bear arms*, 'X' speaks of "the time of the Tudors when heraldry was about at its highest point in England" (2nd Ed., p. 229), though even Boutell admits "the degenerate" condition of Heraldry under the second Tudor Sovereign, while Mr. A. S. Ellis dismisses Tudor heraldry as "mostly rubbish".

[2] See the Prospectus of that work.

detail the laws of the science have not always been written by those having complete knowledge of their subject."

The whole of the papers in these volumes, as originally planned, were new; but the present constitutional crisis has led to the inclusion, at the last moment, of an article on 'The Origin of the House of Lords,' which was published in the pages of a magazine a quarter of a century ago (1884-5). As it is here given in the form in which it originally appeared, there will be found no reference to the subsequent researches of scholars. It is hoped, however, that, even now, it may not be devoid of value as an argument for that feudal origin of the House which, in view of the teaching of Stubbs and Freeman, it was, at the time of its appearance, practically heresy to assert. I may venture, perhaps, to point out that the importance it assigns to the Norman Conquest and its effect upon our institutions is exactly parallel to that which I have traced in the introduction of military tenure (knight-service) into this country. My theory on the latter problem is now accepted by scholars, although involving a reaction no less complete and decisive from the teaching of the older school.

As this paper was not written in view of present controversies, it is necessary to warn the reader that, in speaking of the Crown's control over the writ of summons, I use the phrase in its exact meaning, and am not referring to such modern innovations in our historical constitution as 'the cabinet,' 'the inner cabinet,' or 'the Prime Minister', or to any possible claim of such body or

person to usurp, in this respect, the prerogative of the Crown.

Of those who have been good enough to render me assistance I would specially mention Mr. W. H. Stevenson, to whom I am indebted for the valuable report on the spurious 'Carington' narrative, Sir Alfred Scott-Gatty, Garter King of Arms, for kindly providing me with a copy of the Delawarr document and enabling me to solve the mystery of the Bertie arms, Mr. Oswald Barron, F.S.A., and Mr. H. J. Ellis of the British Museum. Before his lamented death, while this work was passing through the press, the late General Wrottesley placed freely at my disposal his unsurpassed knowledge of Staffordshire genealogy.

J. H. Round.

THE WILLOUGHBY D'ERESBY CASE AND THE RISE OF THE BERTIES

Richard Bertie's claim jure uxoris.—*Its result fatal to tenure of dignities 'by the curtesy.'—Richard Bertie's origin and arms.—The spurious Bertie pedigree.—Rapid rise of the house.—The Great Chamberlainship.—The Burrells.*

When that dashing adventurer Redmond Barry had attained the aim of his ambition by his marriage to a great heiress, the widowed Countess of Lyndon, he set his heart, Thackeray tells us, on becoming a peer himself. He "got from the English and Irish heralds a description and detailed pedigree of the Barony of Barryogue," boasted of "the genealogy of the family up to King Brian Boru, or Barry, most handsomely designed on paper," and began to practise his signature as a peer. But he had over-reached himself at last. His pedigree and his pretensions were jeered at; horrid things were being said about his humble origin; and he confessed that "the striving after this peerage" proved a most unlucky business. I would not compare with Redmond Barry that accomplished scholar, Richard Bertie; but his experience, in this respect, presents a curious parallel. When he had made his astounding marriage to the widowed Duchess of Suffolk,—who, like Lady Lyndon, was a peeress in her own

right, the heiress of a great family, and a blue-stocking to boot—he wanted further to be recognised, in right of his wife, as the holder of that ancient feudal title, Lord Willoughby d'Eresby. But for this unlucky and unsatisfied desire the real origin of Richard might have remained unknown. It seems indeed to have done so till the present moment. It can now, however, be shown, from a letter of his own writing, that, in spite of a wondrous pedigree which opportunely made its appearance, a leader of the old nobility denounced him as "no gentleman" (*i.e.* by birth), while his wife, though urging his claim to the title, was forced to admit that he was "meanly born."

The claim advanced by Bertie—himself a limb of the law—is one of considerable interest and importance to students of our peerage law. It raised the whole question of peerage *jure uxoris*, a subject on which much has been said, but very little determined. [1] Although the practice of summoning *jure uxoris* "has now become obsolete," in the words of our latest authority, [2] Mr. Hargrave [3] doubted whether "this great question had ever formally received the judgment of the House of Lords." [4] As a matter of fact it was revived,

[1] See for instance "Observations on Dignities" in Courthope's *Historic Peerage*, pp. xxxvii-xxxix; Stubbs' *Const. Hist.* (1878), III, 438; Cruise's *Dignities* (1823) pp. 105-108; Pike's *Constitutional History of the House of Lords* (1894) pp. 103-107; Palmer's *Peerage Law in England* (1907) Chapter IX pp. 133-6; *Complete Peerage* I, 392; VI, 292. [The former of these passages cites in full the important "Catalogue of such noble persons as have had summons to Parliament in right of their wives" from p. 576 of Dugdale's *Summons of the nobility* (1685)].

[2] Palmer, *op. cit.*, p. 136.

[3] Cited by Cruise, *op. cit.*, p. 108.

[4] The whole note to Coke upon Littleton from which this was taken was quoted by Sir Robert Finlay in the Earldom of Norfolk case.

and became of practical importance, so recently as 1901-3, when, in the Fauconberg case, the claimants alleged in their printed case (p. 4.) that William Nevill was summoned to Parliament and sat as Lord Fauconberg *jure uxoris*, which they put forward as Proposition XII (p. 12), and further claimed by Proposition XIII, "to prove that in former times, when the husband of a Peeress in her own right was summoned to Parliament by the title and designation of the Peerage vested in his wife, he actually sat in and enjoyed the same Peerage which was vested in his wife, and that no new Peerage was created" (pp. 12-13).

As I have special knowledge of the Fauconberg claim and its result, I may explain that the claimants' object was to use the writs of summons in 33 and 38 Hen. VI to William Nevill with the style "de Fauconberge" added to his name, as proof that an hereditary Barony was vested in his wife, the heiress of the Fauconberg family. As a matter of fact, to anticipate somewhat, it seems to have been the avowed object of Richard Bertie's claim to a summons *jure uxoris* that it would have established his wife's right to the Barony held by her ancestors.

In an even later and historic case, that of the Earldom of Norfolk (1906), the same question was the subject of almost acrimonious dispute. The petitioner sought, as in the Fauconberg case, to prove that a title was inherited by and vested in an heiress by the fact that her husband bore it, contending that he must have done so *jure uxoris*, a proposition which was rejected, on behalf of the

Duke of Norfolk, by Mr. Warmington K.C.,[1] and Lord Robert Cecil K.C.,[2] but vigorously upheld, on that of the petitioner, by Sir Robert Finlay;[3] the Law Lords, in both cases, interposing observations. Sir Robert claimed that the point was "of importance" in the case, that "over and over again the question of sitting *jure uxoris* comes into question," and that "it very much bears upon the title of Earldoms and the calling out of abeyance."

Sir F. Palmer, dealing with "Curtesy and *jure uxoris*," observes (p. 134), that in this case "it was argued that there was no such thing known to the law as the husband of a Peeress being summoned *jure uxoris*;" but he only cites Mr. Warmington's remarks. I shall deal with the subject elsewhere in fuller detail.[4]

It is impossible here to discuss exhaustively the questions of the right to such summons or of the nature of such summons or of what estate in a dignity was vested in him who received it. Historians will attach peculiar weight to the view of that cautious and sagacious writer, Dr. Stubbs, who held[5] that—

> The older Baronies descended to heiresses who, although they could not take their place in the assembly of the estates, conveyed to their husbands *a presumptive right to receive a summons.*[6] Of the countless examples of this practice, which applied anciently to the earldoms also, etc. etc. .... and although *some royal act of summons*, or

[1] *Speeches of Counsel*, pp. 97-8.
[2] *Ibid.* p. 145.
[3] *Ibid.* pp. 146-151.
[4] See the paper on "The muddle of the law."
[5] *Op. cit.*
[6] The italics are mine.

creation or both was necessary to complete their status,[1] the usage was not materially broken down until the system of creation with limitation to heirs male was established.

Nicolas[2] boldly derived the practice from the territorial nature of early dignities, and claimed that—

At a very early period the same law (*sic*) was applied to Baronies by Writ that pertained more especially to Earldoms and Baronies by tenure, and the husbands of heirs female are summoned *jure uxoris*, when, *having issue by their said wives*, they had obtained that interest in law in the wife's inheritance which was considered to entitle them to such summons; the practice, however, clearly partook more of the nature of barony by tenure, and was not in accordance with the personal dignity of a Barony by Writ.

This is a consistent and intelligible theory, and Nicolas was thus able to explain the discontinuance of the practice, holding that, from the time of Elizabeth,

a courtesy in dignities, proceeding as it did out of the law of feudal tenure, may be said, like the law of baronies by tenure, to have altogether become obsolete.

He was careful however, to explain that the practice applied only to tenants by the courtesy, and that though "the cases are numerous where summonses are issued where no issue existed," yet

in all such instances a new dignity, *entirely personal*, must be considered to have been conferred on the husband who,[3] whether he had or had not issue by his

[1] The italics are mine.

[2] In Courthope's version (*Historic Peerage*).

[3] Nicolas explained away the cases in which husbands so summoned were allowed the precedence of their wives' baronies as due to "the Crown exerting a prerogative it then possessed of giving an unwonted precedency."

wife, still occupied in right of her possessions such a position as would entitle him to receive from the Crown a writ to sit in the upper House of Parliament.

It cannot be said that "the Lords' Reports" discuss the question at all adequately; but they do discuss the two cases on which, in 1901, the Fauconberg claimants specially relied,[1] namely the patents dealing with the barony of Dacre, in the reigns of Henry VI and of James I. And their observations depreciate them both. Of the former we read[2] that

> This grant to Richard Fenys *(sic)* gives nothing to his heirs, and was probably intended only to allow him the dignity during his life. The patent also does not express that he was entitled to the dignity by the Courtesy of England, or even state directly that he was entitled to it in right of his wife,......
>
> Independent of these letters patent he could have had no right to the dignity of Lord Dacre, unless by his marriage with the heiress of the preceding Lord Dacre he was entitled as her husband to be a peer of the realm during her life, and after her death to be tenant by the courtesy of the dignity having issue by her; *a right which the committee have not found anywhere distinctly recognised*,[3] though several persons have been at different times summoned to Parliament by writ, or created by patent peers of the realm, by a name or title properly belonging to their respective wives as the law is now settled.
>
> The many extraordinary proceedings respecting the peerage during the reign of Henry VI. take much from the authority of this acknowledgment of the right of Sir Richard Fynes. Some attention, however, seems to have

[1] *Printed Case*, pp. 12-13; *Minutes of Evidence* (1903), pp. 53-4, where these constitute the evidence vouched for their 'Proposition XIII.'

[2] Third Report (Ed. 1829), p. 213.

[3] The italics are mine.

been paid to it in the reign of James the First, as after stated, though in prior cases *it seems to have been considered as settled law that a right of peerage, descended to a female, gave no right to her husband, whether she had issue by him or not.* [1]

The second case is thus dismissed :—[2]

The matter recited in this grant of James the First may, perhaps, be considered as one of the extraordinary proceedings concerning the peerage which took place in his reign. The tenancy by the curtesy claimed by Lennard seems not to have been admitted as a right ; but it appears that a writ of summons to Parliament would have been granted to him as a measure of justice, *flowing nevertheless from the favour of the Crown,* [3] if that justice or favour had been done in the lifetime of his wife. As a matter of justice, it could not have been defeated by the death of his wife ; as a matter of favour, the King could not have granted the dignity to him in prejudice of the rights of his son.

This leads us to Richard Bertie's claim to the Barony of Willoughby, or as he put it, to be Lord Willoughby "of Willoughby and Eresby"—for it seems to have been supposed that two Baronies were involved.

The treatment of this claim has been very unsatisfactory. It appears to be ignored in the *Complete Peerage*, in the *Lords' Reports on the Dignity of a Peer*, and in Mr. Pike's discussion on *jure uxoris* and "the curtesy," [4] while in the two distinctively legal works, those of Cruise and of Sir F. Palmer, it is most inaccurately described. According to the former :—

[1] The italics are mine.
[2] *Ibid.* p. 218.
[3] The italics are mine.
[4] *Op. cit.*, p. 107.

"About the year 1580, Richard Bertie claimed the Barony of Willoughby in right of his wife Catherine, duchess of Suffolk, and Baroness Willoughby, as tenant by the curtesy.

The claim was referred by Queen Elizabeth to Lord Burghley and two other Commissioners ; as also a claim to the same dignity by Peregrine Bertie, the son of the claimant.

The commissioners made their report in favour of the son, who was accordingly admitted to the dignity, in the lifetime of his father."[1]

Bertie, on the contrary, was urging his claim early in 1570 (when his son was only fourteen) ; it came before the commissioners in the summer of 1572, and, so far from being opposed by his son, was avowedly made to protect his son's right.

Sir F. Palmer similarly writes :—

"Fifty years later, however, in 1580, Richard Bertie, who had married Catherine, Duchess of Suffolk and Baroness Willoughby, and had issue by her, claimed the Barony of Willoughby as tenant by the curtesy in right of his wife..... the claim was referred by Elizabeth to Lord Burghley and to other Commissioners, together with the claim for the same dignity made by Peregrine Bertie, the son of the claimant ; and the Commissioners made their report in favour of the son, who was accordingly admitted to the dignity in the lifetime of his father."[2]

Instead of Richard Bertie's claim being "fifty years later" than that of Mr. Wymbish,[3] there were at most thirty years between the two. The rest of the learned Counsel's statement is virtually identical with that of Cruise more than eighty years ago.

[1] *Dignities or Titles of honour*, pp. 107-8.
[2] *Op. cit.*, p. 135 ; also p. 10.
[3] See below for this case.

The explanation is that both writers had admittedly relied on Collins, in whose work [1] the proceedings (pp. 1-12) belonging to 1572 (but there undated) are insufficiently distinguished from those of 1580 (p. 23).

The papers thrown together in book form by Collins have been somewhat too freely cited, useful though they are. For they have, from a legal standpoint, no real authority. The narrative of the two Bertie claims (1572 and 1580) was taken by him from a MS. belonging to Anstis' Library, and will be found in at least two British Museum MSS. (Harl. MS. 6141; Lans. MS. 861), while a third (Lans. MS. 29) contains an abstract of Richard Bertie's arguments. But Lans. MS. 861 is of special value as containing notes in the margin, written by another hand, of the arguments employed against his claim. From these it appears that while the claimant took his stand on law and his right alone, the Crown wanted to treat any recognition of his claim as an act of "special grace and favour." One cannot but admire his sturdy stand against such a sovereign as Elizabeth and his contention, in a letter to Cecil, that "Livery is a kind of grace, yet such as by law the Prince is bound to yield to the subject."

The Crown, on the contrary, was straining its prerogative in high Tudor fashion and even endeavouring to assert that the admission of the right of an heiress to succeed to her father's Barony would be an act of special grace and favour. Indeed there emerges, in the course of these proceedings,

[1] *Proceedings, Precedents, &c.* (1734).

a story that Henry VIII. had insisted that he would make his own Barons, and would not have them made by women (i.e. through a female heir).[1] One is reminded of Elizabeth's royal wrath when the Emperor made Thomas Arundel, a subject of hers, into a Count.

There were really two questions at issue in Richard Bertie's claim, though the two were much confused in peerage proceedings at the time. The first of these was whether an heiress inherited as of right, and transmitted to her heirs, a Barony in fee; the second was whether, in case she did, her husband was entitled to the barony, or at least to the style thereof, in her right.

Of these questions the former, it is held, was not formally set at rest till the Clifton case was decided long afterwards (1674),[2] if, indeed, all doubts were dispelled even then. In the Willoughby case Bertie urged, as to this first question, that precedent was all in his favour and that law was not against him. By precedent I mean more especially a decision, quite unknown (it would seem) to writers on the peerage, in favour of his wife, as her father's daughter, as against her father's younger brother, the heir male, after Lord Willoughby's death in

[1] This ground was actually taken by Serjeant Rolle in his argument against the heir-general in the Grey de Ruthyn case (29 Dec. 1640). After urging the King's prerogative in the matter "by his royal power only, not restrained by law, nor infringed by custom," he proceeds, "this power must be taken from him, and rest now wholly in the disposition of a woman, who, many times led by affection, makes her choice, without judgement or discretion, of a mean man, no gentleman, and it may be one whom the King favoureth not, and yet the issue of such a one must be a baron and peer of the realm; if this maxim is true,—and that without the King's permission or approbation, for it is descended upon him in fee,—how much this derogateth from the King's princely prerogative and absolute power, let the indifferent judge" (Collins, p. 222).

[2] But see, as to this case, the paper on 'The muddle of the law' in this work.

1525.[1] By Bertie's view of the law I mean that he based his claim "on the customs of chivalry used within this realm," and vehemently denied that his case should be decided by the civil law, denouncing the "gross-head civilians," who "held that women are incapable of barronys, and all higher dignities in their own right: therefore their husbands nor children cannot claim from them that right which they have not" (themselves).[2] It must be remembered that there was then a belief (as I shall elsewhere show) that a knowledge of the civil law was requisite for the decision of peerage cases.

In the view of Bertie and his wife her right to her father's Barony was not only involved in the other issue—his claim to bear the title in her right,—but was actually the cause of his claim being made. If, as he alleged, her right had been established against her uncle's claim, and if, as he further alleged, that uncle's son, when he was raised to the peerage (1547), was refused the title of Willoughby of Eresby, and assigned that of "Willoughby of Parham," it is difficult to see how they could profess that her right to the title was in danger unless he were allowed to bear it. The Duchess, however, did undoubtedly urge that this was the case. She wrote to Cecil (29 July

[1] This decision was alleged by Bertie in 1572 (Collins, p. 4) and again in the Dacre case, with the addition of the words "by the Lord Cardinal" after "the claim being heard" (Ib. p. 38). It had meanwhile been referred to by Bertie's son, Peregrine, when claiming on his mother's death (1580). He urged that "the question was handled in King Henry the Eighth's reign; and the right, upon claim made by Sir Christopher Willoughby, younger brother and heir male to the Lord Willoughby, my grand-father, was adjudged to the Duchess, my dear mother."

[2] Collins, pp. 5, 6, 8.

1570) that what grieved her most was the future risk to her son's right.

For it was told her to her face within this month that her barony was gone from her and her heirs to the lately created Lord Willoughby (but she puts her trust in God, though friends fail her, that she shall not for ever be bared, by envy, of her right). It is to God to rule all, and by His good means (those) as meanly born as her husband have been advanced by prince's gifts to greater honour than they (i. e. she and her husband) challenge as their due. They have been kept from it now these eighteen years,[1] the first six years by her own default, for otherwise she might with greater offers have had it.[2]

A week later she wrote again that

of her husband she hears nothing of her Majesty's determination, but of Cecil's good report and loving mind to do him good. As little as her Majesty sets by them, they may comfort themselves, etc......... It is true that to her knowledge neither Lord Willoughby hath sought to do anything against her, neither hath anything passed against her that way since her Majesty's reign. "But this I know, that there is good account made that, when I die, my children shall lose it. And these words have passed plentifully ; and as I wrote, had them spoken to my face the last day ; and therefore I will think if I find no more favour in my lifetime, it is very like their words will prove true after my death......... And yet I cannot but show my natural desire to have my children succeed me, which desire I think is in every honest body. And if my husband might take his place, then should my right be well-known to the world" etc. etc.[3]

Nearly two years, however, elapsed before her

[1] *i.e.* since their marriage.
[2] Lord Salisbury's MSS., I, 478.
[3] To this letter Bertie appended a postcript asserting that "the right is such that it cannot be impugned" and speaking of a possible "dislike" of himself (*Ib.* I, 480).

husband could secure a hearing for his claim. In an important letter to Cecil (now Lord Burghley), he writes (14 April 1572) :—[1]

I send to your Lordship by this bearer my servant (1) the bill for confirmation, having used therein the advice of Mr. Attorney General. I send also (2) a collection of such as have in the right of their wives enjoyed titles of honour ; though you required but a few names, yet I send many ;......... And, to prove the use of it in the Barony of Willoughby, I send (3) two Court Rolls where you shall find it in the title etc.

Bertie had referred to a " bill " in a long previous letter (1 Sept. 1570),[2] and I suspect that in the later of these documents we may recognise the draft " decree for Mr. Bertie to be Lord Willoughby and Eresby, " which is found among Burghley's papers.[3]

The second of the items mentioned can be identified at once in Collins' book, where we find (p. 2) " the names of certain persons that in right of their wives have enjoyed the title and dignity of barons, and by that right have been called to Parliament as barons in every King's government since the Conquest " [!] This list is officially subscribed by those two eminent rascals.[4] " Gilbert Dethick *als*. Garter the principal King of Armes ; Robert Cooke *als*. Clarencieux Roy darmes. " Their first precedent was that

John Talbot, a Norman, came into England with

[1] *State Papers : Domestic.* Vol. LXXXVI, nº 8.

[2] In it he says he is sending therewith " a copy of a bill penned by Mr. Carrel, to manifest the Queen's consent, because the right had so long slept. " (Lord Salisbury's MSS. I. 482.)

[3] Lans, MS. 29, no. 79.

[4] See the paper on " Peerage cases in the Court of Chivalry " *ad finem*.

William the Conqueror and married Matilda daughter of Richard, Lord Talbot of Longhope, in whose right the sayde John was Lord Talbot of Longhope. Of whom the Erle of Shrewsbury is descended.

Now Domesday book proves that, in the time of the Conqueror, Longhope belonged to William the son of Baderon. It descended to his heirs, the Lords of Monmouth, till their extinction in the male line; and it was not until some two centuries after the Norman Conquest that it passed into the hands of a Talbot! Let us now take the third precedent, assigned to the reign of Henry I.

Josselyne, son and heir to the duke of Brabant, married Agnes daughter and heir to William Lord Percy, in whose right he was Lord Percy, of whom descends the earl of Northumberland.

Jocelin belongs not to the reign of King Henry I., but to that of his grandson, Henry II.; he was not "son and heir to the Duke of Brabant," and he was never "Lord Percy." Yet all these precious "precedents" were subsequently dished up anew for the claim to the barony of Dacre.[1]

It is well that such "heralds' books" have long ceased to be produced as evidence in claims to peerage.

Collins' book is full of such precedents similarly supplied, no doubt, by the heralds for the guidance of those who were deciding claims to peerage; and what strikes one most about these precedents is the absolute incapacity of those who supplied them to distinguish between the territorial baronies of Norman times and the parliamentary dignity of

[1] Collins, pp. 35-7.

a peer of the realm. Take, for instance, the Abergavenny case, in which were adduced—

> Examples chosen out of an infinite number of such as, after the decease of a baron or peer of this realm without issue male, in the right of their wives, mothers or grandmothers, having been the sole daughters or the sole daughters and coheirs to the said baron, have enjoyed the name, stile, title, and dignity of the said barony, according to the most ancient usage and laudable custom of England, in the times of every King's government since the Conquest. [1]

This precious list begins with "Wygod baron of Wallingford in com. Oxon in the time of King Harold and William the Conqueror." I have among my pictures an oil painting of the delivery of St. Peter from prison. In the background are seen St. Peter and the angel; in the foreground are soldiers gambling, attired in the uniforms and accoutrements of the 17th century. Its anachronisms are not worse than those of these amazing precedents derived from Norman times.

So much for that "collection of such as have in the right of their wives enjoyed titles of honour," which Bertie, we have seen, despatched to Burghley, in April, 1572. There were, as I have said, involved in his claim two distinct questions; and these were ultimately decided in absolutely contrary ways. The right of an heiress to inherit a barony, and to transmit it to her heirs, was eventually admitted as beyond dispute. But the claim of her husband to hold her title and be summoned to Parliament in her right became obsolescent, and has

[1] *Op. cit.* p. 83.

so completely disappeared that its very existence in former times has been doubted.

The special interest of Bertie's claim is that it occurred at a transition period when lawyers were in great perplexity as to how far it was valid, and that the writ of summons to his son (in his own lifetime) on his mother's death (1580) was, in this, an epoch-marking event, being absolutely fatal to the view that a barony could be held by "the curtesy of England."

The lawyers' perplexity is seen in the report on Bertie's claim by the Attorney General and Solicitor General,[1] to whom Burghley had referred it :—

We have conferred with four of the judges that be now in London concerning Mr. Bertie's case, and they be all of opinion that he cannot challenge to have the Barony and the Title thereof in right of his wife, or else as tenant by the courtesy after her decease. We did make doubt whether her Majesty might declare him Lord of the name and title of the Barony during his life only, and then to call him by Writ according to that declaration, and that they thought her Majesty might not do. But because the course is very rare, they desired to have conference with the rest of the judges, when they shall come to town, etc.

Eleven days later the Attorney General (Gerrard) alone writes to Burghley :—

I have sent to your Lordship here enclosed the book. Mr. Bertie's title, I think is very orderly to declare him to bear the title and name of the Barony, but only during his life, and then to remain to the heirs of the Duchess, where of right it ought to go. And if this declaration

[1] 22 April 1572. *State Papers : Domestic*, Vol. LXXXVI, no. 19.
[2] *Ibid.* no. 34.

shall first pass from her Majesty, and then the Writ follow, I think surely it will be very plain that there can be no further title in the Barony but only during his life. But as to the question, it is moved whether this calling of the father should be any wrong to the son after the decease of the Duchess his mother, if the father do outlive. As to that I must needs confess it seemeth to be some wrong to the son, if he could claim that title during his father's life (as indeed it is most like he could never do), for although it seemeth to be some wrong, yet surely there is no damage, or loss can thereby grow to him. For it is certain that the father shall have the lands during his life, and the son nothing but what his father will be contented to give him. And therefore it is not like the son could claim the title during his father's life, etc.

This letter betrays the difficulty that lawyers were feeling as to the exclusion of the son and heir from the title in the event of the husband surviving his wife and continuing to hold that title by "the curtesy of England."

Bertie himself wrote a fortnight later to Burghley :—[1]

.... I meant to communicate with you how the Queen's Majesty is well pleased at the motion of my Lord of Leicester that my cause should be heard, which I desire for that she is so diversely informed, and not thereby to make any claim otherwise than may stand with her Majesty's good pleasure. Only I wish competent judges, and specially your Lordship for one, for that it lieth not in the knowledge of the common law, as appeareth by a precedent in the time of Henries the 4th and 5th, when the Lord Grey of Ruthen claimed the stile and arms of Lord Hastings, claiming as heir male etc. etc.

Bertie's meaning is here somewhat obscure. His

[1] Letter of 16 May 1572 (*Ibid.* no. 37.)

argument before the Commissioners, as given in "Collins," was specially directed against the *civil* law and its alleged exclusion of women from inheritance of honours, and he there adduces the contest for the arms and style of Lord Hastings as an instance of judgment for the heir-general against the heir-male.[1] (pp. 8-9) What he avowedly based his claim on was "the ancient and laudable custom of this realm".......... "the customs of chivalry used within this realm."[2]

Here we may break off for a moment to consider the draft decree for recognition of his right, which is found among Burghley's papers,[3] and which may possibly be that to which the Attorney-General refers in his letter above. It will be found that it carefully limits the admission of his right, and further, makes it the effect of the Queen's "pleasure and will." It also, somewhat strangely, makes his case a precedent for all similar ones arising in the future.

"DECREE FOR MR. BERTIE TO BE LORD WILLOUGHBY OF WILLOUGHBY AND ERESBYE."

"Wee A. B. C. D. Commyssioners appointed by the Quenes Majesties owne mouth to heare and determine the clayme made by Richard B. Esquier to the name and stile of the L. Willughby of Willughby and Eresby as in the right of the Lady Katerine Duchess of Suffolk his wiefe daughter and heyre to Wm. late Lord Willughby

[1] In his letter he reverses the position, for Lord Grey de Ruthyn claimed through a female; his opponent was the heir male. Moreover what was decided there (a decision upset by the House of Lords under Charles I) was that the heir of a sister of the *whole* blood had a better claim than the heir of a brother of the *half* blood.

[2] Collins, pp. 1, 5.

[3] Lans. MS. 29, no. 75.

of Willughby and Eresby deceased"......... (reciting *user* of the title by Richard Welles and Richard Hastings)......... have reported the evidence to the Queen, "and upon her pleasure and will in that behalfe revealed unto us doe pronounce, order and decree that the said Richard Bertie may lawfully use the name and stile of Ld. Willughby of Willughby and Eresby with all the rights thereunto belonging in the right of the said Ladye Katerine his wiefe during her liefe naturall and likewise after her decease if he survive so long as any issue of ther two bodies lawfully begotten being right heire to the said title and Baronie shall also live, provided alwaies that the sayd Richard Bertie shall not clayme by reason of any writt of summons to him directed to apere in parlement, any furder or larger estate in the sayd name and stile than before is expressed. And that by the Quenes majesties exprest commandment his order from henceforth is to take place in all like cases."

The precedents on which the claimant relied as proving, by custom, his right to bear the title were (as explained in his letter to Burghley), firstly, those taken from the history of other baronies; secondly, those taken from that of the Willoughby barony itself. These latter, on which special stress was laid (we have seen) in the above draft and in Bertie's argument before the Commissioners,[1] were:

(1) that on the death of Robert Lord Willoughby (25 July 1452), the title was immediately *used* by Richard Welles, who had married his only child Joan.

(2) that immediately on the death of the above Richard the title was *used* by Richard Hastings who had married their heiress, Joan. His object

[1] Collins, pp. 4, 5.

was to disprove the Crown's contention that its action, in the form of a writ of summons, was necessary, before the title could be rightly assumed.[1]

The weakness of his case was that it rested on evidence of *user* only. For the fact that a man is assigned a title on the court-rolls of his own manors can be no evidence of his right to bear it. In the case of Richard Welles, he was undoubtedly summoned to Parliament as "dominus Willughby" 26 May 1455, and appears to have been already sitting under that title in 1454, though his name is not found among the summonses to that Parliament (20 Jan 1452/3). In the case of Richard Hastings, he was never *(pace* Garter) summoned as Lord Willoughby, but only as Lord Welles, though he styled himself by preference, Lord Willoughby. To me this appears to imply that the Crown declined to recognise his assumption of that title.

Bertie then weakened his case by arguing that

> if Richard Welles and Richard Hastings had been by writ created, then should the dignity have descended to the heirs of Welles and Hastings, and not have reverted to the house of Willoughby, neither could Christopher Willoughby, the grandfather, nor William Lord Willoughby the father, to the Duchess, have used as they did (and may be proved by evidence and matter of record) the style of Lord Willoughby before they were called by writ to Parliament.
>
> Moreover it is plain that the said Richard Welles, Richard Hastings, Christopher, Lord Willoughby, and William, Lord Willoughby, were not created by writ,

[1] Garter, it appears, told the Commissioners "that he thought both Welles and Hastings used the style of Lord Willoughby, but not in right of their wives, but rather as being called by writ to Parliament." (*Ibid.*)

because they took their places after the antiquity of the baronies of Willoughby and Eresby.[1]

In the first place there were no "heirs" of the body of the two Richards in 1505, to inherit under their writs. And in the second neither Richard Hastings nor Christopher Willoughby ever received writs as Lord Willoughby, and the latter is recognised as a usurper, who wrongfully assumed the title.[2] His son William became heir to it in 1505, and was summoned as Lord Willoughby in 1509 (17 Oct.).

Apart from the question of attainder and its effect, which I have here left aside, the succession of William Willoughby to the barony, after the death of his cousin Joan in 1505, is the subject of a strange and serious error in "the Lords' Reports on the Dignity of a Peer." It is there[3] stated (after a discussion on the attainders of the Lords Welles) that

> The Dignity of Lord Willoughby, which had been inherited by Richard Welles from his mother, became (sic) in abeyance between William Willoughby, Sir Robert Dymock, and Sir Thomas Lawrence, and the abeyance was determined by the summons of William Willoughby.

In spite of this definite statement, it was the barony of Welles, not of Willoughby,[4] that thus fell into abeyance (according to the modern doc-

[1] *Ibid.* pp. 4-5.

[2] i.e. in his will. As he was never summoned he obviously cannot have taken (as here alleged) his seat with the precedence of the old barony.

[3] Fourth Report (Ed. 1829), p. 295.

[4] Cases of a double heirship being vested in one individual have sometimes led to similar errors. Compare my paper on "the surrender of the Isle of Wight" in *Geneal. Mag.* I. 4-5.

trine) and this alleged early instance of "determination" of an abeyance thus disappears.

I have now dealt with the two classes of precedents relied on by Bertie to prove his case, as stated by him in his letter of 14 April 1572,[1] together with what appears to be the "bill" of which it speaks. The latest case which the heralds could produce for him of a clear summons *jure uxoris* was that of the Earl of Derby's son and heir, who, having married Lord Strange's daughter and heiress, had been summoned as Lord Strange ninety years before (1482). There was, however, one later (though somewhat doubtful) case, namely that of Sir Charles Somerset, who, having married in 1492 the daughter and heiress of the Earl of Pembroke (Lord Herbert), was himself styled Lord Herbert on a Patent Roll of 1504 and was summoned as a baron by that style in 1509.[2]

Charles Somerset had issue by his wife, but in the next case which arose, that of Mr. Wimbish, there was no such issue. As this case has been loosely dated, by writers on peerage law, as "in the reign of Henry VIII," it may be well to explain that Mr. Wimbish's wife did not inherit from her brother Lord Tailboys till 1542, so that the date can be narrowed down to 1542-1547.

Its facts are known to us only from the recital of them in Richard Bertie's case,[3] but there is no reason to doubt them. King Henry VIII, we read, asked the judges "whether by law Mr. Wimbish

[1] p. 13 above.
[2] A creation by patent in 1506 has been alleged, but cannot be traced.
[3] They were repeated subsequently in the "Dacre of the South" claim.

ought to have the name of Lord Taylboys in the right of his wife or not."[1] The King eventually ruled "that neither Mr. Wimbish, nor none other from thenceforth should use the style of his wife's dignity, *but such as by courtesy of England hath also right to her possessions for term of his life.*"[2] This ruling was, naturally, understood to imply that those who, having issue by their wives, would enjoy for their lives their wives' lands, were entitled to assume their wives' peerage styles. The reader should observe, however, that this applies only to the user of the peerage style, and does not involve a right to receive a writ of summons.

It was within thirty years of this ruling that Richard Bertie was urging his right to be recognised as Lord Willoughby in right of his wife, by whom he had issue. His case, therefore, was a strong one, and, of the three Commissioners before whom it was argued, Lord Sussex is alleged to have said "that he thought the said Richard Bertye might use the style during the lives of his wife and child" etc.[3] The date of these proceedings can be ascertained from the statement that Bertie was to hear the Queen's decision on them at Kenilworth, to which she made her famous visit in August 1572.[4] Elizabeth, we read, was gracious,

[1] It is a singular fact (which seems to have escaped notice) that Henry VIII was alleged to have designated on his deathbed, "Sir—Wymbisshe" as one of those who were to be created barons. (*Acts of the Privy Council*, 1547-1550, p. 16).

[2] Collins, 11.

[3] Collins, 12. Lord Sussex's point is somewhat obscurely expressed, but what he seems to have meant was that he thought Bertie might exclude, for his life, his own son from the title, but not a collateral heir, if the succession should open to such heir.

[4] "The place appointed for attendance of the said Richard Bertie was Theobalds, the Lord Treasurer's house, for at that time Her Majesty was

but procrastinated after her wont; and nothing further was done in the matter. It is alleged that Bertie professed himself satisfied, on the ground that his case had been laid before the Queen,[1] but this seems scarcely consistent with his previous eagerness to claim the title for himself.

In any case, on the death of his wife the Duchess eight years later (19 Sept. 1580), the dignity was immediately claimed by their son Peregrine and—his case having been heard by the same three Commissioners and reported on to the Queen—his right was admitted Nov. 11, 1580, and he was summoned as Lord Willoughby two months later (Jan. 7).

Just as the ruling in the Wimbish case had restricted barony *jure uxoris* to those cases in which the husband held by "the courtesy of England," so did this admission and summons deny barony even to those who did so hold by the courtesy. Peregrine's summons in the lifetime of his father, who was tenant for life of the Willoughby *lands*, was thus a turning point in the history of the subject. The acceptance, however, of new developments in peerage law and practice has usually proved reluctant;[2] and, eight years later, Sir Thomas Fane was claiming the barony of Abergavenny on the same grounds as that of Willoughby

entering into her progress, but the time there served not. Then the said Richard Bertie was referred to Kenilworth Castle, and there, at the day of Her Majesty's removing, the said Richard standing by, the said Commissioners dealt with Her Majesty," &c. (Collins, p. 12).

[1] "Richard Bertie, having proceeded as far as he meant, held himself satisfied, for the cause why he desired hearing of his right and interest was especially to deliver Her Majesty from error, that she, by wrong information, had conceived that there was no such right," &c, &c. (Ibid.).

[2] As, for instance, with the long hesitation as to the doctrine that a writ and sitting constituted an hereditary barony.

had been claimed by Richard Bertie, while even later Sampson Lennard was similarly claiming that of Dacre and obtaining, in the next reign, a quasi-admission of his right.

Apart, however, from the legal question, another objection was raised to Bertie being summoned as Lord Willoughby to the House of Lords. It was urged that—of course in the sense of birth—he was " no gentleman. " We learn this interesting fact for the first time from a letter of his own addressed to his friend Sir William Cecil.

" My Lord of A. (as I am informed, more of his accustomed good nature than of my desert), told the Queen I was no gentleman, which, perhaps being otherwise unwilling, somewhat stayeth, but if that respect had stayed her ancestors in the time of Fitzalan, bailiff of London, my Lord should have lacked his Lordship now to embroil others. As I have no cause, so I am no wit ashamed of my parents, being free English, neither villains nor traitors. And If I would after the manner of the world bring forth old Abbey scrolls for matter of record, I am sure I can reach as far backward as Fitzalan. And if such scrolls be too old, yet I am not a gentleman of the first escutcheon ; the arms I give I received from my father, and they are the same which are mentioned in the scroll that he shewed to the heralds, and confirmed *(sic)* by Clarentius, the old man that was in King Henry the Eighth's time," Condemns himself for writing "these vayne bubbles. " But because Cecil is desirous to know part of his case, he is desirous that Cecil should know all."[1]

This letter needs some explanation. It is clear that " my Lord of A. " is the Earl of Arundel,

[1] Letter of 1 Sept. 1570 in Calendar of Lord Salisbury's MSS. (Historical MSS. Commission), I, 482-3.

who, both as a Fitzalan and as Earl of Arundel, deemed himself a leading representative of the old nobility, and had even aspired to the hand of the Queen herself. It is also, unfortunately, clear that Bertie was so ignorant as to suppose that the Earl's house was founded by Henry Fitz *Ailwin*, the well-known first mayor of London. He, therefore, retorts that the Earl's ancestor might never have been made a peer if the Crown had hesitated, as in his own case, on the ground of birth.

Jealousy of the new families seems to have been characteristic not only of the Earl of Arundel, but also of his Howard successors. It was Thomas (Howard), Earl of Arundel who, in 1621, when reminded in the House of Lords by the first Lord Spencer that his ancestors had plotted treason, haughtily replied that Spencer's ancestors "were then keeping of sheep." Indeed, when Richard Bertie, in his letter, observed that his parents were not "traitors," he may have intended a dark allusion to the Earl of Arundel's imprisonment, the year before, on suspicion of treason in the matter of the Duke of Norfolk and Mary Queen of Scots. Was it the old jealousy blazing forth anew when the heir of the Earls gave the lie to Richard Bertie's grandson in the House of Lords itself, and retorted to a blow from his staff by hurling an inkhorn in his face? [1] The similar proceedings of

[1] "Upon Saturday in the evening in a Committee in the Lords House the Lord Mowbray [i.e. the Earl of Arundel's son] gave the Earl of Lindsey, Lord High Chamberlain, the lie', whereupon the Earl of Lindsey struck him over the head with his white staff, and the other threw an inkhorn in his face." Letter of July 1641 from John Coke (Report on Coke MSS. II, 289).

our own time in some Continental Parliaments have ancient and distinguished precedent.

The above letter to Cecil, when explained, provides the key to a strange paragraph appended to Bertie's 'case' two years later.[1] Its wording is so vague that its meaning might well be missed ; but with this letter before us, that meaning is at once made clear.

Now resteth only one faint imagination to be answered ; some, without any rule or authority moving them thereunto, require degrees of proceeding in nobility, as in universities observed, being ignorant how some of obscure parentage have leapt at the first step into kingdoms and empires, and that God himself hath said that He, *a sterquilinio*, placed men of base degree with princes. It were injury to vertue and the prince's prerogative, if he might not directly place a worthy man in a worthy vocation. He that winneth the garland by common consent, is worthy to wear it ; if the prince or law enable a man to possess an earldom, why should any cavill at the stile, especially the law and custom freely yielding it, and the examples not rare in England ; as in the earldom of Arundel after the death of William Albinacke, and in the baronies of Bardolphe and Moreley, and divers others of fresh memory ; the same reason prevailing for the layman which serveth for the ecclesiastical person [who is] *no gentleman* otherwise than by virtue, yet by his bishoprick [is] immediately invested with the degree of a baron. And that the degree of knighthood should be first requisite, is a preposterous judgment, sith that it is a dignity which may be added to a marquis or duke. And [it is] therefore most congruable (howsoever it hath been otherwise used) that some sorts of men, [who] before [were] *no gentlemen*, may enjoy rather the dignity of a baron than the martial dignity of knighthood......... The conclusion

[1] It is printed on p. 21 of Collins' *Proceedings &c.*

therefore followeth that to deny to wise and virtuous men capacity of a noble see, or of a noble dignity lawfully purchased, or cast upon him, is to deny law, custom, reason and nature. [1]

It is clear from Bertie's letter to Cecil that this paragraph is intended as an answer to the personal objection to himself[2] as "no gentleman" [by birth], and therefore unfit to be a peer, and still more so to bear so noble a title as that of Lord Willoughby.[3] He even reverts to his former *tu quoque* as against the Earl of Arundel when he speaks of the devolution of that earldom "after the death of William Albinacke," meaning that it passed with a female to FitzAlan, whom he so strangely supposed to have been of plebeian stock.

Richard Bertie's statements as to his own birth raise the whole question of the origin of his house. It is significant that his wife the Duchess, when writing similarly to Cecil a few weeks before, had frankly admitted that her husband was "meanly born," even when pleading that the Queen might summon him as Lord Willoughby: [4] Bertie himself sets out in manly fashion, but then, after vague allusions to "scrolls," falls back upon his arms. Now these arms, it was true, had been granted to his father, but only twenty years before, when the writer himself was in his thirty-fourth year. The actual grant by Hawley, Clarencieux ("Clarentius")

[1] The italics and the words within parentheses are mine.

[2] Compare his expression in a letter to Cecil: "if there is any dislike of himself."

[3] Compare Serjeant Rolle's argument, p. 10, note 1 above.

[4] "It is to God to rule all, and by His good means [those] as meanly born as her husband have been advanced by prince's gifts to greater honour than they [i.e. she and her husband] challenge as their due." Letter of 29 July 1570. (Lord Salisbury's MSS., I, p. 478).

was made under Edw. VI., 10 July 1550, and is printed in "Five generations of a loyal house" (pp. 448-450) from "Glover's Collect." A. f. 41 in the College of Arms. The blazon is "sylver three faulcys of Mottons the bodys of tymber hedded armed horned asure upon the tymber a ryng of the same two above one."—in other words, three battering rams. It is important to observe that there is here no mention of the triple turreted broken castle, which the Berties have borne quarterly with the battering rams coat, and still more so to note that the grant is explicitly a *new* one—"devysed, ordeyned, gyven, and graunted," and not, as Richard Bertie represents it, a confirmation. This is the more noteworthy because, at this period, in cases where there was any evidence that a family had borne arms, the fact was duly recited. All that Hawley admits of Bertie is that he

> "is descended of an house undefamed and beinge at this present tyme Capitayne of Hurst Castell for the Kinges Matie and hath of long tyme used himself in feates of armes and goode works so that he is well worthy to be......... admitted (sic).[1]

Compare this with the language of the same Hawley in the cases which follow, and note the difference.

HAWLEY (CLARENCIEUX)

A. D. 1537. "John Greshame, Mersar... ys descended of a good howse undefamed *beryng armes* under the lawse."

[1] *Five Generations of a loyal house*, p. 449.

A. D. 1541. "John Bolney......... descendid of an olde and ancyent howse undefamed *of long tyme beryng armes.*"

A. D. 1543. "John Wade...... is descended of an antient old house undefamed *of long tyme beareing armes.*"[1]

It will be observed that in Bertie's case Hawley not only pointedly omits speaking of his house as an old one—restricting himself to the negative term "undefamed"—but treats it as never having borne arms and therefore in need of a coat.

This direct evidence at once knocks on the head the attribution to the family for several generations earlier, not only of the coat granted in 1550, but even of the broken castle subsequently quartered with that coat.[2]

We are not told how the broken tower came to be quartered with the coat granted in 1550, and as the matter is a mystery, I have gone into it thoroughly and can now clear it up.

In *Five Generations of a loyal house*, on the page immediately preceding that on which the grant is printed, there is given "the docquet of the Grant, as remaining in the MS. 2 H 5, p. 67 b..... in the College of Arms," certified by Sir Charles Young, then Garter King of Arms. The *blazon* in this docquet is in strict accordance with that in Hawley's Grant;[3] but the *drawing* annexed to the docquet, and there reproduced, is quite at variance with the blazon, for—

[1] *The Ancestor*, N° 8, pp. 126-7.

[2] *Five Generations of a loyal house*, pp. xxv-xxvii.

[3] But in the above book "thre fawlcys of mottons" is printed—"*the* fawlcys *or* mottons!"

(1) it shows only one, instead of three battering rams.

(2) it shows, quartered with that coat, another one with a fractured castle in the field.

The confusion is increased by another achievement, which is found on p. xxvii of *Five Generations*, and which, though it *purports* to be taken "from a copy of the docquet of the grant," shows *three* battering rams (instead of one) in the first and fourth quarters, "two above one."

There was nothing, therefore, to be done but to consult the actual docquet, which I was permitted to do by the present Garter King of Arms. It was then at once discovered that the puzzling drawing was a "*fake*" inserted by a later hand in the space left blank by the side of the docquet! This "fake" had been accepted without question, we have seen, by Garter Young; but the present Garter instantly observed that the ink was quite different.

It is now possible to clear up the whole matter. Reference to Glover's "Collectanea, A" shows that he visited Grimsthorpe, in 1582; that he there saw and transcribed the original grant by Hawley;[1] that he drew achievements of the family's arms from which he *excluded* the castle; and that he transcribed a document containing the *Latin* version of the fabulous narrative[2]. From that narrative is derived the tower fractured by the ram *(turrim arietatam)*,[3] which appears in the 2nd and 3rd

[1] It is still preserved there (see the Historical MSS. Commission's Report on Lord Ancaster's MSS.).

[2] For this narrative see below.

[3] In the French version "Jherosme" Bertie is alleged to have borne "Trois moutons belliques et ung chasteau abbatu." The object of adding the "castle" quarter seems to have been to suggest some feat with the ram.

quarters of the Bertie coat in the peerage books, and for which, we thus discover, there is no heraldic authority.[1]

Nevertheless, the quartered coat is engraved in "Burke's Peerage," both under "Abingdon" and "Lindsey," while under the latter the quarters charged with the "shattered castle" are actually described as the coat of Willoughby! The same absurd blunder is found under "Lindsey" in the *Armorial Families* of that Heraldic authority, Mr. Fox-Davies. And both works, of course, blazon the battering rams "barways," not, as in the grant by Hawley, "two above one." Shirley, working from *Five Generations*, goes further and accepts the drawing on the docquet as genuine.[2] Even as this goes to press, one reads, in Mr. Fox-Davies' so-called *Complete guide to Heraldry* (1909), that "fractured castles *(sic)* will be found in the shield of Willoughby quartered by Bertie" (p. 282), and one similarly finds the battering-rams blazoned as "fesswise in pale," (pp. 283, 400).

We shall have to recur to Hawley's grant, for the point is of importance to the pedigree: for the present one may hazard the suggestion that the case was parallel with Shakespeare's, and that the reason of Thomas Bertie seeking a grant in 1550 and not before may not have been unconnected with his son's desire to obtain the widowed Duchess for his wife and to qualify himself, with this in

[1] It appears to have been tentatively introduced under Queen Elizabeth. In Lans. MS. 205 fo. 72 the shields "set forth for Mr. Berty June 1579" and for Peregrine Berty in Dec. 1576 do not show the fractured tower coat, but two other shields show (1) Bertie, (2) "ye castell."

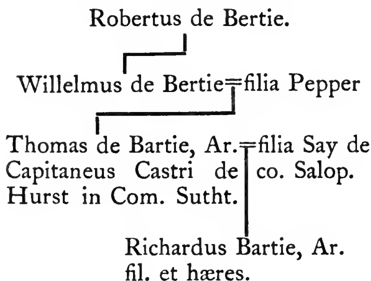
[2] *Noble and Gentle*, 3rd Ed.

view, as "not a gentleman of the first escutcheon."[1]

Even on the showing of the book written to exalt the family, the pedigree cannot be carried further than the father of Thomas Bertie who was granted the coat of arms in 1550, and of whose wife not even the Christian name is known.

The obscurity of the pedigree is proved by the fact that this first ancestor is represented, not as the father, but as the grandfather of Thomas Bertie, not only in the peerage books but even in the pedigree certified out of the College of Arms by Garter in 1843.[2]

That pedigree runs as follows :—



Now we know the date of the birth of Richard Bertie accurately enough. His admission at Oxford describes him as aged 16 about Christmas last past. He was admitted 17 Feb. "anno Domini Millesimo quingentesimo trecesimo tertio secundum computationem Ecclesiæ Anglicanæ."[3]

[1] The younger Bertie was already in her confidence at the time (*Five Gen.* p. 15). I shall recur to this practice of granting a coat to the father for the benefit of the son when I come to the Smiths of the 16th century.

[2] *Ibid.* pp. ix, 451. Garter took it from Vincent's "Baronagium," N° 20, pp. 22, 112.

[3] *Ibid.* 477

This has been taken to mean 17 Feb. 1533/4, with which the "Indicto septimo" which follows would agree. But the record is also dated as in the 10th year of Clement VII, which would make it a year earlier, and this (1532/3) is the date adopted by Mr. Boase in his *Registrum.*[1] The former interpretation would make Richard born about Christmas 1517, the latter about Christmas 1516.

Let us now turn to the will of the first ancestor Robert "Berty"—the "de Bertie" proceeds from the brain of a too obsequious herald—dated 4 Oct. 1501.[2] He distinctly states that both his sons, Thomas and William, are under age, and my point is that, this being so, William, the younger of the two, could not possibly be a *grand*father, as required by the heralds' pedigree, sixteen (still less, fifteen) years later. This is certain. On the other hand, his elder brother Thomas, who is omitted from the pedigree, may well have been the father of Richard Bertie, and this, it will be found, is the only solution consistent with the known facts.

The social position of the first ancestor, now shown to be the father of Thomas and grandfather of Richard Bertie is clearly established by his will. In the first place he asks to be buried in the churchyard, not in the church, a sure mark, at the time, of social inferiority; in the next he could only bequeath to his daughter £6. 13. 4. for a marriage portion, and to his younger son, when of age, £10 and "half my cotage gardyn and croft

[1] (Oxford Hist. Soc.) I, 188.

[2] *Five Generations*, pp. 464-7.

lying to the playn at Berghsted." His elder son was to have his messuage and land at Bersted, after his mother's death, but only half the house till then. The will specially mentions a barn as belonging to each half of the house, and this, I think, suffices to identify it with that messuage *with two barns (cum duobus orreis)* which, with its appurtenant lands, Richard and Thomas 'Bertye' passed by fine in 1546 for the sum of £60.[1] The lands consisted of thirty acres (of arable) three of meadow, ten of pasture, and three of wood,—an absolutely typical "yardland" *(virgata)* with its normal appurtenances, such as the small copyhold farmer, the successor, as Mr. Seebohm insists, of the villein tenant, held in the English village.[2] Last of all Robert wills that "my sonnes Thomas and William shal have my working toles such as be for macyns crafte,"[3] words which gave me the clue by which I shall identify the father of Richard Bertie. The testator was clearly a small yeoman who could also work as a mason, and his will is typical, for the time, of the class to which he belonged.

Starting from the sure ground of record evidence, we find Richard Bertie admitted to his Oxford College as "Ricardus *Bartewe*," his surname also appearing as *Barthewe* in the University registers.[4] The name of his father Thomas subsequently appears under both these forms in the Acts of the

[1] *Ibid.* pp. 469-470.
[2] *The English village community.*
[3] The authoress vainly notes on this that "gentlemen were not only adepts in the art, but frequently possessed tools and insignia of the craft, which they transmitted to their heirs" (*Five Generations*, p. 467).
[4] Boase *op. cit.*; Foster, *Alumni Oxonienses*; *Five Generations*, p. 447.

Privy Council, so that its use is well established. There is a somewhat contemptuous reference also in these Acts (1555) to Richard himself as "the Ladye Katherin, Duches Dowager of Suffolk, and *Bartue* her husband," while his father is styled Thomas 'Bartue' in the Hurst Castle accounts[1].

From Richard's admission entry we further learn that he had been born in *Hampshire.*[2] As he and his father are both represented to have been of Bersted in Kent, we seek to know why his father (Thomas) was living in Hampshire at that date, and to discover mention of him in that county.

We find it in what may seem, at first sight, an unlikely quarter. A roll of 1532-3, happily preserved among the records of the Dean and Chapter of Winchester, reveals to us "Thomas Bartewe" as the mason employed on the cathedral fabric with a yearly fee of 13s. 4d.[3] The staff of the clerk of the works *(custos operum)* consisted of "his workmen, his plumber, glazier, carpenter, mason, tiler," etc.,[4] and the fact that Thomas "Bartewe" was his mason reminds us at once of the clause in Robert Berty's will by which he left to his sons *Thomas* and William "my working toles such as be for macyns crafte."

Harrison, writing half a century later, praises "our skilful masons" and gives his opinion that "masonry did never better flourish in England than" in the time of Henry VIII. A great

[1] Dugdale styles the family 'Bartu' in his *Baronage* (II, 408-9).

[2] This is duly recognized in *Five Generations* (p. 1) and the *Dict. Nat. Biog.*

[3] *Obedientiary Rolls of St. Swithun's, Winchester* (Hampshire Record Soc.) pp. 107, 219, 222.

[4] *Ibid.* p. 56.

impetus was given to the building of important houses not only by the growing wealth and luxury of the age, but also by the dissolution of the monasteries and the erection of seats for their grantees in their place or out of their materials. Even in Harrison's time, however, the status of masons was still low, for he classes them at the bottom of his social scale as "the fourth and last sort of people in England, day-labourers..... and all artificers, as tailors, shoemakers, carpenters, brick-makers, masons etc.".. We should naturally, therefore, expect difficulty in tracing the career under Henry VIII of so obscure a person as was even a cathedral mason.

Some years, however, after the Winchester entry, we are given an interesting glimpse of him (though it might well escape notice) dealing as a practical mason with the windows and chimneys of the great house that was building for Wriothesley at Titchfield near Southampton out of the fabric of the abbey there, of which he was grantee. Among the State Papers is preserved a letter from John Crayford to Wriothesley (12 April 1538), reporting progress on the mansion, in which he says that he was "the rest of that day & this day conferring and advising with *bartyew* wyndowes & chymneys in the said north yle beneth & other places," and he adds in a postcript that "*bartyew*...... concludes that smoke shall not be avoyded by the chymneys of your chieffe lodgings if the steple stande," etc. [1]

[1] See Mr. St. John Hope's paper on *The making of Place House* in *Archæological Journal*, vol. lxiii, for details of the building.

This letter reads as if Wriothesley would know who "bartyew" was, which is of special interest in view of the evidence we shall come to in the following year, and also because we are told of his son Richard Bertie that "in early life he was attached to Wriothesley."[1] Wriothesley himself was a typical upstart of the days of Henry VIII, an attorney who had risen to wealth by the plunder of dissolved monasteries, the son, nephew and grandson of heralds, who had provided themselves with a false surname and a pedigree which Mr. Eyton has described as "a tissue of falsification and forgery." Of his uncle, Garter King of Arms, General Wrottesley writes that "for the forgery and falsification of documents this Thomas stands pre-eminent even amongst the Tudor heralds."[2]

Next year (1539), King Henry VIII resolved to erect, for coast defence, some blockhouses, the names of which are still familiar enough. Among these was one at Calshot Point on the Solent, to which, as to the others, were appointed a "master carpenter, bricklayer, and master mason," and its "master mason" was "Mr. Bert," evidently now a rising man.[3] For that this was Thomas "Bartewe" is shown by a letter of the same year (12 Sept. 1539) from the Earl of Southampton to Cromwell:—

"The barbican at Calshoris-point (i.e. Calshot Point) will be ready by Michaelmas, and to cover this the King will take the lead from Beauley,[4] for which Mr. Wriothesley must make a warrant which his grace will sign. The

[1] *Five Generations*, p. 1.
[2] *History of the family of Wrottesley* pp. 276-7.
[3] State Papers, Domestic.
[4] Beaulieu Abbey.

other point is the cost of the works there and at the Cowe in the Isle,[1] which by *Bartiue's* declaration will ask 1000 marks (£666.13.4.) more than the money he now has."[2]

This letter shows that "Bartewe" had risen to be what would now be termed a builder. Henceforth his work lay among the Solent "castles," for the *Acts of the Privy Council*, 2 February, 1545/6 show us letters written "for delyvery of XII fodders of lede[3] to thandes of Thomas Bartue or Rigewaye to be employed at the fortifications at Haselnorth." Four years later they record (18 March 1549/50) "a letter to Thomas Bartue to prepare vm[1]. quarters of lyme for Sir Hew Paulett for Jersey," where "bulwerkes" were being erected, and later in the same year (18 October 1550) is entered "a warrant to deliver to Thomas Bartue Captain of Hurst £17. 15. 0 for 230 quarters of lyme by him sent to Sir Hugh Powlet to Jersey, and more to him for 62 quarters of lyme, which maketh £23. 6. 3." A letter was again sent "to Mr. Bartue of Hurste" ordering lime to be sent to Jersey.

I have gone thus closely into the matter in order to identify "Thomas Bartewe," the Winchester cathedral mason of 1532/3, with the "Thomas Bartue, Captain of Hurst" who was still dealing in lime in 1550, and thus to show for the first time who the "Thomas Bertie of Berested in the

[1] i.e. Cowes (where two castles were erected).

[2] *Calendar* of Henry VIII papers, from a letter in the British Museum (Cott. MS. Titus B. i, 396), printed by Ellis (2nd Series, ii, 86). The name is printed Bartine in both cases, but I have examined the MS., and it can be read "Bartiue."

[3] From dissolved religious houses.

countie of Kent[1]........ Capitayne of Hurst Castell," who received a grant of arms in July, 1550, really was. That according to the grant he had "of longe tyme used himself in feates of armes and good works" is an example, I fear, of that practice by which, in Elizabethan days (according to Harrison), when a man could afford to "bear the port, charge, and countenance of a gentleman, he shall for money have a coat and arms bestowed upon him by heralds[2] (who in the charter of the same do of custom pretend antiquity and service, and many gay things)."

Now we know why Richard Bertie was spoken of as "no gentleman," and why his wife admitted that he was "meanly born." Greatly to his credit, he had taken advantage, like so many distinguished churchmen, of the system that opened the Universities to the sons of relatively poor men and rose by his fine scholarship to become a fellow of his College ("as a Hampshire man"),[3] even as his father by his own efforts raised himself in the social scale. That the Dowager Duchess should marry one so far her inferior in rank was no isolated phenomenon: her step-daughter, also Duchess of Suffolk, but a far greater lady—for her mother was sister of Henry VIII and widow of Louis XII of France—had chosen for her second

[1] Although he is so described in the grant, it is clear that Hampshire was his home. In the Probate Registry at Winchester there is preserved the inventory of the goods of "Thomas Bartue," late Captain of Hurst castle, with administration of June 5 to his relict, *Alice* "Bartue" annexed. His goods and chattels at Hurst were valued at £38.8.10 and at Winchester (where he seems to have had a house also) at £3.12.0. These facts are not mentioned in *Five Generations of a loyal house.*

[2] What would poor Mr. Fox-Davies or Mr. W.P.W. Phillimore say to this candour?

[3] *Five Generations*, p. 1.

husband Adrian Stokes, "apparently one of the gentlemen of her household,"[1] a match deemed by some to have impaired her own nobility;[2] and this duchess's daughter, Lady Mary Grey (sister to Lady Jane Grey), made so deplorable a marriage with a "serjeant porter at Court," that he was sent to the Fleet Prison, and she was placed under restraint, "sad and ashamed of her fault."[3]

When Richard Bertie, in or about the year 1552, became the husband of the Duchess of Suffolk, an heiress and a baroness in her own right, the social discrepancy must have caused comment in an age when, as Burghley himself found, uncharitable things were said of the grandfathers of rising men. Like the Berties, the Fanes had sprung from a small Kentish yeoman, but at a rather earlier date; and though they had a longer pedigree at their back when the Nevill match connected them with the peerage (1574), the sequel may be told in Mr. Barron's words:—

"To the Elizabethan mind the match of Fane and Nevill had a certain scandal of inequality; but about this time appeared a document which should somewhat redress the balance of rank. This was the Fane pedigree as set forth and prepared by the heralds of the realm. Of this pedigree remain rolls of ancestry beautiful with illuminated shields, and attested by the signatures of officers of arms "tracing the pedigree" in triumph to its source in Howel ap Vane, a nobleman who flourished "long ante-

[1] *Complete Peerage.*

[2] Bertie vigorously impugned this view in the course of his case:—"Justice Brooke in his abridgement reciteth an opinion of a mad judge in an uneven time, and in the heat of indignation against one Mr. Stokes, borrowed from the Roman laws, 'quod mulier nobilis nubens viro ignobili desinit esse nobilis.' And therefore enforceth that a duchess or countess marrying an esquire or gentleman loseth her name and dignity" (Collins, p. 18).

[3] *Five Generations*, pp. 40-41.

cedently to the Conquest," as the peerages even yet remind us."[1]

It was also at "about this time" that there was concocted for the house of Bertie a pedigree by the side of which all other pedigrees would pale, a tale that gladdened its descendants' hearts even in Victorian days till Freeman, furious at its falsehood, arose and smote it in his wrath.

It was while Bertie was hoping to be summoned in his wife's barony of Willoughby that, in the golden age of heraldic fiction, there was produced for him a pedigree based upon a document which, unfortunately, is known to us only from a transcript made at the time (1573)[2] for the purpose. In "Five Generations of a Loyal House" this precious record meets us not only in a French which, as Mr. Barron would say, is that of an Elizabethan Wardour Street, but in Latin, and is even given in facsimile. A Lansdowne MS. is responsible for the French version, and Glover's Collections in the College of Arms,[3] for the Latin one. The origin of the family is thus stated in these two versions:—

ces ancestres et predecesseurs ont iste franck Barons en Bertieland qui est es parties du Prussie. Lesquelles ont assali cest Isle ensemble les Saxonnois.[4]

sui majores liberi Barones fuerunt in Bertiland quæ est in finibus Prussiae, et insulam hanc cum Saxonibus invaserunt.[5]

From the fifth Century this history passes

[1] *Northamptonshire Families*, p. 84.
[2] *Five Generations*, pp. xi, xvii. See also Lans. MS. 205, fo. 72.
[3] Certified by C.G. Young, Garter (*Ibid.* p. 446).
[4] *Ibid.* p. xix.
[5] *Ibid.* p. 444.

straightway to the close of the tenth, about which time "ung nomme Lupoldus (!) de Bertie fut connestable du chasteau de Douure." I may venture perhaps to quote the verse in which the bard of the family thus celebrates in song the office held by her (?) ancestor.

> "He happened at the time to hold
> A place of trust and power,
> As Constable and Warden bold
> Of Dover's ancient tower."[1]

"A trainband captain eke was he"—we find ourselves tempted to proceed, but suddenly remember that "Dover's tower," though far more ancient than the Berties, was not nearly so old as that Æthelred under whom "Lupoldus" served.

Why pursue the anachronisms? "Ce Lupoldus plaidoya longuement avec les moynes Augustins de Canterberie."

> "In those dark times dispute arose
> On lands my fathers swayed,
> And Austin's monks they dared oppose
> And holy tithes evade."[2]

"Lupoldus," however, was a worthy sire for that "Burbachius de Bertie" whose wondrous name was surely suggested by that of Thomas Burbage, executor to Robert Berty in 1501.

But now an anxious time was approaching for the Bertie pedigree. Nearer and nearer drew the dreadful test of Domesday. "Lupoldus," it seems, had been seated at "Bertiesteit," the home, as Bersted, of his far-off descendants; yet Domesday

[1] *Five Generations*, p. xliv.
[2] *Ibid.* p. xliii.

knows nothing of any Bertie lords. At all hazards it was necessary to account for their absence from the record. A friendly hint from the pedigree's begetter, and "Burbachius" fled to France! It was not till the middle of the twelfth century that the family ventured back.

Thenceforth the pedigree is continuous, the French document, followed by the heralds, placing at its head "ung Philippe de Bertie de la mesne *(sic)* famille," who returned to England with Henry II. in 1154 and "recouvert son patrimonie en Bertiesteit" from that prince for his valour in battle. But the only recorded incident in the history of the family is a certain regrettable episode in the life of "Jherosme" de Bertie who flourished at "Bertiesteit" under Henry V. Taunted by one of the Canterbury monks, not with his amazing name, but with his ancestor's conduct to those monks four centuries before, the haughty descendant of "Lupoldus" would have slain the rash preacher "se il ne eust este empesche de ceulx qui estoient presents." For this he had to pay right heavily; and yet the penitent, over and above, built a new aisle ('coste') at his own expense to the monks' church ('ce temple') and was buried in the chapel, on a column of which were placed his arms, "scavoir est Trois moutons belliques et ung chasteau abbattu."

In Lady Georgina Bertie's book we are even given an imaginary sketch of the column bearing these arms (p. xvi)—arms of which even the Bertie coat was first granted by Hawley more than a century later. It is admitted however, that

"the chapel and monastery so richly endowed by him are no longer to be traced (being probably swept away, with many others, by the rude spoilers of Henry the Eighth's reign)."[1]

Now the "Monastere de Canterberie" could only mean either St. Augustine's, Canterbury, or Canterbury Cathedral itself. The author of this precious document appears to have had in mind the former, and the history of that church knows nothing of "Jherosme," of his aisle, or of his arms.

The reader will doubtless have now discovered that the whole of this precious document is a clumsy concoction like that which was forged, in a similar jargon of Old English, to prove that the Essex Smiths were Caringtons,[2] or that which was similarly forged in French to provide the Cecils with pedigree and arms;[3] and which similarly dates from the great age of Tudor heraldic fiction. Yet this must have been the record on which Richard Bertie relied to prove that his own house was as ancient as that of FitzAlan and was that alone on which was based the pedigree from "Philippus Bertie oriundus a Leopoldo de Bertie" down to "Jeronimus de Bertie" supplied by Garter out of Heralds' College in 1843.[4] Both document and pedigree were strenuously upheld in "Five Generations of a Loyal House," and the latter appeared year after year as genuine in "Burke's

[1] *Ibid.* p. xxxv.

[2] See the paper on 'the great Carington imposture.'

[3] See Mr. Barron's remarks on it in *Northamptonshire Families* (p. 21). It made "David Cecile" son of "Guillaume Cecile" of Frasne by "une femme de la maison très cavalière de Beaurepair."

[4] *Op. cit.* p. 451. Jerome is connected with the real ancestor, the testator of 1501, by placing another "Robertus de Bertie" between them (pp. ix, xxv, 451).

Peerage" till, in 1870, Freeman denounced it thus:

Can there be a wilder fable than this? Yes; there is one a good deal wilder, which Sir Bernard Burke repeats without a shadow of doubt in the pedigree of Bertie Earl of Lindsey. This astonishing house, whose name 'in olden deeds' seems to be spelled in many ways as is also the case 'in olden deeds' with the name of Smith, Brown or any other......... "first landed in England in company with the Saxons." Mark the dignity of the race. The Berties, it would seem, were altogether on a level with their companions the Saxons, and they must have quite overshadowed the Angles and Jutes..... Unhappily however, from the fifth century to the eleventh we have no mention of this remarkable stock..... In the eleventh century, however, the Prussian stock put forth a remarkable shoot in the form of Leopold Bertie. The student of nomenclature might amuse himself by the question whether Leopold Bertie or Bill Snooks would be the more impossible forefather at the time...... On the whole, this is probably the most monstrous of all our fictions.[1]

Three years earlier (1874), Mr. G.T. Clark had contributed to the *Archaeological Journal*[2] a paper with the high sounding title "Charters of the Berties of Bertiested or Bersted." In it he wrote that—

"The ancestry of Richard Bertie has been thrown into doubt by the putting forth by the heralds of a pedigree of thirteen generations from a certain Leopold Bertie, of Bertiesland in Prussia, and Constable of Dover Castle in the reign of King Æthelred, a most mythical personage, and at best an anachronism. Such fictions were found in high places under the house of Tudor, and their natural

[1] "Pedigrees and Pedigree makers" in *Contemporary Review*, 1877, pp. 29-31.
[2] Vol. xxxi, pp. 284-288.

effect, when shown to be without proof, was to cause disbelief even in the true pedigrees, where such existed. The Berties thus suffered, and it is but recently that their true position as landowners and gentry of Kent from an early period has been recognised by the highest authority in such matters, and they have found a place in the Libro d'Oro of Mr. Shirley."

A sadly careless and inaccurate archæologist, Mr. Clark, while thus rejecting the "fiction" of the heralds' pedigree, actually heads his article "Bertiested or Bersted," though Bersted was never "Bertiested" save in the riotous fancy of those very heralds who wished thereby to give a fictitious antiquity to the Berties. Moreover, he coolly annexed Walter "de Berstede," sheriff of Kent under Edward I, as bearing "the name of Bertie" in one of its "various forms," though the two names, of course, were wholly distinct. Lastly, his brief remarks contained the further assertion that—

> The grant of arms to the family, 10 Jan. 4 Henry VI *(sic)*, is to the Captain of Hurst Castle, and bears three battering rams quartering *(sic)* with a fractured castle, evidently allusive to the office of the grantee.

As we have seen, the grant was made 10 *July* in the fourth year of *Edward* VI, and the battering rams coat then granted did *not* contain the quartering with the "fractured castle."

And the so-called "charters of the Berties" prove to be only three deeds of no importance, which had been duly noted by Lady Georgina Bertie as seen by Larking among "the Thurnham charters" in the possession of Sir Edward Dering

at Surrenden Dering.[1] Only one of them is granted by a Bertie, namely that by which Richard Bertegh grants "a piece of land" called "Helde" in Thornham, 14 Hen. IV.

Lastly, as to Mr. Evelyn Shirley, "the highest authority in such matters," it is the case that in his 3rd edition (1866) he did admit the Berties within the portals of his Libro d'Oro, writing as follows :—

"The ancient extraction of the Berties from Berstead in the county of Kent is proved by the Thurnham Charters in the possession of Sir Edward Dering and by various public records of undoubted authority ; and although the exact line of pedigree is by no means clear, there appears to be no reason to doubt the descent of this "undefamed house" from John or *(sic)* Bartholomew de Berteghe who were living in the 35th. of Edward I.

But in this same edition Mr. Shirley again insisted that he intended to include "those only who were established as *county families* inheriting arms from their ancestors at that period" ("the beginning of the 16th century"). And I have proved to demonstration that "at that period" the Berties were neither a county family nor in possession of arms (still less of hereditary arms).[2]

"Burke's Peerage," though it has now dropped that pedigree on which Mr. Freeman poured the vials of his scorn, characteristically persists in making Robert Bertie, now the earliest ancestor, "Lord of Bersted" on the authority of a MS. containing the bogus story, although the statement

[1] *Five Generations*, p. 458.

[2] Mr. Shirley's statements were avowedly derived from *Five Generations of a loyal house*, and they show how careless he was in his acceptance of authorities.

is at once disproved by the known history of the manor.

Robert Bertie, Lord of Bersted (see Rawlinson's MS. Bodleian B 73) had a son Robert, who lived at Bersted (will proved at Canterbury, dated 17th year of Henry VII), and by Marion his wife had a son William, who was father, by Elizabeth Pepper his wife, of Thomas Bertie, who...... d. in 1555, leaving...... two sons, of whom the eldest Richard Bertie with his brother Thomas, in 1546, suffered a recovery of lands in Bersted and Maidstone (*see* fines, Chapter House, Westminster).

I have shown that this pedigree is chronologically impossible.[1] We learn from it, however, that Somerset Herald, editor of the volume before me (1899), must suppose that those precious documents, the Fines, are kept at Westminster, in the Chapter House. Let us hope that such weird beliefs on the subject of our public records are not extensively held at Heralds' College.

And yet, though the Berties were not, as alleged, lords of Bersted, and still less gave their name to it,[2] their surname undoubtedly appears at an early date in the neighbourhood, where they may, like other yeoman families, have been of some antiquity. In the early part of the 14th century it is found as " de Berteghe " and subsequently as " Berteghe " and "Berteye." The inference is that the surname, like so many others, was derived from some obscure locality of which the name has now vanished.

[1] See p. 34 above.

[2] Lady Georgina Bertie was severe on Sir Egerton Brydges, who "attempts to refute the derivation of the name of Bersted, by observing that people never gave names to places. The 'smile,' as he calls it, in speaking derisively of Collins' labours, recoils upon himself" (p. xxxv). Brydges, however, was in this case right, and moreover the early form of Bersted was not " Bertiesteit," but " Berghestede," as the evidence in her own volume (p. 459) proves. It is "Berghested" in 1316 and "Berghestede" in 1346 (*Feudal Aids* III, 16, 40).

What, if any, connexion there was between these early Berteyes and the Robert living under Henry VII we do not know.

In any case the rise of Robert's heirs was singularly rapid. The son of the cathedral mason married a Duchess ; the grandson sat among the peers of the realm as the holder of a great feudal barony ; the great-grandson received an earldom, and established his right to the ancient office of Great Chamberlain of England. Successive marriages with a Willoughby and a Vere had connected the Berties with the old nobility and had brought them wealth and honours. *Tu felix Austria, nube!* It is needless to name a modern family which similarly owes its social rise to two successive marriages, for it would probably be guessed.

Which reminds one that, in the peerage as now constituted, the Berties themselves, holders of earldoms created in Stuart days (1626 and 1682), must be ranked among the older nobility, though it was strange to find, the other day, Lord Abingdon described as "the head of one of the oldest Roman Catholic families' houses in England."[1] For Lord Lindsey is the head of the Berties, nor could they possibly be styled an old Roman Catholic house. Richard, their founder, "was decidedly attached to the Reformed Church," while his wife "had distinguished herself by her zeal for the Reformation;"[2] and their son Peregrine, as Lord Willoughby, solemnly swore to the States General in 1585 to uphold "la vraye religion Christienne *comme elle*

[1] *Daily Telegraph*, 10 August 1908.
[2] *Five Generations*, pp. 1, 14.

est a présent exercée tant en Angleterre qu'en les Pays Bas,"[1] contemporary evidence on the identity of the Anglican with the Dutch religion, which is enough to make Lord Halifax or Mr. Athelstan Riley aghast.

The Berties attained, moreover, a higher dignity than an earldom. A Marquisate (1706), followed by the Dukedom of Ancaster, was bestowed on the fourth Earl of Lindsey, though these higher dignities became extinct in 1809. The Great Chamberlainship of England had already passed from the house on the death of the fourth Duke thirty years before. The event is thus alluded to in a characteristic letter from Horace Walpole to Sir Horace Mann.

"The Duke of Ancaster is dead of a scarlet fever contracted by drinking and rioting, at two and twenty...... Fortune seems to have removed him to complete her magnificent bounties to one family. Do you remember old Peter Burrell, who was attached to my father? His eldest grand-daughter is married to a Mr. Bennet, a man of large estate; the second to Lord Algernon Percy; the third to Lord Percy; and the youngest one, the only one at all pretty, to Duke Hamilton. Lady Priscilla Elizabeth Bertie, eldest sister of the Duke of Ancaster, fell in love with their brother, and would marry him, not at all at his desire; but her father, the Duke of Ancaster, had entailed his whole estate on his two daughters after his son, to the total disinherison of his brother Lord Brownlowe, the present Duke;—and the grandson of Peter Burrell, a broken merchant, is husband of the Lady Great Chamberlain of England with a Barony and half the Ancaster estate. Old Madam Peter is living to behold all this deluge of wealth and honours on her race. The

[1] *Ibid.* p. 150.

Duchesses of Ancaster have not been less singular. The three last were never sober. The present Duchess Dowager was natural daughter of Panton, a disreputable horse-jockey of Newmarket; and the new Duchess was some lady's woman, or young lady's governess. Fortune was in her most jocular mood when she made all these matches or had a mind to torment the Herald's office."[1]

Contemporary statements such as this are of interest always for the light they throw on the status of a family at the time, but the writer's words might convey undue depreciation of the Burrells. The 'broken merchant' was, no doubt, a city man, whose son was born in Leadenhall Street, and educated, like himself, at Merchant Taylors' School; but he sat in several Parliaments, as did his son after him, and was High Sheriff of Kent in 1734. His father, moreover, was the 9th son of Walter Burrell of Cuckfield, where the family had been established since the days of Henry VIII and had held the manor of Holmsted since 1605,[2] though the "white marble tablet" in Cuckfield church, recording their earlier ancestry is suspected by its careful incumbent to be no older than "circ. 1780" and to contain assertions which await proof.[3]

But the rise of the Burrell fortunes was sudden enough, clearly, to make no ordinary impression. Wraxall dwells on it at great length[4] telling us how it all began with a chance meeting, in the South of France, of Lord Algernon Percy with

[1] Letter of 9 July 1779.

[2] See the interesting history of the family by Canon Cooper in *Sussex Archæological Collections*, vol. xliii.

[3] *Ibid.* The arms of the Sussex Burrells are totally distinct from those of the families from whom it derived them.

[4] *Posthumous Memoirs*, I, 18-22.

one of Mr. Burrell's daughters, in 1774, and how—

The only son, a young man (it must be owned, for I knew him well) of the most graceful person and the most engaging manners, having captivated the affections of Lady Elizabeth Bertie, eldest daughter of Peregrine, Duke of Ancaster, she married him.

On her brother's death, he adds, she brought him the Willoughby d'Eresby barony with "great part of the Ancaster estates."

Nor did this peerage constitute her only dowry ; with it she likewise inherited, during her life, the high feudal office of Lord Great Chamberlain of England, which has been ever since executed by her husband or her son. Finally, Mr. Burrell himself, after being first knighted, was raised to the rank of a British peer in 1796 by the title of Lord Gwydir.

In no private family, within my remembrance, has that prosperous chain of events which we denominate fortune, appeared to be so conspicuously displayed, or so strangely exemplified as in the case before us. The peerage of the Burrells was not derived from any of the obvious sources that almost exclusively and invariably conduct, among us, to that eminence.

It did not flow from favouritism, like the dignities attained by Carr and Villiers under James the First [1]...... As little was it produced by female charms, such as first raised the Churchills in 1685,[2] the Hobarts under George the Second,[3] and the Conynghams at a very recent period [4]......

[1] Successive personal favourites of the King, of whom the first was made Earl of Somerset, and the second Duke of Buckingham.

[2] Arabella Churchill was mistress to James II, who raised her brother (the future Duke of Marlborough) to the Peerage.

[3] John Hobart (afterwards Earl of Buckinghamshire) "is supposed to have owed his peerage [in 1728] to the influence of his sister Henrietta.... said to have been mistress to George II, when Electoral Prince." *(Complete Peerage).*

[4] A marquessate and three other peerage dignities were bestowed in 1816 and 1821 on Lord Conyngham, whose wife "was well-known as a Court favourite of George IV." *(Ibid).*

Mr. Burrell...... possessed no such overwhelming borough interest, or landed property, as could enable him at a propitious juncture, like Sir James Lowther, to dictate his pleasure to ministers and to kings. The patrimonial inheritance of the Burrells was composed of a very small estate situate at Beckenham in Kent. In his figure, address, and advantages of person, accompanied with great elegance of deportment, might be said to consist the foundations of his elevation... As little did his three sisters owe their elevation to extraordinary beauty...... Never were any women, in fact, less endowed with uncommon attractions of external form than the three sisters just enumerated.

Once again, so recently as 1870, the death of a brother threw into abeyance between his two sisters the ancient barony with the share of the Burrells in "one of the greatest hereditary offices of the English monarchy."[1] Thus it was that by the irony of fate, that share came to be divided between a house of mercantile origin, descended from a Chesterfield alderman, and that which was founded by a Nottingham mercer who bore the name of Smith.

[1] Wraxall, who so describes the office of Lord Great Chamberlain, seems to have imagined, like Walpole, that it passed, of right, to the elder sister, Peter Burrell's wife, although it was decided by the House of Lords in 1781 that it descended to both the sisters, a decision which has been since upheld.

THE BARONY OF DELAWARR.[1]

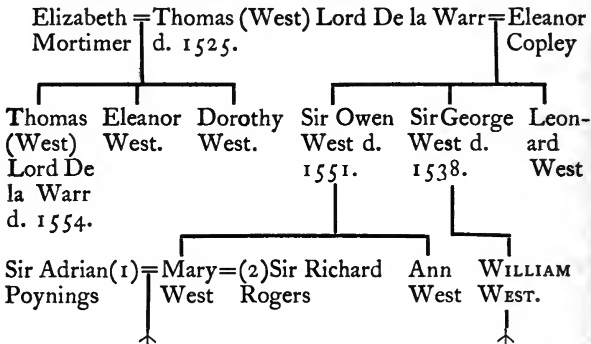
Descent of the barony in the 16th century.—Crime and exclusion for life of William West.—Exclusion of Sir Owen West's heirs.—The old barony confirmed to William West's son.—Proof that William West had a new creation by patent.—Bearing of this on Peerage law.—The heirship to the barony.

Known to us partly from Coke's Reports and partly from Dugdale's 'Baronage,' the case of the Delawarr barony in the 16th century is among the strangest in the Peerage. Though one of its most perplexing features remains as yet obscure, it is possible to correct on another point the version now accepted. And as this has a somewhat important bearing on the growth of peerage law, the task is worth doing.

The fullest modern account of the case is that given by Mr. Pike in his *Constitutional History of the House of Lords* (pp. 119-129), where it is claimed as "in many ways a landmark in the history of the peerage." But the two special points that we have to consider are: (1) how William West came to be heir to the barony, to the exclusion of his uncle's issue; (2) how and when he became Lord Delawarr by a new

[1] The *De* in this name and style is a late addition and as wholly intrusive as in the Irish 'De La Poer' (properly 'Le Poer'). Save for a solitary summons (of military service) to Thomas 'de' la Warr in 1344, the 'De' was not added before the reign of Edward III. The family, whose original surname was La (or Le) Warre (or Werre), gave name to Wickwar(r) in Gloucestershire, and some of them settled in Dublin, when its connection with Bristol was close, in the 12th century. The American State of Delaware also derives its name from them (through the title).

creation. A short pedigree is indispensable for the comprehension of the case :



The pedigree shows that on the death of Thomas, Lord De la Warr, in 1554,[1] the family estates (which were considerable) would have passed to his sisters of the whole blood as his heirs, had it not been that they were entailed on his brothers of the half blood in tail male. But the narrative given by Mr. Pike is inconsistent (he failed to observe) with the dates given by himself. This confusion is traceable, through Collins, to Dugdale, who cites the Rolls of Parliament of 2 Edw. VI for the following story.

This Thomas, Lord la Warr, having no issue of his body took William, his brother's son *(who stood his next heir)*[2] and brought him up in his own house ; but he being not

[1] It is thus referred to in Machyn's *Diary*, p. 71 (1554). "The x day of October was bered the good lord De la Warr in Sussex, with standard, banar of armes, banar-roll, (coat) armur, target, sword, elmet, with harolds of armes ; then came the corsse with iiij baners borne about hym. (He) was the best howssekeper in Sussex in thes days, and the mone (was greater) for ym, for he ded withowt essue."

[2] The italics are mine.

content to stay till his uncle's natural death, prepared poyson to despatch him quickly. Which being discovered, so highly incensed the good old man that, in 2 Edw. VI. upon complaint thereof in Parliament, he procured a special Act to attaint him, so that he might not be capable of succeeding him in his Lands or Honour.[1]

The strange thing, however, is that no such Act is now recorded on the Parliament Roll, as Mr. Pike observes, a fact which I have carefully verified. But the Lords' Journals record among the "Acts passed in the 3rd session of the Parliament begun 4th Nov. 3rd Edw. VI (1549) and continued till 1st Feb., 4th Edw. VI. (1550) "An Act for the disinheriting of William West during his life only."[2]

This proves that the alleged attempt cannot have taken place later than 1549.

Now the story told by Mr. Pike is that—

After the death of George in 1538, and of Owen in 1551, George's son William became the heir in tail male according to the terms of the settlement.

William being then a very young man and being anxious to expedite his succession to the inheritance, mixed some poison, etc.

If he did this not later than 1549, he cannot, it will be seen, have been heir to his uncle, as alleged, at the time. That heir was then Sir Owen West, who did not die till the year 1551;[3] and it was he, therefore, not William, who would have reaped the benefit of the crime.

This is no carping criticism; it seems to bear on

[1] *Baronage*, ii, p. 141.
[2] *Lords' Journals* i, p. 398 (the reference given by Mr. Pike).
[3] Between 17th July and 30th October.

the difficult question of why the issue of Sir Owen was passed over in the succession to the barony, if his nephew William was treated as the heir to his own exclusion. On the other hand, it is clear that the family estates were duly entailed on Sir Owen before William and his issue,[1] so that he cannot have been illegitimate or otherwise incapacitated from succeeding to the dignity. The first difficulty, therefore, unexplained is why William should have tried to poison his uncle Thomas when it would only have opened the succession to his uncle Sir Owen, not to himself. The second difficulty is that caused by the exclusion of Sir Owen's issue from succession to the peerage. This has greatly puzzled writers on peerage history, and has led them to suggest with some confidence that the barony might yet be claimed by his heirs.[2] As a matter of fact Courthope states that—

> Sir Adrian Poynings considered that his issue had, in right of their mother, a right to the barony, and in the 9th Eliz., 1567, a case was prepared in which that claim was urged; but the heralds of that day, upon what ground it is impossible now to say, were of a different opinion.[3]

It is greatly to be hoped that something more may be found in those MSS. at the College of Arms on which Courthope worked, and the mystery cleared up.

Mr. Pike definitely holds that "according to more recent doctrines" (*i.e.* those in accordance

[1] See, for instance, the Inquisition on the death of Lord De la Warr in 1554.
[2] See, for instance, the remarks of Sir Harris Nicolas in *Retrospective Review*, 2nd Series ii, p. 300, and those in *The Complete Peerage*, iii, pp. 48-9.
[3] *Historic Peerage*, p. 150.

with which the House now administers the law) the barony fell into abeyance in 1554, and no heir male had any right to it. And he makes the tentative suggestion[1] that the judges, in 1597, may have been influenced by the doctrine of barony by tenure, the heir male being in possession of the family estates. To me also this solution had occurred as possible ; but its difficulty is that, in the Abergavenny case, the judges, about the same time, gave their decided opinion in favour of Lady Fane, as heir general, although Edward Nevill's possession of Abergavenny afforded a much stronger case for barony by tenure than any lands possessed by the heir male of the Wests.

It is anticipating somewhat to speak of the year 1597, the date of "Lord Delawarr's case" reported by Coke, who seems to have been himself his counsel. The case had arisen in this way. William, the "young man in a hurry," had been disinherited for life, by the above private Act, wholly as to the title and partially as to the lands. As to these, however, his uncle had not been too harsh with him. He was to have the enjoyment of the chief family seat, Offington in Broadwater (Sussex), together with Ewhurst Park and a house in town. He even seems to have been popularly regarded as 'Lord De la Warr,' though when he raised the question under Mary (1556) by claiming to be tried as a peer his claim was rejected.[2]

[1] *Op. cit.* p. 126.

[2] See extract from *Wriothesley's Chronicle* printed below, in the paper on 'The muddle of the law.' His doubtful status is also shown by this extract from Machyn's *Diary*, p. 109. —

1556. "The last day of Juin was led from the Towre unto Yeld-halle

Passing over his attainder and subsequent restoration in blood, we have the fact that, according to Dugdale, "he obtained a new creation to the title of Lord la Warre," [1] of which I have much to say. When he was succeeded by his son Thomas in 1595, the latter claimed to be entitled to the old barony (suspended during his father's life) as well as to the new barony. Or, to put it in another way, he claimed the precedence of the old dignity. The point was referred by the House to the judges, and this led to the 'case' reported by Coke.

One of the two objections raised to the claim was that as William West had accepted a new creation, the barony so created had descended to his son Thomas, who could not waive it. But the judges, says Coke, decided that Thomas was entitled to the old dignity as well as the new, and he was accordingly allowed the precedence of his ancestors.

Now the point of interest here is the nature of the "new" barony conferred on William West. Mr. Pike writes—

> Nine years after his restitution in blood, William was summoned to Parliament (1572) as Lord De La Warr. This was regarded as a new creation, and William took his seat in the House of Lords as a puisne Baron. As, however, the designation of De La Warr was accorded him, it must certainly have been supposed that no right to it existed anywhere if not in him and his heirs.
>
> ......it is clear from subsequent events that the summons...... was held to be the creation of a heritable

Wylliam West sqwyre odur-wyse callyd lord la Ware, and cast of he(gh) treson, to be drane and quartered."

[1] *Baronage*, ii, p. 141.

dignity. It is clear also that this was generally considered good law in the time of Elizabeth, etc......

And on the decision in 1597 he comments thus :—

It is perfectly clear that the summons of William following by a sitting in Parliament was held to create an hereditary peerage. It is perhaps the first case in which a mere summons to Parliament, followed by a sitting, was held to confer an hereditary dignity; and it is closely associated with Sir Edward Coke, whose statements concerning the law on this subject appear to have been the ground of subsequent decisions.
The tree of the later law on barony by writ was now planted and destined to bear fruit in later reigns.[1]

No one had dwelt with such insistence on this feature of the case, but Lord Redesdale, in the third *Report on the Dignity of a Peer* (pp. 32-3) had similarly drawn the deduction that Lord De la Warr's case "may have been considered as having given sanction to the opinion in the case of Clifton"[2] that a writ followed by a sitting created an hereditary dignity. His words are :

In this case it is evident that the Judges, and the House, and the Advisers of the Crown, and the opposers of Lord De la Ware's claim, considered the writ issued to William in the 13th (*sic*) of Elizabeth, as having created him a Baron, and given him a dignity descendible to his son.

The belief that the new barony was created by writ of summons seems to be clearly traceable to Coke's words :

[1] *Op. cit.* pp. 124, 125, 129.
[2] See the paper on 'The muddle of the law.'

Le roigne Eliz(abeth) appel luy al Parliament per briefe de summons et sea come puisne Seignour.[1]

That William was summoned to the Parliament in 1572 there is no question; but was that summons a creation, or was it merely issued in respect of a patent of creation, granted earlier? It seems to have escaped notice that the version of the 'case' given by Serjeant Doddridge, a contemporary writer,[2] although avowedly based on Coke's Report, differs from it in some particulars, especially in the statement that William "...... in the time of the Queene's Majestie that now is,[3] in the eight (*sic*) yeare of her reign, was created Lord De la Ware *by patent*, and had place in the Parliament according to his creation."[4]

Another point is that it asserts the claim to have been first submitted to "the Queen's councell, being her Majestie's attorney general and sollicitor," whose opinion in its favour was confirmed "by the resolution of the lord chiefe justice of England, and lord chiefe baron." After explaining that the new dignity could not extinguish the old, "for he had not that ancient dignitie in him at the time of his creation," the writer observes—

But this is to be noted by the reasons made for the said resolution, that if the said Sir William West had beene baron, and intitled, or in possession of the antient dignitie when he accepted the creation, the law perchance might have been otherwise, but that remaineth as yet unresolved.

[1] *i.e.* as (the) junior Baron, not (as Mr. Pike renders it) "*a* puisne Baron."
[2] He was forty-two at the time.
[3] These words are important as proving that the passage was written before the death of Elizabeth in 1603.
[4] *Collins*, p. 123.

This is the origin of a note in the Hale MSS. printed by Hargrave in his notes to Co. Litt. (Inst. i, 16b).

> "Baron by writ takes grant of the same barony by patent. This determines his barony by writ. Otherwise it is, if the barony was suspended. 11 Co. Lord Delaware's Case."

On which Hargrave pertinently comments that, as no peer can surrender or alienate his dignity (citing the Purbeck case from Shower), he must retain the old one. To this one may retort that the above writers cannot have recognised the doctrine of the Purbeck case as then settled law.

Although he was a member of the College of Arms,[1] Mr. Townsend wrote of "the new creation of the title in William, and the restoration, as it is called, of the son of William to the ancient place and precedency of his ancestors" that "the precise date of this new creation is nowhere mentioned with certainty : I have never seen any letters patent for it, and am of opinion that none ever passed."[2]

But a later member of the College, Mr. Courthope, whose labours among its MSS. are perhaps insufficiently recognised, discovered that "Sir Edward Walker (MS. WQ. 89) gives an account of the ceremony of his creation on Shrove Tuesday 5th February, 1569"[3] etc. By the kindness and liberality of the present Garter[4] I have been supplied with a copy of this interesting record—for

[1] Windsor Herald 1784-1819.
[2] *Col. Top. et Gen.* vii, p. 159.
[3] This should be 1570 (*i.e.* 1569/70).
[4] Sir Alfred Scott Gatty.

such it is, and in my opinion it settles the question absolutely.

As this narrative is of interest also for its full description of the manner in which a peer was created in the days of the great Queen, I print it here in full. It is signed by Lancaster Herald.

"THE CREATION OF A BARON.

"At Hampton Court. On Shrove sonday being the 5 of ffebruary Anno Dni : 1569[1] regni vero Ser. Reginae Elizabethae &c. Willm. West was dubbed Knight as the Queenes Matie went towards her Closet. The Viscont Hereford that day bore the Sword, who being comaunded to draw it forth deliuered the same to the earle of Leycester, who therew^th^ dubbed the aforesaid William West in her Maties presence. And at her Maties returne from her Chappell into the Chamber of presence the aforesayd Sr William West being apparaled in his kyrtle was led from his Chamber through ye great Chamber to the Queenes Ma^tes^ presence in maner and forme following.

First the Officers of Armes 2 & 2.

Then Garter bearing his letters Patents in his right hand.

Then the Lo : Loughborough bearing his mantle.

Then on the Right hand of Sr Wm West the lord Clynton L. Admirall Conducted him.

On the left hand, as the other Conductor, came the lord Cobham, Lord Warden of the 5 ports, wch 2 lords in their Roabes of Estate conducted him

[1] This date is correct. In 1570 (1569/70) Shrove Sunday fell on February 5th. Courthope gives the date, in error, as "Shrove Tuesday."

into the Chamber of presence where as they all made three reuerences to the Queenes Matie and at their Coming to the Cloth of Estate they stoode still and the sayd Sr William West kneeled. After that Garter had deliuered the letters Patents to the Lord Chamberlayn he deliuered them to the Queenes Matie, and the Queene gave them to Secretary Cecill to read, and he read them openly. And at the word *Investivimus* the Queene put on his Mantell. Then ye sayd Secretary proceeding in Reading the sayd Patent to the end, wch contayned the Creation of him to be lord Delaware, he deliuered the sayd letters Patents to the Queenes Matie, and the Queene deliuered them to the Lord Dellaware Who thanking the Queene highly for her gracious goodwill in advancing him to that dignity Rose up on his feete and was accompanyed to the place whereas he was appoynted to dyne in this maner following :—

ffirst the trumpetts sounding and the Office of Armes.

Then Garter before the L. Loughborough.

Then the Lord of Loughborough.

Then the L. Laware led as he came in by the Lord Clinton on the right hand & the lord Cobham on the left hand.

In that dinner tyme at the second course Garter, accompanyed wth the residue of the Officers of Armes, proclaymed the Queenes stile neere unto the tables end wth Largesse in this maner.

ffirst pronouncing 'largesse' and then the Queenes style in latyne ffrench and Inglish and 'largesse' agayne the second tyme, and that done all the other

Officers did Cry 'Largesse' 'Largesse' 'Largesse' three tymes. And so wth reuerence the sayd Garter and the other Officers of Armes present did retyre back from the place where they first stoode further from the table, and Garter pronouncing 'Largesse' once and then the style of the new Baron w^th^ 'largesse' agayne, then he & and all the Officers ioyntly did cry 'largesse' 'largesse' 2 times and so wth reuerence departed.

The sayd new Baron should haue sate at dinn^r^ in his mantell and kyrtell, but because of heate, as he alleadged, he sate onely in his kyrtle and had his mantle taken of The other three Barons that assisted him at his Creation accompanyed him at dynner but sate not in their mantles nor kyrtles but onely in their accustomed apparell.

"DUTYES TO THE OFFICERS OF ARMES AT YE CREATION OF A BARON.

Garter that day had his uppermost garment, a short Gowne of Damaske furred and garded wth velvet.

The Officers of Arms had of the Queenes Matie at ye hands of the Treasurer of the Chamber for largesse that day	£3-6-8.
And of ye new Baron for his knights fee whereof the Pursuiuants had a part	1-0-0.
And further of the sayd new Baron for his largesse	5-0-0.

W^M^ PENSON, LANCASTER."

Although this evidence is, I submit, decisive, one may add that of a letter of 20th April, 1570,

from Louvain, preserved among the State Papers, which speaks of "Mr. West, created Lord Delawarr, (being) put in" to the Lieutenancy of Sussex.[1]

The first point established by the evidence now given is that the case is not, as alleged, an important precedent for the recognition of a creation by writ and sitting. The fact that the father was created by patent must have been well known in the time of his son, twenty seven years later. The next point is that we have here a grave warning against presuming a creation by writ where the patent is not enrolled.[2] The other cases in point are those of Eure and Wharton, some quarter of a century before, which I have dealt with in another work.[3]

With regard to the baronies of De la Warr and their respective limitations, it was observed by Courthope that—

> even if no patent were granted of the Barony in 1569-70, the present Earl is Baron de la Warr under the writ of 13 *(sic)* Eliz., he being *heir-general* as well as *heir-male* of William West, to whom that writ was addressed. If ever it should happen that the *heir-general* is not the *heir-male* of the said William, a question of great difficulty will in all probability arise on the succession of the Barony.[4]

But it can hardly now be doubted that the Earl inherits a barony under the patent of 1570, while as for the older barony, descendible to heirs-general, the question turns on why the issue of Sir Owen

[1] *State Papers: Dom. Addenda*, 1566-77, p. 286.
[2] It is possible that in the De la Warr case the patent was purposely not enrolled lest it should prejudice the right of the grantee's son to the older dignity.
[3] *Studies in Peerage and Family History*, p. 354.
[4] *Historic Peerage*, 1857, p. 151.

West were excluded. If their exclusion is valid by what is now settled law, the old barony is vested in the Wests, as it was indeed recognised to be in 1597. If, on the contrary, it should prove that their exclusion was not in accordance with such law, the principle asserted in the Norfolk case would seem to involve the admission of their right and the consequent restriction of the earl's right to the later barony alone.

PEERAGE CASES IN THE COURT OF CHIVALRY.

Peerage claims were originally referred, not to the House of Lords, but to the Earl Marshal's Court—Cases: Dacre (of the North); Willoughby d'Eresby; Powys; Lisle; Abergavenny; Dacre (of the South); Offaly; Clifford; Mountjoy; Beaumont; Berners; Roos; Wahull; Earldom of Oxford—Treatment of Fitzwalter and Berners claims—The Earl Marshal's Court and the heralds.

The object of this paper is to establish the fact,—which appears to be little if at all known,—that under Elizabeth and James I the recognised *forum* for the trial of claims to peerage dignities, on reference from the Crown, was not, as is generally supposed, the House of Lords, but the Earl Marshal's Court, or 'Court of Chivalry.' This proposition, if established, will involve two corollaries: (1) that in these cases the jurisdiction of the House is not "inherent" but "delegated;" (2) that James I has been wrongly charged with neglecting to provide, when he created the degree of Baronet, any court in which claims to baronetcies could be tried; for a court existed with a recognised jurisdiction over titles of honour.[1]

[1] Mr. Pixley (*History of the Baronetage*, p. 126) writes: "He bequeathed everlasting unrest to his new Degree, not only by this means, but by his failure to appoint any officer or Court to have cognizance of its affairs, or otherwise to provide it with some defence of its own against the caprice of monarchs and the encroachments of impostors." But there can be little doubt that his reference in the Commission of Nov. 18, 1614, to "such usual rules, custome, and lawes...... as other Degrees of Dignity Hereditary are ordered and adjudged" (*Ib.* p. 133) alludes to the Marshal's jurisdiction. Indeed, in the case of Sir Thomas Harris, Bart. (1662), the King directed the Earl Marshal that proceedings should be "according to the custome and usage of the Court Marshall."

Our latest authority, Sir F. Palmer, writes that "There is abundance of authority as to the proper mode of proceeding on peerage claims," and proceeds to cite three cases *temp.* Henry VI, and two *temp.* Elizabeth. He then adds :—

The forms of procedure adopted in the above-mentioned claims has *(sic)* been followed in a great number of subsequent peerage cases, and in almost all the Crown, where any doubt as to the validity of the claim has arisen, has taken the course of referring the matter to the House of Lords for its opinion and advice.[1]

But, on the writer's showing, "the forms of procedure" in the cases he cites were not uniform; for under Elizabeth the Willoughby claim "was referred by the Queen to Lord Burleigh and other Commissioners," while Lord De la Warr's petition "in regard to his precedence in Parliament" was "referred to the House of Lords." Moreover, of the five cases cited, two of those under Henry VI were disputes as to precedence, not "peerage claims," while the third was a claim for precedence, and the same criticism applies to the case of Lord de la Warr.[2]

My point, however, is that no mention is made of the jurisdiction of the Earl Marshal or of the Court of Chivalry.

Mr. Pike observes that—

[1] *Peerage law in England*, (1907), pp. 9-10.

[2] See Cruise's remarks below, and cf. Pike, *Constitutional History of the House of Lords*, pp. 125, 128-9. The precedence of peers *inter se* was essentially a matter for the House to decide. In the Arundel v. Devonshire case cited by Sir F. Palmer, the judges, to whom the House had wished to refer it (*temp.* Hen. VI), declared that it was "matter of parlement longyng to the kynge's highnesse and to his lords spirituell and temporell in parlement by theym to be decyded and determyned." (*Rot. Parl.* v 148).

> Claims of peerage and offices of honour have long been brought before the House of Lords, but not without express reference from the Crown. It does not appear that the Crown is bound to accept this mode of decision, for in the case of the barony of Fitz-Walter.... the claim, though originally referred to the House of Lords, was, after a prorogation of Parliament, withdrawn from their cognizance and laid, by the King's direction, before the Privy Council.
>
> ... The jurisdiction is thus not inherent in the House of Lords itself, but is only created, from time to time, as occasion may arise.[1]

Sir F. Palmer holds, on the contrary, that

> The jurisdiction of the House of Lords is not confined to cases in which a peerage claim is referred to the House by the Crown.
>
> The House of Lords has an inherent jurisdiction as guardian of its own privileges, to determine who are its members, etc., etc.[2]

The evidence which I shall produce seems to be against this view and to support that of Mr. Pike. For the question whether a man was a peer could clearly be tried by the Marshal's court and decided, on report, by the Crown, without consulting the House of Lords.

Cruise alone, it would seem, among peerage writers, realised and definitely asserted, as to claims to peerage dignities, that

> the court to which the crown usually referred such claims was that of the high constable and earl marshall, where cases were determined by the rules and customs of chivalry.[3]

[1] *Op. cit.* pp. 285-6.
[2] *Op. cit.* p. 11.
[3] *Op. cit.* (1823), chapter vi, sections § 1. *et seq.*

To Cruise I am indebted for the extract from the *Nobilitas Politica* of Milles, which, having been published in 1608, affords important evidence on the practice of his time.

For the disciding of sutes concerning honours, and for the preservation unto every man the right of his fame or dignity, the natural tribunal, seat, or court, for the nobility is everywhere called by this name, *Militaris*, that is to say, the marshall or military court, and commonly the court of chivalry: the form whereof with us is this — the appointed place for the holding thereof is the King's hall, wherein the constable of the Kingdome, and the marshall of England, sit as judges; where any plaintiff, either in cases of dignities or armes, may sue the defendant.

It is also duly pointed out in Cruise's work (§. 10) that—

When the office of earl marshal was in commission, claims to dignities were usually referred to the commissioners, though in the following instance a claim of this nature, *but which was in fact only a case of precedence*,[1] was referred to the House of Lords.

But, as his list of cases is very imperfect, and the details not always accurate, I have here compiled a fuller list, and corrected some of the errors of fact made by himself and others.

It would be possible to compile an even fuller and more instructive list if the records of the Earl Marshal's court, in the custody of the College of Arms, were open to the public. It is much to be desired in the interest of students of peerage law that the evidence contained in these records should be dealt with in a monograph on the subject.

[1] This was the De la Warr case (see p. 60 above). The italics are mine.

Mr. Wymbish's case, which Cruise cites for the answer of the chief justices to Henry VIII,—

> That the common law dealeth little with titles and customs of chivalry, but such questions had always been decided before the constables and marshals of England

is known to us, only, unfortunately, from the references made to it in later cases, which themselves are only reported in *Collins*. It will be safer, therefore, to begin with the reign of Elizabeth.

DACRE (OF THE NORTH)

In this well-known case, on the death of Lord Dacre in 1569, leaving three sisters his heirs, the title was assumed by Leonard Dacre, the heir-male. The Earl-Marshal declined to adjudicate, as having a personal interest in the rights of the heiresses, and commissioners were therefore appointed to act for him.[1] These decided the case against Leonard Dacre.

WILLOUGHBY D'ERESBY (*bis*)

The Duke of Norfolk, Earl Marshal, having been attainted, the claim of Richard Bertie to this barony *jure uxoris* was referred to three Commissioners for the office in 1572, as was that of Peregrine his son to the barony, on his mother's death in 1580.[2]

[1] The Earls of Northampton, Pembroke, Arundel and Leicester. (Harl MS. 4798, fos. 24, 29).

[2] See the paper on "The Willoughby d'Eresby case and the rise of the Berties." The Commissioners were Burghley, and the earls of Sussex and Leicester.

Powys.

The claim of Henry Vernon to this barony was referred to the same lords—with the exception of Sussex, who had died the year before—in 1584. "Those two lords join in a letter, dated September 22, 1584, to Cook, Clarencieux (Garter being then vacant), and Glover, Somerset herald, requiring them to examine into the proof of Mr. Vernon's claim." [1]

Lisle.

One hesitates to include the following case, because it was only a petition for favour, not a claim of right. It is, however, somewhat parallel to the Mountjoy and Beaumont cases which came before the Earl Marshal eight years later.

The famous but anomalous barony of Lisle was the subject of this petition from Sir Robert Sidney, in 1598, as at that time "the next heir masle." Although so much has been written on the dignity, it seems to have escaped notice.

My humble sute by your Lordship as Earle Marshall of England unto her Majestie is that it will please her to bestow upon mee the name and place of Lord Lisle, w[ch] sute I trust will not seeme unseemlie or arrogant since I require but that which hath (as I have set down) bin so often granted unto my Ancestors, [there] being also in it no discontinuance, myne Oncle who last possessed it but nine yeers agoe disceased.

As also that I pretend no right, but onlie hold myself inabled by neereness of blood to beseech that grace and favour of her Majestie as in like cases divers of my ancestors have obtained etc.

[1] *Collins*, p. 403.

To the Earl of Essex.[1]

In spite of Sir Robert's plea that he was the nearest "heir masle," he was so only to his *father* (since the decease of his elder brother, the famous Sir Philip, without male issue), while his only connexion with the Lords Lisle was through his *mother*. To her brother, Ambrose Dudley (d. 1590), who had been made Lord Lisle by a new creation, he was neither heir male nor heir general. Nevertheless, he petitioned, we see, not only for the barony of Lisle, but even for its former precedence ("place"), though he confessed that a lower precedence would content him. Five years later he was made Lord Sydney of Penshurst, and in 1605 he received a Viscountcy of Lisle.

Abergavenny.

The most famous, perhaps, of all ancient peerage cases is that of the barony of Abergavenny. Collins devoted to it no fewer than 80 pages out of 415 in his book;[2] it is discussed at length in the *Lords' Reports on the Dignity of a Peer*,[3] and it is also discussed by Sir Harris Nicolas as a claim to barony by tenure.[4] Cruise gave what he supposed to be the facts,[5] and our latest authority, Sir Francis Palmer, also gives them briefly,[6] and further mentions that Doddridge's great argument in the case developed into a book which has been repeat-

[1] Letter in State Papers, Domestic.
[2] *Proceedings..... concerning baronies* etc. (1734), pp. 61-140.
[3] *First Report* (1820), pp. 434-444.
[4] *Barony of L'Isle*, (1829), pp. 384-391.
[5] *Dignities* (1823), pp. 45-49.
[6] *Peerage Law in England*, pp. 181-2.

edly referred to in peerage cases as if it were a work of authority.[1]

Between them all they have left the facts in almost inextricable confusion. Once again one is startled by the contrast between the methods of the historian and the mere muddle of the law. The former would not dream of dealing with his subject until he had classified his evidence and assigned it to its right dates: to the lawyer, apparently, this preliminary is a quite superfluous proceeding. What, after all, does it matter to him what the facts really were? Accordingly we read in the *Lords' Reports* that in this case "the proceedings began by a Petition of Edward Nevile to the King" (James I), in 1605 *(sic)*, claiming the dignity,[2] and it is further asserted that

> A right to be summoned to Parliament by reason of tenure of any land denominated at any time a Barony, does not appear, by any document which the Committee have discovered, to have been asserted in the reign of Edward the First or in the reign of any of his successors, till the claim made by Edward Nevill to be summoned to Parliament by writ, in respect of his possession of the barony of Abergavenny, in the reign of James the First.[3]

At about the same time Cruise alleged that "Sir Thomas Fane, having married Mary, the only daughter and heir of the Lord Abergavenny, claimed in 1604 *(sic)*, the barony of Abergavenny in right of his wife,"[4] and that "the claims of Sir Thomas Fane and Mr. Neville to the barony of

[1] *Ibid.*, p. 24.

[2] *First Report* (Ed. 1829), p. 436.

[3] *Third* (1822) *Report* (Ed. 1829), p. 100. This Report is known to have been Lord Redesdale's work.

[4] *Dignities* (Ed. 1823), p. 45.

Abergavenny, in the same reign (James I), were referred to the house of peers."[1] Sir F. Palmer, who devotes some attention to Doddridge and the authority of his writings (pp. 24-5), observes that "the principal memorial we possess of his work is his argument in the *Abergavenny* claim, 1605 (*sic*), in favour of peerages by tenure set out in Collins' *Claims*, p. 97 *et seq.*," and points out that this argument, in subsequent editions, "has been repeatedly referred to in peerage cases as if it were a work of authority." He also dates the Abergavenny case throughout as 1605 (or 1604) and as of the reign of James I.

All these writers rely on "Collins," who has jumbled up the papers relating to this famous case. Now we have only to glance at his work to discover, on the first page of his report, Sir Thomas Fane referring to "the *Queen's* most excellent majestie, his gracious soveraign," while Serjeant Doddridge, on behalf of his client, Edward Nevill, similarly refers, on the first page of the argument dated "1605" by Sir F. Palmer, to "the *Queene's* most excellent Majestie," as also, on the next, to "her Majestie, God's substitute on earth."[2]

How then can these documents belong to the reign of James I? Nay, more. As Sir Thomas Fane died early in 1589 and his father-in-law, Lord Abergavenny, early in 1587, his claim must obviously fall between these dates.

In this case, then, as in Richard Bertie's claim to the barony of Willoughby, the writers have

[1] *Ibid.* p. 253.

[2] Fane's Case, I may explain, covers pp. 61-96; Doddridge's argument begins on p. 97.

altogether misdated the documents given by Collins which relate to the original claims. And this illustrates, as I have urged, the carelessness of legal writers as to facts and dates. The historian tries to be sure of both before he deals with his document, for he knows how much depends on the critical treatment of his evidence. In the Abergavenny case the error affects the date at which, it is alleged,[1] barony by tenure was first formally propounded as a doctrine; the date at which a barony was still claimed by "the curtesy;" and the date at which the marshal's court was the recognised *forum* for dignities. For both the original claimants recognised, as a matter of course, that this was the court before which their rival claims would come.

Let me then endeavour to explain, apparently for the first time, the real course of proceedings in this memorable contest. Even the stubborn and similar contest for the Earldom of Mar in our own time (1866-1885), which was similarly ended by a kind of compromise, was of scarcely longer duration.

The essential point to bear in mind is that issue was joined on *three* separate occasions, between each of which was a considerable interval of time. Henry (Nevill), Lord Abergavenny, died on or about 10th February, 1587, (1586/7) leaving as his heir-general an only child, Mary, wife of Sir Thomas Fane, and as his heir-male, Edward Nevill, his uncle's son, who inherited, under a family entail, Abergavenny Castle and the other estates.[2]

Thereupon the question arose as to who was

[1] See p. 76 above.

[2] He took under an Act of 2 and 3 Philip and Mary in spite of his father's attainder.

entitled to the peerage barony. The rival claimants were Sir Thomas Fane, the husband of the heir-general, and the above Edward Nevill. Early in December, 1588, their respective cases were in the hands of Burghley,[1] and on the 17th January following we find a memorandum among his notes: "The title of Abergavenny to be tried between Lady Fane and Edward Nevill."

It is to this, the first contest, that belongs the first Abergavenny document printed by Collins, viz. "the right and title of Sir Thomas Fane" etc. (pp. 61-96). The whole document is of one date, and it is important to observe that it speaks of the rival claimant as "Edward Nevill now of Bergavenny" (pp. 63, 82), and shows him to be the *elder* Edward, not his son, who was afterwards the claimant. Sir Thomas had two points to establish: (1) that his wife was entitled, as heir-general, to the dignity; (2) that he himself was entitled to it in her right, as "tenant by the courtesie of England" (p. 62). That his claim would come before the marshal's court he seems to have taken for granted.

Forasmuch as the state of this challenge and claim is for the title of a barony, being a matter of nobility and chivalry, ... the high constable and marshal of England the usual judges thereof in time past......

That the question touching the barony of Bergavenny is not determinable by the common laws of this realm may well be proved by sundry presidents (*i.e.* precedents) of pleadings in the like cases, usually wont to be heard

[1] *State Papers Dom.*, *Elizabeth*, Vol. ccxix, No. 8, Dec. 3, 1588: "Statement of the title of Mr. Edward Nevill to the barony of Burgavenny;" No. 7, Dec. 7, 1588: "A treatise setting forth the title of Mary," etc., etc. See also Nos. 16-22.

and determined in the court of chivalry before the high constable and marshal of England.

Such questions, he pointed out, were not to be tried "by juries:" there was evidently no idea then that the *forum* for them was the House of Lords.

The reason why this first contest for the dignity was never determined may now be explained. Both claimants, by a strange coincidence, died within a few weeks of each other—Edward Nevill 10th February, 1589 (*i.e.* 1588/9) and Sir Thomas Fane 13th March, 1589 (*i.e.* 1588/9)[1] just as the case, apparently,[2] was about to be tried.

For the long space of nearly ten years nothing more was done. But Edward Nevill the younger seems to have assumed the title, and Lady Fane, Sir Thomas' widow, eventually petitioned the Queen for the recognition of her right, complaining of Edward's assumption.[3] This resulted in a notable illustration of the earl marshal's jurisdiction. The Earl of Essex, as earl marshal,[4] formally summoned, by his letters, of 20th November (1598), both parties to appear before him.

The pursuivant who took his letter to Edward Nevill drew up an excellent report of the hearing of the case,[5] which begins as follows:—

On Saterday, 25th of November, 1598, my Lord

[1] See *Northamptonshire Families*, p. 95, where Mr. Barron decides that this was the true date.

[2] See p. 79 above.

[3] Harl. MS. 4798, fo. 1. The position has some similarity to that of the Duchess of Suffolk, in 1570, complaining that Lord Willoughby of Parham, the heir male, was alleged to be entitled to her own barony of Willoughby D'Eresby.

[4] He had been made earl marshal 27 December 1597.

[5] There is a transcript of it in Harl. MSS. 4749, 4798, which are bound up together. The folios are somewhat disarranged.

Marshall sat in Essex House to hear and to determine the Title and Claime of the Barony of Abergevenny descending between Mr. Edward Nevill Esq., heir male to the said house on the on Partie and the Lady Mary Vane heir generall etc.

The Earl Marshall called to his Assistants *(sic)* the Earl of Rutland, the Earl of Cumberland, the Earl of Sussex, the Earl of Tomond, the lord Montjoy, the lord T. Howard of Walden, the lord Buckhurst, the Lord Chief Justice of England and the Lord Chief Justice of the Common Pleas. All these sat above, and beneath at the Table (right underneath my Lord Marshall) was Mr. Garter and Mr. Clarencieux, Kings of Armes, the Lord Henry Howard, Lord Audley, Lord Burghley, Sir Robert Sidney, Sir George Carew, Sir Edward Hobby, and sundry other Knights and Gentlemen. Which for press of people I could not see (the same being so.......) and a number of others which I did not know.

Serjeant Williams—who was afterwards, as Sir David Williams, a well-known judge—was counsel for the heir-male; "Mr. Attorney of the Court of Wards" appeared for Lady Fane; and Coke himself, as Attorney General, represented the Crown. He had not merely a "watching" case: the Queen seems to have been deemed a third party to the suit. The whole report is well worthy of being edited by a peerage lawyer, but here I can only touch on two interesting points. In the first place Serjeant Williams insisted on the necessity of a baron holding thirteen knight's fees, and there was even some debate on such constituents of a knight's fee as hides and carucates of land, on £20 a year as its value, and on the number of fees, 13½, 15, or 20, required to constitute a barony. Lady Fane,

it appears, expressly claimed that she held 20. The citation of a case from 42 Edward III by Serjeant Williams further illustrates the importance he attached to tenure. The second point is one that does not emerge at all in the paper preserved by Collins. It is that, conscious of a weak case, counsel for Edward Nevill did not so much insist upon his right as plead for his "acceptance" by the Queen as the person best qualified to be Lord Abergavenny.

The hearing was adjourned, and the Earl Marshal sat again, also at Essex House, 15th February, 1599 (1598/9),[1] observing at the close of the sitting "I will relate unto her Ma(jes)tie with all care and diligence whatsoever hath been here said, and I doubt not but my Honble Assistance *(sic)* will doe the like." Three days later he sent Clarencieux King of Arms with certain questions to the two Chief Justices, who both, as we shall see, answered them emphatically in favour of the heir-general.

Nothing further was done, however, till a new sovereign had come to the throne, when the heir-general petitioned anew (Harl, MS. 1877, fo. 45 ink).

Petition to James I by Mary dau. & heir of Lord Abergavenny claiming to be "Baronesse of Bergavenny." ..... "And wher also upon peticion exhibited by the sd. suppliant unto the late Queenes Majestie deceased for the allowance of this her title and name of dignitie, yt pleased her Majestie to referr thexaminacion of this her claime unto the right hon^{ble} the late Earle of Essex,

[1] In the interval Lady Fane's allegations had been exemplified by Dethick, Garter, at the College of Arms 15 Dec. 1598 (Harl. MS. 5019, 34d).

Earle Marshall of England, willing him to call unto him for his assistance the two Lord Cheife Justices of England, unto whome upon the full examinacion and discussing thereof the sd. suppliant's title to the honour and dignitie was made sure and indubitable as by their several opinions afterward sent unto his Lordship and hereunder set downe most plainly appearith etc. etc.

18 Feb. 1598 (*i.e.* 1599).

My Lord of Essex Earle Marshall of England sent Clarentieux unto Sir John Popham knight, L. Cheife Justice of England and unto Sir Edmond Anderson, knight, Lord Cheife Justice of the Common Pleas with this question.

"Whether he may not signifie unto her Majestie that the disposition of the Lord Bergavenny resteth wholy in her gracious will and pleasure.

Wher as the heir is collateral and so farr removed and the heir generall incapable in respect of her sex, and the entaile of the lands confirmed by Parliament to the heir male."

The answere of the Lord Cheife Justice of England :

"No right at all in the heire male and therefore he must wholly rely upon the favour of the Prince.

The Common custome of England doth wholly favour the heir generall.

The heir generalls issue to have precedence when both shalbe summoned as in Dacre Lord Willougby. *(sic)* [1]

That her Majesty may call by new creacion the heire male and omitt the heir generall during her life, but yet a right to continue to her sonne having sufficient supportacion.

No entaile can carry away dignitie, but by expresse worde or patente."

The answere of the Lord Cheife Justice of the Common Pleas.

"The heire male hath no right so long as any issue doth continue of the heire generall.

[1] This refers to the double dignities of Dacre of the North and Dacre of the South and of Willoughby d'Eresby and Willougby of Parham.

In his opinion, after the death of the mother, being incapable in respect of sex, there is a right in the sonne. The intaile doth not prejudice the heire generall or her sonne."

Edward Nevill, on his side, also petitioned the King, who, in this case, referred the petition to the House of Lords. It may well be asked why he should have done so if it was then the recognised practice to refer such cases to the Marshal's court. The answer is simple. Nevill, in his petition, expressly prayed that it might be referred to the House of Lords, adding that it had been the practice of Queen Elizabeth and her predecessors so to refer such cases.[1] It is difficult to imagine a more audacious statement in view of the fact that his own claim, and that of his father, to the dignity had both been referred by Elizabeth to the earl marshal's jurisdiction, and that his own counsel, we have seen, had expressly stated, in his case, that the marshal's court was the recognised *forum* for such claims ![2]

Nevill's motive in wishing his claim, on this occasion, to come before the Lords may have been partly due to the answer of the judges, when consulted by the earl marshal, having been so emphatically against him, and partly to the hope that the high precedence which went with the Abergavenny title would be more readily conceded by the Lords to a Nevill than to the Fanes ;[3] the more so as the entail of the Abergavenny estates on him-

[1] *Lords' Journals*, ii, pp. 274, 345.
[2] See p. 78 above and cf. 'Collins,' p. 98.
[3] See p. 41 for Mr. Barron's view that the Fanes, as a comparatively new family, would be considered unequal in social position to the Nevills.

self enabled him to keep up the family position.

His petition, thus referred to the House, first appears on its journals 5th April, 1604, and its hearing was appointed for April 12th. After repeated adjournments and reports to the King, the controversy, as is well known, was finally settled by a compromise, Edward Nevill being summoned by writ as Lord Abergavenny 25th May (1604) and Lady Fane receiving, the same day, letters patent which awarded her the barony of Le Despencer.[1]

It will be, probably, sufficient illustration of the extraordinary inaccuracy, in the Abergavenny case, as to facts and dates, that the Lords' Committee, with this evidence in their own Journals before them that the long controversy was ended at last by the documents of 25th May, 1604, asserted that it *began* "in 1605;"[2] that according to Cruise "Sir Thomas Fane ...... claimed, in 1604, the barony of Abergavenny," although he had been dead, at the time, fifteen years; that, according to the same learned writer, "the case was referred to the house of lords," and yet "it appears from a MS. in the Harleian Collection, No. 1749 *(sic)* that this case was heard before the earl of Essex as earl marshall," etc.,—the facts being, as we have seen, that this hearing was not in 1604, but in 1598, and is dealt with in Harl. MS. 4798, not 1749; and that Sir F. Palmer similarly makes Sir Thomas Fane claim against "Sir (*sic*) E. Nevill" in 1604 (pp. 181-2), and dates Doddridge's "argument on the Abergavenny claim, 1605" (p. 24).

[1] *Lords' Journals* ii, pp. 346-8.
[2] See p. 76 above.

The quite exceptional reference, in this case, to the House of Lords did not, we shall find, affect the practice of referring such claims to the earl marshal or to the commissioners who executed his office. Indeed, in this very instance "the Commissioners for causes belonging to the office of Earl Marshal of England" (to give them their full title[1] had some voice in the matter, for to them was referred, 25th May, the burning question of the precedence *inter se* of Abergavenny and Despencer. The Commissioners[2] reported May 27 (1604) that they "did, with one voice, adjudge and determine" the question in favour of Despencer,[3] and, in spite of Nevill's strenuous opposition, the House, which had referred the question to their decision, confirmed it on July 6, and again on a subsequent occasion. The fact of the reference is the more remarkable because precedence in the House itself is a matter which the Lords themselves have usually decided and also because the decision may involve the whole *status* of a dignity. Sir F. Palmer observes, we have seen, that

> The House of Lords has an inherent jurisdiction, as guardian of its own privileges, to determine who are its members and what is their precedence *inter se;* and inasmuch as this precedence depends on ancienty what is their ancienty,[4] ...

And in another place he points out that the House "has indirectly the power of enforcing its own decisions and declarations of the law," should

[1] *Lords' Journals*, ii, p. 346.
[2] The Earls of Nottingham, Suffolk, Worcester and Northampton.
[3] *Ibid.* p. 347.
[4] *Peerage Law in England*, p. 11.

it come into conflict with the Crown concerning a dignity, by assigning it precedence only as a new creation.[1]

In the Abergavenny case, it is pointed out by the Lords' Committee in their first Report, the assignment to Abergavenny of a precedence below that of Despencer must be held to imply that it was created subsequently to the writ of summons addressed to Hugh le Despencer (1264) and was consequently not, as Nevill claimed, a barony by tenure. For the tenure of Abergavenny castle could be traced further back than 1264.[2] Sir Harris Nicolas appears to have taken the same view, though he, like the Lords' Committee, recognised that this conclusion made the whole case absolutely anomalous.[3] He considered, therefore, that no definite conclusion as to barony by tenure could be deduced from the Abergavenny case, and this seems to be the view of Sir F. Palmer also ; for he writes that "the question whether the barony of Abergavenny was or was not a barony by tenure was thus in effect avoided by a compromise."[4]

That it was a compromise, I agree ; but the argument based on the relative precedence assigned to Despencer and Abergavenny seem to me fallacious. The Abergavenny dignity was expressly allotted to Nevill as an act of "restitution," which would carry with it the precedence enjoyed by the

[1] *Op. cit.* p. 21.

[2] *First Report* (Ed. 1829), p. 442.

[3] *Barony of L'Isle*, p. 390. As the only ground upon which Nevill could really oppose the Fane claim was that the barony was held by tenure, it was obviously an untenable position to say that he ought to have the barony and yet that it must not enjoy the precedence due to it if it *was* a barony by tenure.

[4] *Op. cit.* p. 182.

former lords. That precedence was a matter of usage, as with other ancient dignities, and did not represent any definite date. The only precedence which had to be then determined *de novo* was that of Despencer, and this was settled by ranking it immediately above Abergavenny, apparently with the idea of bifurcating the late peer's precedence.

It is definitely asserted in the *Complete Peerage* (I, 20-21, 230) that the Abergavenny Barony was on this occasion assigned "the precedency of 1392," but all that was actually done was to rank it below Despencer, and, as Nicolas observed, a precedence of 1392, the earliest he could claim under a *writ* to his ancestor, "would have placed him below many barons of whom," as a matter of fact, "he took precedence."[1] As a matter of fact he would be ranked, we find, *above* Zouche (1308) and Willoughby (1313) though actually *below* Clifford, a creation recognised as dating from 1299, and Fitzwalter (1295).[2]

My object, however, is to show that the decision of the (Earl Marshal) Commissioners as to the precedence of the two baronies was quite independ-

[1] *Barony of L'Isle*, p. 390.

[2] Transcript of Lords' Journals, 2 March 1511/2. Accordingly, when Henry Clifford was summoned, in error, *v. p.* as Lord Clifford in 1628, "he was placed next above the baron of Abergavenny, the ancient seat belonging to the barony of Clifford" (*Collins*, p. 308), the barony of Fitzwalter being then merged in the earldom of Sussex. When that barony emerged and was allowed to Mildmay in 1670, its precedence raised difficulty. Lord Fitzwalter, in virtue of the 1295 writ, "claimed precedence of all barons now sitting as barons, particularly of the Lord Abergavenny, and alleged a determination in Henry VIII's time, whereby he was placed next below the Lord Clifford." *(Lords' Journals)*. His claim was opposed on behalf of the representatives of Mowbray, Percy, Abergavenny, Audley, and Berkeley, and he was eventually placed as "the last baron of the reign of King Edward I" *(Ibid)*. Unless the precedence allowed in 1604 was purely traditional, it can only have been based on the view that the first Lord Abergavenny was John Hastings, who appears in the Barons' letter to the Pope (1301) as "dominus de Bergavenny."

ent of, and irreconcilable with the result of the Abergavenny claim in the Lords, and has been held to have a grave bearing on the real question at issue, namely, whether the dignity was a barony by tenure or not.

DACRE (OF THE SOUTH) (*bis*)

This case was largely contemporary with that of the barony of Abergavenny. In the *Lords' Reports on the Dignity of a Peer*, there is no mention of any claim under Elizabeth,[1] and the case is only slightly dealt with. Cruise tersely recites the successive claims of "Margaret, the sister and sole heir to Gregory Lord Dacres,"—one "in the latter end of the reign of Queen Elizabeth," and the other "in 1 James I"—with their treatment and result.[2]

He also, in another place, vaguely states, on the authority of Hargrave, that a claim was made "about 1604, by Sir Sampson Lennard, in right of his wife, Margaret, Lady Dacres."[3] So too Sir Francis Palmer asserts that "in 1604 a claim was made by Sir Sampson Lennard to the dignity of a baron in right of his wife Margaret, Baroness Dacres," etc.[4]

Here again the sequence of events has to be reconstructed *ab initio*. Gregory, Lord Dacre of the South, left at his death (26 Sept. 1594) a sister and sole heiress, Margaret, wife of Sampson

[1] *Third Report* (1822), p. 217 (Ed. 1829).
[2] *Op. cit.* pp. 174-5.
[3] *Ibid.* p. 108.
[4] *Peerage Law in England*, p. 136.

Lennard. This lady petitioned the Queen that her claim to the barony might be referred to her "Majestie's special Commissioners for such cases already appointed."[1] It was duly referred to Burghley and 'the Lord High Admiral' (Lord Howard of Effingham), who are subsequently referred to as "the late right honourable commissioners for marshal causes."[2]

In the case of this barony there would seem to have been no heir-male to oppose the claim of the heiress and her husband. It is true that in the report on Lord Salisbury's MSS.[3] Richard Fienes is indexed as "claimant of the barony of Dacres (of the South)," but reference to his letter of 25th October, 1586,[4] shows that it is calendared as endorsed by Burghley: "Mr. Fynes letter for his title to the Lord Saye."[5]

This letter gives us the key to one six months later,[6] in which he informs Burghley that he has been to see Lord Leicester at Wanstead and was told by him "that for the Barony he had told her Majesty I had as good right unto it as his lordship had to his Earldom."[7] This 'Barony' could not be that of Lord Dacre of the South, who did not die till eight years later. He then passes to another subject, *viz.* "Lord Dacres' *lands*," which he

[1] *Collins*, p. 24.

[2] *Ibid.* p. 35.

[3] By the Royal Commission on Historical MSS. Vol. III, p. 478.

[4] *Ibid.* p. 185. This letter should be noted, for it is years earlier than any reference to his claim given by peerage writers.

[5] *i.e.* the barony of Saye, for which, in this letter, he claimed its ancient precedence.

[6] *Ibid.* p. 251.

[7] This was true. He was *de jure* Lord Saye, although he had assured Burghley in his previous letter that he would ever "acknowledge that both the honour and the place" (*i.e.* precedence)..... come from her Majesty's undeserved favour."

asked Leicester to obtain for him "as the next heir male," but only as an act of grace.

While the heir-general had been making good her right to the barony, her husband had concurrently been claiming to hold the barony in her right. As early as 3 June 1596 we read of "Mr. Leonard's suit for barony of Dacres,"[1] and on November 26, 1598, Essex, as Earl Marshal, sent him his formal summons to appear before him at Essex House on the 29th, there to have his case heard. The fact here established is of considerable importance as proving that, ten years after Sir Thomas Fane had made his claim *jure uxoris*, and twenty-six years after Richard Bertie had made his similar claim, it was recognised that such a claim could still be properly advanced. A letter of Dec. 8 (1598) mentions that Essex "kept a marshal's court lately where the titles of Nevill that claims to be Lord of Abergavenny and Sir Henry (*sic*) Lennard, who would be Lord Dacre of the South were argued, but the matter was referred to the Queen."[1] But, as in the Willoughby d'Eresby and Abergavenny cases, Queen Elizabeth took no action.

Under James I the claim was renewed. The heir-general petitioned the King to refer her claim "unto the most honourable lordes commissionated by your Majesty for the hearing and determining of marshal causes," which was done[2], and on Dec. 8, 1604—only some six or seven months after the settlement of the Abergavenny contest—the said

[1] *State Papers: Domestic.*

[2] S. P. Dom. Elizabeth, CCLXIX, No. 6.

Commissioners[1] reported in favour of her claim.[2] The next step was a petition by Sampson Lennard, her husband, that, as "the most honourable commissioners authorized by your Majesty for the office of the earl marshal...... have, according to right, settled in her and upon her children the said barony of Dacres," his own right to enjoy the style, title, and dignity of a baron in her right might be referred "to the said commissioners." The King referred it accordingly to "the Commissioners marshal," who reported that the precedents were in his favour. Meanwhile his wife died. Thereupon the King granted him a strange patent which recited that his wife "was, in her lifetime, in the same barony of Dacre by our ordinance invested, together with all honours," etc.; that, upon the Commissioners' report, the King had intended to follow the precedents in his favour; that, by his wife's death "and so by the immediate descent of the said barony upon her son,[3] the King's purpose had been made frustrate;" and that "out of our gracious consideration of his said former (*sic*) right," etc., the King granted him the precedence of "the eldest son of the lord Dacre of the south."[4] The date of this patent was April 2, 1612.

[1] The Earl of Dorset, the Duke of Lennox, the Earl of Nottingham, the Earl of Suffolk, the Earl of Worcester, and the Earl of Northampton.

[2] *Collins*, pp. 28-30.

[3] In accordance with the Willoughby D'Eresby precedent of 1580 (see p. 24).

[4] *Collins*, pp. 30-31. The absurdity of this recital is that if his wife had not died when she did, and Lennard had been recognised as Lord Dacre in her right, he would apparently have been liable to lose the title at any moment in the event of her death and his son's succession, which was opposed both to precedent and to Henry VIII's ruling.

Offaly

The case of this Irish barony came before the court at Whitehall, on the suit of Gerald, Earl of Kildare *v.* Sir Robert Digby and Lettice his wife, 4 Feb., '1604' (*i.e.* 1605). The *Complete Peerage* only states that Lady Digby "appears, about 1606, to have claimed, as heir general. . . . . certain estates, as also the Barony of Offaly," and gives no particulars.

Clifford

After the death of George, Earl of Cumberland (and Lord Clifford) his widow

> Margaret, countess of Cumberland, exhibited a petition to the commissioners for the office of earl marshal, setting forth that the King, upon perusal of her daughter's case for the barony of Clifford, had recommended the same to their lordships.[1]

This petition is assigned to "November 3, 1606,"[1] and it seems to have been overlooked. The *Complete Peerage* does not mention it, and Cruise asserts that on the two occasions when Lady Ann[2] claimed the barony, "her petitions were referred by his majesty to the house of lords."[3]

There is a double interest in these proceedings of 1606. In the first place the claim of Lady Ann affords a good illustration of the change of system. In 1606, we see, her petition[4] was referred by the

[1] *Collins*, p. 312.
[2] Lady Ann Clifford, the daughter.
[3] *Op. cit.* p. 195.
[4] *i.e.* through her mother.

King to the Earl Marshal Commissioners; but when, in 1628, her claim was renewed, her petition was "by His Majesty referred to the lords."[1] For between these two dates the system of dealing with such claims had changed.

In the second place, the above proceedings afford, perhaps, the earliest instance of the doctrine of "attraction" in peerage law. For we read in *Collins* (p. 312) that

> The case then had only this *quære*, as it seems by a brief in the manuscript at Lincolns Inn concerning this title, *viz.*, whether all or any of the said baronies be by virtue of the patent of Henry VIIIth creating Henry lord Clifford, earl of Cumberland, entailed upon the then earl (*viz.*, earl Francis) as appertaining to the earldom, or ought to descend in fee simple to the lady Anne as heir-general, and whether she be capable thereof, yes or no.

The records of the Earl Marshal's Court directly confirm this, and give the baronies as Clifford, Westmorland, and Vesci. They further record the order of the Court that the Earl of Cumberland should be summoned to defend his right.

It has hitherto been supposed that the first case in which this question arose was that of the barony of Roos ten years later, 1616, when that dignity was claimed both by the heir-general and by the Earl of Rutland. The point was even then sufficiently uncertain for the King to decide the matter by a compromise.[2]

Mountjoy

We now come to two claims, or rather petitions,

[1] *Collins*, p. 313.
[2] *Cruise*, pp. 115-6.

in the same year (1606), singular for their total lack of any actual right. The first was that of Sir Michael Blount for the Barony of Mountjoy, which became extinct on the death of his kinsman, the Earl of Devonshire. A month later (4 May, 1606) his petition came before the court,[1] although he was only heir-male *collateral* of the grantee.

Beaumont

On November 23, 1606, the Court received and considered the petition of Sir Henry Beaumont for the Viscountcy of Beaumont,[2] extinct a century before. He could similarly only claim to be heir-male *collateral*, and his "petition and case to be restored," which is printed in Playfair's *Baronetage*[3], is a curious medley of reasons for the King's favour. The petitioner "notwithstanding anie claim which he could justly make unto the foresaid title and honour, humbly referreth himself wholly unto your gracious favour," and, though speaking of "his ancient right and dignitie," "referreth himself and all his titles unto your majesties grace, and shall think himself highly honoured to be a creature of your own handy worke, to be disposed of as in your princely favour shall be thought fit."

His claim, in the absence of legal right, may have been influenced by the success of Edward Nevill in the Abergavenny case, which was due to the king's favour and not to any real right.

[1] Records of the Earl Marshal's court.

[2] *Ibid.*

[3] Vol. i. (1811), p. 538. The State Papers (Domestic) of the date mention the claim, which may be compared with the Lisle petition (p. 74 above).

Berners

The claim of Sir Thomas Knyvet to this barony was similarly referred by James I to the Commissioners Marshal, who [1] reported to the King in his favour.[2]

Roos

It is alleged that on the death of Elizabeth, daughter and heir of Edward (Manners), Earl of Rutland and Lord Roos (or Ros), in 1591, "the lord Burghley, lord treasurer, the lord admiral, the lord Hunsdon, commissioners for the office of earl marshal, ordered that" her son, then an infant, should "be published by Garter King of arms to be lord Roos, which was done accordingly."[3]

In any case his right to the title was challenged in after years by Francis, Earl of Rutland, who eventually petitioned the King that his own right to it might be referred to the consideration of "your Highness' commissioners designed in the office of earl marshall and arms." The case was accordingly heard before them,[4] 27th April, 1616, and the King acted in the matter, after hearing their report, 22 July (1616).[5]

Wahull

The claim of Sir Richard Chetwode to a peerage

[1] The earls of Nottingham, Suffolk, Worcester, and Northampton.
[2] *Collins*, p. 350.
[3] *Collins*, p. 166.
[4] The earls of Suffolk, and Worcester, the Duke of Lennox, and the earls of Nottingham and Pembroke.
[5] *Collins*, pp. 162, 170, 172.

barony of this name was referred by James I to the Duke of Lennox, Lord Howard, and the Earl of Nottingham (who were among the Commissioners for Earl Marshal), and their report is preserved by Banks, from whose version succeeding writers on the peerage have derived their knowledge of it.

As the document in question figured prominently in the Wahull peerage claim of 1892, all that was known about it was then ascertained, and it proved to be very little.[1] No original could be found, and the copies (one of which is preserved among the "family papers") vary somewhat in their contents. I do not see, however, any reason for doubting that the claim was made and dealt with by the Earl Marshal Commissioners, though there may not be legal evidence of the fact. But it is difficult to determine the date.

Earldom of Oxford.

It is stated by Cruise[2] that when, on the death of Henry, Earl of Oxford (1625) a contest arose for his dignity "the case was referred by King Charles I to the house of lords." Eventually, indeed, it was so referred, but it seems to have been overlooked that this was a special measure and that in the first instance the case was referred to the earl marshal and other peers, by whom Lord Willoughby's claim to the dignity in question was actually heard,[3] 25 Feb. 1625/6.

[1] *Speech of Counsel*, etc., pp. 2-5, 7-9.
[2] *Op. cit.* p. 101.
[3] *Collins*, p. 174, from *Lords' Journals*. There is also an interesting letter from Robert de Vere (*State Papers: Dom. Charles I*, xix, 106), in which he refers to the Marshal's action).

Subsequently, Robert de Vere having petitioned that the question might be "determined by the lords in parliament," the King "seeing these petitions concern so great an honour and office of inheritance, and that it falls so opportunely during the sitting of our high court of parliament," resolved "to take the advice of our lords and peers of our higher house of parliament, who have the judges with them for their assistance in any point of law which may arise."[1] This seems to have proved the turning point in the treatment of claims to peerage dignities.

That the reference to the Lords was still an innovation is shewn by an interesting letter of Sir Benjamin Rudyerd, from Whitehall, 6th April, 1626, in which he writes: "Petition was made unto the kinge concerninge the Earledome of Oxford and the High Chamberlaynes Place. His Ma(jes)tie desired the Advise of the Lordes House; the Lordes are not to judge, but to give their Advise in these Causes, the Petition not being originally to the House, but to the Kinge, who hath only desired their Advise uppon it, retaining the judgement to himselfe."[2]

It is well known that, as late as 1670, Charles II asserted his prerogative by hearing the barony of Fitzwalter case in Council at Whitehall, and that, the King being satisfied, a writ of summons foll-owed. But it is only right to point out that, in accordance with Sir F. Palmer's view, the House of Lords asserted its privilege by ordering Lord

[1] *Lords' Journals.*

[2] *State Papers: Dom. Charles I*, xxiv, 48.

Fitzwalter to sit in the lowest place until he had proved to their satisfaction his right to the place of the old barony. It seems, however, to have been overlooked that even George I, in 1718, referred a petition for the barony of Berners to the deputy earl marshal "to consider thereof, and report his lordship's opinion what may be fitly done therein," though it was also simultaneously referred to the Attorney-General.[1]

As the jurisdiction of the Earl Marshal is popularly confused at times with the duties of mere heralds, who are in consequence supposed to represent his powers, it would seem desirable to explain that it was, on the contrary, his function to keep the heralds in order and correct their armorial offences. This is particularly well seen, at the period we have been discussing, in the action of the Earl Marshal Commissioners on the charge brought by the Earl of Kent—

> "That Garter principal King of armes, 36 Eliz. *reginæ*, did corruptly and against his own knowledge, contrive and publish under the seal of his office a false pedigree for George Rotheram"

with the intention of propping up a claim to the Barony of Grey de Ruthyn.

Thereupon, on June 22, 1597, as "wee William lord Burghley . . . . and Charles lord Howard of Effingham . . . . . lawfully authorized by the Queen's most excellent Majesty Elizabeth, ... to hold and exercise the office of earl marshal of England," the commissioners "do determine and decree" that Garter is guilty.

[1] *Collins*, p. 369.

And therefore by the authority that we have of the office of earl marshal, and that specially being by our commission authorized with full power from time to time to call before us all officers of arms, both kings of arms, heralds and pursuivants, and to cause due inquisition to be made of all manner of arms by them given to any person, without good warrant,...... And, upon the examination and tryal thereof, to revoke and dissannul all such as shall be so tryed unlawfully assigned,...... By force of which authoritie wee do revoke and disannul the bearing of the said armes...... so quartered by the said George Rotheram, and do judge them to be unlawfully borne ; and do also determine that part of the pedigree made by Garter to be unlawfull, etc., etc.

So again a few years later (1605), in the Appointment of Commissioners for Earl Marshal 5 Feb. 2 James I (Pat. Roll, p. 23, m. 35d) we read that—

amongest other inconveniences of late yeares growne for wante of due regarde had to the accions of our Officers at Armes the Heralds and Kinges of Armes and Pursuivants of Armes wee are informed that divers errors are commytted by certayne Heralds now deceased and by some such as doe live to the dishonor of our nobillitie and chivalrye and to the disgrace of sundrie families of aunciente bloode bearinge the armes of their auncestors in assigninge and appointyng the auncient Armes Badges and Crestes of somme of our Nobillitie and Chivalrie and of other Gentlemen of auncient bloode to men that were and that bee strangers in blood to them and not inheritable thereto and likewise that for gayne and other affeccion the said Heralds have apoynted Armes Crestes and Badges for some other persons of base birthe or of meane vocacion and qualitie of livynge that were meete for persons of good birth and linnage to receive honor either for service in pollliticke governmente or in marshall accions which errors and disorders wee of our princelie

and Roiall dignetie from whence also inferior honors and dignities ought to be derived and protected myndinge to reforme uppon the certayne knowledge of your fidelities knowledges and zeale that you and every of you beare to the mayntenance of all states of our nobillitie and chivalry and of all gentlemen of true blood in their rights tytles and degrees as well for their Armes Crestes and Badges as for all other prehemynencies of righte by lawe of armes belonging to them and everie of them or to their children doe by theise presentes aucthorice you or any six five fouer or three of you to exercise all accions belonging to the office of the Earle Marshall to all purposes and intents...... full pouer from tyme to tyme to call before you all our offycers of armes both Kinges of Armes Heraldes and Pursivants and to cause due Inquisicion to be made of all manner of armes by them of late yeares given to any person withoute good warrante by the lawe of armes...... and uppon due examynacion and tryall thereof to revoke and disannull all such as shallbee soe tryed and founde unlawfullie and unworthelie assigned and given...... and further to consider of such good ordinaunces as hath byn by former Earles Marshalles or Constables of England for the direccion of the said Heralds in their severall offices and for the lymytacion of their aucthoritie.

All this must be very distressing to poor Mr. Fox-Davies, who loudly asserts that "*nothing* can alter the fact that the officers.... of the College of Arms.... have the *sole* authority and control of armorial matters.... [are] the *sole* authority upon matters of arms." [1]

Dethick, the Garter, who was found guilty by the Commissioners for Earl Marshal in the Rotheram business, himself bore a name and arms to which he had no right whatever, just as Wriothesley, a

[1] *Armorial Families*, pp. viii, xxx.

previous Garter, masqueraded under a name wrongfully assumed. For the Dethicks "copying the example of the Wriths, attempted to impose upon the public respecting their family." [1] Dethick, on the other hand, charged Cooke, Clarencieux King of Arms, with being the son of a tanner, and asserted that "he was dissolute and abandoned and prostituted his office in the vilest manner for money." [2] When they were not certifying pedigrees for the *novi homines* of Tudor days, these heralds justified the statements above in the King's appointment of Commissioners by such revelations as these of one another's infirmities.

[1] Noble's *History of the College of Arms*, p. 164.
[2] *Ibid*, p. 169.

THE MUDDLE OF THE LAW

The lawyer v. the historian—The authority of Coke—(1) "A CASTLE FOR THE NECESSARY DEFENCE OF THE REALM:"—*The Lucas patent—Impartibility of serjeanties—Confusion as to grand serjeanty*—(2) THE EARLDOM OF CHESTER CASE:—*Coke's doctrine of abeyance—Facts of the Chester case—The law as to homage—Alleged antiquity of abeyance—Tindal, C. J. on abeyance—The lawyer's conception of "authority"*—(3) THE DUKE OF BUCKINGHAM'S CASE:—*Confusion of tenure with descent—Use made of the case in 1779—The case based on an erroneous allegation—The issue in the case—Rival reports of the case—Mr. Asquith's confusion*—(4) THE LORD ABERGAVENNY'S CASE:—*Held to establish necessity of sitting under the writ of summons—Our dependence on Coke's report—Its accuracy contested—Its statements are inventions—Its writ a concoction—Hypothesis as to the real issue—Barony by tenure the question—Coke's authorities—His own "authority" worthless—"The record of Parliament"—Development of doctrine that sitting must be proved—The Frescheville case—The L'Isle case—the Meinill case*—(5) THE BARONY OF CLIFTON CASE:—*Held to establish descendibility of baronies by writ—Lord Redesdale's attempt to limit its application—Maxim that the law was "always the same"—Criticism of that maxim—Importance of Clifton case over-rated—Its overlooked point—The Willoughby de Broke case—The Clifton decision traceable to Coke's doctrine—Its retrospective application—This development historically wrong, but legally inevitable—Law cannot admit change or growth—The Earldom of Norfolk case—"The law was the same"—A convenient maxim—Its possible consequences—Doctrine of "ennobled blood"—Its retrospective limit—Date of first valid writs—De Ros and Despencer—The Hastings case—The Mowbray and Segrave case—The Wahull case—Sitting "referred" to earlier writ—The Fauconberg and Darcy de Knayth case—Proof of barony 'jure uxoris'—The De Moleyns case—Parallel cases—Proof of Darcy sitting—Conclusion.*

It is not long ago that a learned judge, in the course of addressing a medical gathering, observed that there was this in common between their profession and his own: they both made sure of their facts before forming their conclusions. Now that is precisely what, in my experience, lawyers, dealing with the facts of history, resolutely decline to do. The historian and the lawyer, therefore, part company from the outset. There is no point, perhaps, upon which modern historians have been more uniformly insistent than the right use of their "authorities." The historian tests his foundations before he rears his structure; the student is taught at an early stage to criticise and to classify his authorities, and never to forget that historical works —even those of the ablest men—are but commentary upon those authorities and are not "authorities" themselves.

To one who has been trained in these methods, —to whom they have become second nature,—his first experience of the lawyer's ways must come, surely, as a shock. From light he passes into darkness; science is exchanged for superstition. That change and development are ignored and evolution an accursed thing are but minor peculiarities of the strange world he enters; for what will surprise him more than all is that what is of most matter in the law is not to learn what the facts were, but what some bygone judge or writer supposed the facts had been. He will gaze in wonder on great intellects bowing themselves in homage before the blunders of the past, acute minds submitting to the fetish worship of "our

books" and helpless in the presence of what I have termed "the long ju-ju" of the law.

Strong language, it may be said; but strong language alone can open my readers' eyes, can make them realise that the lawyer's methods are those of the Middle Ages, while those of the historian, as of the man of science, have left them centuries behind. It has been my fate to have to listen, upon more than one occasion, to learned law lords and King's Counsel, in the spirit of medieval schoolmen, gravely discussing a proposition of law which it never occurred to them to question, but which originated merely in the muddled mind of the luminary at whose shrine they worship.

In the spacious days of the Great Exhibition, Hallam,—his style attuned to the taste of that appalling age,—discussed the philosophy of the schoolmen, and insisted on the blighting effect of "authority" on those who, like the great lawyers of our time, "were men of acute and even profound understanding, the giants of their own generation." The authority of Thomas Aquinas had "silenced all scruples as to that of Aristotle, and the two philosophers were treated with equally implicit deference by the later schoolmen." Just in his somewhat sententious criticism, Hallam proceeded thus:

> But all discovery of truth by means of these controversies was rendered hopeless by two insurmountable obstacles, the authority of Aristotle and that of the church. Wherever obsequious reverence is substituted for bold inquiry, truth, if she is not already at hand, will never be attained.

It is easy for a disillusioned age to smile at that *juventus mundi* in which the early Victorians believed themselves to be living and at the somewhat pompous gush in which they proclaimed its glories. But, allowing for this visionary optimism, Hallam was absolutely right when he denounced "authority" and its blighting effect upon the mind.

> But this unproductive waste of the faculties could not last for ever...... What John of Salisbury observes of the Parisian dialecticians in his own time, that, after several years' absence, he found them not a step advanced and still employed in urging and parrying the same arguments, was equally applicable to the period of centuries. After three or four hundred years, the scholastics had not untied a single knot, nor added one unequivocal truth to the domain of philosophy...... How different is the state of genuine philosophy, the zeal for which will never wear out by length of time or change of fashion, because the inquirer, unrestrained by authority, is perpetually cheered by the discovery of truth in researches which the boundless riches of nature seem to render indefinitely progressive.[1]

The erection of that bar to research is an ever-present danger. Even in the field which one would have supposed to be absolutely free from that danger, namely, that of modern science, I remember a dogmatic attempt to deny the mysterious power of radium on the ground that it conflicted with Joule's Law. One is sorry for Joule, but no one's "Law" can be suffered to bar the way to the progress of human knowledge. The incident, however, showed us that even science has its bigotry.

[1] *The Middle Ages*, Chap. IX, part 2.

The object, however, which I have before me in this paper is the demonstration of the errors, the muddle, and the fearful confusion into which lawyers have been led by the practice they have inherited from the Middle Ages of relying upon the "authority" of this or that writer, instead of seeking to ascertain the facts for themselves and to learn upon what evidence the statements of that writer were based.

To establish this, I need not travel outside a single passage in the most famous and familiar of Sir Edward Coke's 'Institutes,' better known as 'Coke upon Littleton.' I shall, however, complete my case by dealing with a passage in his 12th Report. My reason for selecting the former passage—which is taken from the chapter "On parceners" and is cited as 165 a.[1]—is that it has figured somewhat prominently in three notable cases heard, of recent years, before the Committee for Privileges. Having been concerned in all three (as a mere antiquarian adviser) and consequently heard them argued in the House, my attention has been specially drawn to this passage. I have not picked it out as peculiarly susceptible to criticism, but simply because, for the reason I have given, it has been brought specially before me.

Let it not be said that I am killing the slain or merely 'flogging a dead horse.' The very reverse is the case. It is true, no doubt, that modern lawyers might hardly go so far as Blackstone and say that Coke's works have an "intrinsic authority in the courts of justice and do not depend on the

[1] In the 3rd book of the 1st part of the Institutes.

strength of their quotations from older authors." But it is also true that, as Chief Justice Best expressed it, "I am afraid we should get rid of a good deal of what is considered law in Westminster Hall if what Lord Coke says without authority is not law," and that "many of his doctrines were so firmly established by judicial decisions that no judge can now disregard them."[1] My special vindication, however, is that, in the latest work on the peerage law of England,[2] an eminent lawyer, Sir Francis Palmer, has taken up the cudgels for Coke and upheld his authority thus :—

> Needless to say, his statement of the law and his opinions are entitled to the highest respect, for he is one of the chief oracles of our common law...... Even what Coke says, though without authority, is, as Eyre, C. J., remarks (2 Bing. 296, 297) accepted as law *(primâ facie)*, so high stands his reputation. No man assuredly had a better right than he to stamp the legal currency.
>
> In the Redesdale Committee Reports attempts are made, but without signal success, to disparage his authority on the strength of some slight inaccuracies.[3]

Again, in defending at some length Coke's statement of Nevill's Case against the Committee's criticisms, the learned writer observes (in a note) that

> In like manner the Committee seek to treat the *Abergavenny Case*, reported in 12 Co. Rep. as an invention of Sir Edward Coke ; but the facts brought to light by Sir Harris Nicholas in his report of the *Lisle Peerage Case*

[1] I desire to acknowledge my indebtedness for this passage and for others bearing on Coke's authority to Mr. Macdonell's life of him in the *Dictionary of National Biography*.

[2] *Peerage law in England*, 1907.

[3] *Op. cit.* p. 24.

afford cogent evidence to show that there is no ground for such a reflection on Lord Coke's credibility.[1]

It was this passage that led me to include Lord Abergavenny's Case within the compass of this paper.

The year before this work was published the question of the effect on Coke's authority of the criticisms in the Lords' Committee's Reports had been raised before the Committee for Privileges in the Earldom of Norfolk Case (1906). Mr. Warmington[2] and Lord Robert Cecil, counsel for the Duke of Norfolk, impugned Coke's authority, on the strength of passages in those reports, upon two points. One was the famous *De Donis* question raised in Nevill's Case;[3] the other was the tenure of dignities by 'the courtesy of England.' The former was a purely legal question, with which I do not concern myself; the latter I have dealt with in the paper on the Willoughby d'Eresby case and refer to further below in connexion with the Fauconberg case (1903). Mr. Warmington, touching on both points, claimed that in the passage of the Lords' Reports discussing Nevill's case Lord Coke's "proposition is dealt with and I think successfully confuted."[4] Lord Robert went a little further and observed, speaking of Nevill's Case,—

[1] *Op. cit.* p. 200.

[2] Afterwards created a Baronet.

[3] See Palmer, *Peerage Law in England*, pp. 199-203.

[4] *Speeches delivered .... on the claim to the earldom of Norfolk*, p. 97. In the following year appeared Sir Francis Palmer's work, claiming that "in the result, the Committee fail to dispose of or discredit *Nevil's Case*, and that case must therefore be taken still to express the law." (*Op. cit.* p. 203). Between these two very eminent King's Counsel I do not presume to intervene.

I do not wish to say anything disrespectful to Sir Edward Coke, but....... there are a variety of passages in the 'Third Report on the Dignity of a Peer' pointing out that Sir Edward Coke was not a trustworthy authority on Peerage matters, that he more than once made statements which could not be relied upon in connection with Peerage matters....... He applied all the rules of real estate, and the Committee of your Lordships' House even suggested that he had invented facts which were necessary to establish that proposition, though I should not venture to say so, etc. etc.[1]

This led, at a later stage, to a protest from Sir Robert Finlay, who had appealed to the authority of "so very eminent a lawyer as Lord Coke,"[2] and it was now Lord Halsbury's turn to appeal to the Reports.

Sir Robert Finlay. "My learned friend Mr. Warmington, and, in a less degree, I think, Lord Robert Cecil, spoke in a somewhat disparaging way of the authority of Lord Coke, and it may be that the authority of Lord Coke, at one period of our legal history, was exaggerated, but I confess that I was somewhat startled to hear Lord Coke treated as if his authority on the matter of peerage law were practically nil."

Earl of Halsbury. "I think there were some reflections upon it in that 'Report on the Dignity of a Peer'."

Sir Robert Finlay. "There are, my Lord."

Earl of Halsbury. "It is not Lord Robert Cecil. He is rather fortified in what he said by what appears in the Report in which certain observations are made about the accuracy of Lord Coke."

Sir Robert Finlay. "There are certain passages in the 'Report on the Dignity of a Peer' with regard to the point of descent to heirs female, which I shall ask your Lordships very respectfully to consider."

[1] *Speeches*, etc., p. 124.
[2] *Ibid.* p. 35.

Earl of Halsbury. "All I meant was that I think Lord Robert Cecil is justified upon that particular matter by an authority now of considerable weight, I think it is more than 80 years of age."[1]

Sir Robert then proceeded "to vindicate the accuracy of Lord Coke" with regard to "tenure by courtesy" and was able to show that his attitude with regard to the evidence afforded on this point by the earldoms of Salisbury and of Warwick[2] was absolutely sound and judicial, which it certainly was.[3]

The point to which I would here invite attention is the view of a very great lawyer on what constitutes "authority." If I understand that view aright, Lord Halsbury holds that this Report is "an authority now of considerable weight" because "it is more than 80 years of age." Whisky, one is told, improves by being kept in wood; but the view that a Report gains authority by having been preserved in boards so long as eighty years again suggests the vast gulf that severs law from history. An historian who was writing on the Middle Ages would hardly go for his authorities to the reign of George the Fourth. I have not the slightest wish to disparage the

[1] *Speeches*, etc., p. 146.

[2] This evidence is very strong.

[3] Mr. Warmington had not cited the closing sentence of the paragraph from which he was quoting, which runs thus :—"It may be here further observed that if a Title of Honour is a tenement within the protection of the Statute *De Donis conditionalibus*, it is difficult to conceive why it should not be subject to tenancy by the Courtesy of England" (*Third Report*, p. 28). This, it will be seen, brings us back to Nevill's Case. One may add that the work on peerage law most cited, that of Cruise, lays down the general proposition that "All dignities or titles of honour .... were considered as tenements or incorporeal hereditaments, wherein a person might have a real estate. And........ they are still classed under the head of real property" (2nd Ed. 1823, p. 98).

Lords' Reports; as a matter of fact I shall largely uphold their criticism of Coke's statements; but I shall do so where and because it rests on records and on facts, not because they happen to be "more than 80 years of age."

In these introductory remarks it has been my object to prove that I am dealing with a "live" question, that the authority of Coke's statements on problems of peerage law is no mere matter of historical interest or academical speculation, but has been the subject of keen dispute within the last three years, a question which may again, at any moment, be raised in the House of Lords.

And so—to work! The passage I have selected from Coke upon Littleton, that "long ju-ju" of the law, may be divided into three sections. The opening portion is cited as dealing with the Earldom of Chester and figured in the Lord Great Chamberlain case (1902) and the Earldom of Norfolk case (1906), in both of which it was quoted in full. The central portion deals with the office of Constable of England and similarly figured in the Lord Great Chamberlain case (1902) and the Barony of Lucas case (1907). The closing portion deals with the descent of "a castle... for the necessary defence of the realme" and played a very prominent part in the same two cases. The order, however, of the three sections is quite immaterial, and I shall deal with the closing one first.

(1).

"A castle that is used for the
necessary defence of the realme."

The Lucas case practically turned on a singular and apparently unique clause in the Letters Patent creating the Barony of Lucas of Crudwell, which were confirmed by Act of Parliament. This declarative clause was intended to prevent the dignity from falling into abeyance, and it provided that, instead of doing so, it should—

goe to and be held and enjoyed from tyme to tyme by such of the said Coheires as by course of descent at the Common Law should bee inheritable to other intire and indivisible Inheritances, as namely an Office of Honour and publique trust, or *a Castle for the necessary defence of the Realme*, or the like, etc.[1]

On the Lord Great Chamberlain case the doctrine that "a castle for the necessary defence of the realme" was impartible had absolutely no bearing. It figured therein, however, somewhat prominently, as we shall see below.

Now this alleged maxim of the Common Law is admittedly derived from 'Coke upon Littleton,' in two separate sections of which the author draws a sharp distinction between (A) castles "used for the necessary defence of the realme" and (B) "castles of habitation for private use." And to these two classes he assigns different rules of descent. I hope to show that this distinction did not even exist in our ancient law, but was evolved by Coke himself out of his own confusion and muddle.

[1] 15 Car. II, No. 15.

The passages in question were among those from the "ancient writers" which were printed to illustrate the Case of the claimant to the barony of Lucas.

OF DOWER (31 b)

Of a castle that is maintained for the necessary defence of the realme a woman shall not be indowed because it ought not to be divided, and the publique shall be preferred before the private. But of a castle that is only maintained for the private use and habitation of the owner, a woman shall be indowed ...... And the statute of *Magna Charta*, cap. 7, whereby it is provided *nisi domus illa sit castrum*, is to be understood a castle maintained for the necessary and publike defence of the realme. ...... But of the principal mansion or capital messuage, the wife shall be indowed, *si non sit caput comitatus sive Baroniæ*, for the honour of the realme, or (as hath been said) a castle for the publique defence of the realme.

OF PARCENERS (165 a)

If a castle that is used for the necessary defence of the realme descend to two or more parceners, this castle might be divided by chambers and roomes, as other houses be. But yet, for that it is *pro bono publico et pro defensione regni*, it shall not be divided: for as one saith *propter jus gladii dividi non potest*, and another saith *pur le droit del espèe que ne souffre division en aventure que la force del realme ne defaille par taunt.* But castles of habitation for private use, that are not for the necessary defence of the realme, ought to be parted between coparceners as well as other houses; and wives may thereof be endowed, as hath been said in the Chapter of Dower.

It will have been observed that Coke here lays the whole stress on the distinction that was drawn between the two categories. And this distinction, as I contend, was unknown to our ancient law.

The exception to partition on which ancient writers laid their special stress was not the castle, but the capital messuage of the barony or the earldom.

But let us examine Coke's statement in detail. His allegation that a woman could not be endowed "of a castle.... for the necessary defence of the realme" etc. has absolutely nothing to support it in Bracton. What Bracton does assert is something very different, namely that she must not be endowed with a manor which is "the capital messuage of a barony," because that manor must go to the heir. [1] He further asserts that this rule applies also to the earl and his *comitatus*, "whether there should be a castle there or not," [2] which shows how perfectly immaterial he deemed its existence.

As to the words *nisi domus illa sit castrum*, they do occur in *Magna Charta* [3]—and are repeated by Bracton; [4] but they apply, *not* to the widow's dower, but to her "quarantene," which was quite a different matter !

So also the words *propter jus gladii dividi non potest* are obviously taken from Bracton, but he applies them, *not* to a castle, which would have been meaningless, but to the capital messuage of a *comitatus*, referring, of course, to the earl's sword. [5]

[1] "Dum tamen manerium illud non sit caput baroniæ, quia manerium quod est caput baroniæ integre remanebit heredi." fo. 93 (on 'dos nominata').

[2] "Sive castrum ibi fuerit, sive non." (fo. 93 b).

[3] That is, in the re-issues of it (1216, 1217).

[4] "et maneat in capitali mesuagio mariti sui per quadraginta dies....... nisi domus illa fuerit castrum."

[5] "Nisi capitale mesuagium illud sit caput comitatus, *propter jus gladii quod dividi non potest*, vel caput baroniæ, castrum vel aliud ædificium" (i.e. whether it be a castle or any other kind of building). It is not easy to understand how any capital messuage (castle or not) could be the *caput* of an earldom (*comitatus*). Such *caput*, surely, was represented by the 'third penny.'

Again, *pur le droit del espee que ne souffre division en aventure que la force del realme ne defaille par taunt* is a quotation from Britton, but this writer, who was following Bracton, applied the words, *not* to a castle, but to the capital messuage of an earldom or barony. This, I submit, clearly shows how careless Coke was in the use he made of his authorities. Bracton, in his passage on partition, lays his whole stress on the capital messuage of an earldom or barony. Whether that messuage was a castle was to him immaterial.

Coke, moreover, muddled up the ancient law on Dower and on Parceners, instead of keeping the two distinct. That law may be summarised thus:—

DOWER	PARCENERS
(1) Widow not to be *dowered* in the capital messuage of an earldom or a barony. [1]	(1) Parceners not to divide the *capital messuage* of an earldom or barony (whether castle or not).
(2) Widow to enjoy the capital messuage during her *quarantene* (till her dower is assigned to her), unless it is a castle.	(2) Parceners not to divide a single *castle*. [2]

Bracton and his followers, however, dealing with parceners, lay their whole stress on the former of the two propositions which I have here numbered.

No one, it seems, has detected that Coke's

It will be shown below, in dealing with 'the Duke of Buckingham's case,' that the great Bohun inheritance included the 'fee' (i.e. the 'third penny') of three counties and that one co-heir received the 'fee' of one county, and the other one the rest. cf, note 2 below.

[1] Bracton restricts the principle to an earldom or a barony, but in practice it was not.

[2] If there were (1) more capital messuages or (2) more castles than one, they could apportion them among themselves.

imaginary distinction between the two categories of castles was imaginary and wholly erroneous, or that the ancient law of partition treated them all alike.

The case for Lord Lucas,[1] for whom Sir Robert Finlay was leading, contains these statements (pp. 18-9):—

From the earliest days of the English feudal system "a castle for the necessary defence of the realm" has always occupied an important position. It has, it is submitted, always been regarded as an impartible inheritance, and as descending to the senior co-heir.

Such a castle could not be the subject of dower, Coke observing (Co. Litt. 31 b): "it shall not be endowed because it ought not to be divided." (See also Fitzherbert's Abridgement *tit.* Dower 180; Bracton fo. 96, and Blackstone's Commentaries, Vol. 2, p. 132.)

This is a very surprising reference to authorities. Coke's exact words are (see above) "Of a castle.... a woman shall not be indowed;" Fitzherbert—the passage from whom is actually printed, like that of Coke, in the extracts from 'Ancient writers' intended to support these statements,—does not even mention a castle;[2] and Bracton, on fo. 96, is dealing with the widow's *quarantene*, which, as I have said, was quite distinct from the assignment of her dower!

When the Lucas claim came before the House, there was naturally some discussion as to what was in the minds of those who, in the days of

[1] Then technically claimant to the barony.

[2] The case Fitzherbert cites was, as he correctly states, of 4 Hen. III, and was a claim to dower in seven carucates (*not* seven acres) in Bulwick, Northants. The claim was resisted on the ground that the land was *caput baronie* and, as such, could not be assigned in dower. Bracton cites it also, to prove that a "*caput baroniæ*" could not be so assigned (fo. 93).

Charles II, referred to the law governing the descent of a "Castle for the necessary defence of the Realme." One of the Law lords suggested a castle on the Scottish border, a suggestion which seemed to be welcomed as a possible solution. The difficulty was due solely to Coke's imaginary distinction between the two categories of castles. To revert for once to the schoolmen's problems, [1] it reminded one of Hallam's question,

> What could be more trifling than disquisitions about the nature of angels, their modes of operation, their means of conversing, or (for these were distinguished) the morning and evening state of their understandings?

For great intellects, subservient to Coke, were absorbed in the subtle distinction between an ordinary castle and "a castle for the necessary defence of the Realme."

But far stranger was the castle's move in the historic case of the Lord Great Chamberlainship. It was argued in Lord Ancaster's 'Case' that this office was impartible, and that, in the case of co-heiresses, the eldest alone was entitled to it, on the ground that it was "held by the tenure of Grand Serjeanty" (which it was not and could not possibly be); and then there was given as an example of such tenure "a castle for the defence of the realm!"

This was piling the Pelion of confusion high upon the Ossa of error. Mr. Haldane, who led for Lord Ancaster, observed (to the Lord Chancellor) "I rely very much upon Coke upon Little-

[1] See p. 106 above.

ton."[1] But let us be fair to Coke: he did hold that such a castle was an impartible inheritance; and he also held, following Bracton, that a tenement held by serjeanty was an impartible inheritance: but neither he nor, I believe, any other human being had suggested that the tenure of a castle was a typical example of serjeanty, or had ever thought of confusing the two. Yet the "clear thinking" which brought to the birth the territorial army accepted this confusion.

Early in the course of that great speech in which he opened his case Mr. Haldane defined the categories of feudal tenure as follows:

> My Lords, it is plain that this office was of course not land, but the tenure of it (that expression is constantly used by analogy) was in grand serjeanty, that is to say the tenure which is distinguished by that name because of the incidents of it. If the services were very humble indeed, it was the lowest kind of tenure,—that was the villein tenure in English law. If they were of a purely civil nature, the tenure was socage tenure; but if they were services of a higher degree, of a military nature, then you had knight's service, *and it was petty serjeanty* (serjeanty of course, really comes from *serviens*) *the work of a knight.*[2] Or if services were to be performed which were of a still greater nature, it was grand serjeanty.[3]

It is strange to what frightful confusion "clear thinking" may lead. We need only turn to that famous work, *The History of English Law*,—from which Mr. Haldane himself quotes at a later stage, —to learn that "the free tenures are (1) frankalmoin (2) military service, (3) serjeanty, (4) free

[1] *Speeches of Counsel*, p. 76.
[2] The italics are mine.
[3] *Speeches* etc. p. 10.

socage."[1] Serjeanty, whether "grand" or "petty," and whether the service were "civil" or not, comes *between* military service (*servitium militare*) and free socage, and was quite distinct from both of them.[2]

So far as one can understand Mr. Haldane's definition, serjeanty might be either, according to the nature of its service, villein tenure, or socage, or knight service, or even "Grand serjeanty." It bore, in fact, a strange resemblance to "the crew of the Nancy Bell." Whether this was indeed Mr. Haldane's meaning or not, the identification of "petty serjeanty" with "knight's service" can only be described as amazing. And the military (i.e. Knight's) service ranked above *all* serjeanty.

The above passage, however, prepares us for that which followed it.

> I will give your Lordships an example. Suppose the King in those days granted *a castle for the defence of the realm*,[3] the service of his vassal being that he should defend the realm from that castle ; that was a tenure at that time in grand serjeanty, and as your Lordships will find in Bracton and Fleta, the land held by such a tenure always descended to the eldest of the daughters when the daughters succeeded, because the service was of so high and personal a nature that it could only be performed by one person and could not be split up. That was recognised very early.[4]

To this passage Mr. Haldane referred later thus :—

> Your Lordships may remember the instance I gave you

[1] *Op. cit.* (1895), I, 218.
[2] See p. 123 below. 'Scutage' distinguished the 'military' tenure.
[3] The italics are mine.
[4] *Speeches*, etc. p. 10.

of *a castle held by tenure of grand serjeanty for defence of the realm*, [1] which upon descent falling to co-parceners always descended to the eldest daughter, unlike ordinary land, which went among the three daughters. [2]

In spite of the statements in these two passages I do not hesitate to say that no such tenure was known to our law. Neither the ancient writers, nor their successor, Littleton, nor even Coke himself, ever stated or suggested that the tenure of such a castle was tenure in grand serjeanty.

Having, however, read to the Committee the passage from Coke (165a) quoted above, [3] in which he states the law of descent for the two categories of castles, Mr. Haldane observed :—

> Therefore your Lordships will see that whenever you get the tenure of grand serjeanty (he does not mention that tenure, but *a castle used for the defence of the realm is the classical illustration of it*), [4] it goes to the eldest of the co-parceners, [5] etc.

Coke, of course, was not speaking of serjeanty, "grand" or otherwise, in the passage cited by the learned counsel.

But let us take the actual passage from the 'Case,' as read thrice over by Mr. Haldane to the Lords. [6]

(It is now proposed to submit reasons for alleging that the Resolution of the House of Lords in 1781 was erroneous, and that, further direction being necessary, a new Resolution ought to be differently worded.

[1] The italics are mine.
[2] *Speeches*, etc. p. 74.
[3] See p. 114.
[4] The italics are mine.
[5] *Speeches* etc. p. 86.
[6] *Ibid.*, pp. 75, 76, 88. For the authorship of Lord Ancaster's 'Case' see *Ibid.*, p. 109.

The first and principal reason is) [1] That the office of Great Chamberlain, though an office in gross, is held by the tenure of Grand Serjeanty, *e.g.*, a castle for the defence of the Realm, a Barony or Earldom by tenure. Just as the service of defending a castle or rendering the service of an Earl or Baron cannot be performed by more than one person, etc., etc. (p. 10).

This passage betrays an amazing misapprehension of the very nature of serjeanty. The most familiar example of "grand serjeanty" is, no doubt, the tenure of the manor of Scrivelsby by the service of discharging the office of champion at the coronation of the Sovereign. [2] It was the *land* that was "held by the tenure of Grand Serjeanty," i.e. by the discharge of a service or office, not the service or office itself that was (or could be) so held.

The Lord Great Chamberlainship was (as is here admitted) "an office in gross," and had nothing to do with "tenure in (or by) Grand Serjeanty." In 1781 the Judges were asked by the House "if they considered this as an office in dignity or gross? And all agreed that it was an office in gross." [3]

It should really be quite unnecessary to explain that this is so, but one may cite the section 'Serjeanty' in the chapter on 'Tenure' in the *History of English Law*, as making the matter clear.

We may begin by casting our eye over the various 'serjeanties' known in the thirteenth century...... Some of the highest offices of the realm have become hereditary; the great officers are conceived to hold their lands by the

[1] Mr. Haldane's quotation begins here.

[2] This office was among those to which appeal was made in the Lord Great Chamberlain case.

[3] See Mr. Haldane's speech in *Speeches*, etc. p. 75.

service or serjeanty of filling those offices. It is so with the offices of the king's steward or seneschal, marshal, constable, chamberlain...... [1] tenure by serjeanty was kept apart from tenure by knight's service on the one hand and tenure by socage on the other...... [2]

In contradiction to these statements Mr. Haldane —after confusing tenure by serjeanty, as we saw, [3] with knight's service on the one hand and socage on the other,—insisted with great confidence on his Grand Serjeanty argument. To resume the quotation from his speech :—

Accordingly when we come to the tenure of an office, if the nature of the office is such that the services to be performed are of a great and important nature, then the office is said to be held on "the tenure of Grand Serjeanty," or it is sometimes said "in Grand Serjeanty." If it is not land, probably "in Grand Serjeanty" is the proper expression. [4] But in a case of this kind...... there is not the smallest doubt, and there will be no controversy before your Lordships, that "Grand Serjeanty" is the proper description of the services by which this office was held, and indeed in which it consisted...... [5]

Therefore it is grand serjeanty in the sense I have indicated to your Lordships...... this office is as much held in Grand Serjeanty as it was at any period...... the office was a personal office held in grand serjeanty ; I think there will be no controversy about that,...... a personal and impartible office of grand serjeanty. [6]

The learned counsel had begun by asserting :—

[1] It was at one time supposed that the De Veres, Earls of Oxford, held their lands by the tenure of discharging the office of Great Chamberlain ; but this, as I pointed out, is disproved by the evidence of Domesday. The Lord Great Chamberlainship was simply "an office in gross."

[2] *Op. cit.* (Ed. 1895), I, 262-3, 271.

[3] P. 119 above.

[4] No. It was only *the land itself* that was held in (or by) Grand Serjeanty (J. H. R.).

[5] i.e. The office was held by tenure of the office ! (J. H. R.)

[6] *Speeches*, etc. pp. 10-11.

I think it is abundantly clear, and I believe everybody agrees, that that office was made and created and held on the tenure of grand serjeanty.[1]

Again and again, throughout the hearing, he insisted upon this proposition;[2] but assertions, though *crambe repetita*, do not prove one's case. The learned counsel's final claim that—

> as regards the other three offices, the analogy of these offices surely supports my proposition that an office in grand serjeanty (which this and the others are admitted to be) is an office that is impartible, etc.[3]

is fatal, I submit, to his contention. For the three offices claimed as analogous are, as explained in Lord Ancaster's 'Case,' those of Steward, Constable, and Marshal,[4] and the allegation (right or wrong[5]) with regard to each of these was that certain *lands* were held by discharge of the office. When you have that tenure, you have Grand Serjeanty: without that tenure you have not.

One proof, and one alone, so far as I can find, was given. Mr. Haldane vouched it thus:—

> This must be an office of grand serjeanty; I think there will be no controversy about that; at the Coronation nobody less than a knight could officiate, *and that is the test;*[6] it must be a person of at least the degree of knight to render the services.[7]

The strange idea that this was "the test" of

[1] *Ibid.*, p. 10.
[2] *Ibid.*, pp. 7, 76, 78, 84, 96, 230, 231.
[3] *Ibid.*, p. 231. So also p. 96:—"we have got an office in.......grand serjeanty—that office according to Coke is impartible; that office has a number of analogous offices," etc., etc.
[4] *Speeches*, etc., pp. 74-5.
[5] I certainly do not say that it was right.
[6] The italics are mine.
[7] Speeches, etc., p. 11.

grand serjeanty seems to have been derived from Lord Ancaster's 'Case,' where it is argued that "this last condition appears to infer[1] (*sic*) that the law relating to Grand Serjeanty applied" (p. 4). On which Mr. Haldane observed "I think everybody agrees that it did so apply."[2]

Now the most familiar example of Grand Serjeanty, as I have already said, is the tenure of Scrivelsby manor by the service of performing, at the Coronation, the office of Champion; and neither the Dymoke who performed that service at the Coronation of Charles I, nor any of those who officiated after the days of James II,[3] was a knight.[4]

So much for the only proof, the 'test' of Grand Serjeanty. Very different was the real reason for the stipulation made in 1781. It was that the precedents showed that the office of Great Chamberlain had never been discharged by any one below the rank of a knight.

Tenure by knight-service *(feodum militare)*, of course, was that by which the earl[5] or baron held his lands under the feudal system;[6] and it is surprising enough, at the present day, to find "a Barony or Earldom by tenure" selected as an example of "tenure of Grand Serjeanty" (See p. 122 above). That some old-world lawyers held this strange view is proved by the evidence collected in 'Cruise on Dignities;'[7] but it is well

[1] ? imply.
[2] *Ibid.*, p. 74.
[3] i.e. from that of William and Mary to that of George IV, both inclusive.
[4] *Scrivelsby, the home of the Champions*, p. 165.
[5] A territorial baron who held the dignity of an earl.
[6] If there was any exception to the rule, it would not affect the proposition.
[7] 2nd Ed. (1823), p. 30; see below.

disposed of by the weighty observations in the 'Third Report on the Dignity of a Peer' (p. 69).[1]

Littleton (who lived in the reign of Henry the Sixth) in his Treatise on Tenures, speaks of Tenure by Knight Service, and Tenure by Grand Serjeanty....... he says....... that Tenure by Grand Serjeanty is Tenure by some special service to be done to the King; and though he mentions various instances of special services constituting Grand Serjeanty, he does not mention the service of attending the King in his Court, or in his Council, or in a Common Council of the Realm, as a service of Grand Serjeanty, or as any service due in respect of the Tenure of Land. It may be presumed, therefore, that he did not consider such a service as a service of Grand Serjeanty; though, in argument on claims of Peerage by tenure, it has been contended that attending the King in his Court, in his Council, and in a Common Council of the Realm, was service of Grand Serjeanty, due from all those who held a Barony.

Cruise, no doubt, has marshalled an imposing array of legal opinion in favour of the view expressed in Lord Ancaster's 'Case.'

In the case of Sir Drew Drury, in the court of wards 5 Jas. I., as reported by Lord Coke, the two chief justices and the chief baron, in the presence of the earl of Salisbury, after conference among themselves, declared that "In ancient times every baron, etc., held his barony etc. by grand serjeanty, as appeared 18 Ass. Pl. ult. in Clifford's case, and the Lord Cromwell's case, 2 Rep. 80 a." (6 Coke's Rep. 73). ....And in Lord Coke's comment on Littleton it is said—"The Lord Clifford did hold his barony, and the sheriffwick of Westmoreland, by grand serjeanty *in capite.*" And in Lord Cromwell's case it is laid down that every barony in ancient time was held by grand serjeanty. (2 Coke's Rep. 81 a.)

[1] Dated 18th July, 1822.

In the case of the county palatine of Wexford, as reported by Sir John Davies, earls palatine are said to have royal services, having power to create tenures *in capite*, and also tenures in grand serjeanty; for they had power to create barons.

In Lord Chief Justice Crew's argument respecting the office of great chamberlain of England is the following passage :— "The earl of Arundel being seised in fee of the castle and manor of Arundel, being held by grand serjeanty, as all the ancient earldoms and baronies were." And in Mr. Justice Doddridge's argument respecting the barony of Abergavenny he says—"Barons by tenure are those which do (hold) any honour etc. as head of their barony *per baroniam*, which is called grand serjeanty." It is also stated in this last case that the castle and honour of Abergavenny was originally granted to be holden *per baroniam*, *sive* grand serjeanty.

These passages have not been noticed by any modern writer; they appear, however, to carry considerable weight with them, and are confirmed by Spelman, a great authority, in whose Glossary, after explaining the words *magna serjeantia*, comes the following passage :— "Quin et procerum omnes dignitates, scil. ducum, marchionum, comitum, vicecomitum, baronum, hoc tenentur servitio."[1]

Reverting to this passage, Cruise observes :—

It appears from the passage already cited from Spelman, that earldoms as well as baronies were held of the crown by the tenure of grand serjeanty, of which the service was attendance on the *curia regis* and the *magnum concilium* on the great festivals, and at any other time when summoned.[2]

It was said by one of the authors of the *History of English Law* that "the next generation will never want to know how much rubbish" I have

[1] *Op. cit.* pp. 30-1.
[2] *Op. cit.* p. 59.

"swept or helped to sweep away."[1] Fortified by that opinion I would here also relegate, once for all, to the dustbin the whole of the above *dicta*. But I do so largely on the strength of the admirable section on 'Serjeanty' contained in that work itself. To Cruise, as a lawyer, the above passages might seem to be of much weight: to me, as an historian, they do but constitute a fresh proof of "the muddle of the law."

(2)

The earldom of Chester case.

The special importance of this ancient case is that Coke's treatment of it was the legal foundation of the doctrine of abeyance in dignities. This doctrine has been twice discussed, of recent years (1902, 1906), in the House of Lords, but the desired decision as to whether it applied to earldoms or not has not yet been given. At any moment, therefore, a case may come before the House in which the whole question of abeyance may be raised anew.

For the purpose also of this paper Coke's treatment of the case is of great illustrative value. I hope to show that it confirms in very striking manner Mr. Macdonell's criticism[2] that

> Sometimes......... he gives a wrong account of the actual decision; and still more often the authorities which he cites do not bear out his propositions of law...... This last is a fault which is common to his Reports and his 'Institutes' alike, and it has had very serious consequences on English law.

[1] *English Historical Review* x 783.
[2] See p. 108 above.

But let us see what Coke says.

This passage, so much relied on and so repeatedly quoted, runs as follows :—

> But now let us turn our eye to inheritances of honour and dignity. And of this there is an ancient booke case in the 23rd Henry III, *title partition* 18 in these words : "Note, if the earldom of Chester descend to co-parceners, it shall be divided between them, as well as other lands, and the eldest shall not have this seigniory and earledome entire to herself ; *quod nota*, adjudged *per totam curiam.*" By this it appeareth that the earldome (that is the possessions of the earldome) shall bee divided ; and that where there bee more daughters than one, the eldest shall not have the dignity and power of the earle, that is to be a countesse. What then shall become of the dignity ? The answer is that in that case the king, who is the sovereigne of honour and dignity may, for the incertainty, conferre the dignity upon which of the daughters he please, etc., etc.

In the legal battle for the office of Lord Great Chamberlain, Mr. Asquith, [1] whose case was that it was partible, did not meet, as I hold he might have done, Mr. Haldane's argument to the contrary by denying that the office was "held by tenure of grand serjeanty," but took his stand boldly on the general rule of law. Both he and Mr. Haldane, however, [2] cited the above passage in full, the latter, indeed, doing so twice in the course of his voluminous speech, and observing that it "is no doubt the origin of the modern doctrine of abeyance...... the earliest indication of the modern doctrine of abeyance."

In the Earldom of Norfolk case Sir Robert

[1] Now Prime Minister.

[2] *Speeches of Counsel*, etc., pp. 79-80, 85, 163.

Finlay, who had to argue that the doctrine of abeyance applied to earldoms as to baronies, naturally laid great stress on the "authority" of Coke and relied on the above passage as establishing that proposition.

With regard to the "authority" here of Coke, the historical student will ask two separate questions: (1) What were the facts of the case? (2) Do those facts justify Lord Coke's proposition?

It was known, of course, that Cruise, — who had very properly distinguished Coke's account of the earldom of Chester case from his "observations on this case"—had pointed out that "the above observations of Lord Coke do not seem to be well founded,"[1] and had given his reasons. Sir Robert Finlay, relying on Coke, referred thus to Cruise's comment:

> I think your Lordships will find on looking at the whole passage that Mr. Cruise doubts the correctness of Lord Coke's version of what happened with regard to the earldom of Chester, but he nowhere, so far as I can find, throws the slightest doubt upon Lord Coke's general proposition that this applied to all Peerages including Earldoms:[2]

> I told your Lordships...... that Mr. Cruise differed from what Lord Coke said as to what occurred with regard to the Earldom of Chester, and I venture to submit to your Lordships that, whether or not, as regards the somewhat obscure history of what took place with regard to the earldom at that date, Lord Coke was right or wrong, that does not affect the value of the general doctrine which he authoritatively lays down here in the 17th century, etc.[3]

[1] *Dignities*, (1823), p. 181.
[2] *Speeches...... on the claim to the Earldom of Norfolk*, p. 35.
[3] *Ibid.*, p. 46.

I venture to submit that Cruise does not charge Coke with being wrong "as to what occurred with regard to the Earldom," but with his "observations" on the facts. That is the whole point.

The historian would have thought that the first thing to be done, in examining the question, was to ascertain the facts: but that is not the lawyer's way. Lord Robert Cecil, replying to Sir Robert, did, indeed, go so far as to verify Coke's statement by looking up his reference in Fitzherbert's *Abridgement*;[1] but, as the late Prof. Maitland showed, Fitzherbert did but derive his information from 'Bracton's Note Book,' which again was derived from the ultimate authority, the rolls. Now the *History of English Law* refers to the Earldom of Chester case as "the exceedingly important case raising the question whether a palatinate can be partitioned,"[2] and gives the references to the 'Note-book,' so that there is no difficulty in getting at the facts of the case. Nearly twenty years before the Committee for Privileges was called upon to deal with the claim to the Earldom of Norfolk, Prof. Maitland had written thus in the Introduction to his edition of 'Bracton's Notebook,' a work intended for the benefit of his legal brethren:—

Four valuable entries concern the partition, and therefore destruction of the most formidable outcome of English feudalism, the palatinate of Chester...... the doubts of the assembled magnates over this unprecedented case, the rejection of foreign, presumably French, precedents, the reference to Roman or Canon Law as a possible supplement for English jurisprudence, the afforcement of

[1] *Ibid.*, p. 123.
[2] (1st Ed.) I, 162.

the court, the elaborately reasoned judgment, will not go unheeded (I, 128).

This, however, is precisely what they seem to have done. To not one of the eminent counsel engaged in either case or of the Law lords who heard them were any of the details known. Coke stopped the way. I cannot here go into all those details, but to certain points I would call attention.

The contest was in no way one for the dignity of earl of Chester: it was a contest for lands. John ('Scot') earl of Chester (and Huntingdon) had died in 1237 seized of the dignity of earl of Chester and also of the territorial palatinate *(comitatus)*. His heirs were the two daughters of his eldest sister and his two younger sisters.[1] William de Forz, heir to the earldom of Albemarle, who had married the elder daughter of the eldest sister, made, in her right, a double claim: (1) he claimed to be earl; (2) he claimed the entire territorial *comitatus*, on the ground that it was a Palatinate and therefore exempt from the general rule of descent. His opponents, the other co-heirs, admitted that he ought to be earl, but claimed that the territorial *comitatus* was partible and ought to be divided. The dignity, therefore, was not in dispute;[2] the lands alone were in question. That is the essential point.

If these details had been known, the claim of William de Forz would certainly have been referred

[1] They are wrongly stated in the *Lords' Reports on the Dignity of a Pee[r]* and in the *Complete Peerage.*

[2] In 'case' 1227 William de Forz is spoken of as he "qui habet æsnescian[m] et debet esse Comes ut ipsi participes dicunt," and in 'case' 1273 he is "qu[i] habet æsnesciam et debet esse Comes ut ipse dicit."

to, both in the Great Chamberlain case and in the Earldom of Norfolk case, for it illustrates the importance attached to *æsnescia*—a principle keenly discussed in the former, and also the right to an earldom *jure uxoris*, which was no less keenly argued.

'Bracton's Note Book' supplies, further, another point of much importance. The question, we find, was raised whether, if the *comitatus* was partible, the junior co-heirs should hold separately *in capite* of the King, or should hold of William de Forz (who had the *æsnescia*), and William of the King.[1] It is a singular fact that, only the year before, "the English in Ireland sent to Westminster for an exposition of the law" in precisely such a case: "Of whom do the younger sisters hold?" To continue this extract from the *History of English Law*:—

> The answering writ, which has sometimes been dignified by the title *Statutum Hiberniæ de Coheredibus*, said that if the dead man held in chief of the King, then all the co-heirs held in chief of the King and must do him homage.[2]

The importance of this question being raised in 1237 is that it was not realized by the draftsman of Lord Ancaster's 'Case' that the law, as stated by Glanvill, soon changed. Glanvill, cited by Mr. Haldane, who led for Lord Ancaster, held that

[1] "Utrum.................. debeant ipsi participes tenere singulas partes de Domino Rege in capite vel de Willelmo de Fortibus qui habet *æsnesciam* etc. (Case 1227); utrum.......... debeant tenere singulas partes de Domino Rege in capite vel de Willelmo," etc. (Case 1273).

[2] *Op. cit.* (1st Ed.) II, 275. The learned authors add, in a note, that "For some time past the King had habitually taken the homage of all the parceners;" but they make no mention of the Chester case, in which the point seems to have been considered still doubtful. There is nothing to show that the doubt was based on the palatine status of the *comitatus*.

The husband of the eldest daughter shall do homage to the chief lord for the whole fee. And the younger daughters or their husbands are bound to render to the chief lord their services for their tenement by the hand of the eldest daughter or her husband.[1]

But "the law about this matter underwent an instructive change....... it soon becomes apparent that the King is dissatisfied with this arrangement and that the law is beginning to fluctuate."[2]

But not only was Glanvill's doctrine accepted as valid in the 'Case' prepared for Lord Ancaster, but it was further, by a strange confusion, connected with Coke's *dictum* that "Homage and fealty cannot be divided between co-parceners." It was pointed out by the Attorney General and by Mr. Asquith that this "means cannot be divided in the sense of being rendered *to* the co-parceners. It does not mean the converse, as is suggested in Lord Ancaster's Case—it does not mean that they cannot be rendered *by* them, but cannot be rendered *to* them."[3]

The essential point, however, is that the earldom of Chester case did not relate to the dignity of earl. Indeed one has only to read Coke's own words to see that the case he relied on had nothing to do with his subject. Those words are (see p. 129 above) :—

But now let us turn our eyes to inheritances of *honour and dignity*. And of this there is an ancient book case...... By this it appeareth that the earledome (that is the *possessions of the earledome*) shall bee divided.

[1] *Speeches* etc., p. 79. Mr. Haldane spoke of this passage as "the important book of the citation."
[2] *History of English Law* II, 274-5.
[3] *Speeches* etc. p. 167.

If, however, the whole passage is studied with care, it will seem most probable that he misunderstood Fitzherbert and wrongly supposed the case to have decided the descent of the dignity also. We must carefully distinguish from his version of the case his own comment on the decision, which is this :—

What then shall become of the dignity ? the answer is that in that case the King, who is the sovereigne of honour and dignity, may, for the incertainty, conferre the dignity upon which of the daughters he please ; and this hath been the usage since the Conquest, as is said.

Cruise naturally imagined these " observations " to refer to the Chester case, and it is surprising enough to find that Coke has based them on a different case, which he altogether misrepresents, and which, moreover, had nothing to do with peerage dignities !

The case in question was heard nearly twenty years before that of the Chester *comitatus*, and is No. 12 in *Bracton's Note Book*. Its editor, Prof. Maitland, has duly pointed out that these two cases " are Coke's oldest authorities (he had them from Fitzherbert) for the law as to the abeyance of titles of honour;"[1] and what I have to insist on is that these cases concerned lands, and neither of them titles of honour. The earlier case is thus stated in the *History of English Law* :—

In 1218 a litigant pleads that ever since the Conquest of England it has been the King's prerogative and right that if any of his barons dies, leaving daughters as his heirs, and the elder-born daughters have been married in

[1] *Op. cit.*, I, 128.

their father's lifetime, the King may give the youngest daughter to one of his knights with the whole of her father's lands to the utter exclusion therefrom of the elder daughters.[1]

It is admitted in a note that "this contention seems to be over-ruled, and as a matter of fact a partition seems to have been made." What the decisions is these two cases really do establish is that the great rule of law by which lands were equally divided between co-heiresses was re-affirmed in both, despite the 'Palatinate' plea in the Chester case and the special 'custom' plea in the other.[2]

No blame attaches to Fitzherbert, who, in his 'Abridgement,' states the plea fairly enough:—

> Soers, vers le tierce soer. fuit all' in barre un custome que fuit tel—Quod si aliquis baro...... Et omnes reges habuerunt hanc dignitatem a conquestu.

Here is the origin of Coke's somewhat vague phrase:—"and this hath been the usage since the Conquest, as is said."

But let us see how Coke has treated this case. First, he cites it for "honour and dignity," with which it had absolutely nothing to do. Second, he mixes it up inextricably with the case of the Chester *comitatus*. Third, he omits the essential fact that the plea he records was over-ruled. Fourth, he states the case wrongly, for the 'custom' alleged was quite distinct from the modern doctrine

[1] *Op. cit.*, (1st Ed.) II, 273.

[2] The decision in this case (1218) was dead against Robert de Ferrers, who pleaded the special custom:—"Consideratum est quod nichil dixerunt quare non haberent racionabiles partes suas et ideo habeant etc., et Robertus in misericordia pro injusto deforciamento."

of abeyance. In the Lord Great Chamberlain case, when the passage relating to the Chester *comitatus* had been read from Coke by Mr. Asquith, the following instructive dialogue took place.

Lord Davey. That is the doctrine of abeyance which we were told was not established till the Grey de Ruthyn case in 1640.[1]

Mr. Asquith. He says so, ...

Lord Davey. I observe he says, "as is said."

Mr. Asquith. Yes.

Lord Davey. That would make the doctrine of abeyance very much older.

Mr. Asquith. Yes. Lord Coke cautiously says, "as it is said." He does not cite any authority.

Lord Davey. He asks, "What then shall become of the dignity?" And then he says, the King may "confer the dignity upon which of the daughters he pleases."

Mr. Asquith. Yes, it is very precise.

Lord Davey. He lays down the modern rule.

The Lord Chancellor. Yes, exactly as we should lay it down.

Mr. Asquith. Yes.

Lord Davey. He says the land would be divided between them, but the dignity would be conferred by the King upon which of the daughters he please.

Mr. Asquith. Yes, it would pass into abeyance, and the Crown may dispose of it as it pleases.

The Lord Chancellor. So that it does mean, apparently, the modern doctrine...........

Mr. Asquith. Yes, it is the modern doctrine.[2]

The point here is that Coke states as law the doctrine of abeyance in its modern form, although, even if his case concerned a peerage dignity (which

[1] I do not follow this. There was no abeyance in the Grey de Ruthyn case.

[2] *Speeches*, etc. p. 163-4.

it does not) and even if the doctrine alleged in that case had been admitted (which it was not), that doctrine would still be quite distinct from that of abeyance in its modern form. [1] Here, therefore, as I have said above, we have an excellent illustration of Mr. Macdonell's criticism that "the authorities which he cites do not bear out his propositions of law."

Sir Robert Finlay, however, relying on those propositions, argued in the Earldom of Norfolk case as follows :—

My submission to your Lordships is that the value of Lord Coke's proposition is altogether independent of the question whether he was right about this old case of the Earldom of Chester. [2] It shows the view that was taken by so very eminent a lawyer as Lord Coke when he wrote, and I think this was published in the year 1618 or 1620. [3] It shows the view taken by the most distinguished lawyer of his time, and stated without any hesitation and not questioned in the note. [4]

I had submitted to your Lordships that the value of the doctrine there laid down by Lord Coke is really independent of the question of what the precise circumstances relating to the Earldom of Chester were, because Lord Coke lays down the doctrine generally, and in a way that represents the opinion of the most eminent lawyer of that time on the subject.

I venture to submit to your Lordships that, whether or not, as regards the somewhat obscure history of what

[1] I am speaking, of course, of the 1218 case, the statement of which I have given above, from the *History of English Law*. For the 'earldom of Chester' case was not concerned with the dignity: indeed the parties in that case were agreed that this did *not* fall into abeyance, but should go, as of right, to the holder of the *æsnescia*.

[2] Sir Robert here ignored the second case (that of 1218), which was the other leg on which Coke's proposition rested.

[3] Mr. Asquith laid stress in the Great Chamberlain case on its having been published in 1628.

[4] By Mr Hargrave.

took place with regard to the Earldom [1] at that date, Lord Coke was right or wrong, that does not affect the value of the general doctrine which he authoritatively lays down here in the 17th century, etc. [2]

Now let us clearly understand the principle of legal authority which this argument implies. Coke states as law the modern doctrine of abeyance, but he does so neither on his own authority, nor as an *obiter dictum*. He rests his statement on two cases, which were, as Prof. Maitland wrote, his "authorities." [3] His proposition, therefore, rested upon two legs: both those legs have been knocked away; but Sir Robert Finlay tells us that the proposition remains. Its "value" is not affected. I do not presume to question for a moment that this is sound law; but it leaves the historian gasping.

The doctrine thus stated, (as we find) without authority, by Coke was eventually accepted as law, in the case at least of baronies, and received the crowning approval of Chief Justice Tindal. I use the phrase "crowning approval" because, in the Camoys case, that learned judge erected a little "ju-ju" of his own for the adornment of the legal paradise. [4] I deliberately use here again a phrase taken from fetish worship because of the reverence shown by lawyers in the presence of this Judgment (6 Cl. & Fin. 789), which is now deemed the leading "authority" on abeyance in Peerage dignities. [5] As the ex-Lord Chancellor, Lord

[1] See p. 138, note 2 above.
[2] *Speeches*, etc. pp. 35, 37-8, 46.
[3] See p. 135 above.
[4] In the Greek sense of that word.
[5] Technically, of course, it was only an "opinion," delivered on behalf of the judges; but it is also spoken of as a "Judgment." It is cited in Palmer's

Halsbury, observed, in the Earldom of Norfolk case :—

One feels the greatest possible respect for anything that that learned Judge said....... one speaks with great hesitation in criticising anything that so great a lawyer as Sir Nicholas Tindal said, but I cannot quite follow the logic of it.[1]

Sir Robert Finlay, who was here arguing that the doctrine of abeyance applied to earldoms, quoted from this Judgment several passages, among which was one to which I must invite attention.

My lords....... it has been indeed the established and undoubted law upon this subject from a very early period of our history that......... the Crown, the sovereign of honour and dignity, may at any time during such abeyance determine it by conferring the dignity on whichever of the co-heirs it pleases[2] .... Lord Coke indeed in his First Institute seems to think that such has been the law from the time of the Conquest,[3] (Co. Litt. 165), but it has at all events been acted upon at the least as early as the reign of Henry the Sixth ; who in the case of the Lord Cromwell dying without issue male, and leaving several daughters, preferred the youngest (Collins, 248, 175, and 195) ; and in more modern times this exercise of the Royal prerogative has been repeatedly put in force ; as amongst many others, in the case of the earldom of Oxford, in

Peerage Law in England (pp. 105-7), but only for its well-known over-ruling of the view taken by Chief Justice Eyre ("a very eminent judge"), some forty or fifty years earlier, in the Beaumont case. Where would actors be without their conflicting "readings," or lawyers without their conflicting views of one and the same law ?

[1] *Speeches*, etc. pp. 36-7.

[2] Coke's doctrine is here accepted as "undoubted law...... from a very early period of our history", while Sir Robert had only claimed it as law in Coke's time.

[3] The Chief Justice was evidently unaware that this was no opinion of Coke's own, but merely repeated the allegation made (unsuccessfully) in 1218.

1625, and in that of the Barony of Grey of Ruthin.[1]

Of course, if this definite statement as to the earldom of Oxford, in 1625, is true, it at once establishes the point for which the learned counsel was contending. But he was here interrupted by that very acute lawyer, the late Lord Davey, who observed:—

I rather doubt whether it was put in force in the case of the Earl of Oxford. I am not sure. That would have to be looked into.

To which Sir Robert Finlay replied: "I think there is some obscurity about it, but at any rate it has been firmly settled."[2]

Now let us grasp the position. Here is a "great," a "learned" judge laying down the doctrine of abeyance, on behalf of the judges of England, in a considered and elaborate opinion. He is defining, for the benefit of the Lords, the "exercise of the Royal prerogative," and he deliberately selects as his examples of the exercise of that Prerogative two instances in which that Prerogative was not and, indeed, could not have been exercised. For in neither case was there any abeyance to be determined by the Crown! About the facts there is no "obscurity," nor are they the subject of any "doubt:" they are as I have stated them.

Perhaps it is the right legal view that in such a case as this, "whether or not, as regards the somewhat obscure history of what took place with regard

[1] 6 Clark and Finelly, 847.
[2] *Speeches*, p. 45.

to the Earldom[1] at that date," Chief Justice Tindal "was right or wrong, that does not affect the value of the general doctrine which he authoritatively lays down here in the" 19th century.[2] But, if so, it is difficult to see why these learned men should state facts at all. It were better surely to refrain from doing so when their alleged facts are found to be grotesque errors. A well-known clergyman of the last century was never permitted to forget that he had once, in a moment of haste, exclaimed "Hang theology." The lawyer, happier in his freedom, traces his untrammelled course: he can always in effect, if challenged, exclaim "Hang the facts."

One hears much of the rules of evidence: this, possibly, is one of them.

But I have not yet set forth the full extent of the blunders of "that learned Judge." It was bad enough that in his facts he should so gravely err; but the origin of his error is worse. For one can clearly show that he had here merely "cribbed" from 'Cruise,' and "cribbed," Alas! with such reckless haste, such amazing want of care, that he utterly perverts the facts. We saw above that three cases were selected by the Chief Justice to illustrate the Crown's prerogative of determining an abeyance. These were "the case of the Lord Cromwell," "the case of the earldom of Oxford," and "that of the Barony of Grey of Ruthyn." Now these are precisely the three cases[3] which

[1] Of Oxford, in this case.
[2] Compare p. 139 above.
[3] "The case of lord Cromwell," "the case of the earldom of Oxford," and that "of the barony of Grey of Ruthyn."

Cruise had similarly selected on pp. 182-3 of his work[1] in dealing with "Abeyance of dignities by writ." But in his words there is nothing to account for so amazing a blunder as that which meets us in the statement by the Lord Chief Justice. That either in the case of the earldom of Oxford or in that of the barony of Grey de Ruthyn the Crown determined an abeyance is nowhere stated or even implied in Cruise's accurate account. In neither case, as I have said, was there an abeyance to determine. As to Cromwell, the facts are wrong, for Lord Cromwell left as his heirs, not "several daughters," but two nieces. On this, however, one need not insist, for it does not affect the principle; and Cruise is not responsible for the error, which he merely quotes from Coke.

The fact that the Chief Justice had merely "cribbed" from Cruise was unconsciously made manifest when Sir Robert Finlay, after citing him, proceeded to cite from Cruise the very passage which, as I contend, the Chief Justice must have read with such amazing want of care.[2] The whole point of the episode is the illustration it affords of that almost contemptuous indifference to fact that a great lawyer could betray. Again and again have I observed, as I sat and watched these cases, that, just as in the House of Commons the "incident" or the "personal explanation" will often arouse a keener interest than a matter of national concern, so also the energies and the acumen of Law lords and counsel alike are always

[1] *Op. cit.* (2nd Ed.).
[2] *Speeches* (as above), pp. 45, 47.

at their keenest when discussing a "knotty point of law," the mere facts, with the evidence on which they ultimately rest, presenting a feebler attraction to the legal mind.

Let me again insist that deep at the root of the mischief there lies that false conception of what constitutes "authority." Fiction is not converted into fact because it happens to proceed from the mouth of a learned judge. Of Coke's "intrinsic authority" I have already spoken: with Comyn it is the same story.

Best, C. J., citing Comyn's opinion in his Digest, said: "This he lays down on his own authority without referring to any case, and I am warranted in saying we cannot have a better authority than that learned writer. (*Hudson v. Revett*, 5 Bing, 387, 388.)[1]

What the historian seeks to know is, not whether a lawyer was "great," "eminent," or "learned," but what authority he had for his statement and whether he was right in his facts.

By the side, let me hasten to add, of this medieval method, derived from days when the law was a mystery of which the judges were the oracles, the modern scientific method has slowly forced its way. In the very case of the Earldom of Norfolk, with which I have just been dealing, these two methods clashed. In support of the view that "abeyance" applied to earldoms as to baronies, appeal was made, on the one hand, to the "authority" of Coke and of Tindal, and, on the other, to the true authorities, the records which

[1] Palmer's *Peerage Law in England*, p. 27, where Lord Kenyon also is cited to the same effect.

proved the facts of the Crown's dealings with earldoms and of which the evidence was collected and arranged with infinite care. But oil and water cannot mix: the meaning of "authority" must be either (1) the unsupported statement of a judge, or (2) the evidence that proves the fact. It is not possible to combine these two conceptions of authority; the medieval is divided from the modern by a gulf.

The same difficulty, strangely enough, confronts the lawyers and the heralds. However anxious they may both be to adopt the modern method, they are hampered at every turn by their predecessors' acts. We saw at the outset that, by the admission of Chief Justice Best, "we should get rid of a good deal of what is considered law in Westminster Hall if what Lord Coke says without authority is not law." And we should, similarly, have to jettison much genealogy and heraldry in the MSS. at Heralds' College if what has been stated or accepted by bygone Kings of Arms were now put to the proof. Of the latter difficulty, at least, I can speak with special knowledge. For again and again I have had to show the inevitably disastrous effect of endeavouring to pour into the 'old bottle' of unsupported pedigrees the strong 'new wine' of record evidence and facts.[1]

The two methods cannot be combined: proof or assertion, which shall it be?

To that question there is one at least who has given, in the realm of law, no uncertain answer.

[1] Compare the remarks on the Trafford pedigree in the paper on "Saxon' Houses, and those on the 16th century pedigree of the Caringtons.

He who set himself to hew the stones "for some builder of the future," knew that the whole fabric must be built afresh from the foundations, and strove to make very sure that those who wrought it should "have facts and not fictions to build with." He and his colleague could at least claim that they had "given scholars the means of verifying" their "work throughout."[1] For Frederic William Maitland was a man to "prove all things." The historian's method he had made his own: it was not for that great genius to learn, but to teach that method.

While others lingered among the tombs, he drew his knowledge of our law, not from the sepulchres of its sages, but straight from the source itself. For him no fetish blocked the way; for him no vain repetition of statements from the legal Talmud[2] would make those statements true. If "Co. Litt." was wrong, it was not blasphemy to say so; to treat its "sentence" as a judgment from which there was no appeal was worthy of the Middle Ages.[3] I do not know, nor do I suppose that the famous Downing Professor ever said so much, but one can imagine, had he spoken out, how his witty raillery might have shocked the veterans of Bench and Bar. For in his ever vivid originality, in the daring brilliance of his

[1] Preface to the *History of English Law.*

[2] "certain it is that there is never a period, nor (for the most part) a word nor an '&ca' but affordeth excellent matter of learning." (Coke upon Littleton.)

[3] Compare the *Dialogus de Scaccario* on Domesday: "Hic liber ab indigenis Domesdei nuncupatur; sicut enim districti et terribilis examinis illius novissimi sententia nulla tergiversationis arte valet eludi, sic cum orta fuerit in regno contentio de his rebus quæ illic annotantur; cum ventum fuerit ad librum, sententia ejus infatuari non potest vel impune declinari."

style, Maitland was the Whistler of the Law.

(3)

The Duke of Buckingham' case.

It is not Coke's statement of this case that illustrates "the muddle of the law" so much as the case itself and the use that has been subsequently made of it. After dealing with "inheritances of honour and dignity,"[1] Coke, still treating of Parceners, proceeds thus (Co. Litt. 165 a):

> But there is a difference between a dignity or name of nobility and an office of honour. For if a man hold a manor of the King to be High Constable of England and die leaving issue two daughters, the eldest daughter taketh husband, he shall execute the office solely, and before marriage it shall be exercised by some sufficient deputy. And all this was resolved by all the Judges of England in the case of the Duke of Buckingham.

Here one observes, at the outset, before investigating the facts, that Coke introduced an extraneous element; he professes to be stating the rule of descent in the case of "an office of honour," but his illustration is the tenure, not of an office, but of a manor. "For if a man hold *a manor..... to be* High Constable," he writes. And this distinction is vital. Such a tenure, as I explained above, is true tenure by serjeanty (whether grand or petty), and the office would follow the possession of the manor irrespective of descent in blood.

That this is so was shown, for instance, at the coronation of the present King, when the Duke of Newcastle made good his claim, as "holding the

[1] See p. 129 above.

Manor or Priory of Worksop," to the "services" of providing a glove for the King and supporting his Majesty's right arm, although the land had only been acquired by his predecessor, a stranger in blood, by purchase from the Duke of Norfolk in 1839.[1]

It will be seen, therefore, that Coke's proposition would only, on his own statement of the facts, be applicable to an office held in virtue of a manor irrespective of descent in blood. If the land were held jointly by the sisters, or wholly by the younger sister, or were alienated, the office would not belong to the elder sister alone.[2] His rule ignores his own statement that the office attached to the manor.

But his statement of the facts is wrong. For the office was alleged to attach, not to "*a* manor," but to three. And this again is vital: it was the very essence of the difficulty. For of these manors two had passed to the senior, and one to the junior co-heir, both of whom, *by reason of their tenure*, had consequently rights in the office. It is recognised that Coke relied on Dyer's report of the case, and in that Report the headnote runs: "If a man holds *manors* of the King by service of being Constable of England," etc. This was very carelessly reproduced by Coke as "if a man hold *a manor* of the King to be High Constable of England," etc.[3] I shall have to compare again below Coke's statement of the facts with

[1] See Wollaston's *The Court of Claims*, pp. 133-6, 143-6.

[2] In the second or third of these cases the office, clearly, could not ever be executed by the elder sister's husband of right.

[3] I cannot find that Coke's mistake has been pointed out before.

that of his own authority, but for the present it is enough to have shown (1) that he reproduced that statement incorrectly, (2) that even his own statement does not involve his proposition of law.

We will now turn to the use that was made of Coke's proposition when the Great Chamberlainship was in dispute in 1779. The Attorney-General of that date evidently considered it unnecessary to search for Coke's authority; for, although he does not cite Coke, he repeats Coke's proposition.

> It only remains, therefore, to consider in what manner the right of the office may be exercised in the case of co-heiresses, the eldest of whom has taken husband......... that question appears to have been clearly decided in a very celebrated case: Edward Duke of Buckingham claimed to be entitled to the office of Constable of England by descent from the eldest of the two co-heiresses of Humphrey de Bohun, Earl of Hereford and Constable. Upon a case stated to the Judges in relation to the said claim, 6 H. 8, it was unanimously resolved that *where the said office descended to daughters and the eldest taketh a husband he shall execute the office solely, and before marriage it shall be executed by some sufficient deputy.* [1] This resolution of the judges is maintained in several books of authority, is nowhere disputed and appears in all the parts of it to agree with the usage in such great offices as have in the course of time descended to heirs general. [2]

Here, it will be seen, the Attorney General states the resolution of the Judges as it is stated by Coke, ignores the manors, and treats the question as one of "descent" alone. His conclusion, therefore, was "that the eldest co-heiress having

[1] The italics are mine.

[2] Attorney General's report of 1779, quoted in *Speeches*, etc., pp. 58-9.

taken a husband,[1] he is in her right entitled to execute the same" (office).[2]

The judges, however, when consulted by the House, gave their opinion, on the contrary, "That the office of Lord Great Chamberlain of England belongs to both sisters; that the husband of the eldest is not of right entitled to execute it," etc.[3]

When it was endeavoured to re-open the question on behalf of Lord Ancaster, now the senior co-heir, the Duke of Buckingham's case was relied on as proving exactly the opposite of what it had been assumed to prove in 1779! For the lawyers had by this time got so far as to examine the actual reports of the case,—quite a notable advance. It was thus discovered that there were *two* reports, (1) Dyer's, which had been used by Coke, and (2) Keilway's, which is much fuller, but which omits the essential clause as to the husband of the elder daughter. In 1902, therefore, it was the counsel for the *junior* co-heirs who relied upon the famous case, while those of Lord Ancaster were disposed to minimise its importance.[4] Mr. Asquith, taking his stand on Keilway, vigorously claimed that his report showed "the real decision in that case" to have been in favour of the principle which

[1] Mr. Peter Burrell (see p. 51).
[2] *Speeches*, etc., *ut supra*.
[3] *Ibid.*, p. 62.
[4] Mr. Haldane observed: "I do not think that one can say that it lays down anything that is at all really conclusive upon the question which we have got before us .... this case is very much relied upon in the case that is put before your Lordships by Lord Cholmondeley here .... it is not my document so much as it is the document of my learned friend who represents Lord Cholmondeley ...... your Lordships will hear great reliance placed upon it when my learned friend representing Lord Cholmondeley comes to address your Lordships." (*Speeches*, etc., pp. 94, 95).

he was upholding.[1] Five years later, in 1907, Counsel for the claimant of the Lucas barony were urging in his Case (pp. 13-14) that Dyer's version, not Keilway's, was the right one. With this question we shall deal below.

The reader may now wish to know what the case of the Duke of Buckingham, decided by "all the judges of England" in 1514,[2] really was. It is thus stated by Dyer (with whom Keilway is here in agreement) :—

> Humphrey de Bohun, late Earl of Hereford, held the manors of Harlefield, Newnam, and Whytenhurst in the County of Gloucester of the King by the service of being Constable of England, etc.[3]

This statement lay at the very root of the case. It is, therefore, delightful to find that those wise men of Gotham, "all the judges of England," were called upon to give their decision on a state of things which (it can be shown) had no existence in fact. For it is absolutely certain that these three manors were *not* held "by the service of being Constable of England," and that a decision based upon the supposition that they were is vitiated *ab initio*.

Of the three manors Haresfield alone could conceivably claim any connection with the office, as having been held by the house of Gloucester, who also held a Constableship,[4] as early as the Conqueror's day. Wheatenhurst, on the other

[1] *Ibid.*, p. 166.
[2] Not 1515, as stated. The case belongs to Mich. term, 6 Hen. VIII.
[3] I quote the translation from the legal French, as read out to the Committee (*Speeches*, etc. p. 94. On p. 90 is Keilway's statement to the same effect).
[4] It seems doubtful whether this was originally *the* Constableship.

hand, is known to have only come to the Bohuns with the daughter of Geoffrey Fitz Piers at a much later date.[1]

As it is important to establish this, the descent of Wheatenhurst must be shown. Geoffrey's daughter Maud, Countess of Hereford, whose marriage-portion it had been, was still holding it so late as 1236;[2] but "in what way Geoffrey had acquired this manor remains," we are told "to be discovered."[3] I will therefore trace the manor further back. In the *Red Book of the Exchequer* (p. 374) we read that "Witehurst" was held of William de Say, in 1166, by his uncle of the same name. Now "Witehurst" is the form assumed by Wheatenhurst on the Close Roll of 4 Henry III,[4] which records that it was the portion of Geoffrey Fitz Piers' daughter; and Geoffrey, we know, married the elder daughter and co-heir of a William de Say, who divided the Say inheritance with her sister.[5] There cannot, therefore, be any doubt that the 'Witehurst' of 1166 was Wheatenhurst itself.[6] And this identification is clinched by a grant from "William de Say, brother of William de Say" to the monks of Troarn of the tithe of his

[1] This was known to Dugdale (Baronage I, 180) from the Close Roll of 4 Henry III.

[2] Sir Henry Barkly's *Notes on the Testa de Nevill* for Gloucestershire (1890) in Vol. XIV of the Bristol and Glouc. Arch. Soc. Trans.

[3] *Ibid.* Sir Henry suggested that "it may have been given by Henry II to Geoffrey's father, Simon Fitz Peter, Earl of Essex (*sic*), who is said to have married Eustachia, a cousin of the King's." There was no such Earl of Essex.

[4] Wheatenhurst also appears as "Witehurst" or "Witehurste" in several Bruton Priory charters (*Bruton Cartulary* [Somerset Record Society] pp. 76, 77, 78, 79, 82, 83).

[5] See Dugdale's *Baronage* and my *Ancient Charters* (Pipe Roll Society).

[6] It rejoined the Say lordship of Kimbolton on Maud becoming heiress (as well as daughter) of Geoffrey in 1228.

mill at "Witehurst," with the consent of his lord William de Say.[1] This grant would be previous to 1166, when the grantor, we have seen, was holding not from his father, but from his nephew.

By a singularly infelicitous 'shot' the editor of the *Red Book* definitely identifies it as "White Hurst" (p. 1357). This would not matter so much if the guess were avowed; but, unfortunately, the reader is assured that "the place names in this Index have in fact been subjected in turn to a threefold scrutiny" and that "no identification has been attempted here without long and anxious investigation." (pp. CCCLXXIX-CCCLXXX) He would naturally, therefore, accept the identification as established and thus miss this important clue to the manor's true descent.[2]

It is only fair to the Public Record Office to say that if one of its experts came thus to grief over 'Witehurst,' 'le Witehers' proved deadlier still to one from the British Museum. Among the Berkeley Castle muniments edited by Mr. Isaac Jeayes is one described as a

> "Release...... to Dom. Warin fil. Geroldi of the third part of a virgate and a half of land, and of two messuages in Kingston (Kingston-Lisle), juxta le Witchers," etc.[3]

And "Witchers, Le, in Kingston Lisle" figures in the "Index of Places." Though I have not even seen the document, I have no hesitation in reading 'Witehers' instead of 'Witchers,' and in, further,

[1] *Bruton Cartulary*, p. 82.

[2] One might fairly suggest that its distance from Kimbolton might account for Geoffrey parting with it as a marriage-portion for his daughter, while its nearness to Haresfield made it acceptable to her husband.

[3] *Catalogue of the muniments at Berkeley Castle*, p. 141.

joining to Kingston the words "juxta le Witehers." We thus obtain the place-name "Kingston *by the White Horse*," the manor being thus distinguished from all other Kingstons by its proximity to that famous object which gave its name to the whole vale.[1] Whitehorse Hill itself is in Uffington, not in Kingston, but those who have not forgotten their 'Tom Brown's Schooldays' may remember that its author names them both as he sings the glories of the Horse.

Wheatenhurst having afforded proof that the three manors were not, as alleged, held by the service of acting as High Constable of England, let us see to what is due the strange belief that they were. As usual, it can be traced to a quite erroneous finding in an *Inquisitio post mortem*. In 1373, after the death of Humphrey de Bohun, Earl of Hereford and Essex, the last of his line, it was 'found' that he had held Haresfield by the service of being Constable and Wheatenhurst and Newnham by the same service.[2] But even the Inquisitions do not agree among themselves. A generation later, in 1403, Edmund, Earl of Stafford, the Duke's predecessor, was found by the Essex jurors to have died seised of "the office of

[1] It is similarly quite needless to see the original document in order to say that the "Grant from Edward I to Thomas, son of Maurice (de Berkeley)," in 1292, of vast possessions in Ireland (*op. cit.* p. 147) was made, on the contrary, to the well-known Thomas Fitz Maurice, lord of Decies and Desmond; or that its exception of "all the saffron growing on the said land" was really that of the (giving of) croziers—'saffron' being an unlucky shot for *croceis!* But if even "Duuelina" (i.e. Dublin) baffled the editor, what could one expect?

[2] Inq. p. m. 46 Edw. III, 1st numbers, No. 10. This with the later Inquisitions was among the documents printed for the Great Chamberlain case and again for the Lucas case.

Constable of England," no manors being named in connexion with it, while the Gloucestershire jurors found that he had held Wheatenhurst, "by what service they are ignorant."[1] Similarly, in earlier days, Gloucestershire jurors had found that Humphrey, Earl of Hereford and Essex, had held Wheatenhurst "by service unknown."[2]

Moreover, Haresfield itself is entered in the *Testa de Nevill* as held, not by the alleged service, but by ordinary knight-service.[3]

It is right to mention that in the 'Case' presented for Lord Ancaster a caution was duly given :—

> It is, however, very doubtful whether the great offices of State were really attached to manors, except in the sense that manors were granted as maintenance.[4] Such a tenure has often been alleged and occasionally found by juries. No mention of manors occurs in the grants of the offices, though certain manors have always descended to the persons who succeeded to the offices and came to be considered as appurtenant thereto (pp. 13-4).[5]

A particularly good example of this confusion is afforded by the Great Chamberlainship itself. The Veres were already holding (Castle) Hedingham in Domesday (1086) and did not receive the said office till nearly half a century later. And yet it was afterwards alleged, and even "found," that they held their barony of Hedingham by the service of acting as Chamberlain, and this belief

[1] See preceding note.
[2] 3 Edw. I (*Calendar of Inquisitions*, Vol. II, p. 70).
[3] "Comes Heref' tenet in Hersefeld cum pertin' XIIII mil. et dim." (p. 77).
[4] I cannot admit even this exception (J. H. R.).
[5] Quoted by Mr. Haldane in *Speeches*, etc. p. 89.

had to be considered when dealing with the recent claim.

But what we have to remember is that, in 1514, the tenure of the three manors by serving the office of Constable was accepted without question, and that the difficulty was caused by one of these three manors having passed into the hands of the Crown in consequence of Henry IV's marriage with the junior co-heiress of Bohun. There was, in 9 Henry V, a final partition between the co-heirs, and Keilway states that the King chose Haresfield : Dyer states that he chose "W.," and is clearly right. For, by this partition, "Le Manoir de Whitenhurst" was included in "La purpartie de Roy," while the manors of 'Haresfeld' and Newenham were comprised in "La purpartie del Dame Anne la Countesse de Stafford."[1] It was natural, however, that confusion should arise, for the *original* division between the coheirs seems to have been wholly different, and Wheatenhurst is found in the hands of Thomas ('of Woodstock'), Duke of Gloucester, of his wife (the senior co-heiress), of their daughter Isabel, and of Edward, Earl of Stafford (in 4 Hen. IV).[2]

Thus arose "three questions, which," says

[1] *Rotuli Parliamentorum* (1421), IV, 136-8. In full accordance with this is the restoration by Richard III of the Crown's half of the inheritance to the senior (by that time the sole) co-heir (printed in Dugdale's *Baronage*), for in the schedule of that half Wheatenhurst is found.

[2] See *Rot. Parl.* IV, 136-8 for the change of the purparties. It seems to have escaped notice that the 'fees' (i.e. the 'third pennies') of three counties were apportioned between the co-heirs, and that Thomas 'of Woodstock' was originally assigned those of Essex and Northampton, which is doubtless why he is occasionally styled Earl of those counties. Henry 'of Bolingbroke' obtained that of Hereford, which is doubtless why he was created Duke by the style of Hereford. Eventually (1421) the King had "le fee del countee de Essex," while the Countess of Stafford had those of cos. Hereford and Northampton.

Keilway, " have been debated divers times before all the Justices by all the Counsel of the King of the one part and by the Counsel of the Duke of the other part. The first question was whether this office was or could be reserved upon the feoffment or not ? And as to this question the justices have made the case clear, that is to say, that the Office was well reserved. "[1]

The wise men of Gotham were now in a great difficulty. For it followed that the King held a manor by the service of acting as his own Constable (or as one third of his Constable), in which capacity, it was alleged, he could arrest his own person.

This Gilbertian situation set the lawyers to work. But they had soon tied themselves up in a fresh and frightful knot. Fineux, the presiding augur, " in the presence of all the Justices of England for the same cause assembled," stated that they were all agreed that the Duke (who was claiming the office as his right) was " *compellable* at the pleasure of the King to do and exercise the office, "—when the King's one object was to keep him out of it ! And why ? Because otherwise the Duke would hold his two manors " without doing any service for them. " Then ensued this dialogue, which is only part of that which was gravely read by Mr. Haldane to the Lord Chancellor and the Law Lords, in Committee assembled, on the fourth of March in the year of Grace 1902.

Nevell: 'Sir, what is the nature of the tenure in this

[1] Dyer gives the question thus : " Whether the reservation of the tenure at the commencement by the King was good ? And by the opinion of all the Judges it is good enough. "

case?' *Fineux:* 'Grand Serjeantry without doubt.' *Nevell:* 'In Grand Serjeantry is included Knight Service, and then notwithstanding that the office be determined still the service of chivalry remains to the King.' *Fineux:* 'Grand Serjeantry is true service of chivalry and no diversity between them, saving in the relief, for grand serjeantry shall pay the extent of the land for a year, and service of chivalry according to the rate of 100*s.* for a knight's fee;' *quod fuit concessum.* *Brudnell:* 'And if the King extinguish the office by his release, or by any other means, nothing remains to the King except a nude socage;' *quod fuit concessum.*[1]

The meaning of all this is that 'Nevell' was trying to prove, as against 'Fineux,' that even if the office were determined, there would still be a 'service' due from the Duke for these two manors.

If the three manors had been held by the service alleged, Fineux would have been perfectly right in stating that the tenure was "Grand Serjeanty without doubt." But, as we have seen, they were not. Nevell, however, starting from Fineux's statement, argued that knight-service was "included in" Grand Serjeanty and would, therefore, be still due in respect of the manors, even if the "office" were determined.[2] Fineux retorted that Grand Serjeanty *was* knight-service, implying that if it came to an end, there would be no service left for the Duke to render; and Brudenell[3] drove the point home by observing that in that case there would remain to the King nothing but a "nude socage." Fineux and Nevell were both

[1] *Speeches*, etc. pp. 92-3.
[2] i.e. came to an end.
[3] Justice (afterwards Chief Justice) of the Common Pleas and founder of the Brudenells of Deene, afterwards Earls of Cardigan.

in error, because Serjeanty (Grand or Petty) and Knight Service were fundamentally distinct categories of service. To say that land could be held at one and the same time by serjeanty and by knight-service was a statement inherently absurd; and its absurdity would have been manifest alike to Bracton in the 13th century and to Madox, that eminent antiquary, in the days of George the Second.[1] That such statements could be made before "all the Justices of England" does but show the frightful confusion into which the lawyers had brought our old feudal law.

I explained above that there were two reports of the judges' decision on this occasion. Keilway's report, the fuller of the two, states thus "the second question :—When these manors were descended to the women, how they could do this office? And as to this question the Justices were clear that they could make their sufficient deputy to do the office for them." This was the version of the decision on which Mr. Asquith relied.[2] On the other hand, Dyer's report, although much the shorter, adds to this reply the words :— "and after marriage the husband of the eldest may alone."[3] This was the version accepted by Coke (although in somewhat careless fashion[4])

[1] *Baronia Anglica* (1736). Knight-service was distinguished from Serjeanty by the essential 'note' of scutage.

[2] *Speeches*, p. 91.

[3] p. 94.

[4] Coke transposed the clauses in Dyer's version and reads :—"the eldest taketh husband he shall execute the office solely, and before marriage it shall be exercised by some sufficient deputy." Mr. Asquith (*Speeches*, p. 164) pointed out that these are very ambiguous words, because it does not say by whom the deputy is to be appointed; but this is merely due to Coke's incorrigible carelessness, which led him to omit the essential words :—"*they shall make their*" sufficient deputy.

and, from him, by the Attorney General in 1779.

The real question at issue in this celebrated case has been somewhat strangely obscured. According to the Attorney General's report in 1779, the Duke "claimed to be entitled to the office of Constable of England *by descent from the eldest of the two co-heiresses* of Humphrey de Bohun". If this were so, there might be a parallel (apart from the question of tenure of the manors) between his claim and that of the senior co-heir in the Great Chamberlainship case. But the Duke was *sole* heir of the Bohuns and the question, therefore, of the relative right of two daughters and co-heiresses did not arise in the case. How then was it introduced? It appears to me that Counsel for the King were urging successive objections to the Duke's claim, and that one of these was that the office would of necessity come to an end when it fell to two co-heiresses, as there would be no one person who could execute it.[1] The question would thus arise hypothetically and indirectly, and the judges (as I urge below) would answer it by falling back on what had happened when the case had actually arisen.

Assuming, as seems to have been assumed in 1902, that the Duke of Buckingham's case is really in point,—which I contend it is not, having been decided on the assumption that the office was attached to the tenure of land,[2] which the Chamberlainship admittedly was not,—the question arises whether we should adopt Keilway's or Dyer's

[1] In the case of a *sole* heiress her husband could execute it for her.

[2] This assumption was seriously questioned, on behalf of the Crown, by the Attorney-General in 1902 (*Speeches*, pp. 203-5).

report of that case. Mr. Asquith, in that forceful speech which is believed to have influenced the Committee, insisted, almost vehemently, that Keilway was " the contemporary reporter, " and that the clause about the husband of the eldest daughter was " an interpolation of Dyer's, " who was a later writer. He claimed, therefore, that the case was " misquoted by Lord Coke. "

" that is not what was decided in the Duke of Buckingham's case as I shall show your Lordships...... The passage which Lord Coke cites does not appear at all in the report of Keilway, it is only in the report of Dyer. Now this case of the Duke of Buckingham was decided in the reign of Henry VIII. *Keilway was a reporter at that time* —his reports are in Norman-French or in dog-Latin-French, and *he appears to have been a regular attendant upon the courts and a reporter at this time.*[1] Dyer, I am told by my learned friend, was two years old at the time when this case was decided in the reign of Henry VIII. He could have had no direct or first-hand knowledge of it at all ; but reporting in the reign of Elizabeth, etc., etc.

Now that is the decision as reported by *the contemporary reporter, Keilway*[1]...... But then Dyer goes on " and after marriage the husband of the eldest may alone. " That is an interpolation of Dyer's. There is not a trace of that anywhere in the original report. But Lord Coke has copied it into his reports in Coke upon Littleton,...... but the real decision in that case of the Duke of Buckingham is what I have quoted from Keilway. "[2]

Unmoved by forensic art the historian at once enquires, what is the proof for Mr. Asquith's statement that Keilway was " the contemporary reporter " of the Duke of Buckingham's case ?

[1] The italics are mine.
[2] *Speeches*, pp. 165-6.

According to the *Dictionary of National Biography*[1] Keilway was not even born till 1497: he cannot, therefore, have been more than seventeen when this case was heard in Mich. term 6 Henry VIII. Let us turn then to his Reports and enquire what evidence they afford that he was actually reporting at that early age. Their title is

> Relationes quorundam casuum selectorum ex libris Rob. Keilway. Arm. qui temporibus...... Regis Henrici Septimi et inclitissimi Regis Henrici 8 emerserunt et in prioribus impressionibus relationum de terminis illorum Regum non exprimuntur in lucem.

Even Mr. Asquith would hardly venture to assert, in his dogmatic fashion, that Keilway (b. 1497) was a contemporary reporter for the reign of Henry VII (1485-1509). The title of the book clearly proves that his knowledge of the earlier cases must have been at second hand and that there is no reason to suppose that he was, as alleged, himself the reporter of the Duke of Buckingham's case.

It was not till 1581 that Keilway died, and his reports were not published till 1602. Though Dyer was fifteen years junior to Keilway, his reports had passed through three editions when those of Keilway saw the light. This was duly pointed out by the petitioner's counsel in the Barony of Lucas case (1907),[2] where it was also observed that Dyer's version was followed not only by Coke, but by Doddridge in the Great Chamberlain case of 1625.[3]

[1] This work was elsewhere cited at the 1902 hearing.

[2] *Printed case*, pp. 13-14.

[3] Doddridge took his statement of the law direct from Dyer, Coke's work not being published till 1628.

Thus far, however, we are merely left to decide whether it is more probable that Keilway omitted a part of the decision or that Dyer deliberately invented it. The latter view would *a priori* seem the less likely, especially in view of the high reputation enjoyed by Dyer.[1] But we have more to guide us than this. No one, it seems, suggested what is surely obvious enough, namely, that the judges, when assigning to the husband of the elder daughter the right to exercise the office, were simply guided by the fact that he had actually done so at an earlier date when the case had arisen. It was admitted, on all hands, that "Thomas of Woodstock," husband of the elder daughter and co-heiress of the last Earl of Hereford and Essex, had held the office, originally, no doubt, by grant during the minority, but afterwards, apparently, in her right till his death. Therefore the statement of law which Dyer is charged with inventing and placing in the judges' mouths is in absolute accordance with the precedent which the judges must have had before them in this very case.

It is a serious matter to charge a reporter of Dyer's reputation with interpolating an answer by the judges when that answer is simply that which the judges would certainly have given if they were guided by the history of the office as it would be placed before them. To establish such a charge more is needed than Mr. Asquith's assertion.

To the very end of this strange case (1902)

[1] According to the *Dictionary of National Biography* his contemporaries recognised his "incorruptible integrity, learning, and acumen," while in his reports "the arguments of counsel and the decision of the judges" are compressed into as small a compass as is consistent with precision."

there was the same amazing confusion between an office in fee and a manor or manors held by the service of performing an office. In his reply, at the close, to the Attorney General, Mr. Asquith devoted himself specially to the office of High Constable.[1] Starting from the assertion that "the constableship was an office which was held in fee, evidently like the office which your Lordships are now considering" (i.e. the Great Chamberlainship), he traced its descent as such, asserting that, in spite of intervening grants, "when Henry VII came to the throne it goes back to the old family; in 1485, in the first year, I think it is of Henry VII, it goes back to the Buckingham family"....... "the King disregards this whole series of intermediate grants and goes back to the old stock, just as he does with the Chamberlainship." An excellent point, and skilfully put. But here the speaker had to be reminded that the facts were quite the reverse, that Henry VII did *not* "go back to the old family," but confirmed the office to a stranger in blood. Mr. Asquith brushed the facts aside :—"I thought it was Henry VII, but I understand it was Henry VIII." Again the speaker had to be stopped : the Lord Chancellor pointed out that "This was to hold it only for a single day," the Attorney General having clearly shown, on behalf of the Crown, that Henry VIII, so far from recognising an hereditary right in the Duke, had appointed him to act, at his Coronation, for a single day.

Mr. Asquith was not discomfited : the facts, the miserable facts, might indeed be against him, but

[1] *Speeches*, pp. 234-6.

the power of assertion remained. "Yes," he replied, "but then came that litigation. It was at this time, in the sixth year of Henry VIII., that the duke brings his action of which we have heard so much, and it was clearly the opinion of the judges (whatever one may say about their reasoning on the other parts of the case) that he was entitled." But "entitled" *how*? As heir by descent to an office in fee? Not a bit of it. Mr. Asquith himself had taken his stand, we saw, on Keilway's report, and Keilway states that the judges held that the office should

> have continuance in the Duke notwithstanding that one of the three manors has come to the hands of our Lord the King; for otherwise it will ensue that the Duke will have the two other manors without doing any service for them, and so the Duke is compellable at the pleasure of the King to do and exercise the office.[1]

Here is no office in fee, like that of the Great Chamberlain; if the Duke has a right to claim the office, it is not as the heir in blood of former High Constables: it is as the tenant of certain manors. And even so his claim might fail; for "still," the judges said, "the King at his pleasure may refuse the service of the Duke in exercising of the said office." Mr. Asquith, in short, could only appeal to the judges' opinion in the Duke's case by abandoning his initial point, namely that the office was held in fee "like the office" of Great Chamberlain. And so we end, as we began, in "the muddle of the law."

It is not, perhaps, for a mere historian to criticise

[1] *Speeches*, p. 91.

the majesty of the law, the system by which, under the guise of justice, a verdict may depend on the brilliancy of the advocate rather than on the cogency of the facts. The principle is older than Cicero, older even than Demosthenes. From the advocate's point of view it is no doubt ideal: its only drawback would seem to be that some may be at times deterred from availing themselves of its benefits. At the bar of history there are no pleaders, for their arts would be exercised in vain: it is not for assertions that history asks; she seeks for facts alone.

(4)

The Lord Abergavenny's case. [1]

The whole doctrine on which is based the right to baronies by writ,—the doctrine that a writ followed by a sitting creates a barony in fee, descendible to heirs of the body.—rests, in the last resort, on a famous *dictum* of Coke's, a *dictum* admittedly founded on 'the Lord Abergavenny's case.'

It is only necessary to cite the latest writer on the subject, by whom the law upon this point is laid down as follows:—

CREATION OF BARONIES BY WRIT AND SITTING.

The law is well settled that if a writ of summons to Parliament, in the form usual in the case of temporal peers, has been issued to a commoner, and the person so summoned has, in response to such summons, taken his

[1] This case (1610) must be carefully distinguished from the contest for the barony of Abergavenny, which had come to an end in 1604.

seat in the House of Lords, [1] and it does not appear that the summons was issued to him merely as eldest son of a living peer or peeress in respect of one of his parents' peerages, the person so summoned and sitting [1] is to be taken thereby to have acquired what is called a barony by writ, descendible to the heirs general of his body, and this is so even though the summons was issued to him by mistake.

The law, as thus defined, was finally settled in 1673; [2] and on the principle explained at p. 22 [3] must be taken to have been the law ever since the model Parliament that sat in 1295. [4]

It is fully recognized by Lord Coke in his Institutes (I, 16 b).

There, after pointing out two different modes of creating peerages, he says: "Creation by writ is the ancienter way, and here it is to be observed that a man shall gain an inheritance by writ...... The direction and delivery of the writ to him maketh him not noble...... and this writ hath no operation until he sit in Parliament, and thereby his blood is ennobled to him and his heirs lineal, and thereupon a baron is called a peer of Parliament" (See also the *Abergavenny case*, 12 Co. Rep.). [5]

In this statement of the law, convenient and compendious though it is, one may venture, perhaps, to take exception to the words "recognized by Lord Coke." For in this paper I hope to show that the words "*invented* by Lord Coke" would

[1] These statements require to be modified by the addition that the person sitting need not be the person first summoned, but might be his successor (see below).

[2] i.e. in the Clifton case in 1674 (1673/4).

[3] A reference to the Earldom of Norfolk case (1906).

[4] It was questioned in the Committee for Privileges on the Fauconberg case whether this should be accounted the first valid Parliament, as had been supposed. This point will be discussed below, and it will be shown that the House has not accepted 1295 as the retrospective limit.

[5] Palmer's *Peerage Law in England*, p. 38. Cf. *Cruise on Dignities* (1823), pp. 70 *et seq.;* Courthope's *Historic Peerage*, pp. XXVIII *et seq.* Pike's *Const. History of the House of Lords*, pp. 128, 131, etc., etc.

more suitably apply to his *dictum* in the First Institute. That *dictum* rests, as I have said, on the Lord Abergavenny's case, which established, or is alleged to have established, in Cruise's words, the principle that

> A writ of summons has not the effect of conferring a dignity on the person summoned till he has actually taken his seat in parliament by virtue of such writ; so that where a person was summoned to parliament, by such a writ, and died before the parliament sat, it was resolved that he was not a peer.[1]

"Lord Abergavenny's case," unfortunately, is known to us from Coke's twelfth report alone. For the questions sent to the judges and their decision upon those questions we are wholly and solely dependent on the accuracy of Coke's statements. In the "Lords' Reports on the Dignity of a Peer" (1820, 1822) their accuracy was called in question, though very temperately and cautiously, doubtless because Lord Redesdale, whose views they are known to reflect,[2] recognized, rightly or wrongly, in Coke's report the root, as I stated at the outset, of that accepted doctrine on baronies by writ which he vainly set himself to overthrow.[3]

A few years later, in the De L'Isle peerage case, he allowed himself to speak with more freedom, interrupting the petitioner's counsel's appeal to the *dictum* in the First Institute as follows:—

> *Lord Redesdale.* What is the authority he refers to in support of that proposition?
>
> *Mr. Hart.* In Lord Abergavenny's case.

[1] *Op. cit.* p. 72.
[2] Palmer, *Op. cit.* p. 26.
[3] *Ibid.* pp. 40-41.

Lord Redesdale. There was no such person as that referred to in that case. It is perfectly clear that my Lord Coke has somehow or other confounded himself for there was no such person as he describes.

Mr. Hart. If that was the case, he has confounded me.

Lord Redesdale. I only mention it to show that, however great a man he was, in the multitude of cases which he collected he has made some gross blunders, and this was one.[1]

This outspoken statement aroused the indignation and, I think we may fairly say, the alarm of Harris (afterwards Sir Harris) Nicolas, who was himself a peerage counsel, and who saw the danger to peerage "business," which had promised to become brisk, if his lordship were successful in assailing the doctrine that a writ and sitting created a barony, descendible to heirs general, before the days of Richard II. Hence his well-known monograph on the claim to the barony of De L'Isle,[2] in which

It was his first object to establish the truth of the case reported by Lord Coke in the 8th Jac. I, when the Judges decided that a writ and sitting created an hereditary barony, because the suspicion entertained by a Noble Lord might have influenced his opinion. Of the general accuracy of that report such evidence has been adduced in the notice of it in the Appendix as to prove that the doubts which have been expressed are unfounded; whilst the notes present many decisions before that case occurred which are strictly consonant with the exposition of the law on that occasion (p. xiii).

The Appendix spoken of deals with—

The case of Neville, Lord Abergavenny, in the 8th Jac. I, in which the Judges pronounced the law relative

[1] Nicolas, *Barony of L'Isle*, p. 207.

[2] *Report of proceedings on the claim to the Barony of L'Isle* (1829).

to baronies by writ, with remarks tending to remove the doubt of that case having occurred (p. xvii).

It collects in a convenient form Lord Coke's report of the case, the Committee's criticism thereon, and the author's attempted vindication. [1] Sir Francis Palmer, upholding Coke as against the Lords' Committee, claims that "the facts brought to light by Sir Harris Nicolas in his report of the *Lisle Peerage Case* afford cogent evidence to show that there is no ground for such a reflection on Lord Coke's credibility." [2]

Now let us clearly understand what the facts were that Nicolas brought to light. After complaining that the Lords' Committee "impute to that great Judge the publication of a deliberate and gratuitous falsehood," he proceeded thus:—

"This consideration might have obtained greater respect for his statement than was shewn to it by the Lords' Committee or by the learned Lord who adverted to it in the L'Isle claim; more particularly as the former admit the possibility that in the proceedings on the bills brought in, in the 8th Jac. I, to enable Lord Abergavenny to alienate certain lands, "some objections may have been made to some assumption of name of dignity without sufficient warrant, and the Committee may have consulted the learned persons mentioned by Sir Edward Coke;" but their lordships add "that there is no trace in the Journals of any opinion given by those learned persons, or of any question put to them by the House or by a Committee." The result of a search in the *Lords' Journals* has proved, however, that the Lords' Committee are as fallible as they consider Lord Coke to have been; for it appears

[1] *Op. cit.*, pp. 297-308.
[2] *Peerage Law in England* (1907), p. 200.

that a question *was raised* in the 8th Jac. I, as to the proper title of Lord Abergavenny's father.

......On Saturday the 30th of June (1610) the Lord Chancellor declared that in the Bill for enabling the Lord Bergeveny and Sir Henry Nevill his son to alien certain lands are some small errors : *videlicet* 'the said county of Norfolk,' whereas that county was not before mentioned in the Act : also a *mistaking, as is conceived, in the title or addition given to the Lord Bergeveny's father;* whereupon it was agreed that the said Bill shall be recommitted, etc. (p. 306).

And that is all. I have no doubt that Harris Nicolas honestly thought that his discovery (which needed nothing more than a reference to the Index to the Journals) had overthrown the Committee; but, if so, it only shows that he could not think clearly. For their statement, quoted by himself, remains wholly unshaken: "there *is* no trace in the Journals of any opinion (being) given by those learned persons, or of any question (being) put to them by the House or by a Committee."

All he has shown is that there was doubt as to the style which ought to be assigned to Lord Abergavenny's father; and this, the Committee had admitted, was perfectly possible. As a matter of fact, that doubt was bound, we shall see, to arise.

But we can go further still. We may admit, with the Lords' Report, that "the Committee may have consulted the learned persons mentioned by Sir Edward Coke on the subject;" indeed, I agree with Sir Harris Nicolas that we ought not, without sufficient proof, to impute to Coke deliberate invention of the statement that certain judges, *of*

whom he was one, were consulted on this occasion (1610) by the Committee. But even then we shall be no nearer to establishing, as he claimed to establish, the fact that "those personages pronounced the opinion which Lord Coke has attributed to them" (p. 305).

The points we have to examine are two:—

(1) What was the question put to the judges?

(2) What was the opinion they gave in answer?

On these two points Coke's report is clear:—

> In the parliament a question was made by the Lord of Northampton, Lord Privy Seal, in the Upper House of Parliament, that one Edward Nevill, the father of Edward Nevill, Lord of Abergavenny, which now is, in the 2nd and 3rd of Queen Mary, was called by writs to parliament, and died before the parliament. *If he was a baron or no, and so ought to be named, was the question:*[1] and it was resolved by the Lord Chancellor, the two Chief Justices,[2] Chief Baron, and divers other Justices there present, that the *direction and delivery of the writ did not make a baron or noble until he did come into parliament and there sit according to the commandment of the writ; for until that the writ did not take its effect*,[3] and the words of the writ were well penned, which are: "Rex et Regina etc. Edwardo Nevil de Abergaveney Chivalier, Quia de advisamento et assensu concilii nostri pro quibusdam arduis et urgentibus negotiis statum et defensionem regni nostri Angliæ concernentibus, quoddam Parliamentum nostrum apud Westmonasterium 21 die Octobris proximo futuro teneri ordinavimus, et ibidem vobiscum" etc.[4]

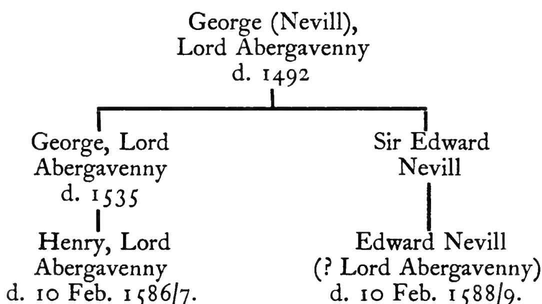
Is this statement true or false? It is proved by internal evidence to be altogether false. To Coke's

[1] The italics are mine.
[2] Of whom Coke was one.
[3] The italics are mine.
[4] Cited from Coke's 12th Report by Nicolas (*Op. cit.* pp. 297-8).

statement of the facts the Lords' Committee marshalled a series of unanswerable objections.[1] They pointed out that the person summoned "in the 2nd and 3rd of Queen Mary" as Lord Abergavenny was not *Edward* the *father* of the peer sitting in 1610, but *Henry* the *cousin* of that peer; that even if it had been Edward, he lived long afterwards; that the writ printed by Coke cannot have been produced. It is, in short, a concoction.

If these objections are valid, as to which there can be no dispute, it follows that the point stated by Coke cannot have arisen and that the famous opinion on this writ as inoperative, without a sitting upon it, to create a man a baron, can never have been given.

A short chart pedigree will make the case clearer.



The question in 1610 was the *status* of Edward Nevill (then deceased), who became heir male of the family in 1587, and succeeded his cousin in possession of Abergavenny, but only survived him

[1] Appendix to First Report, pp. 482-6.

two years. He is known to have *claimed* the title (as against the heir-general),[1] but his claim was pending at his death, and the question was not settled till 1604, when his son Edward became, by what is recognised as a compromise, Lord Abergavenny. It was the elder Edward who was falsely alleged to have been summoned as Lord Abergavenny in 1555.

Nicolas, unable to rebut the objections of the Lords' Committee, was driven to suggest that a writ, of which there is no trace, might have been issued to Edward Nevill (the father) in 1588 for the Parliament summoned for November 12 in that year, "and that Lord Coke, or his copyist, accidentally transcribed and printed the writ of the 2nd and 3rd Ph. and Mary to Henry Nevill for the one which is presumed[2] to have been issued between the 28th and 31st Eliz. to Edward Nevill under the idea that he had succeeded to the barony of Abergavenny as heir male of the last lord." But he had to admit, of this supposed writ, after search had been made, that "no notice of a writ having been issued to Edward Nevill between the 28th and 31st Eliz. is on record."[3]

The presumption, however, against his guess is based on far more than merely negative evidence. Edward Nevill was claiming the title as against the heir-general, and if the Crown had summoned him by writ as Lord Abergavenny, in 1588, it would, by so doing, have decided the claim in his favour. But the question was not decided till

[1] See p. 79 above.
[2] i.e. by Nicolas.
[3] *Op. cit.*, p. 308.

1604, and throughout the long controversy we have no allusion to such a writ, although its issue would obviously have been appealed to by Nevill's counsel as a recognition by the Crown of the rights of the heir-male. [1] The somewhat desperate suggestion made by Harris Nicolas has not only, therefore, nothing to support it, but is also at direct variance with the known history of the claim.

We have now cleared the ground and shown that Coke's report cannot be accurate as it stands. What then really did take place, assuming that the judges, as he states, were consulted on this occasion? To this question, it would seem, no answer has been attempted. And, indeed, to attempt that answer is no easy matter; for the lower criticism will not help us: we must have recourse to the higher.

In the first place, I would suggest, with the utmost confidence, the true source of Coke's date, "the 2nd and 3rd of Queen Mary." It was not, as he states, the date of a writ to Edward Nevill, but that of *the Act of Parliament under which Edward "took."* This all-important Act, essential to Edward's title, is printed in one of the Appendices to the Reports of the Lords' Committee. [2] It enabled Edward to succeed his cousin Henry, Lord Abergavenny, in the family estates, under the entail on heirs male created by Henry's father, in spite of the attainder of Edward's father. This Act would have no bearing on questions of writ and sitting, but if, as I shall contend, the question

[1] See pp. 78-88 above for the history of this controversy.

[2] Vol. IV, pp. 1001-5 ("An Act concerning the restitucion of the heirs males (*sic*) of Sir Edward Nevyll, Knight").

was one of *tenure*, it would obviously bear upon the case.

To ascertain what really happened, we must see what the position was in 1610. It was only six years since Edward, Lord Abergavenny, had obtained for himself that title, not *vigore legis*, but by the King's favour. The House, unable to arrive at a decision,[1] had finally referred the rival claims to the King, inviting him to ennoble "both parties by way of Restitution."[2] The King agreed and left the House to select which of them should have the barony of Despencer, and which the barony of Abergavenny. Nevill was voted that of Abergavenny, the result of this curious compromise being that the *status* of the barony was left in an ambiguous position. Nevill sat in the seat of his predecessors, enjoying their high precedence, and yet his claim to succeed as of right had not obtained recognition. Now the only right he could allege to the old barony was tenure,[3] and tenure was, as a fact, the right which he and his father before him had put forward in their claims. If then, in 1610, he claimed to be holding the old barony, he could only do so on the ground that it was a barony by tenure.[4] But

[1] "The Question nevertheless seemed not so perfectly and exactly resolved as might give clear and undoubted satisfaction to all the consciences or judgments of all the Lords for the precise point of right." *(Lords' Journals).*

[2] This remarkable phrase is pointedly used three times over in the entry. The House had actually voted on the question whether the King should be asked to ennoble them by way of Restitution or by Creation, and there was a majority for 'Restitution' (see also *Lords' Reports*, I, 436-7.)

[3] He could not claim it as a barony by writ, for he was not heir-general.

[4] One cannot treat very seriously the contention of the Lords' Committee that if Despenser (1264) was ranked above Abergavenny, the latter could not be a barony by tenure (I, 440; II, 88). For the ranking of these ancient baronies was altogether anomalous.

this obliged him to claim that his father, on becoming seised of the Abergavenny estate, had thereby become Lord Abergavenny. Consequently, when he had to describe him in the private family Act, he assigned to him that title. And if that Act had passed without question, he would have secured by a side wind the recognition of his claim.

Now we see how much must have turned on "the title or addition given to the Lord Bergeveney's father," [1] and why the question had to be referred to a formidable bench of Judges. The whole *status* of the barony was at stake: their answer would decide whether or not it was a barony by tenure, which the mere seisin of Abergavenny would bestow upon its holder.

The *status* of the elder Edward, whose style was thus in dispute, had been, even in his own day, ambiguous. He obtained livery of Abergavenny as "Edwardus Nevill, armiger, *alias dictus* Edwardus Nevill, dominus Bergavenny" (1588), and in the administration granted to his younger son he is styled "Edward, Lord Abergavenny, *alias* Edward Nevill Esquire" (1590). On the other hand his *Inquisitio post mortem* styles him only "Edward Nevill, son and heir of Sir Edward Nevill, Kt." (1589). The modern writer on peerage history is equally puzzled by his *status*: *The complete Peerage*, for instance, holds that he "certainly may be considered entitled to be reckoned as Lord Bergavenny," [2] on the ground of the proceedings in 1604 and their result.

[1] *Lords' Journals.*
[2] *Op. cit.* I, 19. This is also the reference for the documents cited in this paragraph.

I will now, therefore, give my answer on the first point that we have to decide: what was the question put to the judges?[1] We have seen that it could not possibly be, as Coke states it was,—did *a writ without a sitting* make a man a baron? For no writ had been issued. It was, I believe, wholly different: the real question, I hold, was—did *tenure without a writ* make a man a baron?

If once this answer be accepted, everything falls into place. It exactly fits the facts of the case, for the claim of the elder and of the younger Edward had been that tenure had that effect, and the question had been virtually left open by the anomalous proceedings in 1604. But what is specially noteworthy and important is that it also fits the records[2] given by Coke himself as those bearing on the case. And this the question stated by himself entirely fails to do.

For what are the two documents which Coke here selects for printing in full? One is a statement that those who hold a sufficient estate in lands to constitute a *Baronia integra* were Barons and ought to be summoned, a statement which could only be used to prove that tenure made a man a Baron. Coke, indeed, himself says of it that "by this it appears that every one who hath an entire barony may have of right and of course a writ to be summoned to parliament." The other was the well-known statement in the Preface to Camden's *Britannia* that Henry III, towards the close of his reign, ordained that only those whom the King

[1] See p. 172 above.

[2] I here use this term in a general sense.

chose to summon should come to Parliament, "which act or statute," Coke proceeds, "continues in force to this day, so that now none, although that he hath an entire barony, can have a writ of summons to parliament without the King's warrant, under the Privy seal at least." As for this document, it could only be used to prove that tenure was *not* sufficient to make a man a Baron. On what was alleged to be the question by Coke, namely whether a writ of summons was sufficient, without a sitting, to make a man a baron, neither of these documents could have any bearing whatever.

A brief interruption is here necessary in order to deal more fully with these two documents. The Lords' Committee speak of the first as "The Reference to a Passage in the book called *Modus tenendi Parliamentum*, now considered as a forgery" (I, 485). But Coke's quotation does not tally with the known text of the *Modus*, although the principle is virtually the same in both.

COKE.	MODUS.
cum olim senatores e censu eligebantur, sic Barones apud nos habiti fuerunt qui per integram baroniam terras suas tenebant, sive 13 feoda militum et tertiam partem unius feodi militis, [1] quolibet feodo computato ad £20, quæ faciunt 400 marcas denarii, erat valentia unius	summoneri et venire debent omnes et singuli.......... barones...... scilicet illi qui habent terras et redditus... .... ad valentiam unius baroniæ integræ, scilicet tresdecim feoda et tertiam partem unius feodi militis, quolibet feodo computato ad viginti libratas, quæ fa-

[1] Compare p. 82 above.

baroniæ integræ; et qui terras et redditus ad hanc valentiam habuerint, ad parliamentum summoneri solebant.[1]

ciunt in toto quadringentas marcas; et nulli minores laici summoneri nec venire debent ad parliamentum ratione tenuræ suæ.[2]

Stubbs wrote in one place of "the proved worthlessness of the *modus*;"[3] and though he accepts it in his *Select Charters* as "a fairly credible account of the state of parliament under Edward II," the former phrase is by no means too strong for its doctrine on dignities by tenure, especially the view that the tenure of lands to the annual value of £400 made a man an earl, and to that of 400 marcs, a baron.[4] My own investigations have placed its origin so late as 1386 or thereabouts.[5] Coke not only confused the *Modus* with the treatise on the Marshal's office,[6] but crowned his muddle by writing:—

Many very ancient copies you may find of this Modus, one whereof we have seen in the reign of H[enry] 2, which contains the manner, form, and usage of Gilbert de Scrogel, marshall of England, etc. (4th Inst. xxi).[7]

My criticism does not stand alone: his treatment of another medieval work has been thus condemned:—

Coke (*First Inst.* p. 13), who quotes the *Dialogus* repeatedly, refers to the author as '*Ockam.*' Now as Coke knew the date of the treatise, and ought to have

[1] Coke's 12th Report.
[2] Stubbs., *Select Charters.*
[3] *Const. Hist.* III, 431.
[4] This passage is cited by Stubbs, *Op. cit.* (1874) I, 365.
[5] *The Commune of London and other studies*, p. 318.
[6] *Ibid.*, p. 313.
[7] *Ibid.*, p. 304.

known the date of William of Ockham, it was a bad blunder to have confused the two. [1]

With regard to Coke's other document, the Lords' Committee observe:—

Sir Edward Coke does not state his authority for asserting the existence of the law which he thus represents as made by Henry the Third. The Committee have observed...... that of such a law, elsewhere asserted, they had found no evidence.

Coke, as I said above, took the passage from Camden. Hallam, dealing with the Baronage, subsequently wrote of the "nameless author whom Camden has quoted," and pointed out that "no one has ever been able to discover Camden's authority," and that "the unknown writer quoted by Camden seems not sufficient authority to establish his assertion." [2] Lastly, Mr. Pike has expressed the general conclusion thus:—

The statement is made in the Preface to Camden's *Britannia*, but the existence of the alleged law is not precisely indicated, and it has never been traced to any document of authority. [3]

This, indeed, I consider an under-statement. Coke, however, boldly asserted that this (imaginary) "act or statute continues in force to this day!"

It was necessary to glance at the nature of the authorities on which Coke used to rely; but we will now turn to the records to which he refers in his report. These were examined by the Lords' Committee (I, 395-6, 483), and it is, I would

[1] *Dialogus de scaccario* (1902), p. 9.
[2] *Middle Ages* (Ed. 1860), III, 7, 9.
[3] *Const. Hist. of the House of Lords*, p. 93.

submit, a noteworthy fact that they thus commented upon them :—

> The three cases cited by Coke seem to prove that the fact of summons to Parliament was necessary to constitute the Lord of Parliament,......
>
> The cases thus cited by Coke tend to prove that in the reign of Edward the Third, and afterwards in the reign of Henry the Sixth, the Judges conceived that possession of land holden by Barony did not constitute a Lord of Parliament; but that summons to Parliament was evidence that the person summoned was a Lord of Parliament. (I, 396).

Noteworthy, because it signally, though quite unconsciously, confirms the view of the case which I here put forward, but which was not in the minds of the Committee and had not even occurred to them. It is my suggestion that the question in the case was whether *tenure without a summons* could constitute a man a Baron.

Such unconscious testimony is infinitely more convincing than would be my own opinion on what these cases prove. I will, therefore, only add that, as to one of these cases, that of Sir Ralf Everden, "no person of the name of Everden was ever summoned to parliament as a baron," [1] so that his case could not bear on the effect of a writ without a sitting, while its true bearing, in the view of Nicolas, is that it "corroborates the opinion that such summons was not the necessary consequence of holding lands by barony in the fourteenth century." [1] In the view of Mr. Pike

[1] Barony of L'Isle, p. 130 *note*, where the brief report of the case in the Year Book of 48 Edw. III. is printed.

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the case proves that, at that date, "a Baron was still a person whose status could be proved only by his tenure."[1] The case, at any rate, must have been used as bearing on tenure and its effect. With regard to another of Coke's cases, "35 Hen. VI, 46, 48," he states that in the year-book "he (a baron) is called a peer (*sic*) of parliament." The word, however, in the year-book is "*S(ei)niors* de Parliam(en)t." Coke, with his usual careless inaccuracy, has rendered this not "lord" but "*peer* of Parliament." The case, moreover, has no bearing on the question alleged to be at issue, namely the effect of a writ under which there had been no sitting.

I need only add that if the question alleged by Coke to have been put to the judges is, as I have shown, fictitious, their alleged answer to that question must be fictitious also.[2]

Such then is my case. The charge is grave enough: it is that Coke has here substituted for the question put to the judges, of whom he was one, an entirely different question invented by himself, has concocted a fictitious writ to support the tale he tells, has recorded a no less fictitious Resolution as the judges' answer to that question, and finally, has based thereon a proposition of law. Well might Bacon caustically say that "my Lord Coke's" reports "hold too much *de proprio*." The *Dictionary of National Biography* is well within the

[1] *Op. cit.*, p. 95.

[2] Compare the note to Anderson's report of Shelley's case: "Le Atturney Master Cooke ad ore fait report en print de cest case ove argument et lez agreements del Chanceler et autres juges, mes rien de c' fuit parle en le court ne la monstre" (1 And. 71).

mark in its guarded statement that he sometimes "gives a wrong account of the actual decision, and still more often the authorities which he cites do not bear out his propositions of law."[1]

It is for those who cannot bring themselves to accept the charge as proved to explain as best they can his demonstrated errors of fact and, above all, his invented writ, which has actually found its way into his "Institutes" themselves.[2] Nicolas, we saw, endeavoured to do so; and he failed.

"A little while ago," observed the Governor of Southern Nigeria, about the close of last year, "we discovered the existence of a terrible ju-ju which had been established by one of the chiefs." Happily he was able to add that "the ju-ju has been completely broken." I doubt if even Sir Francis Palmer could still assert the authority of "the long ju-ju of the law."[3]

"The Lord Abergavenny's case" is worth the time we have bestowed on it; firstly, because it affords a test, a clinching test, of Coke's "authority;" secondly, because, as we shall see, it is still of cardinal importance in claims to baronies by writ. On the former point it has been clearly shown that the writer whose "intrinsic authority" has helped to mould our law, and whom the members of his profession have deemed their "oracle" itself,[4] was a witness so untrustworthy, an "authority" so worthless that an historian who

[1] See p. 128 above.

[2] I, 16 b. Its identity is proved by the date (21 October) it contains.

[3] See p. 108 above.

[4] "It became all the rest of the lawyers to be silent whilst their oracle was speaking." 5 *Mod. Rep.* VIII (cited in *Dict. Nat. Biog.*).

relied upon his statements would deserve ridicule and contempt. On the latter there is much to say, much that will require attention.

The only point alleged by Coke to have been settled in the case we are discussing is—

> That the direction and delivery of the writ did not make a baron or noble, until he did come into parliament and there sit, according to the commandment of the writ; for until that the writ did not take its effect......... the writ hath not its operation and effect until he sit in parliament (12th Report, 70)

But to his own proposition of law that a sitting as well as a writ must be proved there has been added by 'the scribes and pharisees' the further and burdensome proposition that the sitting must be proved by "the record of parliament," and by that alone. This rule, although it has proved of great practical convenience in restricting the number of peerage claims, rests on no sure foundation. It was the subject of keen dispute in the De L'Isle peerage case, when it was firmly upheld by the Attorney-General against the elaborate arguments of Mr. Hart and Mr. Shadwell[1] for the claimant. It is needless to travel anew over the ground they covered;[2] and the point, perhaps, is one that ought to be left to lawyers.[3]

One may, however, just explain what is the point at issue. Coke, no doubt, in his 'first Institute,' lays it down that "if issue be joined in

[1] Afterwards Lord Chancellor of Ireland and Vice-Chancellor.

[2] See, for the Attorney's argument, Nicolas' Report of the case, pp. 146-155, and, for those of counsel, pp. 55-67, 121-131, 180-190, 206-214, 224-233.

[3] The Attorney General claimed to have given special attention to peerage law.

any action whether he be a baron etc. or no, it shall not be tried by jury, but by *the record of parliament*, which could not appear, unless he were of the parliament" (16 b). It is argued that as (according to Coke) he could not be a peer, unless there had been a sitting, that sitting must be proved by "the record of parliament." But Coke was lamentably loose in his language, and when we refer to his Reports for the case on which he relies, we find him, in his comments, leaving out the vital words "of parliament." He there puts the proposition thus:—

without *writ* none can sit in parliament: and with this agree our books, for *una voce* they agree that none can sit in parliament as peer of the realm without *matter of record*, and if issue be taken whether baron or no baron, earl or no earl, this shall not be tried per paiis,[1] but by *the record* by which it appears that he was a peer of parliament, for without *matter of record* he cannot be a peer of parliament (12th Rep. 70).

Of the cases cited for this proposition that of the Earl of Kent (Ass. pl. 6. 22) contains a plea that earl or no earl was not an issue triable at the Assizes, because it was not in the Conuzance of the Country (i. e. 'paiis'), "but was of Record.... who is earl, and who not, cannot be known but by Record."[2] This obviously cannot apply to the record of a *sitting*, for an Earl was not created by writ of summons. An even more important passage, which seems to have been overlooked, is found in Coke's 6th Report, 52 (The Countess of Rutland's case.) We there read—

[1] *i. e.* by a jury.
[2] *Lords' Reports*, I, 396.

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that duke or not duke, earl or not earl, baron or not baron, shall not be tried by the country but by *record*; for if they be lords of parliament, it appears by *record*; and therefore *by record, viz. by the King's writ* [1] it ought to be certified.

This passage, which seems to identify the "record" of which Coke speaks with "the King's writ" definitely, is immediately followed in 'Cruise' by one which appears to me to have a most important bearing on the point. Lord Chief Justice Holt, in the famous Banbury case (1694), delivered himself as follows in the Court of King's Bench:—

No man can be a peer without *matter of record;* for it ought to be *either by letters patent* under the great seal, which is the most common way at this day, and by which the patentee is ennobled immediately, though he had never sat in Parliament. *Or by writ*, by which the party is not ennobled until he sit in parliament; and the which is countermandable by death; or by the King, by a *supersedeas*, before the sitting in Parliament. *But in both cases his nobility commences by matter of record, and is matter of record.* And when a man pleads any such matter, he ought to show a *record* of it, that is, show *the letters patent* of his creation, or otherwise show *some writ on record*, by which he or his ancestors, under whom he claims, have been created peers, or summoned, or sat in parliament. For peerage is not a matter in *pais*, to be gained by prescription,......... But there ought to be some *matter of record* of it;......... And in this case, earl or not earl shall be tried by *record; scilicet*, he ought to show some *record* by which he or his ancestors have been ennobled; nobility not being a matter which may be gained by usage in *pais.* [2]

This language is extremely definite, and two

[1] See Cruise, *op. cit.* p. 259.
[2] Skinner's Reports cited by Cruise. The italics are mine.

things are clear from it: (1) that the Lord Chief Justice was taking his law throughout from Coke; (2) that by Coke's "matter of record" he understood only (A) a patent or (B) a writ of summons. That the phrase included a proof of sitting—and, even more, that this proof must be given from "the record of parliament"—are additions of which we find no recognition in his words. To this I think we may add that he read "the Lord Abergavenny's case," as reported by Coke, as implying that a writ of summons, in the absence of evidence of death or of a writ of *supersedeas* (both of which would afford disproof of sitting) was sufficient evidence of creation.

Some hundred and forty years earlier, the issue, peer or no peer, had been raised in a court of law. The fact, which appears to have escaped notice, is known to us, not from a report, but from a chronicler only.

> Tuesday the 30 June (1556) William West calling himself De la Ware was arraigned at the Guildhall in London for treason, but in the beginning of his arraignment he would not answer to his name of Wm West Esq. but as Lord Delaware, and to be tried by his peers, which the judges there with the heralds proved he was no lord *because he was never created nor made lord by any writ to the Parl(iament) nor had any patent to show for his creation*, wherefore that plea would not serve, etc., etc. [1]

Here the issue is dealt with in precisely the same way; prove, said the judges, that you are ennobled by producing a patent or a writ of summons. This is the evidence that was asked for by

[1] *Wriothesley's Chronicle.* The italics are mine. See also p. 59 above.

Chief Justice Holt, no more and no less. Coke, his Reports and his Institutes, had not altered the law: it did not ask for a proof of sitting.

It is singular that the two passages I have quoted above from 'Cruise' were not cited by Counsel in the De L'Isle case, although they struggled hard to demonstrate that the *sitting* need not be proved by a "record of parliament," and that Coke had been misunderstood; for they made use of Cruise's work. The case on which they did rely, and which had been cited by Coke for "the Lord Abergavenny's case," appears to me to be too doubtful to prove their point. It is of the reign of Henry VI, and Fortescue (the judge) is alleged to have said "produce your writ," from which it was argued that he would have accepted the writ alone as proof of peerage. But, as Lord Redesdale observed, "it is a very loose case," and it is not absolutely clear to me that the "b're" Fortescue required was a writ of summons, though he did insist on "matter de record."[1] Indeed, one of the counsel for the claimant admitted that the court's conclusion was "hardly intelligible" to himself.

Mr. Pike, I find, has discussed the meaning of the phrase "record of parliament" in Coke's 1st Inst. 16 b, on which the accepted doctrine is based, and considers it "not quite clear" what Coke meant by it. He aptly adduces another case in which Coke[2] "uses language which also lacks precision" writing that the issue, peer or no peer, "shall be tried by the record *in Chancery* which

[1] Nicolas, *Barony of l'Isle*, pp. 129-131, 188-9.
[2] 12th Rep. 96 (The Countess of Shrewsbury's case, 10 James I).

imports by itself solid truth," but writing as a lawyer, prefers "a far more precise and intelligible statement of the law...... in later times" (2 Barn. and Cres. 871-875), asserting that what is to be "tried by the record of Parliament" in the case of a party claiming to be a baron by writ, is "not whether he was summoned, but whether he sat." [1] With deference, however, one may submit that this was merely the extreme development of what was a later excrescence due to the grievous looseness and confusion of the language employed by Coke.

I do not feel at all sure that the House even insisted on any proof of sitting at all till a good deal later than seems to be supposed. In the Sandys case the Committee for Privileges reported to the House at some length the various writs by which the Petitioner's ancestors had been summoned, but said nothing of proofs of sitting. And yet we read of "the House being satisfied of his Lordship's title to the Honour" without further evidence. [2] Again, even so late as 1690-1691, the earl of Thanet claimed the barony of Clifford on the ground of the summonses directed to ancestors, whose heir he was, but said nothing of proofs of sitting. Nor did the Committee, in their report to the House. [3]

But in claims to peerage dignities the doctrine ripened fast. It is definitely alleged in Cruise's work that "it was resolved by the House of

[1] *Const. Hist. House of Lords*, pp. 127-8.
[2] *Lords' Journals*, 4 May 1660.
[3] 'Collins' pp. 306, 311, 318, 320.

Lords," in the Frescheville case (1677), "that a single writ of summons issued to a person in the reign of King Edward I, *without any proof of a sitting under it*, did not create an hereditary barony." [1] And Sir Francis Palmer cites the case as establishing the necessity of a proved sitting "under the writ of summons relied on as creating the barony." [2] Courthope similarly alleged that

> a sitting under the writ was necessary, and as the onus of proving such sitting rested with the party claiming the dignity, and no such proof being extant in the case of the said Ralph Frescheville, the claim was not admitted. [3]

But the decision is limited to the words of the Resolution, viz. that the lords "do not find sufficient ground to advise his majesty to allow the claim of the petitioner." In the Lords' Reports on the Dignity of a Peer the Committee guardedly state that "it does not clearly appear what were the grounds of this decision" (II, 29) and even incline to the view that 1297 was considered a date too early for "a writ of summons *and sitting*" to operate as creating an hereditary barony. In this we see, no doubt, the hand of Lord Redesdale.

The point that seemed to weigh most with the Attorney General (Sir W. Jones) in the Frescheville case was that neither Ralph nor any of his descendants "were ever summoned or sat" after this first writ (1297). [4] This was the point he raised in his Report to the Crown. The abstract

[1] *Op. cit.* p. 77. The italics are mine.

[2] *Peerage law in England*, p. 45.

[3] *Historic Peerage*, p. 205.

[4] For our knowledge of Sir William Jones' arguments we are indebted to Cruise (*op. cit.* pp. 77-8).

of his argument given by Cruise is somewhat obscure. That there must be a sitting under the writ he insisted; but, instead of calling on the petitioner to prove that his ancestor *did* sit, he urged that "the not repeating the summons was an evidence of *not* sitting," as if the *onus probandi* lay upon the Crown! Moreover, he had another argument; for he urged that "the truth was that anciently a writ of summons and sitting upon it did not make a baron in fee." That he should have advanced this contention is a most important fact, for it implies that he was doubtful of being able to prove that there had *not* been a sitting, and was prepared to fall back upon the plea that, even if there had been, it still would not have operated, at that early date, to make a man a baron. [1] He further showed his consciousness of weakness by the curious admission that "where writs of summons had been often repeated" they might afford a presumption of sitting, [2] but not "where they never issued but once." In spite, however, of all this, he held in its most extreme form what we have seen to be the modern doctrine on the issue peer or no peer. "If a man sued by the name of a lord, and the defendant denied him to be a lord, this must be tried by the records of parliament. What, by the writs of summons? No, but by his sitting." This is why I said that the doctrine ripened early.

[1] The Attorney was bound by the decision in the Clifton case, shortly before, to which the petitioner had appealed. So he had to argue, like Lord Redesdale in later days, that its action was not sufficiently retrospective to extend to the days of Edward I.

[2] This was the argument pressed afterwards, on behalf of the petitioners, in the De L'Isle and Meinill claims.

The quaintest view of tbe Frescheville decision is that which is found in the printed Case presented on behalf of the Petitioners for the baronies of Meinill, etc., in 1901. It is there alleged, with much assurance, that —

> The case of Frescheville in 1677 rested upon one single summons — January 26, 1296–7 (25 Edward I) to attend the King at Salisbury. That was not a summons to Parliament, and none of his descendants were subsequently summoned. Consequently the case failed quite properly *because there were no valid writs*, and *not* because there was an absence of the technical proof of sitting (p.21).
>
> ... that Parliament was *not* a proper or admitted Parliament ; and consequently the De Frescheville case failed, *not* because of the absence of a technical proof of sitting, but because there never was a valid writ whatever *(sic)*, and consequently there never *could* have been either sitting in Parliament or Peerage. The Petition rightly failed, but for an utterly different reason than was *(sic)* the one put forward by the Attorney-General in 1892 (p. 22).[1]

Now one point at least is clear about the Frescheville claim, and this is that it did *not* fail for the reason here alleged. The then Attorney General, instead of raising this objection, accepted the writ as valid, and devoted himself to questioning the sitting. Neither in the Lords' Reports nor in Lord Redesdale's judgment on the De L'Isle claim is any doubt expressed as to the validity of the writ.[2]

[1] The italics are all in the printed Case itself.

[2] Its acceptance in the Frescheville case (1677) may be due to its marginal heading, " De Parliamento tenendo apud Sarum. " Courthope (*Historic Peerage*, p. 205) notes that no " objection appears to have been raised to the writ of 25 Edw. I " in that case. Dugdale, whose work was published in 1676, wrote that " in 25 Edw. I this Ralph de Frescheville...... had summons

From the Frescheville case Sir Francis Palmer proceeds *per saltum* to that of De L'Isle "reported by Sir H. Nicolas," as "another" instance illustrating the necessity of sitting in pursuance of a summons perfecting a title to barony by writ. [1] According to the learned writer —

there was no proof of any sitting, and the House of Lords held that in the absence of evidence of a sitting pursuant to the writ, the claimant, who claimed title through a daughter and heiress of the son, had not made out his claim.

But not only does the Lords' Resolution contain nothing to that effect : the *rationes decidendi*, as set forth in the 'judgment' of Lord Redesdale (with whom the Lord Chancellor concurred), allege no such ground for rejecting the claim, and do, moreover, allege a ground entirely different. Even before the case was heard, or at least while it was pending, Lord Redesdale had clearly indicated the ground he meant to take. In the 'Fourth Report on the Dignity of a Peer' (July 2, 1825) we read of the De L'Isle claim,

it seems necessary that the House should proceed with much caution in the investigation of a claim founded simply on a writ issued at a very distant period...... a writ of summons is, in itself, merely personal ; and it seems to be only *an inference of law*, *derived from usage*,[2] which has extended the operation of such a writ beyond the person to whom it was directed. When usage is supposed to have first warranted this inference of law, and to

to Parliament amongst the Barons of this Realm" (*Baronage*, II, 6). And it seems to have been admitted in the Mowbray case without question. (See below).

[1] *Peerage law in England*, p. 45.

[2] These italics are found in the Report itself.

have attributed to the mere issuing of a writ to an individual, even if accompanied by proof that that individual sat in Parliament under that writ, the effect of creating a title in that individual to an hereditary dignity descendible to all the heirs of his body, is a question which it may be fit for the House deliberately to consider, and to fix a point of time before which the evidence of issue of a writ, and of sitting in Parliament under that writ, shall not be deemed sufficient evidence of the creation of an hereditary dignity of Peerage ; otherwise claims may be made which have not been thought of for centuries...... The Committee who made the Report of 12th July 1819 have supposed that the Statute of the 5th of Richard the Second might be considered as tending to fix that point of time (pp. 323–4).

In his judgment on the claim (May 18, May 22, 1826) Lord Redesdale adhered to this position.

The inference which I conceive ought to be drawn from that is that at that time it was not understood that the issuing of a writ of summons to a man gained in the person to whom that writ was issued a dignity descendible to his issue.

The law was not understood to be that the issuing of a writ to any person to sit in parliament and a sitting in parliament upon that writ created a right to a descendible peerage.

I conceive that there is strong ground for inferring that such was not the law in the reign of Richard the Second.

Under these circumstances......... I do not think your lordships ought to advise his Majesty to allow this claim.[1]

It was this position that Nicolas so strenuously assailed. "Deeply impressed with the consequences which must attend the adoption of the idea that baronies were not hereditary before the 5th Ric. II,

[1] *Nicolas, op. cit.* pp. 258, 273, 285-6.

or of the opinion expressed by a member of the Committee that there should be a limitation to the period when titles may be claimed," he set himself, avowedly, to uphold, as against Lord Redesdale, the principle "that a writ of summons to parliament and a sitting in consequence of such writ created a dignity to the party and the heirs of his body, without reference to the period when such writ and sitting occurred."[1] This principle is now accepted, Lord Redesdale's attempt to question it not having met with acceptance.[2] An opinion, indeed, was subsequently obtained from the petitioner's counsel that the "distinction raised by the noble lord as to the period when the writs were issued is not founded on any sound principle, but is at variance with the Precedents on the Journals of the House."[3]

This then was the ground on which the claim failed; *not* the lack of proof of sitting, but Lord Redesdale's doubt whether, at so early a date, a writ, even when followed by a sitting, could operate to create a peerage. Nicolas, indeed, in his book made this absolutely clear, for he admitted that *if* the claim had been rejected for lack of technical proof of sitting, there would have been nothing to complain of (p. xv). The claim, he added, "*might have been* resisted on the ground of a want of proof of sitting;" his complaint was that the House rejected it on another and (as he maintained) a most erroneous ground. When, therefore,

[1] Preface to *Barony of De L'Isle*, pp. xi, xiii. Nicolas italicised the whole of the above statement of principle.
[2] *Peerage Law in England*, p. 41.
[3] *Nicolas*, *op. cit.* p. xii.

the case is cited as one in which the claim failed from "the absence of evidence of a sitting," it affords but "another instance illustrating" the muddle of the law. [1]

Nevertheless, the author of the printed Case for the petitioners claiming the barony of Meinill (1901) after giving, as above, his novel version of the Frescheville claim, and denouncing Mr. Hargrave for his "utterly wrong and absurd deduction" from the facts of that case, proceeded to explain that

> The De Lisle case in 1826 appears to have been the first to really suffer from the curious and mistaken deduction from the Frescheville case which had become accepted as genuine law, and which had obtained added weight from its acceptance in the Third Report on the Dignity of a Peer (vol. II, p. 34). [2]

The principle thus denounced is "the idea....... that twenty writs by themselves do not create a Peerage, but that a definite sitting *must* be proved." [3]

Now, in the first place, the 'De Lisle' claim did not, as it turned out, "suffer" from such deduction; and, in the second, 'the Third Report of the Lords' Committee on the Dignity of a Peer' was actually appealed to, as *in their favour*, on this very point by the petitioner's counsel ! They cited the allusion therein to "a succession of writs from which a prior creation, either by patent or by writ, might be inferred" (II, 27), and urged that

[1] See p. 128 above.

[2] *Printed Case*, p. 22.

[3] We even read on another page that " By this writ of 1283 and other subsequent writs Walter de Fauconberg is proved [*sic*] to have been a Peer of the Realm and Lord Fauconberg (No 1)." *Ibid.* p. 4.

they had "in this case a succession of writs of a double kind....... so that there is a strong inference, arising from the succession of writs, that the party summoned did sit." [1] The Attorney General did his best to explain away the passage, observing that counsel claimed "that the doctrine contended for [2] is supported (*sic*) by the Report."

In the Wahull case (1892) the actual Resolution recorded only that the claimant had "failed to show that there was created any such barony of De Wahull as he alleges." But the Lord Chancellor's judgment gave as the *rationes decidendi* that—

> The summons and the sitting in pursuance of it are essential conditions of the proof.
>
> Now the proof of *both* [3] appears to me entirely to fail here.........
>
> My Lords, as any kind of proof of the facts in this case fails here, I have not deemed it right to make any observations as to how the facts necessary for the claimant to establish may be proved. I desire neither to affirm nor to deny the accuracy of statements made upon very high authority limiting the mode by which proof can be made. [4] In this case it is obviously unnecessary, and I think would be undesirable to deal with any such question. It is enough to say there is here no kind of proof.

Lord Selborne, in his lengthy judgment, entirely concurred with the Lord Chancellor, but seems to have laid more stress on the lack of proof of sitting

[1] *Nicolas, op. cit.* p. 127.

[2] *Ibid.* p. 151. This was also the doctrine contended for in the Meinill claim.

[3] The Italics are mine. The summons itself was challenged as not to a proper Parliament and therefore invalid.

[4] This refers to the kind of evidence ("record of Parliament") necessary for proving a sitting.

than on the doubtful character of the "Parliament" to which the claimant's ancestors were summoned.[1]

One may fitly close this long investigation of "the Lord Abergavenny's case" and of the doctrines built upon it by glancing at its treatment in the strange production from which I have just been quoting. For it was frankly recognised therein that these doctrines were the great obstacle which a claim to the barony of Meinill would have to surmount. For proof of sitting there was none. It was argued, therefore, in the printed Case, at quite extraordinary length (pp. 19-23), that these doctrines had been wrongly deduced from the 1610 decision, which had been misunderstood.

As in the De L'Isle case, a succession of writs could be proved, and the arguments which had then been urged by counsel were once more trotted out. It was once more "submitted that the actual sitting need not be proved by the record, but may be established by presumption;" it was also urged that

> There is nothing whatever to lead one to imagine that the first Lord Meinill did *not* sit in Parliament, and one cannot but imagine that the presumption is that he obeyed the command of the Sovereign, and did take his place in Parliament pursuant to the King's writ (p. 20).

This is precisely the petitioner's argument in

[1] It is therefore not quite correct to say, as is said in the printed Case for the claimants of the baronies of Meinill etc., that "both the De Frescheville and the De Wahull cases should be discarded" from the list of those which failed on proof of sitting, "because in neither of them" could valid writs be proved. It is clear that in the Wahull case the lack of proof of sitting was deemed at least equally fatal.

the De L'Isle claim, [1] but in the printed Case I am discussing it enjoyed the advantage (or its reverse) of an incomparable style. Its author, indeed, was so impressed by the brilliance of his own periods that, denouncing "a mere travesty of the law," he adorned the close of his sentence with four notes of exclamation. In the grim pages of the printed Cases presented to the House of Lords such excitement, surely, is unique.

It caused, I remember, some comment that this Case was not signed, in accordance with practice, by counsel, [2] and I heard it suggested that Mr. Asquith, [3] who was leading for the petitioners, may not have cared to associate himself with exuberance so ecstatic. That it made no impression on his unemotional mind is shown by the fact that he ignored the argument so elaborately urged, and did not invite the Committee to say that the sitting of "the first Lord Meinill" should be presumed from his writs. He did but briefly observe that "there is no proof of his sitting...... The Meinill claim....... is a very simple one"......... "it is quite clear that there is no proof of his sitting." [4] On this admission the Committee for Privileges made even shorter work of the claim, and reported (23 July 1903) that "With respect to the Barony of Meinill, it is not proved to the satisfaction of the Committee that any person ever sat in this House under that title."

[1] As I have suggested above, the point was quite arguable, in view of Sir William Jones' attitude as to the *onus probandi* in 1677.

[2] "The case must be signed by two counsel" (Palmer, *Peerage law in England*, p. 232).

[3] Now Prime Minister.

[4] *Minutes of evidence* (1903), pp. 183, 215.

Here at last is a clear instance of a claim explicitly rejected for lack of proof of sitting. And the strenuous efforts in the printed Case to prove that "the presumption of the sitting..... amounts to a mass of evidence impossible to construe in any other manner, or capable of being ignored" were thus curtly disposed of. The author, whose bewildered grammar his excitement may possibly excuse, had distinguished himself also by classing "Lord Abergavenny's case" among "Petitions for Peerages....... rejected by your Lordships' house," and by writing of "the supposed Baronies of Nevill, De Wahull,..... the Barony of Nevill" (pp. 20-21) and so forth. It need hardly be explained that the peerage dignity claimed by the elder and the younger Nevill was the barony, the very real barony, not of "Nevill," but of "Abergavenny."

(4)

The case of the Barony of Clifton.

Very closely connected with "the Lord Abergavenny's case" is that of the claim to the barony of Clifton of Leighton Bromswold in 1673-4. The opinion of the judges, when consulted by the House of Lords upon the claim, has proved in practice the sheet-anchor of claims to baronies by writ. Recognized as such by every writer, whether he approved its principle or not, it led to the amazing outburst against the House of Lords by the late Professor Freeman—then newly appointed to his Professorship—in 1885. I have dealt fully in another place with this passionate attack, [1]

[1] *Studies in Peerage and Family History*, pp. 5-7.

which was couched in language of vulgar violence, and which would have forfeited the author's right to be deemed a serious historian, had we not to make allowance for the influence of his *bête noire*, that hereditary principle, his aversion to which amounted to an absolute obsession.[1]

Nowhere, perhaps, has a greater importance been attached to this famous case than in the latest work on Peerage law. Sir Francis Palmer there asserts that

> The leading case in this subject of barony by writ is the *Clifton Case*, 1673, reported in Collins, Claims, 291.[2] In that case Catherine, Lady O'Brien, claimed the Barony of Clifton, and her petition having been referred to the House of Lords, and by the House to the Committee for Privileges, it was ordered by the House that the judges should give their opinion on this case, which they accordingly did.[3]

"The law," Sir Francis adds, "was finally settled in 1673," by the decision of this case; but "the Redesdale Committee, in their third Report (p. 31) endeavour to minimise the effect of the resolution in the *Clifton Case*, and to negative any general application of the principle on which that case rested." The Committee's criticism was not confined to this passage in the Third Report (1822): there is also an important comment (unindexed) upon the case on pp. 323-4 of the Fourth Report (1825). Both passages should be read in conjunc-

[1] I would note that I publicly exposed his amazing errors at the time (1885), as it has been sometimes attempted to suggest that I did not venture to do so in his lifetime.

[2] This is hardly correct. Collins merely prints the relative extracts from the *Lords' Journals*. (J. H. R.)

[3] *Peerage Law in England*, pp. 38 et seq.

tion with Lord Redesdale's own observations on the case in the proceedings on the De L'Isle claim. [1]

In the meanwhile, Cruise had observed that the creation of a descendible barony by writ and sitting had been "distinctly settled in the case of the barony of Clifton," [2] which "solemnly established" the principle. [3] Courthope observed, of "the descendible nature of the dignity created," that

> it was not till 1673, in the case of the Barony of Clifton, that this principle was solemnly established by decision of the House of Lords (after taking the opinion of the Judges), and it has since been so fully recognised and frequently acted upon, that it may be regarded as part of the Constitution of the Peerage. [4]

Mr. Pike, whose views on these subjects are always independent, considers that the doctrine of "hereditary barony by writ" was "more fully recognised in 1674" by the Clifton Resolution and the Judges' opinion, but he points out that

> Even this was rather a decision upon a particular case than the enunciation of a general principle. It appears, however, to have been a sufficient precedent for all subsequent cases in which the circumstances were the same, but to have left open the question of the period at which a summons to Parliament followed by a sitting first operated to create an hereditary barony. [5]

This, indeed, was the ground upon which Lord Redesdale endeavoured, though without success,

[1] *Nicolas, Op. cit.* pp. 101, 273, 281, 285.
[2] *Dignities* (1823), p. 76.
[3] *Ibid.* p. 177.
[4] *Historic Peerage* (1857) p. xxix.
[5] *Const. Hist. of the House of Lords*, p. 131. Compare p. 206 below.

to limit the application of the Clifton precedent and to resist the doctrine that a writ and sitting created an hereditary barony even before the fifth year of Richard II.

As with so many of these questions there seems to have been much confusion on the actual facts involved. There were really at issue two points: (1) the necessity of a sitting under the writ, to render that writ operative as a creation; (2) the descendible nature of the dignity, under a writ containing nothing which imported that effect.

It will be convenient to start from Lord Redesdale's attempts to limit the application of the Clifton case as the governing precedent on the latter point.

In the 'Fourth Report of the Lords' Committee' (p. 323) he went so far as to assert that

> The first decision on the subject seems to have been in 1673, on the claim of the dignity of Lord Clifton; and the House, by referring the question to the consideration of the Judges, may be considered as having had doubts what ought then to be deemed the law on the subject, and as having treated the question as a question of difficulty. Before that decision the law cannot be deemed to have been clearly settled; but on what ground the Judges gave their Opinion that the Honour descended from Jervis Clifton to his daughter and heir does not clearly appear; etc., etc.

And in the Third Report (p. 28) we read

> This Resolution [1] decided that a writ of summons, and sitting in Parliament, vested in the person, so summoned and seated, a dignity descendible to the heirs of his body,

[1] *i. e.* of the House on the Clifton claim.

though no words in the writ expressed an intent to grant a dignity so descendible.

But on p. 31 this admission is somewhat modified :—

Since that decision, the law has been considered, in different cases which have been before the House, as settled by that decision ; but it may be doubted what was the extent of that decision. It is observable that the Opinion given by the Judges, upon which that decision was founded, is confined, in words, to that particular case; namely the case of Jervis Clifton, summoned to Parliament by writ in the sixth of James the First; and it does not follow that the Judges meant to express an Opinion, or that the House, on the ground of that Opinion, meant to resolve, that, in earlier times, a writ of summons and sitting in Parliament had in law the same effect......... To what extent later decisions may have carried the rule beyond the case of Jervis Clifton may deserve consideration.........

The Committee have not discovered on what grounds the Judges gave their Opinion in the case of the barony of Clifton, or what information the Judges had before them on the subject submitted to their consideration. Perhaps, having found that in the claim of the barony of De Grey, in 1670 *(sic)*, three years before the claim of the barony of Clifton, a writ of summons to Parliament and sitting thereupon, had, under the circumstances of that case, been deemed to have given title to an hereditary dignity (which right, however, could scarcely in that case have been deemed to have been lost by Non-user), they may have presumed, from that decision, that the law was to be supposed to be then settled accordingly, though in more ancient times the law might not have been so understood (p. 32);

At this point I break the quotation from this clear and stately prose to point out that its careful

reasoning is marred by a strange error. The barony of De Grey (better known as "Grey de Ruthyn") had been claimed in 1640, not in "1670," and, therefore, not "three" but *thirty*-three years before the Clifton claim. Nor is this a mere slip. The case is dealt with in this Report (pp. 26-7), and its date is there given, three times over, as "1670." So serious an error is rare indeed in these Reports.

Let us resume the quotation.

and that although the time and the manner in which this change in the law had taken place might not be distinctly traced, the fact of a change in the law might be presumed from the modern usage being contrary to the more ancient usage; and as during several years preceding the 6th of James the First, when Jervis Clifton was summoned to Parliament, the descendants of all who had had writs of summons, and had been seated in Parliament according to such writs...... had been ordinarily summoned, and had sate in Parliament, taking precedence according to the first writ; the Judges may have conceived that in the reign of James the First custom had given an operation to such writs which might not have been deemed the effect of similar writs in earlier times. Perhaps the very cautious language in which the Opinion of the Judges in the case of Clifton was delivered, apparently confining that Opinion to the particular case before them, may have been adopted to prevent any inference from their Opinion in favour of any claim under different circumstances, etc., etc.

Lord Redesdale's *dicta* in the course of the proceedings on the De L'Isle claim are wholly to the same effect.

It is very important that your lordships should endeavour to fix in your minds some time when a writ issued to

summon a person to parliament, and a sitting under that writ, should be deemed to create a title to a barony in fee, that is, to a man and the heirs of his body. The first resolution upon the subject was as to a title now enjoyed by a noble lord of your lordships' house—Lord Clifton...... That is the first decision upon the subject, and the first time I can find that any claim of that kind was ever brought forward...... it is manifest from what has passed in preceding reigns that, until that resolution was come to by the House with respect to the barony of Clifton, in consequence of the Opinion given upon that occasion, the general impression must have been otherwise. [1]

Again, as to the doctrine that a writ, "and a sitting in parliament upon that writ, created a right to a descendible peerage," his lordship observed that

The first time that was ever asserted was in the case of the title of Lord Clifton, and certainly the Opinion of the Judges was taken upon that subject, it being then much questioned ;......... The Judges do not appear, from anything which remains, to have given any reasons for the opinion they expressed, at least nothing upon that subject that I can find has ever come down to our time. Whether they did give any reasons, or whether they simply signified that opinion, offering no reasons, it is impossible now to state. [2]

There can, of course, be no question, either from the scientific or from the historical standpoint, that the above admission of "a change in the law"—the application to legal doctrine of the principles of development and evolution—is a great advance on the obstinate and unscientific maxim—one is tempted to say the ludicrous view—that the law

[1] Nicolas, *Op. cit.* pp. 101-2.
[2] *Ibid.* pp. 273-4. Cf. pp. 281, 285

has been "always the same." At the outset of this paper I observed that in the lawyer's realm "change and development are ignored and evolution an accursed thing." Such language, I venture to submit, is not a whit too strong in view of the blighting and sterilising effect on all intelligent research of the lawyer's convenient doctrine that the law was "always the same."

One knows, of course, the subtle plea to which the lawyer has recourse in order to escape the consequences, the obviously absurd consequences, of his own maxim. The law, he pleads, was intrinsically the same, but, "as then understood" (by which word he means misunderstood), it was different. The law, he holds, has never changed from the days of the Middle Ages: it has only been "ascertained" and "defined." This position is well stated in Sir Francis Palmer's work, where the learned author thus deals with the somewhat startling decision of the House on the Earldom of Norfolk claim (1906).

Here it may be well to pause for a moment and point out that where the common law is ascertained, whether by decision or declaration of the House of Lords, the law as so ascertained is taken to have been in force from time immemorial as part of the common law of the land, and is, therefore, applicable to ancient cases as well as to modern cases. Thus in the *Norfolk Case* just referred to, it was held that the law as ascertained by declaration of the Lords in the *Grey de Ruthyn* and *Purbeck* cases was applicable to a transaction which took place in the year 1302, and that the House was bound to apply that law accordingly.

This is based on the principle that in peerage matters

the House of Lords has merely to ascertain the law and apply it. It was contended that it would be hardship to apply the law as ascertained in the year 1906 to a transaction which took place in the year 1302, but, as pointed out by the Lords who took part in the decision, there was no jurisdiction thus to restrict the operation of the common law. [1]

Again, speaking of the rule of law as to proof of creation and tracing descent from the grantee:—

No doubt it is not possible to show that this has always been the law since the time of Henry III, but inasmuch as it has been recognized as the common law in modern times it may be assumed in accordance with the principles recognized in the *Norfolk Peerage Case* (1907) that the same rule has always prevailed. [2]

Let us apply this principle to the case of peerage dignities enjoyed *jure uxoris* or by the curtesy of England. The same learned writer has devoted a chapter to these dignities, and I have also discussed the subject myself in another portion of this work. [3] Sir Francis admits that "the husband of a peeress in her own right seems in former times to have been considered entitled, at any rate after issue had, to be summoned to Parliament in respect of his wife's dignity" (p. 133). He cites cases "in which the curtesy principle was recognized;" but he strangely ignores the Fauconberg case (1903) in which it was actually decided by their Lordships, after much argument on the subject, that the barony, in the time of Henry VI, was "vested in William Nevill in right of his wife Joan," a

[1] *Peerage Law in England*, p. 22.
[2] *Ibid.* p. 98.
[3] See p. 2 *et seq.* above.

proposition opposed by the Attorney General, Sir Robert Finlay, [1] who had afterwards, in the Norfolk case (1906) to argue on the other side. From the latter case Sir Francis Palmer aptly quotes the following dialogue (pp. 134-5) :

Lord Davey. That was very common in ancient times —that the husband of a female heir sat in this House in right of his wife.........

And the issue of a writ to the husband of a female heir did not create a new peerage, but gave him the enjoyment of his wife's peerage. I think probably that is the solution of it.

Lord Halsbury. I think that is what seems to be the law. [2]

Is it the law now? And if not, why not, when, as Lord Halsbury and Lord Davey, in their Judgments on this very claim (1906), so strenuously insisted, "the law is always the same"? When their Lordships in 1903 decided that William Nevill enjoyed a barony "in right of his wife," they cannot have done what they declared, in 1906, it was not in their power to do, namely have recognized a law different from that which is now in force. Consequently it is the law now

[1] See below.

[2] This dialogue will be found on p. 97 of *Speeches delivered* etc. (1906). On p. 145 Lord Davey enquires : "At what period did the practice of men who married heiresses to Earldoms sitting *jure uxoris* cease?" And Lord Robert Cecil replies: "There is, no doubt, a good number of instances, particularly of Baronies, of men who married heiresses sitting." On pp. 146-151 Sir Robert Finlay discusses the point and observes : "I can show your Lordships...... that when a man had issue by his wife, being a Peeress in her own right, it was usual to summon him *jure uxoris* to Parliament, and he sat there *jure uxoris*" (p. 147). He further cites the Wimbish case as "really a decision by the King with that advice that, when there is issue of the marriage, the husband should have the style of the dignity. It is an illustration of the general rule...... the general rule, which is illustrated by the decision of the King, was that he got the dignity if there was issue of the marriage....... I submit to your Lordships that that is a very good illustration of the rule which at that time existed" (p. 149).

that the husband of a peeress in her own right can sit in the House "in right of his wife."

This is a startling proposition and will, no doubt, be denied. But the House has "ascertained" the law in its Resolution on the Fauconberg case,[1] and the law so ascertained is applicable to modern as well as to ancient cases. I must press the question home. Are there, could there be now such things as peerage dignities enjoyed *jure uxoris*? And if not, why not? Sir Francis attempts an answer: as there have not been any claims to such dignities since the reign of Elizabeth (or at least of James I), "it may be taken, therefore, that, whatever was the older practice, it has now become obsolete."[2] Obsolete? But this, surely, is the language of Roman, not of English law. In the Scottish courts the plea might serve; but not with us.[3] "Desuetude," observed Mr. Fleming, in his argument on the Berkeley claim (VIII H.L.C. 56), "cannot determine a right. The law as to wager of battle is an instance of that."

In his Judgment on the Earldom of Norfolk claim the ex-Lord Chancellor (Lord Halsbury) was on this point emphatic.

No stronger illustration of this principle can be given than when, so lately as 1818, the Court of Queen's Bench, with Lord Ellenborough presiding, felt itself compelled to allow a claim to wager of battle in an appeal of murder, and but for the intervention of an Act of Parliament, 59 Geo. III, cap. 46, some of His Majesty's

[1] Namely that a husband can sit "in right of his wife."

[2] *Op. cit.* p. 136.

[3] Coke, the authority upheld by Sir Francis, says "The common law hath no controller in any part of it but the High Court of Parliament; and if it be not abrogated or altered by Parliament it remains still." (I Inst. 115 b.).

judges might have had to preside over a single combat between the Appellant and his antagonist.[1]

Here also the privilege of appeal had not been claimed since the days of Elizabeth (1571), and even then the 'battle' had not taken place. Indeed, "before the accession of Edward I (1272) the judicial combat was already confined to that sphere over which its ghost reigned until the year 1819."[2] And yet Lord Ellenborough laid it down that

> The general law of the land is in favour of the wager of battle, and it is our duty to pronounce the law as it is and not as we wish it to be; whatever prejudices, therefore, may justly exist against this mode of trial, still as it is the law of the land, the court must pronounce judgment for it.

Obsolescence availed nothing.

But where Lord Halsbury's illustration fails is that it only vindicates the application to a modern case of a known law or practice of the Middle Ages, unless legally altered; it does not vindicate the converse process of applying to a medieval case the law as it existed, or was declared to exist, in the 17th century. And it was by this converse process that the Earldom of Norfolk claim was disposed of. Let me take an illustration from the realm of dress. In the garb of judges, of 'bluecoat

[1] *Speeches*, etc., p. 191. This statement, of course, is wildly incorrect. The Court of *King's* Bench gave its decision 16 April, 1818, and the single combat was averted, not by an Act of Parliament, but by the Appellant crying craven and declining fight, the prisoner being consequently discharged (April 1818). It was not till the following year (June 1819) that the Act was passed receiving the Royal assent 22 June. I merely mention this as a further illustration of the supreme indifference to facts and dates of really great lawyers.

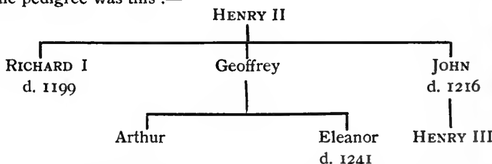
[2] *History of English Law*, II, 630.

boys,' and of bishops, of municipal dignitaries and of yeomen of the guard, we have, no doubt, survivals, more or less ancient, of the same dress that they wore in days more or less remote. While dress, like other human institutions, had its development and its changes, these changes were, in such instances, artificially arrested. We are justified, therefore, in saying that, until such garb is altered, it remains the same as in former days. But does it follow from this admission that we can argue back from the present to the past, and "ascertain" the dress of the 14th century by determining the rules which govern that of our own day? To revert to the case I have already cited, the Dutch painters, at least, of the 17th century, held the lawyers' doctrine and applied it with a will. By them the dress of their own time was "taken to have been in force from time immemorial." They applied it to characters in the Old Testament, and it saved them from long and arduous archæological research. In that respect they found it no less useful than the lawyers.

Should this illustration be rejected, we will come to closer quarters. What of the *casus regis* and its influence on the rules of descent? Who, at the death of William IV, was heir to the throne of the United Kingdom? Queen Victoria, of course, comes the prompt reply. But who then, at the death of Richard I, was heir to the throne of this country? If "the law was always the same," his nephew Arthur was the heir; and after Arthur Eleanor, Eleanor who survived Richard for more than forty years. Yet the throne

went to John, and to Henry his son after him.[1] Why? Because the law at that time was notoriously *not* the same. It was still an open question whether the surviving brother had not a better claim than the child of the intervening brother. Indeed, we find a statement placed in the mouth of the great Marshal, at the death of Richard I, that, as the law stood, John was his rightful heir.[2] So late as 1246 juries were still unable to state who the rightful heir, in such a case, was.[3] Even later, Edward I could claim that "Richard my ancestor was seised thereof in his demesne as of fee, and from the said Richard, because he died without an heir of his body, the right descended to a certain King John as his brother and heir, and from him to King Henry as his son and heir."[4] To the glib retort that, in the days of John or even of Henry III, "the law was the same," but was not "understood," because it had not then been "ascertained" or "defined," I

[1] The pedigree was this :—



As in the case of the Duke of Kent, Geoffrey, the intervening brother, had died in his elder brother's lifetime. Henry III was in the same position to Eleanor as the late King of Hanover to Queen Victoria.

[2] "Mais voyez le comte Jean. En conscience c'est le plus prochain hoir de la terre de son père et de son frère........ le fils est plus près de la terre de son père que le neveu" (*Histoire de Guillaume le Maréchal* ll. 11892-6, 11900-11902, rendered into modern French by M. Paul Meyer). Compare the *Très ancien coutumier* (Ed. Tardif), p. 13.

[3] "who is the next heir it is not for the Jury to judge"........ "the jury know not who is the next heir." *Calendar of Inquisitions* : Henry III, I, 14.

[4] *History of English Law*, I. 498.

would reply by asking :—where *was* the law ? If it was then the same, although no one knew it, it must have existed somewhere. That existence was not in the law-books, not in the minds of men, not, so far as we can find, anywhere on this planet : presumably, therefore, it was somewhere in space. And that, no doubt, is the true answer ; for it has been projected thither by the searchlights of a later age.

Let us take, still from the law of descent, further illustrations of the fact. In the Lord Great Chamberlain case the law of *esnecia* was adduced on Lord Ancaster's behalf ; but it was not grasped that the law had not always been the same. " For the law about this matter underwent an instructive change........ the law is beginning to fluctuate."[1] Or take the even clearer case of the disappearance of restriction on alienation without the heir's consent. Of this " important episode " we read that " the change, if we consider its great importance, seems to have been effected rapidly, even suddenly ; " it was " a great and sudden change. " Was this " great change " effected by a legislative measure ? By no means. " It must have been effected by some machinery of legal reasoning....... above our law at the critical moment stood a high-handed court of professional justices....... who could abolish a whole chapter of ancient jurisprudence by two or three bold decisions."[2] It is thus that our law developed and was changed,— by the " bold decisions " of a judge, or by the speculative blunders of a Coke.

[1] *Ibid.* II, 274-5.
[2] *Ibid.* II, 310-311.

Lastly we come to "that extraordinary rule," as Maine termed it, "of English law," the exclusion of the half-blood.[1] The growth of this famous doctrine has been traced by modern research, and that growth is fatal to the fiction that the law is "always the same."

If we turn to the records of the time, we shall see much uncertainty ; we shall see claims brought into court which the common law of a later day would not have tolerated for an instant, and juries declining to solve the simplest problems...... In Edward I's reign the law seems to be setting its face against the claims of the half-blood ; but even in Edward II's there is a great deal more doubt and disputation than we might have expected...... the lawyers are beginning to make everything turn on seisin, but they have not yet fully established the dogma that if once that eldest son is seised his half-brother will be incapable of inheriting from him.

Our persuasion is that the absolute exclusion of the half-blood, to which our law was in course of time committed, is neither a very ancient nor a very deep-seated phenomenon.[2]

In a word, it "is modern :"[3] clearly "the law of Bracton's day had not yet taken this puzzling shape."[3] We are dealing, observe, with a change, the development of a new doctrine, not the mere "ascertaining" of law misunderstood till then. The authors of the *History of English Law* were lawyers and Professors of law, but they scorned the device of subterfuge. Approaching their problems in the spirit of historians and of men of science, they could write of "a complicated

[1] Down to 1834.
[2] *Op. cit.* II, 301-3.
[3] *Ibid.*

set of interdependent changes..... which gradually established a definite law :" they could, without hesitation, speak of its "evolution."[1]

For to them the law had a higher task than to "circumvent by tortuous paths the obstacles that it cannot surmount."[2] Convenient though the fiction may be that the law has never changed, one cannot, for the sake of convenience, dissociate law from fact. Even facts have their claims. If I have thus denounced the doctrine that the law "is always the same," it is because that doctrine does violence to history, because it is historically false.[3]

Now this discussion has arisen out of Lord Redesdale's doubts whether the Opinion of the Judges on the case of the Barony of Clifton should have been applied retrospectively to the earliest days of Parliament. As it is now settled law that it ought to be so applied, any further discussion may appear academic, and therefore to be scorned by the "practical" lawyer ; for the Lords "have held that the *Clifton Case* established a general common law rule operating retrospectively to the time and in the reign of Edward I."[4]

The student, however, will discover that there are several points of interest which still require investigation, and that such investigation may reveal misunderstanding and confusion. What

[1] *Ibid.* p. 323.
[2] *Ibid.* I. 204.
[3] See below for tho full acceptance of the opposite doctrine by Lord St. Leonards in the Berkeley case.
[4] *Peerage Law in England*, p. 41.

was the real point at issue in the Barony of Clifton case? Whence did the Judges get the law embodied in their Opinion? Does the Resolution of the House justify the use that has been made of it? And if so, what is the limit of its retrospective action? What, in other words, was the earliest true Parliament?[1]

It is hardly possible to deal fully with all or any of these questions, but some answer may be attempted. In the first place, although every one is agreed as to the point at issue in the case, it seems to be at least possible that every one is mistaken. Is the heir-general of a person summoned by writ, and sitting in virtue of that writ, entitled to a barony in fee[2] by hereditary right? Such, it is agreed, was the point raised. But why should such a point be raised under Charles II (1673-4)? Lord Redesdale, it is true, described it as the first claim of the kind, and the decision as the first to be given.[3] And he consequently sought to discover the grounds on which it had been based. But in such a claim, on the contrary, there was no new feature; in several then recent precedents no question had been raised as to such hereditary right. Including cases of abeyance, as being even stronger examples of an hereditary right in the blood, we have Ogle (?) 1628,[4] Grey de Ruthyn 1641, Windsor 1660, Sandys 1660,

[1] Compare p. 203 above.

[2] This phrase, of course, is not technically correct; but it is accepted by usage.

[3] See p. 207 above.

[4] Queried only from the possible doubt as to whether the recognition implied *gratia regis* (there had been abeyance in the case).

Roos 1667, and Fitzwalter 1670.[1] In all these cases a barony in fee had been allowed to the heir-general or to a co-heir (Windsor) without question. The list, I think, is more complete than any yet compiled, and I attach special importance to Sandys, both because it seems to have been overlooked and because it was duly referred to the House and came before the Committee for Privileges.[2] Grey de Ruthyn is a known precedent,[3] but it is well to add that the point was fully argued in that case, for Selden urged against the petitioner that a woman could neither inherit a barony by writ nor transmit to her heirs a right to it.

In what then did the Clifton case differ from those which had preceded it? Tho petitioner's great-grandfather, Sir Gervase Clifton, had been summoned and sat, and had died in 1618.[4] In the Sandys case the petitioner's (maternal) grandfather had been summoned and sat, and had died in 1623. But when we scan the Judges' Opinion on the Clifton claim, we note that they mention the fact, to us wholly irrelevant, that the husband

[1] I do not include Norreys, because although Lord Norreys took his seat without opposition, it was not till 1679. But it was alleged in the Howard de Walden case (1691) that he "was declared Lord Norris by King Charles II in 1669" and Dugdale's *Baronage* (II, 410, 489) published in 1676, speaks of him as "now Lord Norris, by descent from his grandmother," whose father had died in 1623.

[2] Report from Committee 4 May 1660 (*Lords' Journals*).

[3] See p. 143 above.

[4] Courthope (p. xxx) says that, though some held that there must be two writs and two sittings, "this is a mistake, for in the case of the Barony of Clifton there was but one writ, and a sitting under it, which was held sufficient to create a barony." This is repeated from Cruise (p. 79), who relies on "Collins." But there the statement is traced to its source in a letter of Feb. 25, 1694/5 from the Earl of Huntingdon, in which the statement is made (p. 330). The facts are that Lord Clifton had been (naturally) also summoned to the "Addled Parliament" of 1614 (Dugdale's *Summonses*).

of the first peer's heiress "was by letters patent created baron Leighton of Leighton Bromswold," etc., etc. They also take "the case in fact to be as His Majesty's Attorney General reported it to be." What then was the tenor of that report? Here we come to the new matter. The Attorney General (Heneage Finch) had placed in the very forefront of his report (29 Oct. 1673) this apparently irrelevant fact, and, further on, had stated his opinion

> That when the Duke of Lennox, her husband, did, in 17 *Jacobi*, accept a patent of the Barony of Leighton Bromswold in tail to him and the heirs male of his body, this could neither alter the nature nor the course of descent of his wife's inheritance, but that remained as it was before.

Why? Because the writ and sitting had created for Sir Gervase a barony which was an inheritance in fee, "which ought to descend to his lineal heirs."[1]

Such then was the strange difficulty which presented itself to the minds of the lawyers of the time. The petitioner, according to the Lords' Journals, claimed her great-grandfather's "barony of Leighton Bromswold." Had his son-in-law's acceptance (within a year of his father-in-law's death) of "the barony of Leighton Bromswold" in tail male affected the validity of her claim? Strange though it may seem to us that such a point should even be raised, it was raised again in the case of the barony of Willoughby de Broke, full twenty years later. The petitioner then

[1] 9th Report Hist. MSS. II, 37.

admitted that his ancestor Sir Fulk Greville, through whom, as *de jure* Lord (Willoughby de) Broke, he claimed, had not asserted his right to the old barony by writ, but had accepted a new barony—" Brooke of Beauchamps Court "—by patent in tail male, 1621. But this, he urged, could not affect his hereditary right to the other. Lord Brooke's counsel, however, disputed this, and the objection was also raised on behalf of the Crown. Eventually it was urged for the Crown " that the heir male has a grant of the barony of Broke, [1] which was Sir Robert Willoughby's title ; that two persons cannot have it ;....... that there is a lord Broke in the House already, there cannot be two, so that if the title be allowed to the heir general, then the patent to the heir-male is void, etc. " [2] The Attorney General argued that " His accepting a Patent for Brooke of Beauchamp Court should be a kind of extinguishment of the other Barony " ! [3]

It will, I think, hardly be questioned, when all this has been considered, that the only point of possible doubt in the barony of Clifton case was the effect of the creation of a barony of Leighton Bromswold, by patent, in 1619.

The Committee for Privileges actually insisted on the patent being produced and read.

The Lady Obryan is called in again. She is told that

[1] i.e. the dignity created in 1621.

[2] See " Collins " 321-5 for all this. The petitioner of 1673 had escaped this aspect of the difficulty, for, as was duly insisted on, the " barony of Leighton Bromswold " created in 1619 had become extinct in 1672.

[3] *House of Lords' MSS. : New Series*, Vol. I. This report of the proceedings is of considerable importance as confirming and amplifying the account in " Collins. "

the Lords desire to see the Patent or (if she have it not) an authentique copy of it at their next meeting.

The Councell produce a copy of the Patent which is read. [1]

The meagre reports of the proceedings leave in some obscurity the point eventually in question, but the Solicitor General, at least, appears to have acknowledged the claimant's right.

The Attorney Generall opens the auncient custome of calling by Writt and hopes the House will proceed in favor to his majesty.

The Sollicitor acknowledges his judgment to be that a summons creates a fee if there be no speciall words of limitation in it.

The Lady Obrians Counsell argue on the nature of writts and leave their Case to the Lords' judgment...

The Judges are asked whether a Writt of Summons and Sitting upon it make a fee.

The L. Ch. Justice C. Pleas desires they may not give a sudden answere but may have a convenient time to answer. [2]

The Judges then unanimously disposed of this question by their Opinion:

First, that the said Jervas, by virtue of the said writ of summons, and his sitting in Parliament accordingly, was a peer and baron of this kingdom, and his blood thereby ennobled.

Secondly, that his said honour descended from him to Catherine, his sole daughter and heir, and successively after several descents to the petitioner as lineal heir to the said Lord Clifton.

Thirdly, that therefore the petitioner is well entitled to the said dignity.

[1] Priv. Book, 12 Jan. 1673/4. I am indebted to the authorities of the House of Lords Library for allowing me to consult this volume.

[2] MS. Min. 20 Jan. 1673-4. (See the preceding note).

A dignity so created and descending could not be affected in any way by the patent creating the barony of Leighton Bromswold.

The suggestion I have here made as to what was the true reason for taking the opinion of the judges is confirmed, I think, by the case of another barony in fee only four years before. When Benjamin Mildmay had claimed, as heir general, the barony of Fitzwalter, in 1668, no question was raised as to the right, in ordinary circumstances, of an heir-general to a barony in fee : but the two points on which the House resolved to hear counsel were "Whether a barony in fee shall descend to the half blood? And whether a barony in fee may be merged in an earldom in tail?"[1] When the case, owing to the prorogation of Parliament, came before the King in Council, the same two points were again argued by counsel and finally referred to the judges who unanimously agreed "that if a baron in fee simple be made an earl, the barony will descend to the heir general, whether the earldom continue or be extinct."[2] It was not a question of whether a barony in fee should descend, in normal circumstances, to the heir-general, but whether that normal rule of descent would be affected by a patent conferring on its holder an earldom in tail male. As in the Clifton and Willoughby cases, it seems strange now to us that such a point should be even raised.

This brings us to the second question : whence

[1] *Lords' Journals*, 21 April 1668. It appears that the Attorney General (Montague) had raised the strange objection that if such a barony was not attracted, but emerged, it would tend to multiply peers.

[2] Order in Council 19 January, 1669/70.

did the Judges get their law?[1] Lord Redesdale sought for the answer, and professed that he had sought in vain. And yet surely that answer is simple: they got it straight from Coke. The famous passage in his First Institute contains these words:—

Creation by writ is the ancienter way......... and this writ hath no operation until he sit in Parliament, *and thereby his blood is ennobled to him and his heirs lineal*, and thereupon a baron is called a peer of Parliament. (16 b)

It is one of the curiosities of literature, or at least of legal literature, that Nicolas, who constituted himself the champion of this doctrine, ignored this, the one passage in which it originally appears, and devoted himself, in his monograph, to vindicating the accuracy of "the Lord Abergavenny's case" in Coke's 12th Report. For in that report, which he there printed, the *hereditary* effect of the writ and sitting (the point for which he was contending) and the famous doctrine of the ennobling of the blood —which so enraged Mr. Freeman—are actually not to be found! The italicised clause is an interpolation, by Coke, in his First Institute.[2]

This was rightly and acutely urged in the (Willoughby de) Broke case (1694-5) by the then Attorney General.

L[ord] Coke says this, but he cites no law-book for this.

The writ has no words of an inheritance in it......... My Lord Coke 1st Inst. says 'A Barony by Writ and

[1] See pp. 205, 207 above.

[2] This may have largely escaped notice. Cruise (p. 76) appears to have overlooked it.

sitting in Parliament creates an inheritance.' Lord Coke is the only author in law that says so. He cites no authority for this.[1]

In styling the italicised clause an "interpolation" by Coke, I do so in no offensive sense, but only as emphasising the fact that nothing of the kind is found even in his own report of "the Lord Abergavenny's case." Nor do I suggest that this doctrine was a mere invention of Coke's: on the contrary, I hold that he was simply stating the law as it then existed and as it had existed for some time—certainly from the days of Henry VIII.

Here again the whole question is that of its retrospective application. Does it follow that because the doctrine he thus asserts was law in his own day, it was also law in the days of Edward I? It was the latter proposition which Lord Redesdale assailed; and in that assault he was justified by precedents of weight. In the (Willoughby de) Broke case the Attorney General cited Prynne, Doddridge, Elsing, and Selden as against the solitary *dictum* of Coke,[2] and urged that

> There were many persons summoned as the father, but none of the descendants. This is a personal summoning of one person to one Parliament, and mentions nothing of continuance.[3]

It is important, however, to observe that in the Willoughby case the real question was not raised, for writs had been issued down to and in 1515.

[1] Proceedings of 11 Dec. 1694 and 16 March 1694/5 in *House of Lords' MSS.: New Series*, vol i. Cf. 'Collins,' pp. 322-3.

[2] See, for an epitome of their arguments, "Cruise" (1823), pp. 73-4.

[3] *House of Lords' MSS.: New Series*, I, 403.

If there had been no writs since the days of Edward I, the result might have been different. [1]

Hallam, who was influenced by the arguments of Selden and his fellows, puts the case very reasonably when he writes:

> The course of proceeding, therefore, previous to the accession of Henry VII by no means warrants the doctrine which was held in the latter end of Elizabeth's reign, and has since been too fully established by repeated precedents to be shaken by any reasoning. [2]

It is probable that any historian who fairly examined the evidence would arrive at the same conclusion; and, writing from the historian's standpoint, although himself a lawyer, Mr. Pike emphatically does so.

> It has already been shown that in the reign of Edward I. and for some time afterwards, the number of persons summoned among the Barons varied very widely. This fact in itself is almost sufficient to prove that the idea of the creation of an hereditary barony could not have been in the mind of the sovereign at the time at which the summons issued. We find that men were summoned to one Parliament and not to another; we find that their heirs were sometimes summoned and sometimes not. All this is quite inconsistent with the theory that a single summons to Parliament, followed by a sitting in Parliament, gave a peerage to the person summoned and the heirs of his body. [3]

Gneist, who devoted special attention to "the

[1] On the other hand, the Attorney had a strong point in the discontinuance of the writs, none having been issued since 1515 to those entitled to them by the law now accepted.

[2] *Middle Ages* (1860), III, 125.

[3] *Const. Hist. House of Lords* (1894), p. 108.

development of the heritability of the temporal peerage,"[1] held that

> The summons by writ could not, being a single act of invitation, express or found a permanent right...... This title by custom (to a writ) was in the fifteenth century hereditary for the older and more eminent, but not for others. Mere personal summonses became rare even under the house of Lancaster; under the Tudors they entirely ceased; and under Elizabeth the courts interpreted a summons by writ to be hereditary 'by virtue of custom.'
>
> .... the 'summons' by writ to each separate session had not in itself the character of a 'dignity' conferred. The arbitrary modern expression, which speaks of a creation of peers by writ, is only a source of confusion and dispute.

Enough has now been said to show that we have here to deal with two distinct developments, each gradual, and each, as such, a thing abhorrent to the law. The first is the slow and gradual growth of the hereditary right out of custom; the second is the gradual development, since the days of Coke, of the doctrine that a writ and sitting created an hereditary barony. A gradual development, I say, because at first it was applied only to baronies which had not long been dormant or in abeyance and for which, therefore, there could be produced comparatively recent writs. Lord Frescheville did, no doubt, endeavour in 1677 to claim that he was justified by the Clifton case in asserting that a solitary writ in 1297 had created an hereditary barony, but, as we have seen, he failed. It was not till a century later (1764) that the Barony of Botetourt,

[1] *Const. Hist.* (1886), pp. 430 *et seq.*

which had not been heard of for nearly four hundred years, was suddenly disinterred and called out of abeyance for one of its co-heirs.[1] This precedent led to a number of similar claims, which are grouped together and satirised in *The Complete Peerage* (I, 288-9). But, in spite of the Lords' Reports and of Lord Redesdale's pleading, it is difficult to see how the House could have avoided the extreme application of the doctrine, when its principle had once been adopted. Of development, of change, of evolution, the law knows nothing.

This is a point that one cannot leave without reverting to that striking Judgment on the Earldom of Norfolk case (1906) which was based avowedly on the maxim that "the law was always the same." For this Judgment is generally considered to have been delivered under the influence of the late Lord Davey, whose insistence, indeed, upon that maxim was, we shall see, unflinching. Circumstances, however, alter cases, and, when we turn from the Norfolk claim to that for the Barony of Wahull, from Lord Davey, sitting as judge, to Sir Horace Davey, arguing as counsel, we are surprised to find that able lawyer arguing that in fact, as apart from theory, the law, even so late as the days of James I, was not the same as now. He went, in fact, much further than Lord Redesdale in his heresy.

The point arose in this way. Counsel had a very weak case and was obliged to rely largely on

[1] See Appendix on "Case of the Barony of Botetourt" in Nicolas' *Barony of L'Isle*, pp. 309-317. According to Cruise, the petitioner's Printed Case claimed it as "a certain rule in law that the sitting in parliament, by virtue of a writ of summons,........ gave a barony in fee."

a report by the Commissioners for Earl Marshal in the days of James I, of which there are varying versions, and the authority of which rests upon the facts that "it is obviously very old, and the spelling is the spelling of a byegone time."[1] In this document, *quantum valeat*, the Commissioners are made to speak of the Claimant's "Right soe fully appearing (which cannot dye)," but somewhat inconsequently express their opinion that he deserves to be "regarded in grace" and that they "think him worthy of the Honnour of a Barron." It was at once pointed out by one of the Committee that

> It contains apparently no finding of the Claimant's right...... If these words had been intended to bear the meaning you attribute to them, I should have expected the Commissioners to report that he was entitled to the Peerage.

Counsel was thus forced to adopt, unconsciously no doubt, the position that Selden had taken up, in the Grey de Ruthyn case, two and a half centuries earlier. Selden denied that a barony in fee descended to an heir general *as of right*—

> but I confess, where a sole barony...... hath been in a man who left a sole daughter and heir, it hath many times so fallen out that the King hath conferred the honour upon the issue of that daughter ; but that is *ex gratia regis*, not *ex vigore legis ;* and it is rather a restitution or revival of an ancient honour than right of descent.[2]

Sir Horace had similarly to plead that, in the days of James I, right of descent was not sufficient;

[1] *De Wahull Peerage : speech of counsel* (1892), p. 7.
[2] 'Collins,' p. 204.

the heir general could succeed only *ex gratia regis*. This would explain, he urged, the wording of the Report.

Sir Horace Davey: 'They regard it as a *right*; but it may be that at that time of day, in the reign of James I., the question whether a person should be summoned or not was treated as a matter within the King's discretion, as part of his prerogative, and that the right to be summoned, where a Barony by Writ had been established, was not so fully settled as a matter of absolute right as it is at the present day.'

Earl of Selborne: 'Was it not as much a matter of absolute right in James I's reign as at present?'

Sir Horace Davey: 'I believe not.'

Earl of Selborne: 'That is a new proposition to me... I do not think Lord Coke's language upon the subject indicates any doubt with regard to the right to a Peerage. .... The decisions in recent times we must suppose to have been expository of the law: *the law could not have been invented.*'

Sir Horace Davey: '*No doubt that is so. The law is, in theory, always the same*, but there have been periods when the law has not been so clearly ascertained and defined as it has been in recent times. *When it is ascertained and defined, it has always been the law*, but there have been times when it has not been defined in the way in which subsequent tribunals have defined it.[1]

Here I pause to observe that, as was explained above, no one suggests that the law on this point was "invented" by Coke. He stated, correctly no doubt, the law as it existed in his own time. But there had been two developments since earlier times, first, the development of the hereditary principle in baronies by writ themselves; second, the consequent development in peerage law; for

[1] *De Wahull Peerage: speech of counsel*, p. 8. The italics are mine.

peerage law, as such, is, of course, largely based on actual custom and usage in the matter of peerage dignities. As that usage developed, and as that custom changed, so had the law relating to them to follow suit. Even in the Earldom of Norfolk case one caught stray glimpses of a fact that cannot be suppressed. From the 'Third Report on the Dignity of a Peer' Sir Robert Finlay cited the words:

> The Committee conceive that they have fully shown that Resolutions and Decisions of the House which may now be considered as settled law regulating the House in deciding on rights of Peerage would, if applied to what has passed in former times, tend to produce great confusion (p. 244).

The following dialogue also is instructive.

> *Lord Davey:* 'Can it be considered to be clearly established in the reign of Henry the Sixth that you must trace the devolution of a Peerage, not from a person last seized, but from the original grantee?'
>
> *Sir Robert Finlay:* "I should not like to say that it is. Your Lordships see that Lord Coke lays it down as quoted by Mr. Cruise in the passage I referred to. It is very difficult to say at what period in our legal history particular doctrines, however formally established they are, were generally recognised as law.'
>
> *Lord Davey:* 'That is where the difficulty is in administering this branch of the law.' [1]

The principle for which Sir Robert was contending is, I may add, affirmed at the outset of 'Division I' of the same Report. It is there observed that the Journals record

> some Resolutions of the House in direct contradiction

[1] *Speeches of Counsel*, p. 63.

to what had been practised, and submitted to as lawful, in earlier times; and therefore, if the House was fully informed, was fully aware of all which had been before done, these Resolutions must have probably been founded on a supposition that the Dignity of Peer of the Realm had then assumed a character different from the character which had belonged to the Earls and Barons of earlier times.

The Grey de Ruthyn Resolutions are then quoted with the comment that they may be deemed to have been in contradiction to ancient practice.[1] And it is elsewhere added that

> These surrenders of Honours are in direct contradiction of the Resolutions in the case of Viscount Purbeck, but they were certainly anciently frequent.[2]

I do not myself admit that these surrenders are "in direct contradiction of the Resolutions in the case of Viscount Purbeck," though that is the statement usually but very loosely made. Those Resolutions (or rather that Resolution) were rigidly limited to the case of a surrender *by fine*, a practice which had been introduced in the Stafford case, on legal advice, by the Crown, and which was again resorted to, on legal advice, in that of the Viscountcy of Purbeck. The Resolution solemnly affirmed, upon "a question in law...... whether *a fine levied to the King* by a peer of the realm of his title of honour can bar and extinguish that title," that "no *fine* now levied, or at any time hereafter to be levied to the King can bar such title of honour, or the right of any person claiming under him that levied or shall levy such fine."[3]

[1] *Third Report*, p. 25.
[2] *Ibid.* p. 218.
[3] *Lords' Journals*, XIII, 253; *Shower*, parl. ca. 1.

Cruise, with careful accuracy, restricts the Resolution to the "surrender of a dignity by fine,"[1] but the Lords' Reports[2] wrongly assert that it rejects "surrender *by any act of the person*" &c. &c. Sir Francis Palmer similarly treats it as a "full recognition" of the conclusions in the Grey de Ruthyn Resolution,[3] though these were far more general in their terms, and Lord Ashbourne, in his judgment on the Earldom of Norfolk case, dealing with the validity of the surrender in 1302, observed that "In 1678 the net question presented itself for decision in the Purbeck Case, and the resolution of the House, was distinct and unqualified." In this Lord Davey concurred;[4] but the 1302 surrender was not effected *by fine*.

We now come to the passage in which, as if horror-stricken, Lord Davey rebuked Sir Robert for questioning the sacred doctrine and for daring to speak of it as a "theory"—the very term which, as Sir Horace Davey, he had himself applied to it.[5]

Lord Davey: 'We have to look at the resolution in the Grey de Ruthyn case' (1641).

. . . .

Sir Robert Finlay: 'Yes, but what I am submitting to your Lordships is......... that the reasoning in this case is with reference to the Parliamentary dignity of the office.... What I suggest for your Lordships' consideration is that such views have very little bearing upon a surrender

[1] *Dignities*, p. 113.
[2] *Third Report*, p. 26.
[3] *Peerage Law in England*, p. 156.
[4] Sir Francis Palmer accordingly writes that "in the *Norfolk case* . . . . it was held that the law as ascertained by declaration of the Lords in the *Grey de Ruthyn* and *Purbeck cases* was applicable to a transaction which took place in the year 1302." (p. 22).
[5] See p. 230 above.

which takes place just after Parliament began (i.e. in 1302).

Lord Davey : 'The law was the same. Surely you do not say, whatever other people may suggest, that that is not a declaration of the law ?'

Sir Robert Finlay : 'I do not question that for one moment.'

Lord Davey : 'Then the law must be the same, although the people did not know it.'[1]

Sir Robert Finlay : 'Of course, my Lord, that is the theory. I concede that.'

Lord Davey : 'Not the theory, but it is the fact.'

Sir Robert Finlay : 'It is a correct theory.'[2]

Few things are more remarkable than the haste of the lawyers to do obeisance when the sacred ju-ju is held up before their trembling gaze. At a later stage of this same case the then Attorney General expressly associated himself with the argument of Sir Robert Finlay, his predecessor in that office.

Mr. Attorney General : 'My learned friend, Sir Robert Finlay, if I may so submit to your Lordships, used a very strong argument, namely, that although undoubtedly the law is to be gathered as declared by *(sic)* the Grey de Ruthyn case as it was in operation in the seventeenth century, yet it must not be inferred that the same law was in operation in the fourteenth century....... I wish to adopt the argument of my learned friend, Sir Robert Finlay, in regard to that matter'.....

Earl of Halsbury : 'What do you say about it yourself? I should like to hear you upon it. Is it or is it not the state of the law which we must recognise and act upon ?'

Mr. Attorney General : 'I think it is, but I also submit to your Lordships that in these matters, the law may be progressive.'

[1] This is a delightful admission : it is the sacred principle *in excelsis* (see pp. 208-9 above).

[2] *Speeches*, etc. p. 152.

Earl of Halsbury : 'May it ? Is that a principle of the law of England ?'

Mr. Attorney General : 'My Lord, I think I could find authority for saying that the Common Law is progressive, and it has adapted itself from time to time.'

Earl of Halsbury : 'I should like to hear authority [1] for that.' [2]

One thinks of Galileo faintly protesting, in spite of his enforced submission, that the world, after all, does move. "Authority" was against him.

Consider the humour of the position. "Authority" decrees that we must "ascertain" what the law really was in 1302, not by historical methods, not by legal research, but by a vote of the House of Lords in the days of Charles the First. How simple, how admirable the method ! One looks at that monument of toil, the *History of English Law*, and sighs to think of its wasted labour. The hard problems which its authors investigated with patient and untiring skill might have been so rapidly, so simply solved by putting them to the vote in the House of Lords. It is not even requisite that the vote should be relevant to any issue actually before the House ; for the famous 'Grey de Ruthyn' Resolution was only passed "upon somewhat which was spoken of in the argument concerning a power of conveying away an honour" [3]

[1] In a lawyer's mouth, it must be remembered, this phrase only means that some other lawyer had said so.

[2] *Speeches* etc. p. 183.

[3] *Lords' Journals*, 1 Feb. 1640/1. The reference may be to Selden's incidental argument that "if a man that is noble will accept another degree of nobility, whereby his blood may be further ennobled, this may amount to a surrender" ('Collins,' p. 207).

It should be noted that the Grey de Ruthyn Resolution, although, as Sir Francis Palmer observes, "not in any sense necessary to the decision of the case," has "long been treated as valid and binding," as in the recent

It was carried, as it were, in lightness of heart.[1] There was once a book entitled 'Astronomy without mathematics:' may we not hope for a companion, 'History without research'? For the Upper Chamber has a new function; it can make history, we learn, in more senses than one.

In the Earldom of Norfolk case it made history with a will. Thomas de Brotherton, the King's brother, was taken, as it were, by the scruff of his neck, and ejected from that earldom of Norfolk which his contemporaries believed him to hold, as did, indeed, every one else down to the year 1906. The King, it was discovered, had no power to confer that dignity upon him in 1312 and the King's father, Edward I, had no power to accept the surrender by Roger Bigod of his earldom in 1302.

" Earldom of Norfolk case " (*Op. cit.* p. 20), while the decision in the Devon case (1831) that a limitation to " heirs male for ever " was a valid limitation to heirs male collateral—though essential in the case—was over-ruled and rejected in the Wiltes case (1869), which turned on precisely the same limitation. The result of this glaring illustration of "the muddle of the law" is that the Courtenays enjoy the earldom of Devon, while the Scropes of Danby do not enjoy the earldom of Wiltes, although the limitations of the two dignities were, admittedly, identical.

[1] In the singular Printed Case (1901) presented on behalf of the Fauconberg etc. Petitioners, on which I have already commented, the extraordinary statement is made that the Stafford creation of Sept. 12, 1640, shows the effect of this Resolution—which was not even passed till some five months *later!* Its author carelessly or stupidly imagined that Roger Stafford surrendered his barony when the Grey de Ruthyn claim was under the consideration of the House, although that claim did not come before the House till nearly a year *later!* His words are :—

> " The House had then *(sic)* under its consideration a claim to the barony of Grey de Ruthyn, and though the point had not been brought up at all in the Grey de Ruthyn case, the resolution in that case shows that your Lordships' House took the opportunity of solemnly declaring that a Peerage could *not* be so resigned. The King then *(sic) created* Sir William Howard and his wife . . . . jointly Baron and Baroness Stafford " etc. etc.

The true dates at once dispose of the alleged sequence of events. As it is a serious matter, surely, to lay before the House of Lords an incorrect statement, this demonstrates the need for counsel's signature to a case (see p. 200). Where, as in this case, there was none, the solicitors should be called on to supply the draftsman's name, even though his excitable loquacity might afford a clue to his identity.

It was vainly urged by the Attorney General that the Grey de Ruthyn Resolution could not apply "to a grant which was made in the fourteenth century at a time when it was universally recognised as a perfectly valid grant..... it is certainly clear that in the early part of the fourteenth century every legal authority, from the Lord Chancellor downwards, considered certainly that this view of the law was right; and that the King had the right to grant the honour...... the Lord Chancellor of the time who attests this very surrender."[1] Their Lordships knew better.

Edward I, 'the English Justinian,' the great lawyer King, the one English sovereign who has left his stamp upon our law, showed himself as ignorant of the law, in Lord Davey's view, as his own Lord Chancellor. He "was by instinct a law-giver, and he lived in a legal age;"[2] he was the founder of our Parliament; and he showed himself so ignorant of law, especially of the law of Parliament, as to accept the surrender of an earldom, in opposition to the Lords' Resolution of 1641.

"The law was the same" then—in the bosom of the infinite, but as it had not yet emerged therefrom, the ignorance of Edward may be pardoned.

Irritability may betray consciousness of a weak position, and Lord Davey resented his reading of the law being questioned.

Sir Robert Finlay : 'What I am going to call attention to is the extreme danger of applying this doctrine against surrender to what had taken place so long before.'

[1] *Speeches*, etc., pp. 184-5.
[2] Stubbs, *Const. Hist.* II, 106.

Lord Davey: 'Really, you want us to say it was so very early, and the law and the opinion of the people living in King Edward the Second's reign and the King's advisers were so very unsettled, that it is rather hard to enforce the law upon them. That is really what you are saying.[1]

This, of course, is begging the question whether it *was* "the law" at the time. If we turn to the two legal writers who have concerned themselves with the subject, we find them both accepting, without hesitation, such early surrenders as valid, and specially selecting, as an instance, that of the Earldom of Norfolk. The prohibition of such surrenders only applies, in their opinion, to much later times.[2]

But I will now appeal to a higher "authority," an "authority" such as that, I presume, for which Lord Halsbury asked. Is it the case that the law relating to peerage dignities was "always the same"? Or has it, on the contrary, as I have contended, been subject to development and "change." In his 'judgment' on the famous Berkeley claim, in 1861, Lord St. Leonards, who had himself held the office of Lord Chancellor, and who was "an able, most acute, and most profound lawyer," enunciated—evidently with no idea that it was even open to question—the view which was treated as rank heresy, and which almost excited horror, in the Earldom of Norfolk case.

[1] *Speeches*, etc., p. 153.

[2] See *Cruise on Dignities* (1823), pp. 109-111, and Pike's *Const. Hist. of the Lords* (1894), pp. 269-272. Cruise held that the Grey de Ruthyn Resolution "cannot be considered as having the authority of a law," and Mr. Pike maintained that "Before the days of Charles I" an Earl could surrender his dignity to the King, and that the contrary doctrine is "Lord-made law of comparatively recent growth." Mr. Lindsay, K.C. (a peerage counsel) wrote, in 1902, that "such surrenders were undoubtedly lawful in England down to the reign of Richard II" (*Ancestor*, No. 1, p. 113).

Time, which changes all things, has exercised its power... The law itself, as to dignities, has been greatly changed or modified from age to age......

I may draw the attention of the Committee to some of those changes to which I had occasion to call the attention of the House upon the question of life peerages..... Again, the right of a Peer to surrender his peerage to the Crown was established by many precedents, which had not been questioned; but in 1640 this House resolved [the Grey de Ruthyn Resolution]...... So a Peer could be degraded by the King for poverty; but Parliament alone can now degrade a Peer, &c. &c. (VIII. H. L. C. 99-100):

It is clear, the reader will observe, that Lord St. Leonards deemed the surrenders of which he speaks to have been in accordance with the law as it existed when they took place. It was not because the law was then "not understood" that such surrenders were possible, but because the law was different, because it "has been greatly changed."[1]

In view of the unquestioned precedents afforded by surrendered earldoms, precedents duly cited by the law officers of the Crown in 1660, 1678, and 1906,[2] there can be no question that the recent decision, applying the Grey de Ruthyn Resolution retrospectively without limit, does violence to history, and overthrows surrenders of dignities effected centuries ago, which no one had ever questioned.

[1] This, it will be seen, amply vindicates the view ineffectually urged by the Attorney General in 1906 (in accordance with that of Sir Robert Finlay): "Is it a true proposition to say, in deciding cases of this class, that the law does undergo no modification, that. . . . the law, which has declared three centuries after that association that the dignity of a seat in this House has been well established, should operate to construe grants of dignities at the time of the very birth of that association, and at a time prior to the birth of that association? In other words, the dignity has undergone a change, and may it not be that the law undergoes a change with it? (see pp. 230-1 above).

[2] *Speeches of Counsel* in the Norfolk Case, p. 187. I prepared a special report for the use of the Crown in that case.

We may yet have to reconsider the validity of that most irregular proceeding known as the Norman Conquest, for, although he posed as the rightful heir, it is understood that William I owed his throne to that unfortunate incident, the Battle of 'Senlac' or of Hastings. We may have, therefore, to evict his name from the list of British sovereigns, as that of his descendant, Thomas of Brotherton, has been evicted by the House of Lords from among the Earls of Norfolk. To change the annals and the records of the past seems to be a fascinating task: there are those who would hamstring English history by persuading themselves and others that there never was a Reformation, as there are those who would choke its voice for the greater convenience of the law.

For, after all, it is frankly acknowledged that the justification of this action is the argument from convenience. It was urged by the Committee that they could not administer two different laws, a medieval and a modern, [1] and one quite sees the force of the objection from the lawyer's practical standpoint. [2] One also sees the force of the objection, easy though it is to make, that even admitting changes in the law, there must be named a fixed date, before which the earlier law, and after which the later law ought to be applied. Lord Redesdale fully appreciated this and endeavoured to fix a definite point beyond which the retrospective action of the doctrine derived from the Clifton case should not extend. Pressed upon the point, in the Norfolk

[1] *Speeches* etc., on the Earldom of Norfolk claim, pp. 166, 185-6, 191-4, etc.
[2] But see my remarks on the Fauconberg decision, p. 210 (above) and below.

case, Sir Robert Finlay answered, as an historian would have answered, that the change was too gradual for a fixed point to be named.

Lord James of Hereford : 'Can you fix any limit of time when you say the rule does apply and when it does not?'
Sir Robert Finlay : 'I could not venture to give any definite date. These things took place so gradually that it would be difficult or impossible to suggest to your Lordships any definite date before which it could be said these resolutions should not apply.'
Lord James of Hereford : 'If you cannot do that I do not see how you can suggest what form our judgment should take.'[1]

Quite so. And that is why the law is forced, by the exigencies of its administration, to deny the existence of development or of change in mortal things. For this reason law and history are and must always be in conflict. The law is and must remain medieval in its methods; it is not the facts that the lawyers seek, but a convenient legal fiction.

But even if the argument from convenience and the practical exigencies are held to justify the repudiation of the facts of peerage history and, as I have expressed it, the re-writing of the past, it is quite possible that this contention may defeat its very object, and may lead to practical difficulties greater than those it would avoid.

To take but a single instance, what of the barony of Abergavenny? It was gathered, in the Norfolk case, from an observation of Lord Davey's, that, in spite of the lapse of six centuries, if an heir of the Bigods petitioned their Lordships for the earldom

[1] *Speeches*, etc. p. 166.

which his ancestor surrendered to Edward I, they would feel bound to do him justice.[1] But how much more would they be so bound to do such justice to an heir of the body of Lady Fane, petitioning for the old barony of Abergavenny on the ground that its transference to Edward Nevill, in 1604, was against "settled law"! Every argument that justified their Lordships in deliberately rejecting and undoing the work of the first two Edwards would apply with greater force to the action of James the First. For if the proposition that an earldom, in the days of Edward I, could not legally be surrendered is at least highly disputable, it will hardly be disputed that, in the days of Elizabeth and James I, a barony in fee could only pass to the heir of the body. And again, if it is historically wrong to project into the Middle Ages a principle first enunciated in the days of Charles I, no such violence to history is involved in its application to his father's days.

If then, to adapt Lord Davey's words, "we had an heir of the body on one side of the Bar, and Lord" Abergavenny "on the other side of the Bar, could there be any doubt what" their Lordships "decision ought to be between them?" If, as Lord Ashbourne puts it, the petitioner took his stand on the fact that he was heir in blood, and

[1] "It seems to me you must look at this case just as if we had an heir of Roger le Bygod before us now. We are just as much bound to protect the interests of an heir of Roger le Bygod as if he was before us now. If we had an heir of the body on one side of the Bar, and Lord Mowbray on the other side of the Bar, could there be any doubt what our decision ought to be between them?"

Lord Ashbourne followed with the same question. If the party claiming to be such heir demanded the earldom, "what would be the answer to be given to that?"

that the diversion of the dignity from his ancestors "should not be now recognised, what would be the answer to that?"[1] Well, there is only one answer, surely, that could be attempted : it is that the dignity was a barony by tenure and descended with the lands.[2]

And this is an answer which at the present day the House cannot give.[3]

Lord Davey, it is true, endeavoured to guard himself by observing that "the thing is quite different to our being asked to disturb an existing state of things, and it may be (that) the House would not be disposed to advise the Crown to take away, for instance, an Earldom which had existed to the present time."[4] But, apart from the vaunted principle that "the law is always the same," and apart from the fact that in peerage dignities there is no prescription, it would not be a case of taking away from the Nevills the barony of Abergavenny, but merely of following the well-known precedent in the cases of Strange and Clifford. In the case of both these baronies a person who was not the heir general was summoned to Parliament (1628) and allowed the old precedence precisely as

[1] *Earldom of Norfolk* : *Speeches*, etc., p. 185.

[2] There was no Act of Parliament to ratify the diversion, and a lost patent could not be urged, for all the facts of the case are known, and Edward Nevill did not even suggest the existence of a lost patent, but based his claim on tenure.

[3] In the Berkeley case (1861) "the speeches of the members of the Committee are replete with learning and research, and may be said to finally and effectually dispose of the notion that there are any baronies by tenure now in existence." (Palmer's *Peerage Law in England*, p. 183.) "It may now be taken as settled that, if there ever were, there are now no longer any peerages by tenure in England." (Ibid., p. 186.)

The allegation that the barony of Abergavenny is a barony by tenure was, indeed, expressly discussed and rejected by Lord St Leonards, Lord Chelmsford, and Lord Redesdale in their judgments on the Berkeley claim.

[4] *Earldom of Norfolk*, etc. p. 185.

Edward Nevill had been in 1604. In both cases the heir of that person retained the barony, but with the precedence only of 1628, the original barony being recognised to be vested in its true heirs.[1]

Whatever additional sanction the action of James I may be conceived to have given to the diversion of the barony of Abergavenny from its descent to heirs-general is effectually disposed of by the fate of his son's similar action in the case of the baronies of Conyers and Darcy. The heir (or co-heir) of these dignities actually took his seat in 1641 under a Patent diverting their descent in favour of the heirs male of his body,[2] and yet the House, in the teeth of this action, has allowed Conyers (1798) and Darcy (1903) to his heirs or co-heirs general. Every objection to a claim by the heirs of Lady Fane's body to the ancient barony of Abergavenny has now, I submit, been disposed of : every bolt-hole has been stopped.

But the cream of the matter is this. In strict accordance with the precedents in the cases of Clifford and of Strange,[3] the Nevills' barony of Abergavenny would be reckoned as dating only from the summons of 1604. But *this* barony should have left the family, with an heiress, in 1641, and

[1] See 'Cruise,' pp. 224-234. "The writs of 1628 having been, it was admitted, issued in error to the above persons, the house of Lords conceived themselves obliged to admit that the writs operated as new creations of baronies, and resolved accordingly."

[2] This is an even stronger case than that of Abergavenny, in which there was no Patent or limitation.

[3] On precisely the same principle the baronies of 'Willoughby de Parham' and 'Percy' created, in error, by writ and sitting in 1680 and 1722, are considered to be now respectively vested in the heirs of the person summoned in 1680 and in the Duke of Atholl.

be now vested in her heirs. A *second* Nevill barony of Abergavenny would then be created by the writ of 1661 (if a sitting can be proved), only to pass away with an heiress in 1695. A *third* Nevill barony of Abergavenny would then be created by the writ issued in 1695, fall into abeyance in 1724, and become vested in a sole heiress in 1737. And a *fourth* would be created by the writ issued in 1724 to William Nevill and be now vested in the Marquis of Abergavenny as not only the heir male, but the heir general of his body. There would thus be at this moment *five* baronies of Abergavenny extant, dormant, or in abeyance.

In this conclusion there is nothing fanciful, no *reductio ad absurdum.* It is a sober and serious application of principles fully recognised, of absolutely settled law. The representatives of any one of the above three heiresses could raise the question at any moment, as well as those of Lady Fane, on the ground that a writ followed by a sitting created a barony in fee. The House, we learned in the Norfolk case, can only administer the law as declared and settled; and by that law the claim would be good, and the King's attempt to alter the succession to the old barony, in 1604, *ultra vires* and invalid. [1] The whole reasoning in the Norfolk case applies with tenfold force.

The doctrine of the Clifton case, which has led me to this discussion was, we have seen, sound at

[1] As the famous shifting clause in the Buckhurst Patent (1864) was pronounced to be in 1876, and the Wiltes limitation to the grantee and his heirs male for ever in 1869. Lord Redesdale, indeed, in his 'judgment' on the Berkeley peerage claim (1861), bluntly denounced the compromise of 1604 as an " illegal job,...... which was not creditable to the House. "

the time of its promulgation. It was then, gradually at first, extended retrospectively till it reached an age when, in the opinion, not only of historians, but of not a few legal writers, it ceased to correspond with the facts. But its progress could not be arrested ; Lord Redesdale tried, but failed to limit its application, not being able to convert a gradual process of development into a fixed point such as the law requires. The point I desire to emphasize is that the result was certain ; the doctrine that a single writ and sitting created an hereditary barony even under Edward I may be, and doubtless is, historically quite false, but the law's practical requirements made it an inevitable result.

The next question with regard to the case of the barony of Clifton is : " Does the Resolution of the House justify the use that has been made of it ? "[1] One may venture to submit that it most certainly does not. The wording thereof is curiously terse :—" That the said Catherine Lady O'Brien hath right to the barony of Clifton. " It is obviously quite impossible to deduce from this Resolution any general principle. Lord Redesdale rightly insisted on the restricted character even of the Judges' Opinion, which applied only to the claim before them ; and he would probably have assigned to it an even smaller range than he did, had it not been for his strange mistake in supposing the claim to be the first of its kind.

In any case, there is nothing, we see, in the Resolution itself as to the operative effect of a writ and sitting in Parliament or as to the great doctrine

[1] See p. 218 above.

of " ennobled blood." It is on this point that Professor Freeman came so terribly to grief. In 1885 he violently charged the Lords with " corruption or usurpation," because " the Lords laid down the rule that the King's writ 'ennobled the blood' and bestowed a hereditary seat in Parliament —a thing which nobody would have found out from the writ itself," and accused them of having " always acted with the very narrowest aim of narrowing the access to their own body, in the interest of the phantasy of 'ennobled blood.'"[1] He even went so far as to charge the Lords with inventing this doctrine in order to keep the Judges out of their House.

> It was the superstition, perhaps one should rather say the cunningly devised fable, about hereditary right, ennobling of blood, and the like, which kept them out for ages.[2]

There is grim humour in the thought that, as we have seen, the " phantasy," the " fable " of " ennobled blood," was, in the first place, invented, not by the Lords, but by the judges themselves; in the second, was clearly derived by them from Coke, who was himself a Judge; and in the third, was ignored by the Lords, from whose Resolution it is absent. And yet there are those who still believe in Professor Freeman's accuracy.

One turns, with a sense of relief, to the last remaining question,[3] viz., the limit to which the doctrine is retrospective, a question which involves

[1] *Studies in Peerage and Family History*, pp. 5-6.
[2] *Ibid.* p. 7.
[3] See p. 218 above

determining the date of the first true Parliament. It is easy to say that a summons to, and a sitting in Parliament create an hereditary barony ; but what is meant by " Parliament " ? Is it a body which is so styled ? Or a body which discharges legislative functions ? Or a body in which the three estates are all duly represented ? This is a question which the House of Lords has not definitely settled.[1]

With his wonted caution Stubbs observed that

> It is convenient to adopt the year 1295 as the era from which the baron, whose ancestor has been once summoned and has once sat in parliament, can claim to be so summoned.[2]

But here again the reason is that of " convenience." The historian is careful to explain that this epoch "owes its legal importance to the fact that it was used by the later lawyers as a period of limitation, and not to any conscious finality in Edward's policy." Less clear is the footnote appended to the passage quoted above :—

> The importance of 1264 and 1295 arises from the fact that there are no earlier or intermediate writs of summons to a proper parliament extant ; if, as is by no means impossible, earlier writs addressed to the ancestors of existing families should be discovered, it might become a critical question how far the rule could be regarded as binding.

But what rule ? That which makes the parliament of 1295 the first to which the writs are valid ? Or that which would extend the same

[1] Sir Horace Davey (as he then was) made a point of this in the Wahull case.

[2] *Const. Hist.* (1875), II, 184.

validity to the writs of 1264? Stubbs himself appears to have recognised without hesitation Simon de Montfort's Parliament: he styled it "The great Parliament of 1265,"[1] and described it as a "parliament" throughout.

As a matter of fact there are no fewer than four possible 'first' Parliaments from the standpoint of Peerage Law. They are those of 1265, 1283, 1290, and 1295. Two baronies (De Ros and Despencer) date from the first, two (Mowbray and Segrave) from the second, one (Hastings) from the third, while as to the fourth there is no question. It seems an impossible task to reconcile with any principles the dates assigned to these creations.

For those assigned to De Ros and Despencer we must look to the reign of James I. When the letters patent of that sovereign assigned to Lady Fane, in 1604, the old barony of Despencer, they expressly gave it a precedence dating from the summons of Hugh Despencer in 1264 (49 Hen. III).[2] And when, in 1616 (22 July), the same sovereign made a similar assignation of the barony of Roos, the instrument recited the report to His Majesty by the Commissioners for Earl Marshal "that in the record of the sessions of parliament, in the forty and ninth year of King Henry III, Robert de Roos was summoned, and did sit in Parliament as baron, by the name of lord Roos," etc. This extremely definite and somewhat startling statement must be based, to a great extent, on the Commissioners' large imagination; for no such

[1] It was summoned Dec. 14, 1264, to meet on Jan. 20 following.

[2] See on this point the *Lords' Reports*, I. 438-440.

"record of the sessions of parliament" is known to historians. There is only a record of the summons addressed "Roberto de Ros." It is generally but erroneously stated[1] that the date of 1264 as that of the (De) Ros creation was fixed by the Lords' decision in 1806. That decision did, however, fully confirm the date assigned to it, as we have seen, so far back as 1616.[2]

We pass to the barony of Hastings. This dignity was decided, in 1841, to be vested in "the co-heirs of Sir John de Hastings, who was summoned to and sat in Parliament Anno 18 Edward I" (1290).[3] Here we have a new Parliament introduced as supplying the root of title, a Parliament which came between those of 1265 and 1295. It was proved that the above John was summoned in 1295, and his father in 1264, the writs of the latter year, it would seem, being still (1841) accepted as valid. But the sitting was deduced from a record relating to the 'Parliament' of 1290, a summons to which was assumed from the fact of that sitting, a new precedent being thus created, a precedent which affected other baronies.[4]

[1] *e.g.* in *The Complete Peerage* throughout.

[2] The writ of 1264 seems to have been accepted by both parties and by the Attorney General (' Cruise,' pp. 48-51, 191-2,) and was certainly so accepted in the Lords' Resolution, which spoke of the Barony as "vested in the said Robert de Ros."

[3] Sir Francis Palmer deals with this important case (*Peerage Law in England* pp. 41-3), but erroneously dates the creation "23 June 1295" (*Ib.* p. 176.) It is often wrongly given.

[4] Lord Cottenham, delivering judgment, appears to have relied on the words in this document—"in pleno Parliamento ipsius domini Regis...... et ceteri magnates et proceres tunc in Parliamento existentes." But this is begging the whole question of what the word ' Parliament ' denoted at that date. Stubbs admits that, even subsequently to the point of division adopted by him, namely the great Parliament of 1295, "for many years both the terminal sessions of the King's ordinary council, and the occasional assemblies of the *magnum concilium* of prelates, barons, and councillors, which we have noticed as a great survival of the older system, share with the constitutional

This being so, it is difficult to see why the barony of Hastings was not further allowed to date from the sitting peer's father's summons, in 1264. For in the Ros case the proof of the sitting is found at an even later date and in the lifetime of the grandson, not the son, of the baron summoned in 1264. Hastings, therefore, would have the stronger claim of the two. The barony was claimed as created by the writ of 1264,[1] nor was that writ questioned; for the creative validity of the writs of 1264 was not rejected, or even doubted, till a generation later (1877).[2] But the attempt to refer the sitting of 1290 to the writ of 1264 was thus disposed of—apparently without argument—in the Lord Chancellor's 'judgment.'

"Then take Sir John de Hastings as the first Peer who sat—because there is no evidence of Sir Henry de Hastings[3] having sat, though no moral doubt can exist

assembly of estates the name of Parliament" (*Const. Hist.* [1875] II, 224-5). And he instanced summonses in 1297 and 1299. For the loose use of the word Parliament previous to 1295 see the *Lords' Reports*, I, 29-30.

His lordship's position was this:—"The grant is stated to have been not properly the subject of a grant by Parliament; but whether the subject of a grant by parliament is, I apprehend, not material, provided it appears clearly that it was a proceeding in Parliament...... There is nothing to impeach this document as having been a proceeding in Parliament; it is therefore a Parliamentary proceeding," etc. Here again the point is missed. The objection raised—apart from the subject of the grant, which "directly affected only the tenants-in-chief of the Crown"—is that there are grounds for supposing the Assembly to have been composed, at the time, of such tenants only, without representatives of the counties or boroughs (*Lords' Reports*, I, 199-201.) As the House appears to have a strong tendency (*e.g.* in the Wahull case) to accept only records relating to properly constituted Parliaments, the validity of this document as proof of sitting appears to be open to question.

[1] The claimant's counsel was Sir Harris Nicolas.

[2] Their validity seems to have been fully accepted in the *First Report on the Dignity of a Peer* (1820), where we read that they "are generally considered as the earliest Writs of Summons to Parliament now extant on Record" (p. 142). They were also treated as valid in Courthope's *Historic Peerage* (1857) throughout (p. xxv and *passim*), and apparently, as we have seen, by Stubbs (1875).

[3] Summoned in 1264.

of his having been the peer from whom Sir John de Hastings derived his title, but when a party is claiming a dignity and he derives his title from some individual as his ancestor, he is bound to show the concurrence of these two circumstances, of a summons and a sitting in that ancestor [1] —it appears to me that your Lordships are acting in accordance with the principle which has regulated your former proceedings in cases of this sort in coming to the conclusion upon the evidence that Sir John de Hastings was summoned and sat in the Parliament of 18th of Edward I."

But the dating back of a creation from the first proved sitting to the first issued summons—one or more generations earlier—is a point which, important though it is, seems to be curiously obscure. In delivering judgment on the Wahull claim (27 June, 1892), the then Lord Chancellor made the startling statement (speaking of the Mowbray case) :—

I do not think that case is any authority against the uniform course of decision of your Lordships' house, which certainly does not allow of the proposition that where a Peerage is established, you are entitled to refer its date to the earliest Writ of Summons that can be proved.

With regard to this "uniform course of decision," it is clear, as we have seen, in the De Ros case (1806) that the House did refer the creation to the earliest writ of summons (1264). It is confidently stated by Nicolas that this was also done in the Botetourt case ; but this, though apparently it was so, may

[1] This *dictum* is most important. The principle it enunciates had been violated in the case of the barony of De Ros (1806), and was here (1841) asserted (and in the Scales case [1856] questioned) only to be violated anew in the Mowbray case (1877), and then enunciated anew in the Wahull case (1892) as the "uniform" practice of the House!

be open to dispute.[1] To these examples the printed Case for the Fauconberg etc. petitioners adds those of Botreaux, Despencer, Clifford, Berners, and Zouche of Haryngworth. Zouche seems to be a clear case (1807), as the House found the barony to have been "created by writ in the reign of Edward II," though the earliest proved sitting is that of the first peer's grandson late in Edward III's reign. In the Clifford case (1691) the lords found that the petitioner was "the sole lineal and right heir to Robert de Clifford, first summoned to Parliament as lord de Clifford by writ dated Dec. 29, 28 Edward I"[2] (1299), though the first proved sitting is that of his grandson, the fifth peer. These cases are sufficient to cast a strange light on the "uniform" practice of the House.

We next come to the baronies of Mowbray and Segrave (1877). This notable case effected a double revolution. On the one hand the validity of the writs of 1264, till then apparently accepted, was rejected by the Committee on constitutional grounds, the summons to Nicholas de Segrave in 1264 being consequently disallowed. On the other, the writs to the 'Parliament' of Shrewsbury, in 1283, which no one, it would seem, with one exception,[3] had ever imagined to be valid, were accepted without question. The Minutes of Evidence on the Hastings case (1841) reveal the accept-

[1] Nicolas deals fully with the case in his *Barony of L'Isle*. The proof of sitting was for the second peer; the first writ was addressed to his grandfather, the first peer. As they were both named John, the terms of the Resolution are ambiguous. And the precedence assigned in 1764 is, admittedly, against the view that the peerage dates from 33 Edw. I.

[2] *Lords' Journals*, 12 Dec. 1691.

[3] Palgrave had accepted them in *Parliamentary Writs* (1830-34).

ed view. Sir T. D. Hardy, the well-known head of the Public Record Office, gave evidence as follows :—

Q. Have you made any search whether there are any writs of summons to Parliament from the forty-ninth of Henry the Third (1264) to the twenty-third of Edward the First (1295) ?
A. I have.
Q. Do you find any ?
A. I do not.

So much for the writs issued in 1283. It was very properly pointed out by the eminent peerage counsel [1] who appeared for the petitioner that to rely on the writ of summons to this Parliament was a new step. [2] He urged that the passing by this Assembly of the Statute *De Mercatoribus* proved it to be a Parliament : "Therefore I submit that the Writ of the 11th Edward I is a regular Writ of Summons to Parliament."

The extraordinary thing is that, though they were thus warned that the writ was a new one to use, and that its validity had to be proved, the Attorney General and the Committee appear to have accepted it as valid without argument or question. And what makes it the more extraordinary is that the Attorney successfully challenged the validity of the writs of 1264, till then accepted by every one, and was thus left face to face with those of 1283 as the earliest writs, if valid, in the case both of Mowbray and of Segrave.

[1] Mr. Fleming.
[2] "My Lords, that summons has not hitherto received the attention to which it is entitled. It was Sir Francis Palgrave in his very learned book (1830) upon writs of summons who first drew attention to the fact that it is a summons to Parliament."

All this was brought out clearly, fifteen years later, on the claim to the barony of Wahull (1892). The two 'Parliaments' to which writs were produced by the petitioner for that barony were those of 1283 and 1297. On behalf of his claim it was urged by counsel[1] that the writs of 1283 had been admitted as valid in the Mowbray and Segrave Case. The Attorney-General at once challenged the *status* of this 'Parliament,' pointing out that "no prelates were summoned" and that in the Mowbray and Segrave case "there was no discussion as to whether this Parliament was a true Parliament."[2] The point was keenly argued throughout,[3] the Committee being obviously most reluctant to accept the Assembly as a Parliament, a reluctance the more notable in view of the fact that proof of sitting was admittedly lacking, so that the claim might have been rejected upon that ground alone. After reading the Segrave minutes relative to this 'Parliament,' the Lord Chancellor observed :—"I see no argument in that case"[4] .... "the Attorney General's contest was with regard to the 49th of Henry III, and he appears to have acquiesced (and the matter is not argued) in its being a Parliament in the 11th of Edward I"....... "It is not argued."[5] In their Judgments the Lord Chancellor dismissed the alleged summonses with the observation that they "leave it doubtful whether they were summonses to Par-

[1] Sir Horace Davey.
[2] *De Wahull Peerage : speech of Counsel*, pp. 27, 40.
[3] pp. 21-43, 45-6.
[4] *Ibid.* p. 45.
[5] *Ibid.* p. 46.

liament at all," while Lord Selborne spoke with extreme caution of the 1283 Assembly :—

Lord Cairns in the Segrave case appears to have thought that Assembly a Parliament, service in which, under a writ of summons, might confer an inheritable right of Peerage, and for the present purpose I am content so to take it, although no spiritual Lords were then summoned. I must guard myself, however, against being understood to affirm that proposition, if it should become material in any case that may hereafter arise.

The truth is, if one may speak plainly, that their Lordships were hampered throughout by the unfortunate, but undoubted acceptance of these writs as valid, in 1877, by Lord Cairns, without having had the point argued. Their keen intellects were engaged in desperate attempts to explain away that acceptance, in spite of its emphatic language :—

" the fact that is established before your Lordships is this, that the first *perfectly valid Writ of Summons*, which is proved before your Lordships is a Writ of Summons addressed to Nicholas de Segrave in the 11th of Edward I. A sitting afterwards took place and would be referred to that Writ of Summons. "

Lord Selborne, in his Judgment, even maintained that

The Resolution of the Committee for Privileges in the Segrave case which Lord Cairns moved did not affirm it ;[1] it was only " that the barony of Segrave was in the reign of Edward the First vested in Nicholas de Segrave ; " and, as Nicholas de Segrave sat in the Parliament of the 18th year of that King,[2] that proposition was open to no doubt.

[1] The validity of the writ.

[2] Here, it should be observed the 'parliament' of 1290 is accepted, without reservation, as valid (cf. p. 250 above).

One would wish to speak with all respect of any Judgment by Lord Selborne ; but this is a curiously weak attempt to escape from the consequences of that Resolution. For the Resolution on the *Mowbray* claim is proof that the Segrave Resolution was in no way dependent on a sitting. The Mowbray and Segrave Resolutions were identical, *mutatis mutandis* ; and the Mowbray Resolution ran :—

That it is proved by the Writ of Summons addressed to Roger de Mowbray in the 11th year of Edward I, and the other evidence adduced on behalf of the Petitioner, that the Barony of Mowbray was in the reign of King Edward I vested in Roger de Mowbray. [1]

Now there is no evidence that Roger de Mowbray " sat in the Parliament of the 18th year of that King " or indeed in any of his Parliaments. The earliest proof of sitting is in the time of Roger's son, the second peer, who is proved by the Parliament Roll of 12 Edward II to have sat late in the year 1318. [2] Consequently, the Mowbray Resolution presents no such loophole as that for which Lord Selborne sought. The proposition that " the Barony of Mowbray was *in the reign of King Edward I* vested in Roger de Mowbray " is based on writ, and on writ alone. And the writ of 11 Edward I, " the first perfectly valid writ of summons which is proved before your Lordships," was the writ which Lord Cairns here deliberately selected. [3]

[1] i.e. before his death in 1295.

[2] This was the earliest proof that counsel could produce (*Mowbray minutes of evidence*, p. 35 : 30 May 1876).

[3] If a sitting in the reign of Edward I was thus deemed unnecessary to the proposition in the Mowbray case, it cannot be held to have been necessary to the same proposition in the Segrave case.

So far as I can find, this point has always been overlooked.

The attempt, therefore, to explain away the full recognition, by Lord Cairns, of this writ as valid, breaks down absolutely. It was rightly insisted throughout by the Wahull petitioner's counsel that the writ of 11 Edward I must have been treated by Lord Cairns as a writ of summons to Parliament and operating fully as such. It was valid, or it was not : there was no middle course.[1] That this, indeed, is the lawyer's view is seen in Sir Francis Palmer's work, in which we read of "the Mowbray case having recognized a peerage, as created by sitting *(sic)*, as dating as far back as 11 Edw. I," and are definitely told that "it was held that the Mowbray barony was created by summons and sitting *(sic)* in 11 Edw. I."[2] But here again one must correct the lamentable inaccuracy of lawyers ; for in the Mowbray case, as we have seen, there is no proof of "sitting" in the 11th or any other year of Edward I.

And now we must go further. As there was no such proof till the days of the second peer, it follows that the sitting in his case must have been referred back to make the writ to his father in 11 Edw. I operative as a creation. For in that father the barony of Mowbray was declared, we have seen, to be vested. What then becomes of the assertion made by the Lord Chancellor that the uniform practice of the House is against any such doctrine as "that where a Peerage is established,

[1] The Committee had striven to draw the subtle distinction that the writ might be valid, though the Parliament was not, if it were issued to a person proved *aliunde* to be a peer, and that it might thus be used for determining his precedence only. In the Wahull case it stood alone and, could not, therefore, on this hypothesis, prove a creation.

[2] *Peerage Law in England* (1907) pp. 27, 45.

you are entitled to refer its date to the earliest Writ of Summons that can be proved"?[1] And what becomes also of Lord Selborne's observation, in his Judgment on this same case :—

> I hardly think it probable that so great a lawyer as Lord Cairns can have meant to say (what seems to be attributed to him by the shorthand writer of the proceedings in that case) that a sitting[2] in the Parliament of 1290 ought to be "referred" to a Writ of Summons to an earlier Parliament held seven years before.[3]

For Lord Cairns, we have seen, went much further than that in "referring" back the barony of Mowbray to an earlier generation and, in so doing, was but reverting to a recognised practice of the House.

Yet on this point the Mowbray decision effected a third revolution. For if the sitting of John de Mowbray proved that the barony was "vested in" his father who was summoned, then the sitting of John de Hastings should have proved that the barony was vested in *his* father who was summoned, which is precisely what Lord Cottenham, in 1841, had definitely refused to admit. And—which is far more important[4]—the sitting of Roger de Scales should have proved that the barony was vested in *his* father (who was summoned to Parliament as his father and grandfather had been summoned before him), which was the very point at issue in the Scales peerage case (1856), the view

[1] See p. 252 above.

[2] i.e. of Nicholas de Segrave.

[3] It must be remembered that there are no writs of the 1290 'parliament' on record.

[4] For it involved, not mere precedence, but the actual existence of the peerage.

taken in the Hastings judgment that the 'sitting' of a son did not constitute such proof being, if it were upheld, fatal to the claim of the petitioners, who were descended from the father, but not from the son.

Writing in 1900 I ventured to observe :—

When it is added that the contested writs of 1294 and 1297 were also allowed to be put in evidence without question, and that the writ of 1283 affected a hundred baronies, it will be seen that the Mowbray decision (1877) unconsciously wrought a revolution, and that the history of baronies by writ must now be undertaken *de novo.*[1]

It was due, avowedly, to that decision that the barony of Fauconberg was claimed in 1901 as "created by the writ of 1283, which in the Mowbray and Segrave Peerage Case was held to be the earliest writ to which the creation of a Peerage could be assigned."[2] In the same Printed Case, however, when it was desired to depreciate this writ, for the purpose of the Meinill claim, its author wrote of it as follows :—

The 1283 writ, which had been previously allowed in the Mowbray and Segrave case, was in the De Wahull case distinctly disallowed as being in itself a creative Peerage writ, it being held that the summons was not to a properly constituted Parliament, and that, therefore, a Peerage could not be based upon it, though it seemed to be admitted that where other and better evidence could be

[1] *Studies in Peerage and Family History*, p. 10. The standard work of reference on the subject at the time was Courthope's *Historic Peerage* (1857), in which 1264 was accepted as the date of the first valid writs, while those of 1283 were ignored, It would have, therefore, to be re-written.

[2] Printed Case p. 1. We also read, on p. 9, that "the validity of this summons to Parliament as creating a Peerage dignity was admitted in the Mowbray and Segrave Case," and on p. 10 it is spoken of as "the earliest writ (1283) which (since the Mowbray and Segrave Case) is admitted to possess creative powers."

produced of the existence of the Peerage, the 1283 writ might be allowed for the purpose of precedence (p. 22).

In the course of the proceedings on this claim (1903) the question of this Parliament's validity was fought out over again and at very great length, the Mowbray and Segrave case (1877) being cited in its favour and the Wahull case (1892) as impugning it. It is needless to repeat the arguments for and against, Mr. Asquith [1] upholding the validity and the Attorney General (Sir Robert Finlay) marshalling the objections. We who watched the case considered the Committee to be divided in opinion, the Lord Chancellor apparently relying on the acceptance of the ordinance *De mercatoribus* as a statute (which only a Parliament could have passed), while Lord Davey appeared to consider the *status* of the Assembly doubtful. It is worthy of notice that some importance was attached to Stubbs' views, everything he had said of this Parliament being read to the Committee. It is clear that the historian did not recognise the Assembly as a true Parliament, but the Lord Chancellor declined to accept anything but decisions of the House as authoritative on that subject.

In spite of the elaborate and, it might be thought, exhaustive discussion of the subject, one aspect of the matter seems to have been overlooked. Whatever lawyers may think of it, peerage students, undoubtedly, would consider it of great importance. This is the issue of writs in 1283 to persons who were never summoned to a Parliament of clear validity. So far as I can ascertain from an analysis

[1] now Prime Minister.

of the writs, *no fewer than half*[1] the 'barons' summoned on this occasion belonged to this category. To me personally this is a fact which is more hostile than any other to this Parliament's validity.

But observe the 'happy go lucky' ways of English Peerage law. The validity of writs to this Parliament was deemed, in 1892 and again in 1903, so difficult a point that it was argued at great length. And yet, when they were first relied on, in 1877, Lord Cairns and his colleagues accepted them without 'argument' and even without 'discussion.'

Keen as was the fight in the Fauconberg case, the point was there, really, of very small consequence; for as there was a writ to the Great Parliament of 1295, it was only the precedence of twelve years that was at stake. Of far greater consequence was the real issue in the case, namely whether the barony should be admitted as dating from the days of Edward I (whether 1283 or 1295) or from those only of Henry VI, when William Nevill, who had married the heiress of the Fauconbergs, was summoned to and sat in Parliament, as Lord Fauconberg, being the first bearer of that title of whom a sitting can be actually proved.[2]

[1] Out of the 98 (excluding Griffin the Welshman) only 49 were ever summoned to a Parliament of certain validity. Some of the others were summoned to the invalid Parliaments of 1294 and 1297, but the majority of them were summoned on this occasion only.

[2] It was attempted to use the "Barons' letter to the Pope" in 1301 as proof of sitting, but it was known to be very doubtful if this could be done, and the Printed Case admitted that "there is no proof in the Rolls of Parliament that any Lord Fauconberg sat in Parliament" (i. e. down to the extinction of their male line). The failure of the attempt must be held to show (as in the Hastings case) that the House will not accept the Barons' letter as proof of sitting. Indeed the evidence now at our disposal makes it impossible to accept it as such (see my paper in *The Ancestor*, No. 6, pp. 185 et seq.).

We opposed, for the Crown, the earlier precedence, and I shall now show that it was disallowed, and rightly disallowed, by the House. On the left is the precedence asked for by the petitioners' counsel : on the right the Lord Chancellor's motion and the resolutions agreed to.

Mr. Asquith.

We submit, therefore, that the proper resolution to be come to is that, as regards the Barony of Fauconberg, it is a barony which is shown to have been in existence in 1283 [1]..... we ask your Lordships to say that the peerage existed at the time when the first producible Writ of Summons (1283) was issued.

The (Mowbray) Resolution is "That it is proved by the Writ of Summons addressed to Roger de Mowbray in the eleventh year of Edward I (1283) and the other evidence" — that is the only piece of evidence that is specifically mentioned in the petition, and I say at once the Petitioners in this case would be satisfied with a Resolution in that form, if it is proved that there did exist in the reign of Edward I a Barony of Faucon-

The Lord Chancellor.

My Lords, I move that the Committee do report to the House that, in the case of the Barony of Fauconberg, a writ was issued in the fourteenth year of Henry VI, and a sitting took place under the writ so issued of that date......

Ordered to report to the House :—

That the Barony of Fauconberg is an ancient barony in fee.

That it is proved by the Writ of Summons addressed to William Nevill in the seventh year of Henry the Sixth, and by the sitting in Parliament of the said William Nevill as Lord Fauconberg in the 14th year of Henry VI, and by the other evidence adduced on behalf of the Petitioners, that the Barony of Fauconberg was in the reign of King Henry the

[1] *Speeches*, etc. p. 190.

berg. Your Lordships there have a direct precdent in the Mowbray case.[1]	Sixth vested in William Nevill in right of his wife Joan.

One has only to compare the two columns to see that their Lordships did indeed follow the Mowbray precedent—so far as its form was concerned—but with the result of emphasising the sharpness of the contrast. They resolved that the barony of Fauconberg existed, *not* (as they were asked to find) " in the reign of Edward the First, " but " in the reign of King Henry the Sixth, " when it was " vested in William Nevill. " Admittedly, there were two reigns to which the creation could be assigned ; and it was the later reign that their Lordships chose.

So much at least is clear. A dialogue earlier in the case had brought out the point well.

Lord Davey : " You have no evidence that he sat at Shrewsbury (1283)—assuming that to be a Parliament. "

Mr. Asquith : " Only that he was summoned. "

Lord Davey : " Have you any evidence that he sat ? "

Mr. Asquith : " No, there was no evidence that anybody sat there. "

Lord Davey : " Therefore the first sitting you prove is the sitting of William Nevill in right of his wife. " [2]

Mr. Asquith : " Unless we prove the sitting at Lincoln, [3] that is so. "

Lord Davey : " Then, from the fact of his sitting in the reign of Henry VI, you ask to give precedence to the peerage to the Shrewsbury writ. " [4]

[1] *Ibid.* pp. 211, 212.

[2] So also Lord Davey observed (just previously) : " Unless Mr. Asquith can make out the sitting at Acton Burnel, and that Acton Burnel was a Parliament, and the sitting at Lincoln, he must rely upon this, must he not ? " (p. 207).

[3] i.e. by the Barons' letter to the Pope.

[4] *Minutes*, etc. p. 211.

And this their Lordships would not do. The Shrewsbury writ they ignored.

But in view of the fact that two baronies were allowed by this decision, and that it had a most important bearing on the Parliament of 1283, on the Barons' letter to the Pope (as proof of sitting), on the relation of summons to sitting, and on enjoyment of dignities by the curtesy, it is much to be deplored that no Judgments were delivered on that occasion. We are left to interpret the Resolution as best we can without them.

This is the more to be regretted because we are at once struck by the startling discrepancy between the Chancellor's motion and the Resolution in which it was embodied.

(1) The Chancellor selected with much precision the writ of 14 Henry VI, under which the first sitting actually took place. The Resolution, on the contrary, selected, instead, the writ of 7 Henry VI. An important point of principle was involved in this alteration.

(2) The extremely important words "in right of his wife Joan" were added in the Resolution. The doctrine of curtesy [1] in dignities, categorically denied as to modern, and questioned as to early times, [2] was thus formally affirmed,

[1] I use this term in preference to *jure uxoris*, because William Nevill had issue by his wife, and the wording of the Warwick patent of 28 Hen. VI suggests that if he were summoned in right of his wife, it would only be after issue was born, when he would be tenant by the curtesy.

[2] See the passage from the 3rd *Report on the Dignity of a Peer* (p. 47) cited by Lord Robert Cecil in the Earldom of Norfolk case :—"it has long been decided that no husband can be tenant by the curtesy of a dignity vested in his wife and the heirs of her body; and it may be doubted whether such tenancy by the curtesy of a dignity was ever allowed as a right."

and the *status* of the dignity affected to an extent difficult to determine.

Whether the absence of formal Judgments, together with these notable changes, points to some difference of opinion one must not even speculate : one can only note the facts.

Now what are the conclusions which emerge from the Fauconberg and the Darcy Resolutions as reported together to the House ? Firstly, the importance attached to the first proof of sitting, and the reluctance to date the creation of a barony earlier than the first sitting. This had clearly been the principle adopted in the Hastings case (1841), when, contrary to precedent, the barony was dated only from the sitting of 1290, not from the writ of 1264. In the Mowbray and Segrave case (1877) the law—which is "always the same"—once more fluctuated : the "sitting" of Nicholas de Segrave in 1290 was "referred" to his writ of 1283 ; and that of Roger de Mowbray's son was similarly referred to his father's writ of 1283. In the Wahull case (1892) the pendulum swung back with violence, and the whole principle of referring was vigorously denied. In the Fauconberg and Darcy case (1903), I do not hesitate to say, the Resolutions, as actually reported to the House, were at absolute variance with one another. If the motion of the Lord Chancellor had been adopted as it stood, the result would have been wholly consistent, and a sitting would not have been referred to an earlier writ of summons than that under which it took place. But what, as they stand, are the facts ?

The proof of sitting admitted for Fauconberg was that of 14 Hen. VI, for William Nevill, who then sat as Lord Fauconberg, but had been summoned as early as 7 Hen. VI (as William 'de Nevill' simply). The proof of sitting admitted for Darcy was that of 18 Edw. III, for John Darcy, who had been summoned as early as 6 Edw. III. Had the terms of the Chancellor's motion been adhered to in the Resolutions, both dignities would have been, consistently, dated from the first sitting, —Fauconberg from 14 Hen. VI, and Darcy from 18 Edw. III. Instead of this, their Lordships followed, for Fauconberg, the Segrave precedent, admitting a writ of summons, years earlier than the sitting, and, for Darcy, apparently, the Hastings precedent, rejecting a writ of summons years earlier than the sitting! What, in view of these facts, are the dates we should assign to these dignities? *Quien sabe?*

"Burke" knows, of course. People who accept the "authority" of that work may be interested to learn that it assigns to Fauconberg as the date of its creation, *not* the date claimed (1283), *not* the date allowed (7 Henry VI), but 1295! As it duly mentions the writ of 1283, we must infer that the editor, in his wisdom, rejects that writ as invalid, before explaining to his readers, under Mowbray and Segrave, that it is the earliest valid writ, and that these dignities date accordingly from 1283. As to Darcy, he assigns to it, as date of creation, "27 Jan. 1331-2," the date claimed, but not allowed. But can we wonder that a peerage editor should be thus hopelessly bewildered, when he is

called upon to choose from a whole jangle of Judgments?

I ventured to say above that the House had "rightly disallowed" the earlier precedence claimed for the barony of Fauconberg. This conclusion is firmly based on the evidence of parallel dignities. I would place side by side four cases, all of them belonging to the reign of Henry VI. John Bourchier, who married the heiress of the Berners family, was summoned to Parliament as John 'Bourchier de Berners' (also as 'Dominus Berners' and 'Johannes Berners'). William Nevill, who married the heiress of the Fauconbergs, was summoned as "Willelmus Nevill" (but later as "Willelmus Nevill de Fauconberg," and he is entered as "Le Sire de Fauconberge"). William Bourchier, who married the heiress of the Fitzwarines, was summoned as William "Bourchier, dominus de Fitz Waryn." Robert Hungerford, who married the heiress of the Moleyns family, was summoned as Robert "Hungerford, dominus de Moleyns." The Berners family could shew neither writ nor sitting; the Moleyns family could shew a single and invalid writ, and no sitting; the Fauconbergs and the Fitzwarines alike could show valid summonses but no proved sitting.

Now Proposition XII of the Fauconberg printed case is—

> that William Nevill was summoned to Parliament, that he sat in Parliament *in right of his wife* as Lord Fauconberg, and that he was allowed and bore the title of Lord Fauconberg.

What is the *proof* of the assertion which I have

here italicised? Absolutely none. It is a mere inference from the fact that he was occasionally allowed the style of "Sire de Fauconberge" or "Dominus de Fauconberge." If that inference is sound, it must also be sound in the other three cases; for the style is similarly allowed in all three. But it is not sound in the case of Berners, for no peerage dignity was or could be vested in the heiress of the Berners family; it is not sound in the case of Fitzwarine, for the precedence enjoyed by that barony, under Henry VIII, was only that which would be conferred by the summons of Henry VI;[1] and it was not sound in the case of De Moleyns, for there was no barony vested in the heiress, and the House of Lords, in 1870, dated the creation only from the days of Henry VI. Therefore the style of Fauconberg borne by William Nevill is no proof that he sat in Parliament "in right of his wife;" and yet it is the sole 'proof' vouchsafed.

Under Proposition XIII of the same Case, namely that "no new peerage was created" in such cases, it is somewhat astonishing to read that

> The doctrine that a husband could, and, in those days, did usually sit in and enjoy the Peerage Honours vested in his wife has never been disputed, and in recent years has been admitted in the case of the Barony of De Moleyns (1870), in which case, moreover, the sitting in Parliament which was put forward as technical "proof" of the existence of the Peerage, was in the person of Robert Hungerford, the husband of Alianora, *de jure* Baroness de Moleyns.

This allegation, happily, was verified for the

[1] This applies also to Berners (see below).

Crown, when it was found that nothing of the kind was "admitted" on that occasion. And though the sitting of Robert Hungerford was, no doubt, "put forward" to prove the existence of a Peerage dignity in his wife's family, it was emphatically not accepted for that purpose. This was well brought out by the Attorney General[1] in 1903. "I do not think," he observed of the above allegation, "the statement is accurate." He then showed that counsel had endeavoured in the De Moleyns case, precisely as was done in the Fauconberg case, to use the sitting of Robert Hungerford as "referable" to the writ issued to his wife's ancestor, and so to prove a Peerage for the latter. But Lord Redesdale, sitting as Chairman, would not have it, and interpolated (of the Henry VI sitting) "That would be held to be a new creation." Accordingly, the Attorney General continued, the Resolution of 1871 ran :—

"That Robert Hungerford was first summoned to Parliament as Lord De Moleyns by Writ dated the 13th January in the twenty-third year of King Henry the Sixth (1445) and was present in Parliament as Lord de Moleyns on the 12th day of February in the twenty-seventh year of the said King."

This Resolution, it will be seen, was closely followed in the Fauconberg case, but with the unfortunate addition of the words "in right of his wife Joan." Though this addition is part of what the Resolution states to be "proved," I repeat that it is devoid of proof, and that there was produced no evidence of the fact. The Attorney

[1] Sir Robert Finlay.

General had put this quite clearly to their Lordships :—

> I submit to your Lordships that there is nothing in all this to show that he sat *jure uxoris*..... it cannot be relied upon as a sitting constituting a summons in right of his wife, so as to lend any validity to the Peerage which is said to have vested in his wife.[1]

He was here interrupted by the Lord Chancellor with the strange question :—"You do not deny, historically, that they did sit in right of their wives, do you?" It is not a question of whether "they" (whoever "they" may be) did so, but of whether William Nevill can be proved to have done so. And this, as I have shown, he cannot. The Attorney General, unfortunately, only hastened to agree to the above general proposition, but Lord Davey, by a question, recalled the need of proof :— "Is the Writ expressed to be to him *jure uxoris*?[2]

The Resolution, as it stands, stultifies itself. For it carefully abstains from recognising either writ or sitting in any of the Fauconberg family (which is what their Lordships were expressly asked to recognise), and consequently does not recognise them as peers. For, as Lord Redesdale expressed it, in the parallel case of De Moleyns :—

> You do not prove any sitting under the original creation....... Unless there is a sitting as well as a summons, we never have held it to be a creation of a barony.

And yet the same Resolution states that the barony was vested in the husband of their heiress "in right of his wife"!

[1] *Minutes*, p. 206.
[2] Of course no writ would be so expressed.

As yet I have only denied that William Nevill can be proved to have sat "in right of his wife." I shall now go further and show that such a summons as his was treated by the House itself as a new creation.[1]

Of the four cases we have kept in view, two, Berners and Fitz-Warine, can be definitely put to the proof; for their holders actually sat as such under Henry VIII, when it becomes possible to ascertain precedence. And in 1512 the order of precedence was this :—

Dominus Latymer (First writ 25 Feb. 1431/2)
Dominus Stourton (Patent 13 May 1448)
Dominus Fyz Waren (First writ 2 Jan. 1448/9)
Dominus Berners (Ditto 26 May 1455)
Dominus Hastynges (Ditto 26 July 1461)

This, it will be seen, is decisive. Fitz-Warine and Berners are both ranked as new creations in the persons of the husbands of the heiresses. No older precedence is allowed them. We thus simply knock to pieces Proposition XIII in the Fauconberg Printed Case :—

when the husband of a peeress in her own right was summoned to Parliament by the title and designation of the Peerage vested in his wife, he actually sat in and

[1] The solitary case adduced as proof of Proposition XIII is that of the Barony of Dacre. But this stands on a different footing from the four cases with which I deal. (1) The original Dacre line had a *proof of sitting* as well as summons, so that the House would recognise without question that a barony was vested in them and their heiress : Fauconberg has no such proof. (2) The last of the original line had been summoned so late as 1455, and the husband of the heiress was recognised as Lord Dacre in 1458 and summoned in 1459 : in the Fauconberg case there was an interval of nearly *seventy years* between the last summons to the old line and the first to William Nevill, no Fauconberg having been summoned since 1362. (3) The precedence of the Dacre heiress' husband was specially established by Edward IV's award in 1473.

enjoyed the same Peerage which *(sic)* was vested in his wife, and that no new Peerage was created.

For the cases of Fauconberg and Fitz-Warine are similar in all respects. In both cases the earliest writ is that of 1283; in both it is followed by valid summonses to the great Parliament of 1295 and others afterwards; and in both there is no proof of sitting, till the line ended in an heiress, save the Barons' letter to the Pope, which has not been accepted by the house. In both cases the father of the heiress was never summoned to Parliament;[1] and in both cases the husband of that heiress was summoned to and sat in Parliament in the reign of Henry VI, and bore her surname as his style. In the Fitzwarine case the precedence of his barony can be tested, and we find that the House allowed it only as from his first summons. Therefore the precedence of the Fauconberg barony is only that which is similarly given by the first summons of William Nevill in the reign of Henry VI.[2] And from this conclusion there is no escape.[3]

If I have somewhat laboured the point, it is

[1] In the Fauconberg case there were 40 years during which he might have been summoned, but was not. In the Fitzwarine case he died under age.

Mr. Asquith, who is too fond of assertion, informed the Committee at the close of his argument that in the Fauconberg case we find "regular writs of summons directed to *every successive holder* of the title" (*Minutes*, p. 214). And what meaning, moreover, if any, has the phrase, "holder of the title?"

[2] And even this precedence is only right if their Lordships "referred" the sitting of 14 Hen. VI to the summons of 7 Hen. VI, as I have assumed.

[3] Under Proposition XIII in the Fauconberg Printed Case we read that "though there can be no doubt that William Nevill, Lord Fauconberg, sat in and enjoyed the ancient Barony of Fauconberg vested in his wife," yet (it is cautiously added) "a denial of the contention does not materially alter the position of the Petitioners, as they would still be entitled to a barony under William Nevill's summons and sitting" (as indeed was duly found). "Consequently, the only point at issue, and the point on account of which all the proofs up to the present have been produced, is the question of the proper place and precedence of the Barony of Fauconberg upon the Roll of Barons."

because the matter is not merely of academic interest. A claim to the barony of Fitz-Warine (or rather of coheirship thereto) may be made at any moment, and all the questions in the Fauconberg case will then be raised anew. When this happens, we may hope to learn how a barony can be "vested in" a man "in right of his wife," when there was no recognised barony to which she could have succeeded.

Again, these questions will be raised anew if the barony of Furnival should be claimed. There also the first writ is that of 11 Edw. I (1283), and there also, though summonses are on record to four of the family in succession (1283-1383), the only proof of sitting, it would seem, that can be found is the Barons' letter to the Pope, which, as we have seen, cannot be accepted; [1] but the heiress of the last Furnival summoned married (as in the Fauconberg case [2]) a Nevill, who was summoned as Thomas "Nevill de Halumshire," and of whose sitting as 'le Sire de Furnival' there is proof. In this case, therefore, also we might learn if the heiress of a non-existent barony could transmit that barony to her husband.

And there is one point more. In strange contrast with the Fauconberg Resolution, that which dealt with the Barony of Darcy ignored writs absolutely and relied on a sitting alone.

That it is proved by the Parliament Roll of 18th Edward III and the other evidence adduced on behalf of

[1] See p. 262 above, and p. 276 below.
[2] Oddly enough, she also was named Joan.

the Petitioners that John Darcy sat in Parliament in right of that Barony in that year.

Let us see then what is the proof, the only proof relied on for the fact that the Barony was created. It is printed in the 'Minutes of Evidence' (p. 66) and is claimed in the Printed Case (p. 17) as proof " that John, first Lord Darcy, was present and sat in Parliament as a Peer of the Realm. " On account of the importance assigned to it I give it here in full.

It'm fait aremembrer q' la dit Co' e prierent a n're S'. le Roi etc..... A quele priere n're dit S'. le Roi octroia et si fu la dite patente faite 't assentuz en p'sence 't p(er) avis de les prelat' 't grantz souzescritz cest assav' lercevesq(ue) de Cantirbirs levesques de Cicestr' de Loundres 't Dely les Counts de Norht' 't de Suff(olk) le Seign[r] de Wake Mons' Rob(er)t de Sadyngton Chancell' S'. William de Edyngton' Tresorer *Mons' Johan Darcy Chaumb(er)leyn* Mestre Johan de Ufford gardeyn du prive seal nostre S'. le Roi Mons' William Scot' Mons' Johan de Stonore Mons' William de Shareshull Mons' Rog' Hillary Mons' Richard de Wylughby Mons' William Basset Mons' Richard de Kelleshull Mestre Johan de Thoresby et S'. Johan de Seint Poul.

One has only to read this document to see that it cannot possibly be proof " that John, first Lord Darcy was present and sat in Parliament as a Peer of the Realm. " For who were those with whom we find him here grouped? The list may be analysed as follows :—

(A) Four 'prelates' :—Canterbury, Chichester, London, and Ely.

(B) Three lay peers :—the " Counts " of Northampton and of Suffolk and the " *Seigneur* de Wake."

(C) Four officials :—The Chancellor, the Treasurer, the Chamberlain' (" Monsieur " John Darcy), and the Keeper of the Privy Seal.

(D) Four judges who had been separately summoned to this Parliament. [1]

(E) Five other eminent legal officials, who had not been so summoned.

When counsel attempted, in the Hastings case, to put in " the Barons' letter " as proof of sitting, we learn from the Report that

> The Counsel were informed " that it did not appear that this was an act which the individual could have done only as a Peer. " [2]

It is obvious that precisely the same objection applies to the above record. Nine judges, the majority of whom had not even been summoned to attend, as such, the Parliament, are named among its "grantz" as well as John Darcy. He is entered only as an official ; and if it proves his sitting as a peer, it proves theirs also ;—" which is absurd. " But, it may be urged, he had been summoned to this Parliament as a baron, and they had not. On the contrary, John Darcy *was not even summoned to this Parliament.* [3] The following brief dialogue did indeed take place.

The Lord Chancellor. " He was present and sat in Parliament, did he ?"

Mr. Asquith. " There is no question that he was summoned in the eighteenth year of Edward III, and he was present. In the Parliament Roll amongst those

[1] The Chief Justices of the King's Bench and the Common Pleas and the Chief Baron of the Exchequer with a former Chief Justice.

[2] *Fauconberg* etc. *Minutes*, p. 178.

[3] See *Lords' Reports* IV, 552, for summons of 18 Edw. III.

persons appears the name of John Darcy, chamberlain..... You have got both the writ and the sitting in the case of the first lord." [1]

This, however, is only Mr. Asquith's little way. Bold assertion is one thing : proof is quite another. [2]

But as yet I have only shown that the document in question is not technically valid as proof of sitting. I will now go further. If any of these great, these learned lawyers had known their constitutional history or had deigned to consult someone who did, they would have discovered that this document which they fondly imagined to constitute proof of sitting in Parliament, was, on the contrary, proof only of presence in *the King's Council.* It records a plenary meeting of the council for the ratification by the King of the measures passed in Parliament as statutes by his "patente."

Take the names. I have examined the original Charter Roll of 18 Edward III [3] in order to ascertain the names of that small permanent body by whom his charters were witnessed. This body was unaffected by the Parliament of that year ; [4] before, during, and after its meeting, the same names recur. The three prelates, Canterbury, London, Chichester,—of whom Canterbury and Chichester were brothers, [5] and London a relative

[1] *Minutes*, p. 183.
[2] Compare pp. 161-5 above.
[3] 25 Jan. 1343/4 — 24 Jan. 1344/5.
[4] 7-28 June, 1344.
[5] "Since 1330 he [Edward III] had depended chiefly on the two Stratfords, John... archbishop of Canterbury, and Robert his brother... bishop of Chichester. The brothers had held the great seal alternately... John Stratford... as archbishop, chancellor, and president of the Royal council, was supreme in the treasury as well as in the chancery" (Stubbs, *Const. Hist.* II, 384).

—head the list again and again.[1] Of the lay peers the earl of Northampton, who was a cousin of the King, occurs regularly as the first witness,[2] and the earl of Suffolk, a great noble, attests with him.[3] The third lay peer, the 'Seigneur de Wake,' is the baron whose name similarly appears on the permanent body of "grantz." A son-in-law of Henry, earl of Lancaster, and a brother-in-law of the King's uncle, he attests, as "Thoma Wake de Lydel," charters of 10 June, 18 June, 1 July, 19 August, 23 August, 23 October, and 26 December. It is particularly interesting to find that a charter of 1 July, just after the close of parliament (28 June), has the same first nine witnesses (with the sole exception of the bishop of Ely) as our own undated document.

It has now been shown that this document records a meeting of that permanent council of which Stubbs wrote that

> from the accession of Henry III a council comes into prominence which seems to contain the officers of state and of the household, the whole judicial staff, a number of bishops and barons, and other members who in default of any other official qualification are simply counsellors; these formed a permanent, continual or resident council etc. etc.... the distinguishing feature of which was its permanent employment in the business of the court.[4]

> there was a permanent council attendant on the King, and advising him in all his sovereign acts, composed of

[1] *e.g.* in charters of 23 April, 1 June, 10 June, 16 June, 1 July, 2 July, 11 July, 19 August, 23 October, and 12 Jan. (1344/5). London is absent in one of 23 August, and Ely takes his place in one of 18 June. Chichester is absent in one of 26 December.

[2] *e.g.* in charters of 23 April, 1 June, 10 June, 16 June, 18 June, 1 July, 2 July 11 July, 23 October, 26 December.

[3] *e.g.* charters of 23 April, 1 June, 1 July, 26 December.

[4] *Const. Hist.* II, 256.

bishops, barons, judges and others, all sworn as counsellors [1]

a council by whose advice they [i.e. the kings] acted, judged, legislated and taxed when they could, and the abuse of which was not yet prevented by any constitutional check. The opposition between the royal and the national councils, between the Privy Council and the parliament, is an important element in later national history [2]

Under a king with the strong legal instincts of Edward I, surrounded by a council of lawyers,.... the practice and study of the law bid fair for a great constitutional position.... The action of the Privy Council, which to some extent played the part of a private parliament, was always repulsive to the English mind ; had it been a mere council of lawyers the result might have been still more calamitous than it was. [3]

The named witnesses to the King's charters in 1344 regularly end with the steward of the household, and when, in 1340, John Darcy himself occupied that position, he is similarly found on the roll as the last named witness. [4] It was again *ex officio*, as an officer of the King's household, that he is named, as we have seen, in the document entered on the Parliament Roll of 1344 (18 Ed. III).

As the Lord Chancellor in 'Iolanthe' solved a distracting problem by boldly inserting the word "not," [5] we may, I would suggest, with similar addition, retain the wording of the Darcy Resolution of 1903. It will then run :—

[1] *Ibid.* II, 260.

[2] *Ibid.* II, 240.

[3] II, 189, 191. The historian adds that "the dislike of having practising lawyers in parliament appears as early as the reign of Edward III."

[4] Llanthony charter of 10 April 1340, put in among the evidence in the Lord Great Chamberlainship and Barony of Lucas cases. The other witnesses are three prelates, three earls, the treasurer, and one baron, Henry de Ferrars (of Groby).

[5] in the rule : "every fairy who shall marry a mortal."

That it is *not* proved by the Parliament Roll of 18th Edward III and the other evidence adduced on behalf of the Petitioners that John Darcy sat in Parliament in right of that barony in that year.

And, for Mr. Asquith's benefit, there might have been added a Resolution :—

That it is proved by the Close Roll of 18 Edward III that John Darcy was not among those summoned to Parliament in that year.

The importance attached by their Lordships to John's alleged sitting is manifest from this passage :—

Lord Davey : " The only sitting as a Lord Darcy that you have is the first one, of 18th Edward III. It afterwards got merged in the Conyers ? "

Mr. Asquith : " Yes "...... " in all these summonses to Parliament of the fourth, fifth, and sixth Lords Darcy, they are summoned as Lords Darcy simply. "

. . . .

Lord Davey : " But, as I understand, there is no proof that they sat. "

Mr. Asquith : " I do not know that we have any actual proof that they sat, because we have got an ancestor who sat, [1] and it is not material to bring evidence of their actual sitting. "

Lord Davey : " You have only got one ancestor of whom you have got evidence that he sat ? [1] "

Mr. Asquith : " That may be, but the moment we have shown that an ancestor sat [1] we do not require any further evidence, " etc., etc. [2]

But how is that ancestor shown to have sat ? By a record which even an historian can see shows nothing of the kind. He remembers that a peer-

[1] i.e. in 18 Edward III.
[2] *Minutes*, p. 184.

age was here at stake; and he learns with wonder what great lawyers consider to be evidence, imagine to be proof.

In the sacred mysteries he has no voice; for their Lordships can only listen to counsel learned in the law. It may be that, even when enlightened as to the true nature of the record upon which the Resolution of the House on the Darcy creation rests, they may treat the matter as of no account, a mere layman's fancy. Or, again, it may be that enquiry will be made as to the origin of the statement to the House that this was a proof of sitting. It is understood that in peerage cases there rests upon the counsel employed a peculiar responsibility for the evidence they bring before the House. But in spite of the extreme confidence of Mr. Asquith's unfortunate assertions, his own responsibility in the matter, doubtless, is but technical. Contrary to custom, as explained above, he did not sign his clients' Case, that strange and garrulous production upon which I have had to comment.[1] On those who prepared that case and on its anonymous draftsman there rests the moral responsibility for this and for its other statements. Of that draftsman's idea of accuracy one may judge from his informing the House (p. 22) that "your Lordships' House has definitely decided that such[2] shall not be recognised (*vide* Resolution, 1641, in Fitzwalter case)." As everyone knows,[3]

[1] See pp. 193, 197-8, 200, 201, 236, 269-70.

[2] *i.e.* Baronies by tenure.

[3] 'Collins' pp. 286-8. *Reports on the dignity of a Peer; 1st Report* p. 446; 3rd Report, p. 73. Cruise, *op. cit.* p. 66. Courthope, *Historic Peerage* pp. xxii, 200. *Complete Peerage*, III, 373. Pike, *op. cit*, p. 130. Palmer, *op. cit.* p. 182.

the Fitzwalter case was decided, not by their Lordships' House, but by the King in Council, and not in 1641, but in 1670.[1] It is precisely because barony by tenure had *not* been the subject of any Resolution of their Lordships' House that it was possible to claim the barony of Berkeley as a barony by tenure in the last century. Indeed, it was expressly urged that a mere decision by the Council was in no way binding on the House of Lords. And lastly, what the Council really held was, not that barony by tenure "shall not be recognized" but that it was "not fit to be revived." So the statement is a tissue of blunders from beginning to end.

And yet it is this hopeless blunderer who takes upon himself to charge an eminent legal commentator with "an utterly wrong and absurd deduction," "a mere travesty upon the law" (p. 22.)

That a writer who can speak of an Order in Council of the days of Charles the Second as a Resolution by the House of Lords in those of Charles the First, should imagine a record of the King's Council to be a proof of sitting in the House of Lords (1344) is not perhaps surprising; but that the House should accept his error and enshrine it in a formal Resolution is, surely, a lamentable thing. We may rank that Resolution with those which, a quarter of a century before, were similarly based on the strange 'proofs' that the Crown had determined the abeyance of the baronies of Mowbray and of Segrave.[2]

[1] *i.e.* 19 Jan. 1669-70.

[2] See my *Studies in Peerage and Family History.* pp. 456-7. Even so far back as 1668 the fact (so strangely ignored in 1877) that titles of baronies were assumed and recognised in error was known and was urged in argument before the House.

But of what account is a mere historian? His criticism is nothing worth, for it rests only upon fact. The lawyer's ways are not as his: they dwell in realms apart. Let him bow before the majesty of the law, grey with its hoarded wisdom, nor seek to break the spell of that august dominion. He who knows what history is may leave its lore in peace. It is time that he should pass from that darkened world, haunted by the ghosts of dead errors, and, through the ivory gate, emerge into the light of day.

TALES OF THE CONQUEST.

The Sackville story—Its probable truth—The Mordaunt charter—The Burdet Charter—Sir 'Payan' D'Auney—The Dawnay crusader—His 'medal' and crest—The Umfreville charter—The 'William the Bastard' charter—The Saltmarshe imposture—The Sharnburn story—The Ashburnham hero—The Dover pageant—Mischief of pageants—The Colchester pageant—The Stourton hero—Mr. Shobbington's exploits—The Pilkington and Trafford story—Two Scottish stories—The Kynnardsley story—De Warenne's rusty sword—'Exeunt omnes'.

In this paper I propose to glance at some of the tales, legends, or traditions concerning the Norman Conquest associated by certain families with their ancestors at that period. By dealing with such tales in groups one can form a better idea of their nature and their probability than by studying any single specimen in isolation.

It must not be supposed that the historian or genealogist of the modern school is intent only on destruction and that his sole aim is to prove such stories false. Such, no doubt, is the gist of the complaint made by the editor of 'Burke's Peerage'[1] but, to prove how mistaken that idea is, I shall give as my first example a story, hitherto, it seems, unknown, which appears to me to be of great interest and, in the main, probably true.

[1] In the 1909 edition.

A small piece of parchment preserved in the British Museum records a claim to certain liberties on the part of B[artholomew] de Sackville, who held of the Marshals, Earls of Pembroke in the days of Henry III a knight's fee at Fawley, Bucks.[1] Beginning with the words "Ostendit Domino suo dominus B. de Saukeville," he tells his story thus:—

"Comes Giffardus antecessor domini marescalli veniens ad perquisicionem Anglie tradidit totam terram suam de Normannia custodiendam cuidam senescallo suo qui vocabatur Esbrandus, qui eam egregie custodivit et constabularium de Archis [2] et alios exigentes indebitas consuetudines de terris domini sui cepit et detinuit. Perquisita autem Anglia, data fuerunt domino Comiti Giffardo omnia maneria quæ fuerunt Elvive la Wode, inter quæ fuit manerium de Fall', et dominus comes Giffardus statim mandavit senescallum suum de Normannia ut custodiret omnes terras suas in Anglia et eas disponeret quia vir prudens erat et fidelis. Qui statim, audito mandato domini sui, advolavit in Angl[iam] et veniens ad dominum suum nunciavit ei quæ fecerat. Dominus autem ejus fecit eum senescallum de omnibus terris quas perquisierat et in primis dedit ei pro servicio suo et probitate electionem duorum maneriorum suorum, scilicet de Crenend[ona] aut Fall' et ipse elegit Fall' pro pulchritudine loci. Et dominus Comes ei concessit cum omnibus pertinen[tiis] et libertatibus sicut ipse tenuerat. Qui posedit *(sic)* et habuit per totam vitam suam cum visu franci plegii et omnibus aliis libertatibus. Mortuo autem Esbrando successit ei Jordanus filius suus et heres, qui in pace tenuit, sicut pater ejus fecerat, per totam vitam suam, sed non multum vixit. Mortuo autem Jordano successit ei filius ejus et heres, Willelmus, qui similiter in

[1] *Testa de Nevill*, p. 247.

[2] The famous castle of Arques lay some miles to the E. N. E. of Sauqueville in another valley.

pace tenuit, cum omnibus libertatibus usque ad mortem Comitis Giffardi. Quo mortuo satellites regis ceperunt omnes terras quæ suæ fuerant in manu regis et feoda....et fecerunt omnes homines tam dominiorum quam villarum... sequi Com[itatus] et Hundreda usque ad illum tempus quo, deo disponente, domina Comitissa, mater (?) domini marescalli, data fuit illustri viro sancte memorie Willelmo marescallo. Quo facto, reddita fuit ei libertas dominiorum suorum sed non feodorum extrincecorum.... feoda extrinceca.... sequebantur Comitatus usque post guerram. Finita autem Gwerra, jussum fuit ut quilibet....vendicaret jura sua. Dominus vero.... W. marescallus h[oc] sciens... et suis injuste detineri impetravit a rege Johanne libertatem feodorum extrincecorum et optinuit. Quo audito, dominus Jordanus de Sauk[avilla] impetravit a domino suo marescallo libertatem manerii de Fall' et optinuit. Post tres vel plures annos (?) [1]..... Falco de Breute per quandam falsam assisam abstulit domino comiti Willelmo juniori libertatem suam feodorum illorum. Quam dominus rex ei restituit per perquisitionem Alani de la Hida ......eum injuste esse spoliatum, set dominus Jordanus de Saukavilla" etc.

Although this tale commences at so remote a period, its truth can be tested in places by the evidence of chronicles and of records. And, on the whole, it bears that test well. It is by no means easy, as a rule, to trace to their Norman homes the followers of William whom Domesday shows us in possession of English lands. Nevertheless it is possible to show that the Sackvilles and the great house of Giffard dwelt alike in the little valley of the sluggish and the winding Scie. Halfway between the port of Dieppe and Longueville, the home of the Giffards, the traveller to Paris

[1] MS. damaged here.

passes Sauqueville, which gave its name to the Sackvilles. Herbrand, its lord in the Conqueror's day, had a daughter Avicia, wife of Gulbert de Heugleville (lord of Heugleville-sur-Scie) and three sons, gallant knights, [1] Jordan, William, and Robert.

This Herbrand, clearly, is the ' Esbrandus ' of our narrative, who, according to it, was given Fawley *(Fall')* by Walter Giffard. Domesday duly shows us Fawley held of Walter Giffard by a Herbrand. But the narrative adds two statements of very singular interest. The first of these is that Walter obtained the lands of ' Elviva la Wode. ' Now it is a singular fact that, in Buckinghamshire, Domesday shows us Walter Giffard succeeding at (Long) Crendon, his chief seat, and another manor *a son of* ' Alveva, ' who is doubtless identical with his predecessor in some other places. The statement therefore, that Walter received the lands of Ælfgifu 'the crazy' ('la Wode') may be absolutely correct, though Domesday does not reckon Fawley itself among them. The other statement, namely that Herbrand selected the manor of Fawley, "on account of the beauty of the spot," in preference to the much larger and more valuable one of Crendon, is—though interesting as an early instance of the feeling for natural beauty—hardly in accordance with what we should expect of the typical Norman baron. He could hardly fail to feel that he had gained by leaving the meadows of the Scie for the banks of the stately Thames, but Crendon, if less

[1] " Aviciam Herbrandi de Salchevilla filiam..... Hæc tres fratres habebat præclaros milites : Jordanum et Guillelmum atque Robertum " *Ord. Vit.* (Ed. Société de l'histoire de France, III, 39, 45).

beautiful a spot, had a far more practical attraction.

That Herbrand was succeeded by a son Jordan, as alleged by the narrative, is confirmed, we have seen, by Ordericus and is also supported by the *Abingdon Cartulary* (II, 85), which shows us certain writs addressed by Henry I to Walter Giffard and to Jordan de Sackville concerning some land they had wrested from the abbey. In the next generation we are shown by our tale William succeeding to Fawley; and the return of Giffard's knights in 1166 duly records William "de Saukeville" as holding one fee, which was certainly Fawley.[1] It was doubtless his father who is referred to in Henry II's charter of confirmation to that great Giffard foundation, the Priory of Sainte Foy at Longueville, in 1155, in which he confirms the gifts of Jordan 'de Saukevilla' and 'the tithe of the land which Jordan de Saukevilla gave as a marriage-portion with his daughter'.[2]

Even before the year 1166 the death of Earl Walter Giffard, to whom it refers, had taken place (1164), and the King's officers, as it says, had taken over his great fief.[3] The next episode in the narrative is the marriage of "that illustrious man of sacred memory, William Marshal" to the Clare heiress who brought him these old lands of the Giffards in 1189. We know much of this brilliant marriage to "la bone, la bele, la sage, la corteise de haut parage" Isabel, and can even read how the happy pair spent the honeymoon at Stoke d'Abernon, "liu paisable, e aesie, e delitable," kindly

[1] *Liber Rubeus*, p. 312.
[2] See my *Calendar of documents preserved in France*, p. 77.
[3] See *Pipe Roll* 11 *Hen. II*, p. 25.

lent by Sir Enguerrand d'Abernon.[1] From that date there is no need to verify the story. It is interesting, however, to find that the Jordan de Sackville whom it names as obtaining from his lord the marshal the lost liberties of Fawley, stood high in his favour ; for in 1207 he received from him the charge of a great portion of the Earl's Irish domains, while in 1210 he was one of the hostages exacted from the Earl by the King.[2]

Here then we have, so far as we can judge, a true tale of the Conquest and at least a true descent from a Conquest ancestor. That even at the time when it was written such a truthful story was a rare thing is seen when we examine the Conquest traditions of an even earlier period enshrined in the iurors' returns of 1212.[3]

Having thus begun with a story which seems to me to be true, I pass to a number of tales which belong to the realm of legend. On the one hand there are tales of the conquering race, of the men who were endowed with lands for their service to the Norman duke by charters which will not bear the test of critical examination, as in the cases of Umfreville, Mordaunt, and the Honour of Richmond. On the other are those told of the 'Saxons' who contrived to retain their lands, either by successful resistance to William, as in the cases of Stourton, Ashburnham, Kinnersley, and Bulstrode, or by peaceful arrangement, as in those of Sharnburn, Saltmarsh, Pilkington and Trafford.

[1] *Histoire de Guillaume le Maréchal* I, 344.
[2] *Histoire de Guillaume le Maréchal.*
[3] See for these returns my paper on 'The great Inquest of Service' in the *Commune of London and other Studies.*

One of the most daring and successful concoctions intended to provide an ancient house with a Conquest pedigree and a Conquest tale is the first charter of the Mordaunts.[1] This precious document was given to the world, in the days of Charles II, by Henry (Mordaunt), earl of Peterborough, under a fictitious name.[2] It runs as follows :

Eustachius de Sancto Egidio omnibus hominibus et amicis suis tam Francigenis quam Anglicis salutem. Sciatis me dedisse et hac presenti charta confirmasse Osberto dicto le Mordaunt, fratri meo, pro homagio et servitio suo, terram meam de Radwell, cum omnibus pertinentiis et libertatibus suis, sibi et hæredibus ejus, tenendum de me et hæredibus meis, libere et quiete, honorifice et hæreditarie, sicut illum (*sic*) ego inter alia recepi ac tenui de donatione et munificentia Willielmi illustrissimi Regis Angliæ, pro servitiis quæ pater meus in conquestu et ego sibi fecimus, per servitium dimidiæ partis feodi unius militis, pro omni servitio sæculari. Ego vero prædictus Eustachius de Sancto Egidio et hæredes mei prædictam terram prædicto Osberto et hæredibus ejus contra omnes homines ac feminas warrantizabimus. His testibus Ranulpho filio Thomæ Hervei, etc.

Eustace de St. Gilles, it will be seen, is here alleged to grant to his brother Osbert 'le Mordaunt' the manor of Radwell, which had been given him by King William for the services of his father and himself "in the Conquest of England." Now we have only to turn to Domesday to learn that the whole of Radwell (Beds) is accounted for in that record, and that neither Eustace nor his brother are to be met with in that account. Yet, in spite of this and of the obvious anachronisms in the style

[1] The Mordaunts can be traced back to within about a century of Domesday.
[2] In that very rare work *Succinct Genealogies*, by 'Robert Halstead' (1685).

of the alleged charter, it was accepted as genuine without question even by the critical Brydges [1] in his edition of 'Collins' Peerage,' whence it passed, as a matter of course, into the pages of 'Burke.' In them the tale it tells is still repeated as fact.

That statements so definite and so easily disproved should be made the basis of an elaborate pedigree from the days of the Norman Conquest is a striking proof of the lengths to which a forger would go and affords a useful warning to the reader and introduction to the cases which follow. As I have elsewhere observed, [2] Lord Peterborough—

> also produced a charter (which appears to be the best evidence for "Payn," the Conquest ancestor of the Dawnays) in which a Hugh Burdet was made to say that the Conqueror had given him Maidford in Northants. As "Hugh" appears in Domesday as only its under-tenant, Baker, the able historian of the county, pronounced the charter to be of special interest for the new light that it afforded :—
>
> "A wide field is thus opened to conjecture as to the nature and extent of the enormous grants made by the Conqueror to the principal Domesday tenants-in-chief."

But a glance at the witnesses is enough to show that the Charter must have been concocted.

This concocted document begins :—

> Hugo de (*sic*) Burdet etc.... Sciatis me dedisse Pagano de Alneto cum Emelina filia mea villam meam de Maydford tam liberam quam illam recepi, ex donatione domini mei Willelmi Regis, etc. etc. [3]

Although to this charter there is given the

[1] My text is taken from his work.
[2] Paper on '*The Companions of the Conqueror*' in *Monthly Review*.
[3] *Op. cit.* p. 6.

somewhat mysterious heading : "Inter fines de Reg. Ric. primo Pagano de Alneto Hugo de (*sic*) Burdet dedit villam de Maydford," it is obvious that Hugh Burdet[1] cannot have given in 1189-1190 a manor which had been given him by William I or William II (i. e. between 1066 and 1100). Baker, as we have seen, took him to represent the 'Hugh' who held Maidford, *not* of the Conqueror, but of Hugh de Grentmesnil in 1086.[2]

It is however with Payn (*Paganus*), "the Conquest ancestor of the Dawnays," that I would here deal. I do so because, even as I write, there appears this apposite information in that fount of genealogical lore, the "Social and Personal" column.

> Payan, the unusual name bestowed yesterday on the infant son of Captain and Mrs. Guy Dawnay at St. George's Chapel, is one of those peculiar to an old family, and in which not unnaturally no small pride is taken. In this case it connects a baby of the twentieth century with a maurading baron of the eleventh century. In the train of William the Conqueror came one Payan d'Aunay, of Aunay Castle, in Normandy. Whether he was a bigger barbarian than his fellows, or had more brains or brawn, history does not tell, but he made himself secure in this island ; one descendant distinguished himself in the Crusades, and another at Crecy, and thereafter many others have fought nobly for England down to the present head of the family Viscount Downe, who has had a distinguished military career......

Uncommon Christian names, peculiar to particular

[1] The 'de' before Burdet is impossible and would of itself stamp this charter as spurious.

[2] Baker's *Northants*, I, 44. The pedigree there given shows that the Cornish Dawnays were unconnected with the lords of Maidford, though the 'Emmeline' of the charter may have been suggested by the name of the heiress of the former *temp.* Edward III.

families and derived from ancestors of fame, are not rare in the peerage. Perhaps the most interesting instance occurs in the Earl of Huntingdon's family; his brother, the Hon. Aubrey Hastings, received at the font the names of Robin Hood.[1]

This information, as so often, is derived, to begin with, from 'Burke's Peerage.' In that 'authoritative' work we read that

> Sir Payan d'Auney of Auney Castle, Normandy, came to England with the Conqueror (*Brydges' Collins*, VIII, 453).

But when we turn to the work here vouched as the authority, we discover, in the first place, that it cannot cite any authority for the fact, and in the second, that its version runs :—

> Sir Paine *(sic)* Dawney of Dawney *(sic)* castle in Normandy...... came into England with King William the Conqueror.

Just as "Dawney castle" has been altered into the less improbable "Auney castle," so the simple "Paine", which is found in an old edition of 'Burke,' is now metamorphosed into 'Payan.' On what authority?

It is obvious that every family of Paine, Payne etc. must be descended from a fore-father who bore the Christian name assigned to that "marauding baron" who accompanied the Conqueror to England. They, at least, have a clear right to revive the Christian name of that forefather at the

[1] *Evening Standard and St. James' Gazette* 25 Sept. 1909. Even if the 'Robin Hood' of legend were descended from a Conquest "earl of Huntington"—a pedigree, wrote the Duchess of Cleveland, "which I should have thought it impossible for the most credulous mind to accept" (*Battle Abbey Roll*, II, 34)—this would not place him among the "ancestors" of the Hastings family, whose earldom of Huntington dates from 1529.

font. Whether the Dawnays have the same claim is, at least, more than doubtful.

This old Yorkshire house has a clear territorial pedigree of more than five centuries, a rare thing —it is needful to insist—at the present day. It claims descent from a younger son [1] of a house of the same name at the other end of England, the Cornish Dawnays, whose possessions extended into Somerset and Devon, and the last of whom fought at Crecy. The pedigree of that house in "Brydges' Collins" begins only under Edward I, but can certainly be traced further back. The "marauding baron," however, is not found in Domesday or, so far as I know, in any other record. As to the surname, it is, of course, French and implies Norman origin. [2]

And now as to the "descendant" who "distinguished himself in the Crusades"—a family distinction which is more usual in French than in English genealogy. Here again the authority is 'Burke.' According to that veracious 'Peerage,' he was—

> Sir Nicholas Dawnay, who had summons to Parliament, 1st Edward III, among the Barons, but not afterwards, owing to his absence in the holy war against the infidels, whence he brought a very rich and curious medal.

This is taken bodily, we find, from "Brydges' Collins," where it is added that the medal is "now in the family's possession," and that Sir Nicholas

[1] But he is, in "Brydges' Collins," the eldest son.

[2] "Aunaie" means only alder-bed, but has given rise to place-names. In Normandy alone there are an Aunai (Orne) and Aulnay (Eure), and an Aunay or Aulnay (Calvados), at which last are the earthworks of an 11th cent. castle. The name was latinised as *Alnetum*, and the surname as *De Alneto*. There may well have been more than one family of the name.

remained "in the Holy Land many years." As the editor of 'Burke' improves his knowledge, he will some day discover that Nicholas cannot have gone crusading under Edward III, because 'the holy war' had ended with the fall of Acre in the days of Edward I. He will also learn that Nicholas was never summoned to parliament [1] in spite of the statement to that effect in "Burke's dormant..... and extinct peerages," where it is similarly added that "his lordship made a journey to the Holy Land."

Shirley, however, gives as the crusader—

Sir William Dawnay, who was in the Holy Land with Richard I, in 1192, at which time that king gave him, in memory of his acts of valour, a ring from his finger, which is still in possession of the family. [2]

This is also the version given in *The Battle Abbey Roll* [3] where we further read that "on the same occasion they received a grant of their crest, a demi-Saracen in armour, with a ring in the dexter hand and a lion's paw in the left." This is one of those impossible tales that are told of Richard's crusade, impossible because to those who have really studied heraldry these grants of arms, crests, augmentations, etc. are, at that time, wild anachronisms.

My own suggestion is that the real hero of the tale was a younger son, William Dawnay, who held the honourable post of Turcopolier of the English Langue at Rhodes, as a Knight of St. John,

[1] Even Banks had discovered this.
[2] *Noble and Gentle men.*
[3] By the late Duchess of Cleveland. The object is there stated to be "a somewhat massive ring, containing a talismanic gem" (I, 25),

from 1449 to 1468. It is easy to see how the Dawnay ring, like the Fitzwilliam scarf, needed a distinguished genesis, and how William Dawnay, who fought the Turks in the 15th century, was projected back into the 12th and made to fight them with distinction in Richard I's crusade. The crest has the appearance of a late grant embodying "the family tradition."[1] As an illustration of the worth of such tradition, the story of the ring presented by Richard *alias* the "curious medal" brought home by Sir Nicholas is well worth the telling by way of an interlude in our "tales."

As I am only dealing here with the Conquest period, I can but allude to the strange forgeries of twelfth century deeds—the work apparently of a Tudor scrivener—concocted to provide the Lamberts with an ancient and illustrious pedigree, and duly inspected and accepted three centuries ago, by all the Kings of Arms at once.[2]

The next charter of the Conquest with which I propose to deal is that by which William the Conqueror is said to have granted Redesdale to Robert Umfreville in 1076. This charter is known to us from the MSS. of Dodsworth in the Bodleian Library, to which they were bequeathed by Lord Fairfax, Dodsworth's patron. An eminent and meritorious antiquary of the days of Charles the First, Roger Dodsworth made his transcript from what he believed to be actually the original charter of the King. From this transcript it was accepted

[1] The 'lion's gamb' is suggestive of a further, but lost tradition.

[2] See my paper, "The tale of a great forgery" in *The Ancestor*, III, 24.

without question by Dugdale,[1] and from it also the document was printed, in an English translation, so recently as 1908 in the *Essex Archæological Transactions.*[2] Its form is amusing enough :—

William, by the Grace of God, King of England and Duke of Normandy : To all the people, as well French, English as Normans.[3] Greeting, know ye that we have granted to our beloved kinsman, Robert Umfreville, Knight, Lord of Tours and Vian, otherwise called Robert with the beard, the lordship vale and forest of Redesdale etc. etc...... which came into Our hands by Conquest, to have and to hold...... by the service of defending the same from enemies and wolves for ever with the sword which we had by Our side when we entered Northumberland, and further of our more abundant grace we have etc. etc...... In testimony whereof we have caused Our seal to be affixed to these letters.

Witnesses : Matilda, Our Consort, William and Henry Our Sons, this 10th of July in the tenth year of Our reign.

Although the use of the plural style and the dating clause with its regnal year prove alike the grossness of the forgery, the charter, as we have seen, was accepted without question.[4] The Umfrevilles are known to have held Redesdale, on the northern border, from an early date, with certain regalities, but the service due from them is entered in 1212 as that of defending the valley from marauders[5] not of attacking wolves, as the charter appears to imply, with the sword worn by William

[1] *Baronage*, I, 504.
[2] Vol. X, N.S., pp. 329-330.
[3] The Normans, in charters of this time, were included in the "French" *(Franci)*.
[4] It is similarly accepted in the Duchess of Cleveland's *Battle Abbey Roll.*
[5] "per servitium custodiendi illam a latronibus" (*Liber Rubeus*, p. 563) "per servitium ut custodiat vallem a latronibus" (*Testa de Nevill*, p. 392.)

the Conqueror when he had "entered Northumberland" years before the grant.

Lastly, there is the famous charter which professes to have been granted by the Conqueror, at the siege of York, to his 'nephew,' Alan, Count of Britanny. This charter also was accepted by Dugdale as genuine, and in Gale's *Honour of Richmond* we see the charter itself being handed by the Conqueror to Alan, the engraving being taken from the 15th cent. illumination in Cott. MS. Faust B. VII. Often printed as authentic,[1] its bearing was gravely discussed by Lechaudé d'Anisy in his *Recherches sur le Domesday Book* (I, 75) and again, a few years ago, in M. Dupont's *Recherches historiques et topographiques sur les compagnons de Guillaume le Conquérant* (p. 124). It is chiefly notable for its strange beginning,—"Ego Guillelmus cognonime Bastardus, rex Angliæ." Mr. Freeman deemed it "palpably spurious,"[2] and with this opinion I concur.

The point I wish to impress upon the reader is that the apocryphal "tales of the Conquest" are not by any means confined to legend or "tradition," but are confirmed at times by charters deliberately concocted for the purpose. There may, of course, be cases in which the anachronisms are explained by a genuine charter of later date having been claimed in error for the period of the Conquest. For instance, in 'Burke's Landed Gentry' the pedigree of Edgcumbe of Edgcumbe begins with the evidence of such a deed.

[1] e.g. in Selden's *Titles of Honour*.
[2] *Norman Conquest*, II, 609.

We are told that

> The family of Edgcumbe has been settled in the parish of Milton Abbott, Devon, from a very early period, as appears both from a deed in Norman French (having the words 'de Eggecombe' and dated "in the 12th year of the Conquest") etc. etc.

One would have supposed that even the editor of the "Landed Gentry" might have known that deeds of the Conquest period were neither written "in Norman French" or dated in this fashion. And yet, if the deed really belongs to the 14th, not the 11th century, and if it is dated in a given year of King Edward "the second (or third) after the Conquest," it may quite well be genuine.

We will now turn from the conquerors to the conquered and glance at some of the tales told of 'Saxon' houses.

One of the most astonishing instances of an obviously forged Conquest document being cited without question is that of a charter which found its way into "Burke's Landed Gentry" at the head of the elaborate and lengthy pedigree of Saltmarshe of Saltmarshe. Its "opening" read as follows:

> The following descents of this ancient house are derived from an old pedigree still in the possession of the family, as well as from entries in the Heralds' Visitations, MSS. in the British Museum, Hutchinson's Durham, Wills, court rolls, Post Mortem Inquisitions, and other public records. The family name was derived from the lordship of Saltmarshe in East Yorkshire, and in ancient days was spelt in several different ways, of which the most usual were Saltmerse (Domesday Book), Sautmareis, Saute Marays, and de Salso Marisco, the latter form being most common during the 12th and 13th centuries.

Learned and impressive enough this overture will sound. But we proceed.

Sir Lionel de Saltmerse owned land at Saltmarshe in the time of King Harold, was knighted by William the Conqueror 14 Nov. 1067, when he gave him under royal letters patent the lordship of Saltmerse in the presence of Thurkill, Earl of Warwick ; Peverill, Earl of Nottingham and Derby ; Simon Silvester, Earl of Leicester ; William Fitz Osborne, Earl of the Isle of Wight ; the said Lionel yielding *(sic)* himself, and giving a pair of mail gloves, at the monastery of Battle Abbey in Sussex, as appears from Doomsday Book in the Exchequer. His son,

Sir Lambert de Saltmerse was knighted by William Rufus at the forest of Dean, 20 March, 1085.

It is comparatively a detail that William the Conqueror was not at Battle Abbey, but in Normandy at the date named. It is also a detail that nothing of this appears, as alleged, in Domesday Book, which proves on the contrary, that " Saltemersc " (not " Saltmerse ") was still, in 1086, a ' berewite ' of Howden, the whole belonging, not to " Sir Lionel, " but to the bishop of Durham. The really deadly thing is the test of names.

For Thurkill was not "earl of Warwick"; (William) ' Peverill, ' though a great landowner in the counties of Nottingham and of Derby, was not earl of either shire ; and " Simon Silvester " is a wild shot, it would seem, for Simon de Senlis (*Silvanectis*), who was not an earl, and even if he had been, would not have been " earl of Leicester." *Quid plura ?* The document is a forgery, and the dates are fictions.

The very curious Sharnburn story[1] stands some-

[1] " Historia familiæ de Sharnburn " transcribed by Spelman and printed by Bishop Gibson in *Reliquiæ Spelmanniæ*, 1698, (pp. 189-200).

what apart, in respect not only of its sobriety, but also of the interest it would have for serious historians, could we accept it as authentic. It is specially exposed to the test which Christian names supply, and the result, when it is so tested, is distinctly satisfactory. Moreover, its tale of Edwyn's fate after the Norman Conquest is very much in accordance with what authentic history might lead us to expect. On the other hand, the fulness of the pedigree from the Conquest, which is a marked feature of the narrative, is a very suspicious feature, in view of the extreme difficulty of obtaining such information. Only an early family record of most exceptional character could supply such information. Moreover, one cannot but observe the fact that the narrative dates from the end of Elizabeth's or beginning of James the First's reign,[1] the most unfortunate period to which it could belong.

But let us see what the story is. Edwyn 'the Dane,' who had come into England with Canute, obtained Sharnburn and Snettisham in Norfolk, and held them till the Norman Conquest, when he was ejected by William de Albeny 'Pincerna' and William de Warrenne 'Forestarius.' He and others in like case thereupon complained to the Conqueror that they were peaceable men, who had never resisted him. On enquiring into the matter and being satisfied that the statement was true, the King ordered them to be reinstated and styled 'Drenges.' But Edwyn's two powerful oppressors would not restore his lands, and he had to content himself with a compromise. Nor did he finally obtain

[1] The latest date it mentions is 1602.

peace till he prudently married his son 'Asceur' to a natural daughter of the Conqueror.

The whole of this tale was duly accepted by Dugdale, whom it led into the serious error of making William d'Aubigny ("de Albini") come "first hither with William Duke of Normandy, at his Conquest of England"[1]. It was not till the reign of Henry I that William d'Aubigny settled in England, being provided by that King, of whose Norman supporters he was one, with a considerable fief in Norfolk[2]. His son was the first earl of Arundel (or Sussex). The evidence of Domesday Book is no less mercilessly destructive of the Sharnburn tale. The minuteness of its detail for the Conquest period points, Alas! to such deliberate concoction as that to which we owe the charters dealt with above.

The tales which follow seem to be supported by no alleged evidence, but to rest only on 'tradition.'

The Ashburnhams were resolved that their Conquest ancestor should die gallantly for his country at the hand of the Norman invader. As to the manner of his death they were indifferent enough. Thynne, the Elizabethan herald, held that

> Bertram Ashburnham, a baron of Kent, was constable of Dover Castle A.D. 1066; which Bertram was beheaded by William the Conqueror, because he did so valiantly defend the same against the Duke of Normandy.

It was this version that aroused the scorn of Pro-

[1] *Baronage*, I, 118. He also made a serious error in beginning his pedigree of 'Albini of Cainho' with the statement that "Henry de Albini" was "without doubt" a younger son of "Nigel de Albini," brother of the above William (*ibid*, p. 131). Henry was, on the contrary, the heir of quite another Nigel.

[2] *Red Book of the Exchequer*, p. 397.

fessor Freeman.[1] But the pedigree-maker was ready to serve up his 'Bertram' — as the cookery-books have it — "another way." The hero should fight and fall, in high command, with Harold.

Other accounts state that Bertram in the time of King Harold was warden of the Cinque Ports etc..... and being a person in great power at the landing of William the Conqueror, King Harold, who was then in the north, sent him a letter to raise all the forces under his command, to withstand the invader; and, when the king came up to oppose the Conqueror, the said Bertram, who had an eminent command in the battle, received so many wounds, that soon after he died thereof.[2]

One would have imagined that such an end was glorious enough for any ancestor; but a third and more elaborate version remains to amaze and delight us. In this version "the Baron of Ashburnham" combines with Stigand, the Primate, to wrest from the helpless Conqueror his confirmation of the liberties and ancient privileges of Kent.

In the peerage-writer's inimitable style, we are told that "the whole body of the nobility of Kent" with "the hearty approbation and consent of the inferior orders of the people" resolved to extort this concession.

William determined to visit that country, not only to gratify his curiosity, but also to smother the flames of rebellion that were ready to break out in it.

Thereupon the nobility and gentry

Having raised a considerable force, drew it together and advanced towards the King, whom they met and

[1] "Pedigrees and pedigree-makers" in *Cont. Rev.* Vol. xxx.
[2] Playfair's *Baronetage.*

surrounded at.... Swanscombe ; from which they would not suffer him to stir, till he had granted their demands and taken an oath etc..... nor were they satisfied with his oath, but obliged him also to give them hostages for their greater security.

The infuriated King, heedless of his oath and his hostages alike, repudiated all his concessions, and among the victims of his infamous vengeance

The Baron of Ashburnham had his head struck off near one of the gates of Canterbury, where he had lived much esteemed, and had been very active in the cause of liberty and his country...... The two sons of Bertram (Philip and Michael) lost their heads at the same time with their gallant father. [1]

Bertram, even at this early date, seems to have displayed the virtues of the typical Whig nobleman ; but why he should have lived at Canterbury, when his own seat was in Sussex, [2] is a problem hard to solve. It may, however, have been due to that family eccentricity which led this race of English patriots to bear such quaintly foreign names as Piers and Bertram, Philip and Michael. Michael is a name that had a fatal fascination for the pedigree maker who concocted " the great Carington imposture, " but ' Lionel ' and ' Leonard ' also were names which tripped from his fellows' tongues.

Of that successful resistance to the Conqueror, under the leadership of Stigand and himself, Professor Freeman wrote :—

Everyone knows the legend...... about the Kentish men coming with boughs in their hands and wresting from

[1] See Playfair's *Baronetage* for all this.

[2] His grandfather, Piers, according to the pedigree, was lord of Ashburnham " some years before the Norman Conquest. "

William a confirmation of their rights...... The tale describes the Kentishmen as led by Stigand, who was then undoubtedly in London. [1]

The Dictionary of National Biography, in its life of Stigand, tersely observes that "the story of his leading the men of Kent to meet William in arms and forcing him to confirm their privileges is a mere fable."

Mr. Louis Napoleon Parker knows better. In the Dover Pageant of 1908, which was widely advertised as the only one enjoying his management in that year, one of the greatest scenes was that of Stigand rallying the natives to resist the Norman invader and winning from William for Dover, to the joy of the 'Saxons', the proud motto 'Invicta.' What they did with it when they had got it, we were not told: perhaps they put it at the head of the borough rate demand notes.

Against such travesties of history I have ventured to raise my voice. If a pageant were frankly treated as a mere historical play, no harm might be done; but when it is represented as an educational influence and as actually teaching history, it may give fresh and vigorous life to long-exploded fiction. The historian finds it hard enough to keep such fiction at bay without its public and deliberate revival by means of 'historical' pageants. I am not speaking, of course, of so scholarly a production as the great Church Pageant, in which the public were enabled, by the labour of experts, to see the storied past live and move before its eyes.

But of the "Parker pageants," by the reader's

[1] *Norman Conquest* (2nd Ed.), III, 538.

indulgence, I would here say something ; for, apart from their influence on the great audiences on whom they must have left vivid impressions of history and archæology, they were no mere ephemeral productions. The publication of their texts in permanent form was announced last summer (1909).

Mr. Parker goes out of his way to inspire confidence in his accuracy by prefixing a note to the books of his pageants which assumes, in the case of Colchester, this form :—

> Every incident in the Pageant is based either on local tradition or on authentic history ; and in many cases the characters repeat the actual words spoken by their prototypes. This is especially the case in Episode VI.

When we analyse this signed statement, we find that it amounts to claiming that every incident in Mr. Parker's pageant is based either on fact or on fiction, a claim which no one would dream of disputing, but which can hardly be said to advance our knowledge.

But as Swanscombe, the scene of the alleged meeting between the Conqueror and the men of Kent, lies in the north-west of the county, and Dover at its opposite extremity, it is clear that even " local tradition " cannot in this case be invoked as a plea for deliberately falsifying " authentic history. "

For my part I declined to aid and abet Mr. Louis Napoleon Parker in making history ridiculous by connecting myself in any way with the Colchester Pageant of the following year (1909). The greatest stress was laid on its educational value ; special

provision was made for great audiences from schools, and even teachers were urged to attend and see the history of the town unfolded before their eyes. And the "book," to the uninitiated, appeared heavy with learning. Every episode was precisely dated; facts and names were thrust upon the public in almost pedantic detail; the lordships of "Eudo Dapifer" were recited from Domesday Book, and his style "Dapifer" explained; and even the charter of Richard I was read out by a mounted "herald" with explanations of 'scot and lot,' 'murdrum,' 'lastage', 'passage' and 'pontage.' Well might an audience imagine that if such a pageant erred, it was in excess of erudition and zeal for historical truth.

Yet it is not easy in a short space to give adequate illustration of its wanton and grotesque errors. One may pass over the marriage of Helena, daughter of Coel King of Colchester, to Constantius Chlorus in '274,' though authentic history rejects the fact and local tradition assigns it to 264, a quite impossible date. One may also forgive the Osyth episode of '650', though it was not only at variance with history, but substituted a mythical conversion of the folk for that which the famous bishop Cedd actually effected in Essex at this period.[1]

It is when we come to the marriage of Edward the Elder to 'Ecgwyn,' a youthful shepherdess, in '921', that in the growing light of history one calls a halt. Their son Æthelstan had actually been born some quarter of a century before the

[1] He was, as a priest, sent to Essex, at the request of Sigeberht, its King, in 653 to convert its people. The chapel of St. Peter's on the wall (Bradwell) is considered to owe its origin to him.

date here so precisely given ! And if Edward did marry the girl,[1] it was in his early youth, and not as "great King Edward ;" nor can the event be connected in any way with Colchester or its district, which was not included, when Æthelstan was born, in the realm of Edward's father, but was held by his enemies the Danes. "Local legend" is guiltless here ; it knows nothing of Ecgwyn, and it affords no excuse for this violence to history. By the very scene of the pageant there ran the wall of Colchester, that ancient wall which the Romans built, which the English stormed, as they routed the Danes, and which Edward visited and repaired, in 921. Here is the making, in the year named, of great and stirring pageant scenes, scenes that to those who saw them would teach real history. Instead of these Mr. Parker gives us the childish scene of Ecgwyn, a scene with which Colchester can have had nothing in the world to do, and to which he carefully assigns a perfectly impossible date.

For Episode III Mr. Parker enjoyed "the invaluable assistance of Mr. C. E. Benham," a local and ardent admirer of "the Master." With the usual affectation of accuracy "1157" was selected as the year in which "Thomas of Canterbury — Thomas Beckett" visited Colchester, accompanied by bishops whose names are given, including "Hilary of Chester" *(sic)* ; and Queen Eleanor asks the King how he can tolerate that "arrogant priest." The anxiety of the authors to be strictly historical doubtless made them oblivious of the fact that Thomas

[1] "Quedam concubina" she is styled by William of Malmesbury. The newly appointed bishop of Colchester alluded in his Pageant sermon to her "simple faith," which illustrates his own simple faith in Mr. Parker's history.

was not an archbishop, or even a priest, in 1157, but a highly secular person. He was, however, thoughtfully provided with first and second murderers (*vide* 'The babes in the wood') as "knights in attendance"![1]

The Pageant now burgeons with facts, names, and dates. Hubert de St. Clare, who "gave his life for King Henry at Bridgnorth" (p. 32), is summoned by that King to his presence two years afterwards ('1157') and entrusted with Colchester castle. Sixty years after his death his daughter is shown in the Colne meadows addressed as "sweetheart" by her husband, — who, as we might naturally expect, was dead at the time. As his name, 'Lanvallei', with its Celtic prefix, proclaimed his house to be of Breton stock, it is grotesquely altered into 'Langvale' throughout in the text of Mr Parker's pageant. With her dead husband "Dame de Langvale" welcomes, in this nightmare of history, "Robert, Prior of the Crouched Friars," accompanied, strange to say, not by friars, but by "his monks" (*sic*). One would have imagined that Green's 'History' had made the date of "the coming of the friars" familiar even to a schoolboy, but they are here shown us years before any friar set foot in England and longer still, of course, before the coming of the 'Crouched' friars. And they are even confused with their foes, the monks. It is thus that a pageant may be made of educational value.

We must hurry on and can only glance at "Allegna, bishop of Llandaff" in attendance on "Queen

[1] In the list of characters two of the knights who murdered him in 1170 attend him in 1157!

Catherine of Arragon" in 1515, who is duly made, as a Spaniard, to speak broken English. The scrupulous accuracy of this will be realised when it is explained that the bishop of Llandaff, in 1515, was Miles Sawley, an Englishman. As for the Spaniard his name might as well have been given as "Alleluia;" it is as wantonly distorted as that of the local Abbot, who being named William "de Ardele"[1] is, of course, transformed into "William de Airedale."

The crown, the *clou* of this wondrous pageant was the episode of the famous siege (1648). For this again "the invaluable assistance of Mr C. E. Benham" was secured, and a special point was made of minute historical accuracy. Accordingly, the royalist commander, George, earl of Norwich (so created four years before) is not only styled Lord Goring, but is even addressed as "Goring" by Sir Charles Lucas, the very man who would not have done so. This, no doubt, is one of the cases in which "the characters repeat the actual words spoken by their prototypes." Even at the very end of this, the closing episode of the pageant, there is the same affectation of accuracy. "Stephen Nettles, Rector of Lexden"[2] is introduced by name long after Mr Wyersdale had replaced him, and "Francis Marriage" is made the spokesman of the 'Company of Baymakers,' against the fine imposed on them, although the names of all those who had to pay are known, and neither among them nor in any of the records of 'the Dutch church' of Colchester is any

[1] From Ardleigh near Colchester.
[2] Within the liberties of Colchester.

Marriage to be found.[1] This, however, is as nothing when compared with the blunder, the grotesque and wanton blunder, on the Parliamentary Committee. The Royalists had brought as prisoners from Chelmsford the members of the County Committee for the Parliament and kept them while besieged in Colchester. It was needless to mention their names in a Pageant, but, to give the impression of accuracy, 'Goring' recites them in full. Will it be believed that, instead of reciting the real names of these gentlemen — which are duly printed in the standard (Morant's) and the modern (Cutts') histories of the town — he is actually made to recite those of the principal officers engaged in conducting the siege of Colchester? The blunder is the more inexplicable, because, of the "prisoners" he names, several are actually shown commanding troops in the contemporary siege-map, which is reproduced in the book.[2]

It is because this pageant pretends to be history, because of its minute affectation of accuracy, that I have sought to vindicate the truth.

In the Introduction contributed by a local town councillor, a panegyrist of "Parker pageants," we read that

> The wealth of material to hand has enabled him to found the early incidents of the story on recorded facts..... The story of Helena, her marriage with Constantius Chlorus, and the ultimate acceptance of Christianity by

[1] See Vol. xii of the Huguenot Society's publications.

[2] Viz. Honywood, Whaley, Bloys, Gurdon, Ewer, and Cook, though the fine old name of Bloys is disguised by Mr. Parker and his admirer as Bloggs! Of the remaining three named two were leading officers at the siege, namely Rainsborough, and, above all, "Henry Ireton" himself! The fourth I do not recognise.

the Empress and her son Constantine, is derived from a mass of material six or seven centuries old at least, stored in the Borough Muniment Room in Colchester Castle......

The sixth and last Episode.... deals most impressively with the siege of 1648, each scene and incident finding its warrant in some one of the many diaries and records still extant in the Borough Muniment Room.

One would presume that a councillor's statement on the records of his own corporation would be true. But if the writer were asked to produce the "mass of material" among the borough records on which is based "the story of Helena," her conversion, and that of her son, [1] or to name "the many diaries and records still extant" in that collection on which any scenes or incidents of the siege 'episode' are contained, he would find himself in a difficult position.

Let us now return from this digression to the tales of gallant "Saxons" resisting William and his Normans in the style of the Dover Pageant. I need not again dwell on the Stourton family legend concerning "Botolph Stourton, the most active in gallantly disputing every inch of ground with the foreigner and finally obtaining from the duke his own terms." For, of "this patriotic and gallant soldier" and his "exploits" Mr. Freeman disposed as a "monstrous fiction "...... "invented of set purpose to swell the credit of a family." Nevertheless the whole story was elaborated and confidently repeated in the great history of the family

[1] On "the myth of Coel, Helena, and Constantine" Mr. Cutts observes that "Helena was a native of Naissus, a town of Mœsia, of humble parentage; Constantine was born before Constantius set foot in Britain." *Colchester* (Historic towns) pp. 50-51.

which was published some years ago, in which we read that the position of that Botolph who—

> took an active part against the Norman invaders, and who himself made such a strong resistance against the Conqueror personally, led that monarch to arrange with Botolph on his own terms when the Conqueror invaded the Western parts of England...... All this is history, and it has been chronicled that it was actually at the residence of Botolph at Stourton that the Conqueror came to meet his opponents to arrange there the terms which these Saxon warriors had demanded and actually obtained from him (p. 12.)

It was fortunate for William that he had not to encounter many such gallant leaders as Bertram, lord of Ashburnham, or "Botolph, lord of Stourton."[1]

But even a Buckinghamshire squire could defy the Norman with success. Lipscombe, in his history of the county, preserves and apparently accepts the tale of Mr. Shobbington of Hedgerly Manor, who succeeded, like those two heroes, in bringing the Conqueror to terms. The Shobbingtons had held for generations this finely wooded estate when William granted it, like others, to one of his followers at the Conquest. But he did not know the man with whom he had to deal. Mr. Shobbington, declaring he would sooner die than lose the home of his ancestors, armed his servants and tenants and summoned his neighbours to his help. The Penns and the Hampdens and others of the county families of the period hastened to answer the call; they chose their position, threw up earthworks, and prepared to die in the last ditch. And if anyone

[1] See, for my criticism of the Stourton story, *Studies in Peerage and Family History*. pp. 50 *et seq*.

should doubt the truth of this veracious narrative, the earthworks are there to confute him.

Well might these gallant Saxons thus entrench their position, for William had supplied the Norman intruder with a thousand of his finest and bravest troops. The English, as historians inform us, could not fight on horseback ; but this did not deter them. In the words of Lipscombe.—

Whether they wanted horses or not is uncertain ; but the story goes that, having managed [1] a parcel of bulls, they mounted them and sallying out of their entrenchments in the night, surprised the Normans in their camp, killed many of them and put the rest to flight. The King having intelligence of it, and not thinking it safe for him, whilst his power was new and unsettled, to drive a daring and obstinate people to despair, sent a herald to them, to know what they would have, and promised Shobbington a safe-conduct if he would come to court; which Shobbington accordingly did, riding thither upon a bull, accompanied by his seven sons. Being introduced into the royal presence, the king asked his demand, and why he alone dared to resist, when the rest of the kingdom had submitted to his government, and owned him for their sovereign ? Shobbington answered that he and his ancestors had long been inhabitants of this island, and had enjoyed that estate for many years ; that if the king would permit him to keep it, he would become his subject, and be faithful to him, as he had been to his predecessors. The king gave him his royal word that he would, and immediately granted him the free enjoyment of his estate. Upon which the family was from thence called Shobbington alias Bulstrode ; but in process of time the first name was discontinued and that of Bulstrode only has remained to them.

Need one observe that the surname of Bulstrode

[1] In the old sense of the word, as applied to horses.

is merely derived from Bulstrode in Hedgerley? Lipscombe, however, who found this narrative "amongst some ancient documents in the possession of the family of Bulstrode," recites the cumulative proof that this tale of the Conquest is true.

The truth of this story is not only confirmed by long tradition in the family, but by several memoirs which they have remaining, and by the ruins of the works that are to this day seen in the park of Bulstrode, as well as by the crest of their arms, which is a bull's head etc. etc.

And is there not also the Bull inn to remind us of the bull Mr Shobbington 'strode'?

Should it be urged that it is waste of time to deal at the present day with tales so preposterous as this, here is the answer. A sober county historian, living under Queen Victoria, gives us his reasons for believing this story to be true. Foremost is the "long tradition in the family," that frequent and worthless plea, and among the others is their bull's head crest, which is merely derived, one need scarcely say, from the name of Bulstrode, even as the bull's head crest of the Nevills is derived from that of their Bulmer ancestors.

In Lancashire two ancient houses, the Pilkingtons of Pilkington and Rivington and the Traffords of Old Trafford, laid claim to the same legend. Both of them possessed a long pedigree, although it is certain that in neither case can it be carried back beyond the 12th century. The one outstanding feature of the legend, which varies somewhat in its details, is that the ancestor disguises himself as a thresher in a barn when pursued by Norman soldiery. Hence the crest which, in the Trafford

case, represents a man with a flail threshing and the motto 'Now thus.' Who shall undertake to say how these tales arise? One thinks of the crest of the Lathoms, and of the earls of Derby, their descendants, with its eagle and baby legend, or of that of the Leinster FitzGeralds, with its ape and baby story. Fuller's version of the tale is this :—

> Being informed by my good friend Master William Ryley, Norroy [1646-1667], and this country man, [1] that the Pilkingtons were gentlemen of repute in this shire before the Conquest, when the chief of them, then sought for, was fain to disguise himself, a thresher in a barn. Hereupon, partly alluding to the head of the flail (falling sometime on the one, sometime on the other side,) partly to himself embracing the safest condition for the present, he gave for the motto of his arms, 'Now thus, Now thus.' [2]

Of the Trafford story Agarde seems to give the earliest version.

> [Their] arms [i. e. crest] are a labouring man with a flayle in his hand threshinge, and this written mott,
>
> *Now thus*,
>
> which they say came by this occasion : that he and other gentlemen, opposing themselves against some Normans, who came to invade them ; this Traford did them much hurte, and kepte the passages against them. But that at length the Normans having passed the ryver came sudenlye upon him, and then he disguising himselfe, went into his barne, and was threshing when they entered, yet being known by some of them, and demanded why he so abased himself, answered, *Now thus*. [3]

The reader will at once recognise the likeness

[1] i.e. a Lancashire man.

[2] *Worthies*, II, 196. The strange device "Nowe it is thus" appears, it is interesting to note, on the standard of Sir William Tyler *temp*. Henry VIII.

[3] *Ancestor* No. IX, p. 75, from Hearne's *Curious discourses*.

between this tale of private resistance to Norman invaders and those I have dealt with above. Mr. W. H. B. Bird has indeed ventured to ask : "have we, in this crude legend, a genuine tradition of the Conquest ?[1]" But, though he does his best, the most he actually claims is that "if we dare not say the story is true, we may at least pronounce it likely enough."[2] Its likelihood I cannot see.[3] Mr. Bird would attach weight to the "tradition" that the Traffords held Old Trafford even before the Conquest. If so, the unlikelihood of their retaining it through that catastrophe, when other lands in that neighbourhood were passing into Norman hands, is increased, surely, by their offering armed resistance to the Normans. The forfeiture of any lands they held would have followed as a matter of course. It was only a Shobbington who could hope to retain his land by such resistance or a Stourton who could bring the Conqueror to terms by holding the "passes" against him.

It is unscientific to treat these legends in isolation. We have to place the Trafford story, with their crest of the thresher and his flail, by the side of the Hay family legend, with the Earls of Kinnoul's crest of a countryman bearing an ox-yoke, or

[1] *Ibid.*

[2] *Ibid.* p. 77.

[3] I have seen it stated that, in one locality, the legend is told of a Trafford of the time of the Civil War, who protected by this device his concealed treasure. This is parallel to the Dawnay story (commemorated in the crest of the family) which, we saw (p. 295) was assigned by tradition to two different periods, both, apparently, wrong. The confusion inseparable from so-called "tradition" cannot be insisted on too strongly. Even Mr. Bird rejects it in the case of Pilkington, though he admits that "the Pilkington mower is found on seals at an earlier date than Trafford's thresher" (*Ancestor*, VIII, 93) ; "the Pilkington mower had certainly been in use a century or so before." (*Ibid.* IX, 78).

that of the Hamiltons, with its saw in the oak tree and terse motto 'Through,' in memory of the ancestor who saved himself in his flight by disguising himself as an oak-cutter when his pursuers were upon him, and exclaimed to his comrade 'Through!' No intelligent antiquary would now accept that story or would believe that a husbandman named Hay, with his two sons, armed only with ox-yokes, held a pass against the Danes pursuing the Scottish army and changed defeat to victory. It was still possible, however, to write in 1887 that this "fabulous traditionary story would still appear to be held for gospel truth in the northern district of Aberdeenshire, as various allusions were made to it on the banners and triumphal arches displayed when the eldest son of the present Earl [of Errol] came of age, as well as in the speeches delivered on that occasion."[1]

There is yet another tale of the Conquest, which is worthy to rank by that of Mr. Shobbington of Bucks. It is that of John de Kynnardsley of Kynnardsley Castle, Herefordshire. At the head of the 'Lineage' of Kynnersley of Leighton and also of Sneyd-Kynnersley of Loxley there appeared in 'Burke's Landed Gentry' this paragraph : —

According to an old pedigree "the family of the Kynnersleys is very ancient, being seated long before the Conquest in com. Hereford, in a castle soe called at present. In Domesday Book it is recorded that when the Conqueror was possessed of his newe kingdome of England, hee sent his Commissioners throughout ye remote parts thereof, to know howe every man held his lands. In which time there was an ould gentleman

[1] *Great historic families of Scotland*, II. 370.

that lived and was owner of Kynnardsley Castle in com. Hereford; by name John de Kynnardsley, and by title a knight (if any knights were before the Conquest.) This ould gentleman was blind, he had then liveing with him twelve sonnes, whom with himself he armed, and stood in his castle gate, his halberd in his hand, attending the coming of sheriffs and other commissioners from ye King, who being arrived, demanded of him by what tenure he held his castle and lands; ye old knight replied by his armes, showing to them his halberd.

In spite of the ingenious way in which Domesday Book is introduced, we should search it in vain for this incident, which is obviously suggested by the famous story of Earl Warenne's answer to the *Quo Waranto* enquiry in 7 Edw. I. Stubbs tells it thus, on the authority of Hemingburgh: —

The earl of Warenne in particular resented the enquiry. When he was called before the justices he produced an old rusty sword and cried, 'See, my lords, here is my warrant. My ancestors came with William the bastard and conquered their lands with the sword, with the sword will I defend them against anyone who wishes to usurp them. For the king did not conquer and subdue the land by himself, but our forefathers were with him as partners and helpers.' The speech was mere bravado on the part of the earl, who although in the female line he represented the house of Warenne, was descended from an illegitimate half-brother of Henry II, but it expressed no doubt the view of the great feudatories of the preceding century; and it may have helped to call Edward's attention more closely etc. etc. [1]

But, though one must always hesitate to question anything that Stubbs accepted, it is doubtful whether we ought to recognise even this incident as true.

[1] *Const. Hist.* (1875), II. 110-1.

The tale is accepted everywhere. "The earl," says Mr. Barron, "is remembered in the histories by his braggart answer to Edward I's commissioners who questioned his warranties... when Warenne showed them for warranty the ancient and rusty sword of his ancestors who had conquered the lands with it" (*Ancestor*, VI, 191). Stubbs' *Select Charters* contains the passage from Hemingburgh — a contemporary and valued chronicler; our leading historian on the period, Professor Tout, accepts the story without hesitation in his monograph on Edward I,[1] and repeats it in his life of the earl;[2] Green, of course, tells the story; and Mr. Malden, the Surrey historian, gives it to his readers as true:[3] the "famous" answer, he writes, "has passed into a commonplace of history." And yet it is he himself who has referred us to the legal record which proves that the earl appeared by his attorney before the justices in Surrey and made the prosaic answer of 'prescription.'[4] Mr. Malden, it is true, seems to think that this was subsequent to the dramatic episode of "De Warenne's rusty sword flung upon the council table"; but Hemingburgh, our only authority for the tale, distinctly assigns it, not to a council, but to the earl's appearance before the justices.[5]

And no one, it would seem, has observed that we have also the earl's answer to the *Quo waranto*

[1] *Edward the First* (1893):— "When the King's lawyers came with their writ of *quo waranto*, the earl...... bared a rusty sword," etc.

[2] *Dict. Nat. Biog.* (1899), LIX, 366.

[3] *History of Surrey*, (1900), p. 110; *Victoria History of Surrey*, I, 347.

[4] "a tempore a quo non exstat memoria." The coronation of Richard I was then becoming the limit of legal memory.

[5] "vocatusque est... comes de Warenna coram justitiarios regis et interrogatus."

enquiry in Sussex. His abuse of his franchises and hunting privileges in his Conquest lordship of Lewes was such that "Sir Robert Aguylon" petitioned Parliament for redress, stating that the earl could show no title to their exercise.[1] His hare-preserving was a pest to his neighbours, urged this vassal of the earl, whose manor of Perching nestled at the very foot of the South Downs. At the midsummer eyre of the year 1279 the earl

> "was questioned before the Justices Itinerant in Sussex by what authority he claimed Free Warren in Worth and divers other lordships in Sussex; he pleaded that his ancestors, on the loss of Normandy and their own lands there, had compensation for the same by the grant of other lands here in England, with this privilege; that they and their heirs should have free warren in those and all other their lands which they then had, or afterwards should acquire, *in regard of their surname 'De Warenna'*[2] which plea was then allowed."[3]

It appears that neither in Sussex nor in Surrey did the earl perform his celebrated sword trick before the King's justices. In both counties he recognised their right to ask him *Quo waranto?* and advanced a peaceful plea. Are we to infer that Hemingburgh's story, definite and elaborate though it is, is a mere invention based on his lawless and overbearing character? I find it difficult to escape from that remarkable conclusion. It should be pointed out that the tale is found in only one MS. of the chronicle and that it describes very inaccurately the *Quo waranto* proceedings.

[1] *Rot. Parl*, I, 6*b*.
[2] The italics are mine.
[3] *Dugdale's Baronage*, I, 79, from the original plea-roll, (rot. 50).

The chronicle describes it as the king's object to know "quo waranto magnates tenerent *terras*; et si non haberent bonum warantum, seisivit statim *terras* illorum." Now the enquiry, on the contrary, was essentially one as to *franchises*, for these, according to the King's lawyers, could only exist in a subject's hands by a proved grant from the Crown.[1] This is fully recognised by Stubbs[2] and by Prof. Tout.[3] Lastly, Hemingburgh's statement that the King was alarmed by this incident and began to retrace his steps[4] is not confirmed by what we know of the *Quo waranto* proceedings.[5]

Pitfalls are about the historian's path, and, as I have always insisted, it is to the evidence of records he must look "as enabling the student both to amplify and to check such scanty knowledge as we now possess of the times to which they relate."[6] Tested by record evidence, Hemingburgh goes by the board.

But what are we to say of the amazing story actually told to the justices and apparently accepted by them as confirming the earl's claim? In the true Bulstrode spirit he alleged that his ancestors were granted free-warren "in regard of their surname *de Warenna!*" Now the origin of their

[1] *History of English Law*, I, 558-9.

[2] "the itinerant justices were to enquire by what warrant the *franchises......* were held." *Const. Hist.* II, 110.

[3] "royal commissions traversed the country, inquiring by what authority the lords exercised their exceptional powers. Many of these *franchises* were found," etc. etc. (*Edward the First*, p. 215.)

[4] "Rex autem, cum audivit talia, timuit subi, et ab incepto errore conquievit."

[5] Stubbs, after narrating the earl's indignant action, observes: "But the rigour with which the Quo Waranto writ was enforced shows that the King was already obliged to make extraordinary efforts to obtain money," (II, 111.)

[6] Prefaces to *Ancient Charters* (1888) and to *Geoffrey de Mandeville* (1892).

name is known. The Varenne is a tributary of the Arques, which flows into the sea at Dieppe ; and on it stood Varenne, now Bellencombre, where there is still seen the mighty moated mound which is the typical stronghold of a Conquest lord.[1] That they should have been granted freewarren because they took their name from Varenne is obviously a ludicrous story, and when we realise that the earl told it only some seventy years after the alleged grant, it throws light on the real value of those "family traditions" on which Conquest and other tales all too often rest.

And so we return to Sir John Kynnardsley confronting the Commissioners at his castle gate with his twelve sons about him. Mr. Shobbington, we remember, had only seven. It is sad to think that Sir John's halberd must go the way of Mr. Trafford's flail, of De Warenne's rusty sword, and of Mr. Shobbington on his bull, but they will find themselves in goodly company. The ghostly lords of Ashburnham and of Stourton have trod the way before them, and a host of 'Saxon' forefathers are about to follow in their train.

[1] See my paper on "The Castles of the Conquest" in *Archæologia.* Vol. LVIII.

THE ORIGIN OF THE HOUSE OF LORDS[1]

Effect of the Norman Conquest—Constitution of the Witenagemot—Council of the Norman Kings—A feudal body—Composed of the tenants-in-chief—Meaning of 'baron'—Meaning of 'peer'—The Lord's 'curia'—'Court' and 'council'—Principle of tenure Its breakdown in practice—Development of the writ—Writ replaces tenure—Privilege replaces duty—The 'lesser barons' excluded—The writ strengthens the crown—The hereditary right a safeguard.

With every facility at their command, and with every wish to do justice to their subject, the Lords' Committee on the Dignity of a Peer are compelled to confess, in the first of their voluminous and admirable reports,—

that after all the exertions of the former committees, as well as of the present committee, the subject has appeared to be so involved in obscurity that they have been unable to extract from the materials to which they have had recourse any conclusions perfectly satisfactory to their minds. At different times, and with different views, men of considerable talents and learning (some of them peculiarly qualified for the task by their previous studies and employments), have used the greatest industry in investi-

[1] The reader's attention is particularly drawn to the fact that this paper, as explained in the Preface, is here printed as it was published a quarter of a century ago, in magazine form (Oct. Dec. 1884, May 1885). The few additions now made are enclosed in square brackets.

gating the subject; but, unfortunately, they have in general adopted certain positions, which they have sought to prove, and have suffered themselves to be misled in many instances by the influence of party and the eagerness of controversy.[1]

And they close that Report with these words:—

They are conscious of many defects, and fear there may be many inaccuracies in what they now offer; and they are disposed to consider this report as rather leading the members of the House to satisfy themselves by their own exertions on points which may be the subject of doubt or difficulty, than as affording all the materials necessary to remove doubt and difficulty on those points, with respect to which there may be found sufficient authority for the purpose; at the same time showing that it is highly probable that no exertion can now obtain all the information necessary to remove all doubt and difficulty on a subject apparently involved in great obscurity.[2]

Hallam also, in entering on an investigation of the same subject, pronounces it, with truth, "exceedingly important, but more intricate and controverted than any other."[3] Nor could anyone be more conscious than myself of the difficulties that surround on every side the origin and the development of the House of Lords. I would therefore disclaim, at the outset, for my conclusions any pretensions to finality, especially where they are of an original character, based on my independent investigations.

It is impossible, moreover, within the limits of an article, to do more than generalise on so wide a subject, or to argue out each disputable point.

[1] 1st Report (25th May, 1820), p. 14.
[2] *Ib.*, p. 448.
[3] *Middle Ages* (1860), iii., 4.

I would insist on "a wide divergence" between the "two schools—the legal and the archæological," of which the former, from necessity and from natural tendency, has exercised, in my opinion, so injurious an influence on the study of our constitutional antiquities. Nowhere is that divergence more apparent than in the treatment of such a subject as I am about to discuss, a period of *transition*, where the same words have different meanings, not only at different periods, but even at one and the same period, and thus refuse to be bound and fettered within the narrow and misleading limits of legal definition.

I take as my starting-point the Norman Conquest. In so doing I am well aware that I am somewhat at variance with the historical school, as represented by Dr. Stubbs and Professor Freeman; and still more with the archæological, as represented by Mr. Gomme. Yet, that, in this matter, the Norman Conquest did make a distinct break in the continuity of our historical development; that the history of the House of Lords can be traced uninterruptedly back to the Norman Conquest, and (uninterruptedly) no further; that an absolutely new and fundamental principle was introduced at this point, and that from this principle all that follows can be deduced—all this I hold to be capable of absolute demonstration.

I would invite attention to four changes which distinguish the Assembly after, from the Assembly before the Conquest. (1) In *name:* the "Witenagemot" is replaced by the "curia" or "con-

cilium." (2) In *personnel:* the "Witan" are replaced by "Barones." (3) In *nationality:* the Englishmen are replaced by Normans. (4) In *qualification:* "wisdom" is replaced by "tenure."

It is in the fourth and last of these changes that the vital distinction is to be sought.

For what was the Witenagemot itself on the eve of the Norman Conquest? For the answer to this question we naturally turn to the works of those recognised authorities on the political and constitutional history, respectively, of that period —I mean Professor Freeman and Dr. Stubbs. Now even the former, with his democratic bias, recognises it as at that time "an aristocratic body,... a small official or aristocratic body." He adds that "the common title of those who compose it is simply the *Witan*, the *Sapientes* or *Wise Men*," and that "we find no trace of any property qualification." [1]

It is similarly proclaimed by Dr. Stubbs that "the members of the assembly were the wise men, the sapientes, witan"; and he further divides its *personnel* into two elements: (1) "the national officers, lay and clerical, who formed the older and more authoritative portion of the council"; (2) "the king's friends and dependents." [2]

But while, according to Professor Freeman, "we find no trace of nomination by the Crown," [3] Dr. Stubbs insists on that power of nomination, and attaches to it great importance, urging that, by its means, the kings

[1] *Norman Conquest,* 2nd Edit., I., 102-3, 590.
[2] *Const. Hist.,* i., 124-5.
[3] *Ut supra.*

could at any time command a majority in favour of their own policy. Under such circumstances the Witenagemot was verging towards a condition in which it would become simply the council of the king, instead of the council of the nation.[1]

Now, whatever differences of opinion there may be between these two great authorities,—differences which I cannot here discuss—they are both entirely at one with Kemble in rejecting what Professor Freeman terms "the strange notion of Sir Francis Palgrave, that a property qualification was needed for a seat in the Witenagemot."

Let us now turn from the Witan to the council of the Norman kings.

There would appear to me to be three paths by which we may approach that difficult subject, the constitution of the National Council under the Conqueror and his immediate successors. We may either (1) examine that constitution at the point where it emerges from obscurity, and work backwards from that point to the Conquest. Or we may (2) collect from contemporary writers the references to such councils as were held during this period, and draw, from the language employed, inferences as to their probable constitution. Or we may (3) investigate the Conqueror's principles of administration, and then, applying them to the circumstances of the case, and adjusting them by his political necessities, form our conclusions as to the course he would be most likely to adopt. And if these three different paths should lead us to the same conclusion, we may safely

[1] *Const. Hist.*, i., 140.

claim that such conclusion is not likely to be wrong.

Briefly pursuing these three methods, we obtain, as to the first, from Dr. Stubbs himself, when treating of the "gatherings of magnates" in the great council of the kingdom, the following definite admission :—

> that those gatherings, when they emerge from obscurity in the reign of Henry II., were *assemblies of tenants-in-chief*, is clear on the face of the history.[1]

And in another place he again observes that

> the national council under Henry II. and his sons seems, in one aspect, to be a realization of *the principle which was introduced at the Conquest*, and had been developed and grown into consistency under the Norman kings, that of *a complete council of feudal tenants-in-chief*.[2]

It is true that he regards this feudal ideal as having been less perfectly attained, and, indeed, only inchoate, in the days of the Conqueror himself, when he would assign to the assembly a constitution more nearly resembling that of the Witan. But as, from its introduction into England with the Conquest, the feudal system had to struggle for existence against adverse and disintegrating influences, we must presume that it would be more, not less, powerful under the Conqueror than under the second Henry. Whatever may have been, in practice, the composition of the Conqueror's councils, we must infer that, in theory, from the first they must have been composed of tenants-in-chief.

[1] *Const. Hist.*, i., 356.
[2] *Ib.*, i., 563-4. [The Italics are mine].

Dr. Stubbs' view is clear and consistent. He calls upon us to see

(1) in the Witenagemot a council composed of the wise men of the nation ; (2) in the court of the Conqueror and his sons a similar assembly with a different qualification; (3) and in that of Henry II., a complete feudal council of the king's tenants. [1]

And he similarly contends, in his auxiliary work, that

although not, perhaps, all at once, the national council, instead of being the assembly of the wise men of the kingdom, became the king's court of feudal vassals,

and that, at any rate, by the time of Henry II., " its composition was a perfect feudal court." [2] The only point, therefore, that I question, is whether this court is at all likely to have been less feudal under the Conqueror himself than under Henry II. Admit, as Dr. Stubbs does, the " different qualification," and the question, I would submit, is at an end : we have at once an assembly founded on *tenure*, that entirely new and distinctive " principle which was introduced at the Conquest." [3]

Secondly, as to the constituents of the Council during this obscure period, slight as is the available evidence, it points to the same conclusion. The Conqueror announces himself as acting " communi consilio et concilio archiepiscoporum et episcoporum et abbatum et omnium principum regni mei," [4]

[1] *Const. Hist.*, ii., 168.
[2] *Select Charters*, pp. 15, 22.
[3] *Const. Hist.*, i., 564. See on this point, p. 257, where it is contended that " the organisation of government " on the feudal " basis " was actually "*put an end to*" by "the legal and constitutional reforms of Henry II."
[4] Ordinance separating the spiritual and temporal courts.

while the chronicler describes him as acting "consilio baronum suorum."[1] In the charter of liberties of Henry I. (1100) the expression used is similarly—"communi consilio baronum totius regni Angliæ,"[2] and we shall see below that the *barones* were the body of tenants-in-chief. It is true that, according to Professor Freeman, "the body thus gathered together kept their old constitutional name of the Witan,"[3] but for this assertion he has no evidence, either from official documents or from Norman chroniclers. He takes the expression from the English chronicle, the compiler of which would cling to the term, at once from habit and from patriotism. We have, indeed, a *reductio ad absurdum* in the fact that we might claim on the same ground that the true title of Pontius Pilate was that of "shireman" of Judea! Dr. Stubbs more accurately assigns to the assembly "the title of the great court or council,"[4] the title, in fact, which had been borne by the assembly of the Norman dukes.

[I leave the paragraph preceding as it was originally written, because it is absolutely correct in its statement as to Mr. Freeman. It has, however, been brought to my notice that he was infuriated by this criticism on the part of a young writer. He wrote in protest from Somerleaze (27 Aug. 1885) to the late Mr. Edward Walford, and on Mr. Walford's death, the letter came into the market and

[1] R. Hoveden, *Chronica*, ii., 218.
[2] *Select Charters*, i., 96.
[3] *Norman Conquest*, iv. 623; cf. pp. 690, 694, etc., etc.
[4] *Const. Hist.*, i., 356.

was acquired by one of my friends. From it I take this outburst:

In one case I really must use the words direct falsehood. .....Mr. Round says something to the effect that I have said that the [name] *Witan* or *Sapientes* was continued long after the Norman Conquest, but that I bring no instances...... Now he could hardly have written that without having *Norman Conquest* V, 412 before him and here instances of the use of *sapientes* in that way are given. He must have trusted to the likelihood—a strong one certainly—that his readers would accept what he said without making the reference.

On the contrary, I hope that my readers *will* make the reference. They will then discover that the supposed instances are nothing of the kind. Mr. Freeman's text there runs:—

The name of Witan indeed dies out; the formal style of the wise men is lost in such vague descriptions as *proceres* and *magnates*. But the ancient title dies out very gradually. It long survived the Conquest, both in its English and in its Latin form.

In the footnote to which we are referred we find the proof given thus:

the name Witan ...... goes on in Latin. In Benedict, I, 116 Henry the Second consults "archipresules episcopos et comites et *sapientiores* regni sui." Again in I. 169 he appoints a court officer "Consilio episcoporum suorum et aliorum quorundam *sapientum virorum* regni sui." Lastly in I, 207 he settles the number of the judges" "per consilium *sapientum* regni sui."

Of these quotations the very first is decisive, it will be seen, against Prof. Freeman. For who were the essential members of the old Witan? The archbishops, bishops, and earls. Yet the

chronicler here names them *separately* from the "sapientiores regni sui," which proves that by the latter term he did not mean the Witan, in which they would have been comprised. The point is not only of some importance in itself, but also an interesting illustration of Mr. Freeman's persistent error (which may not be sufficiently realised) in assuming a specialised meaning for words which had actually a looser denotation than now. A 12th century chronicler would no more use *sapientiores* in the restricted sense of "the Witan" than he would use "majores natu" in the sense only of the Ealdormen. My statement that Mr. Freeman could produce no evidence "either from official documents or from Norman chroniclers" remains unshaken.]

Thirdly, passing to the policy of the Conqueror, it is now, of course, a recognised fact that it was essentially "a policy of combination, whereby the strongest and safest elements in two nations were so united as to support one sovereign and irresponsible lord."[1] But it is also a fact that, the Norman system originating as it were from above and the English from below—the former strongest at the centre, and the latter at the extremities,—these "strongest and safest elements" were to be sought in the upper portion of the Norman body politic, and in the lower portion of the English. Thus it would be the object of the Norman kings "to strengthen the Curia Regis, and to protect the popular courts."[2] Consequently, the retention of

[1] *Ib.*, i., 444.
[2] *Ib.*

the English Witan would not form part of the "policy of combination." The Norman *curia* or *concilium*, moreover, would derive, as we shall see, from the feudal lord its existence and its *raison d'être*: the Witan, on the contrary, derived their authority from comparatively independent sources. Here again, then, the former would be selected by the Norman kings.[1] Practically, the policy of the Conqueror may be thus briefly summarised: to use his rights as feudal lord to strengthen his position as king; and, on the other hand, to use his rights as king wherever he was weak as feudal lord. Now, turning from the two extremities of his administrative system to the two periods of his reign, we see how this principle must have worked. So long as his danger was from the resistance of the English, or the invasions of their allies, he would be found to rely on that feudal system which formed the tie between him and his scattered followers. But when his hold on the country grew firmer, and he could set himself to check the feudal element, his government would then become less exclusively feudal. Here, then, we are driven to the same conclusion, namely, that the feudal council must have been introduced with the Conquest.

We may notice, at this point, the famous assembly of 1086, at Salisbury, because it has been vigorously claimed as a survival of the old national assembly of freemen. Mr. Gomme claims for it that

Here, indeed, was a great primary assembly, unin-

[1] It will be observed that here I incline to Gneist's view (*Verwalt.*, i., 238 sq.), rather than to that of Dr. Stubbs.

fluenced by Norman laws, and tradition has handed down through the chronicler Orderic that the number here assembled was no less than sixty thousand. [1]

But let us turn to the truly contemporary accounts, not to that so styled by the Lords' Committee, [2] and learn from them, as quoted by Dr. Stubbs himself, [3] the true composition of this assembly. It consisted of *(a)* the tenants-in-chief; *(b)* their own feudal tenants *(milites eorum)*, and of no one else. As to there being "no less than sixty thousand" present, that number, as Mr. Freeman reminds us, [4] comes from Orderic, who bases it on his notoriously absurd boast that the Conqueror divided the kingdom into fees for sixty thousand knights ("lx millia militum." [5]) [6] This fact is of special importance as proving that Orderic is at one with Florence in limiting this assembly to *milites*, and including no class below them. And the purpose of the assembly agrees with its consti-

[1] *Antiquary*, ix., 55.
[2] 1st Report, p. 34.
[3] *Select Charters*, p. 78; *Const. Hist.*, i., 266.
[4] *Norm. Conq.*, iv., 695.
[5] Lib. iv., cap 7.
[6] The argument is this: Florence excludes from this gathering all beneath the class of "milites," by which term (as the early portion of the passage shows) he means the under-tenants enfeoffed by the tenants-in-chief.

Ordericus says, in one place, that there were sixty thousand present at this gathering. In another he asserts that the Conqueror (649 D) had "lx millia militum" in England, and in another that the Conqueror so disposed the land into knights' fees "ut Angliæ regnum lx millia militum indesinenter haberet" (IV. 7).

Ergo, Ordericus must have based his 60,000 at Salisbury, on his estimate of the knight's fees, and, consequently, must have meant that the 60.000 at Salisbury were all *milites* (cf. "se tertio" etc.) which is precisely what Florence tells us.

It is very instructive to compare this "body whose numbers were handed down by tradition as no less than sixty thousand" (*Norm. Conq.* IV 694) with the "sixty thousand horsemen" (*Ib.* IV. 562)—"ut ferunt, sexaginta millia equitum" (533 C)—of thirteen years earlier, and the numbers of the Norman invaders "commonly given at sixty thousand" (*Ib.* III. 387) of seven years earlier still. Orderic there gives (500 B)—"quinquaginta millia equitum cum copiâ peditum," where milites were obviously horsemen.

tution. The under-tenants swore fealty to William as their feudal lord—they became his "men" (*wæron his menn*)—that their lords, the tenants-in-chief, might not be able to claim their exclusive fealty, if engaged in rebellion against the king. Lastly, though we find Dr. Stubbs speaking of "the great councils of Salisbury in 1086 and 1116,"[1] and even claiming such assemblies as one form of "the royal council;"[2] yet Mr. Hunt has shown good reason for doubting whether the assembly of 1116 corresponded with the peculiar character of the gathering in 1086,[3] and, as to the latter, I find no evidence whatever that it can be described as, or in any way discharged the functions of, a "Council." This distinction is of great importance, as, had it done so, the royal council would not have been limited, as it essentially was limited, to the tenants-in-chief alone.

Two more points have yet to be noticed, as they seem to have been hitherto overlooked, and as they throw light on that important subject, the denotation of *barones* and *milites*. In the same passage in which he describes the gathering, Florence alludes to the great Survey: "Quantum terræ quisque *baronum* suorum possidebat, quot feudatos *milites*" (*i. e.*, how many tenants they had enfeoffed). We see that the *barones* must here include *the whole body of tenants-in-chief*. When, therefore, he goes on to speak of those present at the Salisbury gathering as "archiepiscopi, etc., etc., . . . cum suis militibus," we understand that all the former

[1] *Const. Hist.* i., 358.
[2] *Ib.*, i., 564.
[3] *Norman Britain* (1884), pp. 120-1.

are summed up in the class of tenants-in-chief, while the latter are, similarly, their feudal tenants.[1] And finally, when we compare the passage in Florence with that in the *English Chronicle*, we find the two classes rendered by "his witan and ealle tha land-sittende men," thus proving the very point I contended for, namely, that by "witan," in the Conqueror's reign, was really meant nothing else than *barones*, that feudal council of tenants-in-chief, based on the new principle of *tenure*, which, as Dr. Stubbs observes, was "introduced at the Conquest."

Thus, then, to resume the results of our investigation, we have seen that the old English Witenagemot was replaced under the Norman kings, and indeed, in my own opinion, immediately after the Conquest, by a feudal council, which though it might, in practice, bear to it a certain superficial resemblance, was based on a wholly novel and radically distinct principle, the principle of *tenure*. That council was co-extensive with the tenants-in-chief, the *barones regis*, who sat in it exclusively as such. It will next be my object to trace the process by which that council was restricted in practice, and so, eventually, in principle, to one section of those tenants-in-chief, and thus to connect our House of Lords, as a baronage and as a peerage, with the *barones* and the *pares* of Norman days.

I shall hope to show, in so doing, that this great historic institution springs from a single principle, a principle to which its existence can be traced by

[1] All the tenants-in-chief, I mean, were, *as such*, "barones." But those who enjoyed, in addition, an official dignity, as the Earls, Bishops, etc., would, of course, figure under those names in ordinary affairs of state.

overwhelming proof. And that principle is—*Vassalage.*

In the former part of this paper, it may be remembered, I undertook " to connect our House of Lords, as a baronage and as a peerage with the *barones* and the *pares* of Norman days."

By so doing I proposed to establish that this assembly is of essentially *feudal* origin, and that the fundamental principle from which it springs is no other than *Vassalage.*

It is wonderful, when we glance at the literature of this subject, to perceive the wasted ingenuity and labour, the hesitating results, and the singular errors that are one and all owing to the want of proper definitions. If the great scholars who have handled this subject had only, before writing about "barons" and "peers," endeavoured to form a clear conception of the meaning, or meanings, of *barones* and *pares*, they would have been saved from many a pitfall, and might even have discovered that in the meaning of these terms is to be found the key to the entire problem.

When, for instance, in a remarkable passage, unnoticed, so far as I know, by historians, William de Braose is represented as appealing to the judgment of "the barons my peers"[1]—and this so early as 1208— it may well be wondered what idea it conveys to those whose eyes it meets, either of the class to whom he appealed, or of the grounds on which he appealed to them. I propose, then,

[1] " Paratus sum et ero domino meo etiam sine obsidibus satisfacere secundum judicium curiæ suæ et baronum parium meorum, certo mihi assignato die et loco."—M. PARIS, *Chronica Majora* (Ed. 1874), ii, 524.

here to adopt as my text four words which occur in this passage : *dominus*, *curia*, *barones*, *pares*. But let us first endeavour to form a clear conception of the meanings of the term *barones*.

The development of the word must be sought, I would suggest, not in the relation of the "man" to his *land*, but in the relation of the "man" to his *lord*. For myself, I claim for *baro* six distinct meanings, most of which were in use at one and the same time.

1. A *man*. Dr. Stubbs speaks of it as "in its origin equivalent to *homo*," and as "used in the *Leges Alamannorum*... for *man* generally."[1] Scholars differ as to its etymology, but are agreed that such was its meaning when it emerged in the eighth century. This meaning survived in the "baron et feme" of the law-books, and, indeed, still survives in the "baron and femme" of heraldry. For *baro*, like the allied *vir*, meant not only "man generally," but man in the special sense of our "man and wife."

2. A *vassal*. "The word," says Dr. Stubbs, "receives, under feudal institutions, like *homo* itself, the meaning of vassal."[2] This meaning survived not only in the "court baron" (of which more below), but in the occasional use of *barones* by certain great tenants-in-chief, to indicate their under-tenants. It may be added that not only *homo*, but our own "man," was undergoing a like development, as in the "wæron his *menn*," quoted by me above.[3]

[1] *Const. Hist.*, i. 365. So, "tam baronem quam feminam" (*Lex Rip. Tit.* 58, No. 12) and "barum aut feminam" (*Lex Alam. Tit.* 76).

[2] *Ibid.*

[3] p. 319.

3. A *tenant-in-chief.* In this, the most important of all its meanings, *baro* is a contraction of "baro *regis*,"[1] the vassal of *the king* being so distinguished from "vassal" generally. *Baro*, says Dr. Stubbs, "appears in Domesday, and in the charter of Henry I., *in its recognised meaning of a tenant-in-chief of the king*."[2] How it came to assume that meaning, no one, I believe, has attempted to explain. I cannot but think that advantage was taken of the existence, side by side, of the forms *homo* and *baro* to specialise the latter as a tenant-*in-chief*, while the former represented that tenant's men, *i.e.*, the "under tenants."[3] That such a distinction did, in practice, grow up, is clear, and its obvious convenience is surely the explanation.

4. A *palatine tenant.* Its use in this highly specialised meaning is most familiar in the case of the Palatine Earldom of Chester. Here, again, I am not aware that any explanation has been suggested. But if I am right in the view that I have expressed in the preceding paragraph, it would follow, most naturally, that, as possessing "the regalia," an Earl Palatine would desire that those who held of him in chief should be distinguished by the same name as those who held in chief of the king.[4]

The same suggestion would also explain why the more powerful even of the non-palatine lords would occasionally take upon themselves to address their tenants as "barones."

[1] "Magnus homo et baro regis."—*Royal Letters*, i. 102, 104.
[2] *Const. Hist.*, i. 365. [The italics are mine].
[3] "Homines baronum meorum."—*Charter of Henry I.* (1101).
[4] "The Earl.... was said to hold his earldom as freely by his sword as the king held England by his crown," etc., etc.—*Const. Hist.*, i. 363.

5. A *tenant-in-chief not otherwise distinguished.* I have already (see p. 320) alluded to the importance of this distinction. "Every earl," says Hallam, "was also a baron."[1] "All the members," we are reminded by Dr. Stubbs, "were barons by tenure, greater or less."[2] That is to say, all the members were *barones* (*regis*)—tenants-in chief,—but those who, in addition, possessed special titles, earls, bishops, abbots, and so forth, were also, and more usually, spoken of by these names. Thus it first came to pass that "barones" were identified, like modern "barons," with the lowest rank in the peerage.

But it must always be remembered that this which I have classed as the *fifth* meaning of the word was in use concurrently with the *third* (and others), and that it is only from the context we can tell in which sense it is employed.

I shall recur below to the vital point to which this distinction leads us, namely, whether all the members of the Assembly sat in it as "barones" (*i.e.*, in virtue of being tenants-in-chief), or whether the earls, etc., sat in it by some different right.

6. A member of *the upper section of the preceding class.* Just as the tendency to distinguish earls, bishops, etc., from the other *barones* narrowed the limits of the baronage *from above*, so the tendency to exclude from its ranks the "lesser" barons (*barones minores*) similarly narrowed it *from below.* The goal therefore to which the "baro" was tending was that of *a member of the more important*

[1] *Middle Ages*, iii. 5.
[2] *Const. Hist.*, i. 358.

class ("barones *majores*") *of tenants-in-chief not distinguished by any higher title.*

I trust the above classification may serve to clear the ground, and to save us from those pitfalls which are chiefly owing to the want of these very definitions.

It is needless to include such forms as the "Barons of the Exchequer" (from whom may be traced our use of the word in the courts of justice to this day)—for they merely represented those members of the *curia* (*i.e.*, the *barones* in the "third" sense) who acted as its Exchequer Committee—or such as the "Barons" of London and of the Cinque Ports, which I look upon as an attempt to feudalise (in form) the tenure of our more important towns.

Pass we now to the *Pares*. Just as the *barones* were, in their origin, *vassals*, so the *pares*, as Madox has shown, were in their origin *fellow-vassals*.[1] Their parity consisted in the fact of their holding of a common lord by a common tenure. And just as "barones" was qualified, as we have seen, by various words not expressed, so "pares" represented the expression "pares *curiæ*." But, it will be remembered, this parity and its corollary, the *judicium parium* ("trial by peers"), was confined to no one class in the vast feudal hierarchy. It was applied to all freemen (*liberi homines*) by the Great Charter (Art. 39), and I have even noted a case in which all the tenants of an abbey were entitled to certain privileges, *except* one unfortunate class and

[1] *Baronia Anglica*, p. 14. So Spelman :—"Pares dicuntur qui, acceptis ab eodem domino......feudis, pari legi vivunt, et dicuntur omnes pares curiæ", etc.

their "pares." It was, therefore, obviously desirable that the highest class of "pares"—those who were such in virtue of their holding directly from the Crown—should be distinguished from all those who were *pares* of any lower *curia*. In the need of such distinction, I venture to think, arose the style of "pieres *de la terre*," or (as we now say) "peers *of the realm*,"—for those who in virtue of their tenure *in capite* were the "pares" of the "curia *regis*."

We have now analysed *barones* and *pares*, and have seen that they were essentially terms of relation. Vassals were *barones* relatively to their lord; they were *pares* relatively to one another. That by "peers" is meant simply "equals," it is not so difficult to realise; but that "baron," which has now so long represented superiority and distinction, should have originally implied inferiority and subjection, is a fact too often forgotten, or perhaps unconsciously overlooked. Hence it is that the ludicrous error as to the meaning of "court-baron" has obtained so wide a prevalence. Lynch, the Irish institutional writer, though reputed a specialist on the subject, actually looked on a court-baron as so called from being the court of a parliamentary "baron"; while, in the latest edition of the *Encyclopædia Britannica*, "C. J. R." thus writes of Baron:—

The origin and comparative antiquity of barons have been the subject of much research amongst antiquaries. The most probable opinion is that they were the same as our present lords of manors (!); and to this the appellation of court-baron given to the lord's court, and incident

to every manor, seems to lend countenance .... but the latter only [*i.e.*, those holding by grand sergeantry] ..... possessed both a civil and criminal jurisdiction, each in his *curia baronis* ! [1]—Vol. iii., p. 388.

We are now in a better position to understand the appeal of William de Braose to the judgment of the "barons" his "peers" (*judicium curiæ suæ et baronum parium meorum*). Dr. Stubbs observes of the Great Charter (Art. 39) :—

The *judicium parium* was indeed no novelty ; it lay at the foundation of all German law ; and the very formula here used is probably adopted from the laws of the Franconian and Saxon Cæsars. [2]

But the record to which I would invite attention is one far earlier than the Great Charter ; it is the writ of John's great grandfather, issued, according to Dr. Stubbs, in 1108-1112, and printed in his *Select Charters* at p. 99. By the side of the passage here extracted I print an extract from the *Libri Feudorum* as almost startling evidence of the sources of Henry's enactments.

CONRAD THE SALIC. (1024—1036.)	HENRY THE FIRST. (1108—1112.)
Si contentio fuerit de beneficio inter capitaneos, coram imperatore definiri debet ; si vero fuerit contentio inter minores valvassores et majores de beneficio, in	Et si amodo exsurgat placitum de divisione terrarum, si est inter barones meos dominicos tractetur placitum in curiâ mea : et si est inter vavassores duorum

[1] For the true meaning of court-baron, see *Const. Hist.*, i. 399 :—"Every manor had a court baron, the ancient gemot of the township, in which by-laws were made and other local business transacted. ... Those manors whose lords had.... sac and soc..... had also a court *leet*, or *criminal* jurisdiction."

[2] *Ibid.*, i. 537.

judicio parium suorum definiatur per judicem curtis.—*Lib. Feud.* I. xviii.

dominorum tractetur in comitatu.—*Fœdera*, i. 12; *Select Charters*, p. 99.

The very use of the rare term *vavassores* is significant as to the inspiration of Henry's writ, which enforces the point on which I have insisted, namely, the essentially *feudal* origin of the *curia*, and of its descendant, the House of Lords.

But we must bear in mind that William de Braose, when he claimed to be judged by the "barones," his "pares" (1208), claimed to be so judged in the "*curia*" of his "*dominus.*" Just so, in 1341, the Lords asserted their right to be judged by their peers *in full parliament.* [1] Here we have at once a striking illustration of that descent of Parliament from the *curia* on which I am about to enlarge. For what was this *curia*—*mea curia*, as Henry I. in the above writ terms it? In its origin it was nothing but that court of the feudal lord (*dominus*), to which his vassals owed suit and service, in which they were judged by their fellow vassals, and which, when summoned, they were bound to attend. When the *dominus* happened to be the king, his *curia* was distinguished as the *curia regis*. But it was obviously as *dominus*, not as *rex*, that he held and presided in that court. Now the problem we have to solve is this: Can we connect this *curia* with the *concilium?* Can we deduce the latter from the former? Or must we seek for it a different origin?

On this point Dr. Stubbs observes:

[1] "Les piers de la terre. . . . ne deivent respondre, n'estre juggez fors que *en pleyn parlement* et devant les piers."—*Rot. Parl.*, ii. 127.

It would be rash to affirm that the Supreme Courts of Judicature and Finance were committees of the national council, *though the title of Curia belongs to both*, and it is difficult to see where the functions of the one end and those of the other begin.[1] And it would be scarcely less rash to regard the two great tribunals, the Curia Regis and Exchequer, as mere sessions of the king's household ministers, undertaking the administration of national business without reference to the action of the great council of the kingdom. The historical development of the system is obscure in the extreme .... The great gatherings of the national council may be regarded as full sessions of the Curia Regis, or the Curia Regis as a perpetual committee of the national council, but there is no evidence to prove that the supreme judicature so originated.[2]

The gist of the matter, however, is given in the following passage:—

It may be enough here to note that, whereas under William the Conqueror and William Rufus the term *curia* generally, if not invariably, refers to the solemn courts held thrice a year or on particular summons, at which all tenants-in-chief were supposed to attend, from the reign of Henry I. we have distinct traces of a judicial system, a supreme court of justice called the Curia Regis, presided over by the king or justiciar.[3]

The use of *curia*, under the Conqueror, is illustrated by the passage from William of Malmesbury (*Vit. S. Wulfst.*, ii. 12):—

Rex Willelmus consuetudinem ... ut ter in anno cuncti optimates ad *curiam* convenirent de necessariis regni tractaturi, etc., etc.[4]

[1] The italics are my own.
[2] *Const. Hist.*, i. 376, 387.
[3] *Ibid.*, i. 376-7.
[4] *Ibid.*, i. 370.

And Dr. Stubbs himself (i. 369-70) speaks alternately of these assemblies as "courts" and "councils." Why, then, are we to seek for the *concilium* a different origin than the *curia?* Why should we fly in the face of history when the *concilium*, as I shall show, can be deduced from the *curia?*

It is notorious that among the duties which vassals owed to their lord was that of "counsel"—when he asked for it. But it also is obvious that such "counsel" would, in early days, be rarely asked for, and would, for practical purposes, be little more than a formality. Dr. Stubbs accordingly observes of the early "courts" or "councils":—

> The exercise of their powers depended on the will of the king, and under the Conqueror and his sons there are scarcely any traces of independent action in them.[1]

As yet, therefore, the *curia* would be chiefly viewed as a court (in the sense in which we speak of "a court of justice") in which the king, as lord, administered justice to his vassals. But as "counsel" (*consilium*) became, in form at least, a more prominent feature in those gatherings, so they would tend to assume the name of "council" (*concilium*). Here we have one of those instances in which, as I contend, a careful study of the *word* throws light on the history of the *thing*. But while this process was taking place on the one hand, on the other there was simultaneously growing up "a judicial system," as Dr. Stubbs

[1] *Ibid.*

terms it (*vide supra*), which involved the existence of a department with specially trained officials. Here, then, as it seems to me, is a rational and consistent explanation of the development of the *concilium* from the *curia*. As the assembly of vassals became gradually known as the *concilium* (from the growing prominence of the "counsel" feature), so the title of *curia regis* would be gradually monopolised, in the most natural course, by the *curia* in its judicial (the older) aspect. Thus would the terms "court" and "council," which remained synonymous, as Dr. Stubbs admits, for some time after the Conquest, be gradually differentiated in meaning, the *concilium* denoting the "curia" in its consultative aspect, and becoming thus the parent of the House of Lords, and eventually of all "Parliament"; while the *curia regis* represented the "curia" in its (older and) judicial aspect, and became the parent, not only of our judicature, but also, through the Exchequer, of our financial administration; for it need hardly be observed that in the Norman period the judicial and financial systems were so united as to be practically one.

Whether the above view may meet with acceptation or not, I would claim for it that it is at least scientific. Why does Dr. Stubbs leave us, after all, to wander in the regions of conjecture? Why is he driven, as we have seen, to confess that the "development of the system is obscure in the extreme"? Because the determination to divorce the *concilium* from the *curia* in origin, and to derive the former, at all hazards, from the Witan pre-

cludes a consistent explanation and leaves the *curia regis* in the air, its origin undetermined, its development haphazard. Once admit that in the feudal *curia*, an institution of which the existence is undisputed, we have the common origin, by a natural development, at once of the *concilium* and of the *curia regis*, and all these difficulties vanish.

I am, of course, aware that such a view as this exposes me to the characteristic rejoinder from Mr. Freeman that I cannot possibly be a "real scholar" or have read my "history with common care;"[1] but, convincing as that argument should doubtless be, I am compelled to believe that the House of Lords descends, on the contrary, "by unbroken succession," not from the "primary assembly" of freemen, not even from the aristocratic *Witan*, but from the feudal *curia*, in which the *dominus* was surrounded by his *barones*.

THE TRANSITION FROM TENURE TO WRIT

In investigating the transition from tenure to writ we have, admittedly, to take for our "fixed point" the well-known clause of the Great Charter:—

Et ad habendum commune consilium regni, de auxilio

[1] "I hold that the House of Lords is by personal identity, by unbroken succession, the ancient Witenagemot, and further that the ancient Witenagemot was a body in which every freeman of the realm had, in theory at least, the right to attend and take part in person. *The former of these two positions I do not expect that any real scholar will dispute;* the latter has been made —and I do not at all wonder at it—the subject of much dispute. The unbroken continuity of our national assemblies before and after the Norman conquest is manifest to *everyone who reads his history with common care......* There is no change which implies any break in what we may term their corporate succession."— *Fortnightly Review*, xxxiii, 240 (Feb. 1883).

assidendo aliter quam in tribus casibus prædictis, vel de scutagio assidendo, summoneri faciemus archiepiscopos, episcopos, abbates, comites, et majores barones, sigillatim [1] per litteras nostras; et præterea faciemus summoneri in generali, per vice-comites et ballivos nostros, omnes illos qui de nobis tenent in capite.

This is our *terminus ad quem*. A century and a half, we must remember, had elapsed between the Conquest and the Great Charter, and, as we have seen, for that lengthy period the evidence is so scanty as to leave a wide field legitimately open to conjecture. But from whatever principle we elect to start, we have to arrive somehow or other at the same *terminus ad quem*. There, at length, we stand on sure and common ground.

Now, differing as I do both from Dr. Stubbs and from Mr. Freeman, it is necessary that I should call attention to the striking way in which they differ between themselves. While they both look ultimately to the Witan, Dr. Stubbs elects to derive the assembly from a small council of "magnates"; Mr. Freeman from a gathering of all landowners, if not, indeed, of all freemen. Consequently, to reach their common goal, they have to follow paths which involve the adoption of theories diametrically opposed. Dr. Stubbs brings us to the Great Charter by widening the constitution of the assembly; Mr. Freeman by narrowing it. In the view of the former, the assembly was passing through a process of expansion; in the view of the latter,

[1] [I do not hesitate to render this, as Stubbs did "singly by our letters," reading therefore, "si*n*gillatim." Mr. McKechnie, however, in his valuable monograph on the Charter (*Magna Carta*, 1905), renders: "by our letters under seal" (p. 291). But the Latin will not bear this sense.]

through one of contraction. Thus, Dr. Stubbs writes of the reign of Henry II. :—

Greater prominence and a more definite position are assigned to the minor tenants-in chief ; there is a growing recognition of their real constitutional importance, a gradual definition of their title to be represented and of the manner of representation, and a growing tendency to admit not only them, but the whole body of smaller landowners, of whom the minor tenants-in-chief are but an insignificant portion, to the same rights.... The point at which the growth of this principle had arrived during the period before us is marked by the fourteenth article of the Great Charter..... The council is thus *no longer limited to the magnates* ; *but it is not extended so as to include the whole nation, it halts at the tenants-in-chief.*[1]

Mr. Freeman, on the contrary, argues as follows on this same "fourteenth article" :—

The vague practice of earlier times had stiffened into a definite custom.... The right to be summoned was established in the case of the King's tenants-in-chief; but it did not go further. This amounted to *a practical disfranchisement of all but the King's tenants-in chief.* There was no need to take away their right by any formal enactment.... *the "land-sitting-men" of Salisbury easily stiffened into the tenants-in-chief of the Great Charter.*[2]

So far from "the land-sittende men" including the tenants-in-chief, they were expressly distinguished from them. This misapprehension is one of the causes of the errors in Mr. Freeman's theory. The point of the comparison, however, remains. The two views of the process which had been taking place from the Conquest are opposite and irreconcilable.

[1] *Const. Hist.*, i., 564, 566.
[2] *Norm. Conq.*, v., 409-10.

Dr. Stubbs and Mr. Freeman are both wrong; but I shall here, as throughout, address myself to the views of the former, as alone deserving of notice.

I claim, it may be remembered, that the House of Lords "descends...... from the feudal *curia*, in which the *dominus* is surrounded by his *barones*."[1] Once firmly grasp the conception of these *barones*, and no difficulties remain.

After straining every nerve to minimise the feudalising results of the Conquest, even Mr. Freeman is compelled to admit that—

> the effect of William's confiscations and grants was to bring the tenure of land, the holding of land as a grant from a lord, into a prominence which it had never had before, to make it, in short, the chief element in the polity of the kingdom.[2]

That is precisely my contention. This was, in Dr. Stubbs' words, "the principle which was introduced at the Conquest."[3]

The tenure of land was that "different qualification"[4] for a place in the assembly from that which had been known before the Conquest. If, like most of our historians, we look no deeper than the surface, we may fail to detect any striking change; but if we keep steadily before us the "different qualification," the principle of *tenure*, we shall readily understand all that follows.

What then is the principle of *tenure*? Dr. Stubbs possibly, Mr. Freeman certainly, have failed

[1] See p. 349 above.
[2] *Norm. Conq.*, v., 370.
[3] See p. 329 above.
[4] See p. 330 above.

to steep themselves in feudal principles sufficiently to grasp this idea. When we speak of "Barony by tenure," the idea suggested is always that of a dignity held in virtue of the possession of a particular estate. We think of such cases as the Earldom of Arundel, or the famous Barony of Berkeley. But this is not the principle of *tenure*. Tenure does not turn on what or where the land is, but on how it is held; tenure does not imply the relation of a man to his land, but his relation to his lord; tenure is not his privilege as the lord of a fief, but his duty as the man (*baro*) of his lord. In short, the principle of tenure is derived, not from below, but from above. We must work down to it from the lord, not up to it from the land.

We start then from the assemblies of the Norman kings, necessarily, as in every feudal polity, composed of their tenants-in-chief (*barones*), and of no one else. This principle contained the seeds of its own decay, and must have steadily tended to break down from its very first introduction into England.

The worst flaw in this system, and the point that we ought to keep steadily in view, is the harsh and artificial division of society, necessarily involved by its conception. The relation to the lord being its sole standard, it attempted to place on an equality those often of most unequal position, while, conversely, on the same principle, it would sever, by a sharp line, those who socially were in all respects equal. A system so unnatural would be difficult to maintain, even under favourable circumstances, but that difficulty would be

increased when it was introduced into a country of the size of England, at once by the greater number of those who, as *barones*, were all equally (*pares*) members of the *curia* (or *concilium*), and by the greater disproportion between the larger and the smaller tenants-in-chief; between (slightly to anticipate) the *barones majores et minores*. It is easy to understand that, on two grounds, the lesser *barones* would, from the first, keep away, as far as possible, from the *curia*. In the first place, the cost of attendance would be more serious, relatively, to them than to the magnates; in the second, even if they did attend, they would find themselves relatively powerless. Lastly, the feudal polity was, in England, superimposed on the existing native one, which, in its shire system and in its popular courts, maintained a rival organisation.[1] It is, therefore, our task to trace the process by which the feudal theory here broke down in practice.

Let us then recur to our "fixed point," the article I have quoted from the Great Charter, and see what information we can gather from it. Firstly, we learn that the *commune concilium* still consisted in theory of the body of tenants-in-chief; secondly, that attendance had come to be regarded no longer as a burden, but as a right; thirdly, that the Crown, in the issue of the writ, had discovered a means of withholding that right; fourthly, that a definite distinction had been arising between the greater and the lesser tenants-in-chief.

[1] See the *Leges Henrici Primi*, vii. 1: "Sicut antiquâ fuerat institutione formatum," *et seq.*

Now, there are few more difficult questions than the origin of the Writ of Summons. Dr. Stubbs has acutely pointed out that an incident in Becket's life affords evidence of the practice in his day. But there can be no question that it was of earlier origin. It is natural to suppose that for any special assembly (*i.e.*, apart from the three annual ones) special intimations would be addressed at least to the magnates, to secure their attendance. When a full attendance was specially required, as at the Council of Northampton, the king *solemne statuens celebrare consilium*, *omnes qui de rege tenebant in capite mandari fecit.*[1] Attendance being, for the lesser tenants (*barones minores*) at any rate, a burthen, it would, no doubt, be practically confined to those who, in each case, received the summons. So far, however, the summons was, by no means, a privilege to be valued. But when, on the one hand, the assembly grew in power, after the Norman period, and, on the other, the misgovernment of John made it eager to exercise that power, all this would be changed. It was no longer the object of the Barons to avoid, and of the Crown to enforce, attendance. The contrary, in fact, was now the case, and this being so, the writ of summons suddenly assumed a very real importance.

This, I would suggest, is the turning-point in the process, and, consequently, a matter to be clearly grasped. From being little more than an incidental form, the writ, under these changed

[1] Grimm, *Vita S. Thomæ*, p. 39. The great importance of this passage lies in its identification of the whole body of tenants-in-chief with the "episcopi, comites, barones totius regni," of whom R. de Diceto (c. 536) independently tells us this Council (A.D. 1164) was composed.

circumstances, would become itself the one essential. Now that the *duty* had become the *right* of attendance, the Crown would naturally take advantage of the fact that the assemblies had in practice, as I have above suggested, been only attended by those who had received the writ of summons. Practice and theory, in that practical age, were so conveniently and so persistently confused that it would be an easy step from this to the doctrine that, without a writ of summons, no *baro* could attend.[1]

We have evidence, I contend, in the Great Charter, that the Crown had been endeavouring to use the writ as a means of excluding its opponents from the assembly. This would imply that the writ was already recognized as a necessary condition of attendance. The Crown, then, had succeeded in so far introducing "the thin end of the wedge." But as yet, it was "the thin end" only. The *barones*, while admitting that they could not attend unless summoned, insisted that they all must be summoned. That this view is the correct one, we surely gather from the remarkable passage in Mathew Paris, where we read that, some ten years

[1] Mr. Freeman rightly perceived the importance of the Writ of Summons as a factor in the development of the House of Lords. He writes :—"At least from the Norman conquest onwards, our kings took to summoning particular men to the Assemblies, sometimes in great numbers, sometimes in small. Now it is a universal law that, when a practice of summons comes in, it gradually comes to act as the shutting out of those who are not summoned" (*The Nature and Origin of the House of Lords*, p. 11). But (1) he is inconsistent with himself as to the date when summons came in ; (2) he fails to grasp the all-important distinction between the time when attendance was a privilege, and the time when it was a hardship ; (3) he is absorbed in his fancies about the "freeman," and so fails to confine himself to the tenants-in-chief, who have alone to be considered ; (4) he contends (for present party purposes) that "among the barons, too, he [the king] had a very free choice" (*Ib.* p. 12), thus missing the point.

after the Charter, the *barones*, assembled at Westminster, refused to give their answer to the royal demands :—

Quod omnes tunc temporis non fuerunt, juxta tenorem Magnæ Cartæ, *vocati ;* et ideo sine paribus suis tunc absentibus, nullum voluerunt tunc responsum dare, vel auxilium concedere vel præstare.

In the royalist reaction after the death of John, the Crown, this implies, must have revived its attempt to employ the issue of the writ for the exclusion of troublesome opponents. And that such was the case we actually learn from the significant omission of "the fourteenth Article" in the subsequent reissues of the Great Charter. Passing now over forty years, we come to the famous parliament convoked by Simon de Montfort. This I claim as a most important link in the chain of development. By a characteristic stroke the skilful earl seized upon the writ of summons as a means of excluding, in the name of the Crown, all but his own partisans. This was, of course, an extreme case, and presents a striking parallel to those autocratic measures in which the "freedom" of Cromwell surpassed the tyranny of the Stuarts.[1] It proved, however, the growing tendency to admit the control of the Crown over the summons, and so marked a further stage in the transition from tenure.

It is difficult to pronounce confidently on so wide and intricate a question, but it would seem that the eventual success of the Crown, in establishing its control over the writ, must have been due, on the

[1] [See for instance, my demonstration, in 'Colchester and the Commonwealth' (*Eng. Hist. Rev.* 1900, xv, 641-664), of Cromwell's restriction of the borough electorate to his own partisans].

one hand, to its own caution in not venturing to exclude magnates of importance ; and, on the other, to the steady growth of a counter-balancing principle in the doctrine that a man once summoned must be summoned always, and, indeed, as it was ultimately held, his heirs also. This amounted to a virtual compromise, by which the Crown established its control over the original issue of the writ, at the cost of surrendering it for all subsequent issues. When we add to this the oligarchical spirit that characterised the *barones majores*, and that made them readily, so long as their own writs were safe, acquiesce in the disappearance of the lesser tenants, we shall find it easy to understand how the Crown acquired what I may term its right of exclusion among the " barons by tenure, " that is, the tenants-in-chief.

But one cannot fully comprehend the breakdown of tenure, without glancing at the fate of the *barones minores*, or lesser tenants-in-chief. They were, as I have said, from the first the weak point in the system. The feudal theory made the least of the *barones* the equal (or " peer ") of the greatest, on the ground of their common relation to their lord. This unnatural equality could not work in practice. The distinction between the " greater " and the lesser *barones* that we meet with in the Great Charter must have established itself very early. A lamentable amount of erudition has been expended on this really simple distinction. What constituted a *baronia major*—whether size, or privileges, or character of tenure—has been long and keenly discussed. It has been hoped thus to

ascertain the meaning of a *baro major*. A moment's thought should show us that *baronia* was derived from *baro*, not *baro* from *baronia*. Consequently, a *baronia* can have originally meant neither more nor less than the holding of a *baro*. To hold *per baroniam* was, in the first instance, neither more nor less than to hold *ut baro*—as a tenant-in-chief. When, therefore, we read of the *barones majores* or *minores*, we have a right to ask, why should these expressions mean anything else than what they do mean, viz., the "greater" and "lesser" tenants-in-chief? [1] When we speak of "rich and poor," we do not torture ourselves to ascertain where the division should be drawn, nor do we look upon these terms as technical. [2] And so, taking the words *majores* and *minores* as they stand, we see that, for practical purposes, the line would draw itself. Hence when attendance had become a privilege to the magnates, it would still, for the reasons I have given, be valueless, or even a hardship, to the lesser *barones*, who would gladly dispense with the special summons. Thus we see, in the Great Charter, that while the assembly was still, in theory, co-extensive with the tenants-in-chief, the "general summons" was covering the

[1] [This is the view that was subsequently taken by Pollock and Maitland (*History of English Law*, I, 260), who "regard the distinction as one that is gradually introduced by practice, and one that has no precise theory behind it. The heterogeneous mass of military tenants-in-chief could not hold together as an estate of the realm ;...... but the line between great and small has been drawn in a rough, empirical way, and is not the outcome of any precise principle." I have noted a curious confirmation of this view in a London deed of Richard I's reign which speaks with similar looseness of "the greater barons (*majores barones*) of the City."]

[2] [The parallel division of serjeanty into 'grand' and 'petty' which originated in the Great Charter affords, I think, an illustration of such non-technical classification.]

fact that the "lesser" tenants were already dropping out. The whole process can be better traced in Scotland, where it took place much later. In England, as is well known, the "general summons" to the lesser tenants was addressed to them through the sheriffs. This brought them into fatal contact with *the old shire-organisation.* By that strong organization they were inevitably attracted, to be merged politically, in due course, in the general *corpus* of under-tenants and freeholders. So it was that the "knights of the shire," by becoming identified with the Old English shire-organisation, were severed from those "greater barons," henceforth the "barons" *par excellence*, who duly and easily developed into our House of Lords.

By this definite and striking rupture, tenure, and with it the feudal polity, received a deadly blow. In the ideal system, land was everything, its owner and his blood nothing. Henceforth, tenure having broken down, the writ of summons leaps into prominence, because there is nothing else to take its place.

The final stage in this development, from the territorial to the personal, was reached when the Crown to its power of *ex*clusion added that of *in*clusion; that is to say, when in addition to omitting some of those who were tenants-in-chief, it could venture to summon to the assembly some of those who were not. By this the initiative of the Crown became so absolute, that had it not been—*pace* Mr. Freeman—for the counterbalancing influence of the doctrine of the hereditary right to the writ, the House—and this appears to me a

striking thought—might have sunk into a mere formal gathering of the nominees and creatures of sovereign.

To Mr. Freeman the doctrine of "ennobled blood" is notoriously a "silly superstition." Nay, rather, an abomination. Rejecting "the accidental hereditary element," he assures us that

> It must always be borne in mind that it is the personal summons to Parliament which is the essence of peerage... This is what has made the English peerage so utterly different from any continental nobility. Nobility, so far as it can be said to exist in England at all, is attached to the possession of an hereditary seat in Parliament, and to nothing else. It is the writ of summons to Parliament which is held to "ennoble the blood," whatever that means. For as every one knows, there is in England no nobility in the sense which the word bears in other lands.[1]

But now that the right to attendance is no longer derived from tenure, it is difficult to say what it can be derived from, if not from "blood." Those who now hold "Baronies by Writ," hold them because they are the heirs[2] in blood of the party first summoned. True, as Mr. Freeman urges, that "with us the children of the peer are commoners." But why is this? Precisely because the House is *feudal* in origin, as its "peers" and "barons" still witness, and, consequently, the feudal principle of primogeniture, the identification of the fief with its actual tenant alone, still dominates our peerage.

We have, then, in our House of Lords, an assembly of feudal derivation, springing from a court of vassals, which has been changed, by the force of

[1] *The Nature and Origin of the House of Lords*, p. 16.
[2] [or co-heirs].

circumstances, into an hereditary peerage, still modified by the feudal principle; still reminding us, by the evidence of its nomenclature, of its origin in the Norman Conquest; and still retaining, down to our own days, representatives of the tenure element, whatever modern historians may say, in the non-hereditary—bishops.[1]

On the other hand, in the House of Commons, we have the resultant of the representative system in the Anglo-Saxon local courts, the summary and ultimate development of Teutonic government from below.

[1] "Archiepiscopi, episcopi, et universæ personæ regni, qui de rege tenent in capite, habent possessiones suas de domino rege *sicut baroniam*,...et *sicut barones ceteri* debent interesse judiciis curiæ domini regis cum baronibus," etc., —*Constitutions of Clarendon*, Cap. xi.

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