A PAPER

ON

THE MAR PEERAGE

READ BEFORE

THE ALLOA SOCIETY

OF

NATURAL SCIENCE AND ARCHÆOLOGY,

ON

TUESDAY Evening, May 4th, 1875,

BY

THE REV. A. W. HALLEN, M.A.,

Incumbent of St John's, Alloa;

TOGETHER WITH

The Judgment of the Committee of Privileges, Pedigrees, &c.

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The Mar Peerage Case.

The Mar Peerage Case is one of especial interest to Alloa people, because the Earls of Mar and their progenitors—the noble and powerful Erskines—have been resident here for more than five centuries, and a direct line of heirs male has held the Tower of Alloa as the stronghold of the race. But, apart from the local interest which we have in the matter, the title of Mar is one of historic fame. Who that knows what Scotland has done, knows not the name of Mar? And before the family of Erskine added glory to the ancient title it was powerful for good or evil in the annals of our land. It may be well, before we go minutely into the case, to try and explain the nature of that title, which existed without doubt for some generations successively till the senior line of the original territorial Earls failed which Mr Goodeve claimed to have succeeded to, but which the House of Lords has not adjudged to him, having decided that Walter Henry Erskine, Baron Erskine, also Earl of Kellie, Viscount Fentoun (Premier of Scotland), Baron Dirleton, and Baron Erskine of Dirleton, is also Earl of Mar, because Queen Mary created his ancestor, John Lord Erskine, Earl of Mar, and not because he is descended from the territorial Earls of Mar.

Alban formed a part of what is now called Scotland—it was in fact the nucleus of the future kingdom; it was divided into seven provinces or earldoms; the Lords of these seven territories were distinct from the other Earls of Scotland—their

distinctive title was Mormaor, just as in the old German Empire certain princes of the realm were termed Electors. These Mormaors were, it is true, called Earls also by old historians, but their powers far exceeded those of an ordinary Earl, and their title depended on the possession of one of the seven provinces into which the kingdom was divided. The seven provinces were:—

1. Angus and the Mearns.
2. Athol and Goverin (Gowrie).
3. Strathern and Menteith.
4. Fife and Fortreve.
5. Mar and Buchan.
6. Moray and Ross
7. Caithness.

Of these Mar and Buchan was a very important one, containing as it did the even then flourishing city of Aberdeen, having Lowland vassals and Highland bands at its command, and several rich religious houses—the primitive schools of art and learning—within its boundaries. Not one of these Earldoms remain at this day—not only have the provinces been broken up into counties and estates, but the descendants of the old Mormaors or Earls no longer hold the old titles. The same titles in most cases do now exist, but they are of more modern creation, and are not in any case held by the heirs of the old possessors. *(See appendix B.)*

The title of Earl of Angus (Duke of Hamilton) dates from 1389.

The Earl (Duke) of Athol dates from 1628.

The Earldom of Strathern and Menteith was created in the 17th century.

The Earl of Fife is an Irish Peer, and the creation is recent.

The Earl of Moray is a Stuart, and the title as it now exists was created by King James VI.

The Earldom of Caithness dates to 1455, and the family now holding it does not represent the old Mormaor family.

Buchan, which went with Mar, is now held by a branch of the Erskines, who, as we shall see, hold the title of Mar under a new creation. We see then that had Mr Goodeve made out his case, viz., that the old grand earldom *was restored fully and wholly* by Queen Mary, and that he was heir to it, Mar would have been the only great provincial Earldom left of all the seven. He would have held a title more ancient and more noble than any peer under a Royal Duke, for he would have been Mormaor of a vast province. But the task was impossible; the Royal Stnarts had taken good care to break up for ever a body of men who, having once had the power of electing their Sovereign, were likely to regard it as their just prerogative to control his policy, and, if needful, do violence to his person. The seven territorial Earldoms are extinct or dormant—so dormant, indeed, that it is not likely their slumbers will ever be broken. *(See Appendix B.)*

Though the old Mormaorship of Mar was by some before the recent decision said to be only dormant, this fact has been finally settled that Queen Mary failed to revive it, whatever her wishes, or the wishes of Lord Erskine, may have been, and we can hardly expect that in the 19th century any steps will be taken to unravel a network of difficulties, or clear away clouds of confusing evidence, especially after the wording of the Decision which you will presently hear. The only result of such a course would be that heirs would spring up to all the other Earldoms, and we should have 7 Mormaors without an acre of that territory which *alone* gave them their rank. The present Earl of Mar has been adjudged the title, because Queen Mary created his ancestor, John Lord Erskine, an Earl of Mar, and not because he has in his veins the blood of the old Mormaors.

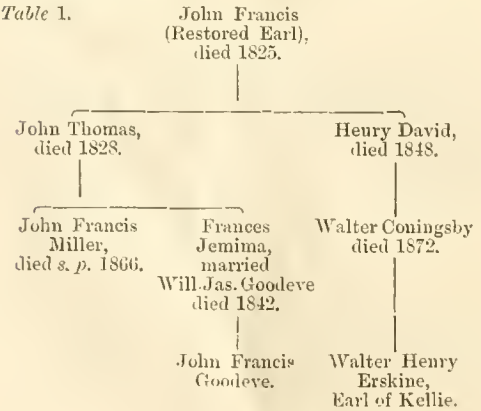
It is no easy task for one who is only a layman, as far as law is concerned, to put into brief form a long and intricate law suit. All the more as it affects the question of pedigree, which I find is a very puzzling one to many persons. The question raised in the suit was this, who was Earl of Mar

on the death of John Francis Miller Erskine, Earl of Mar and Kellie in 1866? was it Walter Coningsby Erskine, his first cousin, who being his heir male succeeded to the title of Earl of Kellie in terms of the patent, and to the Mar estates in terms of the entail? Or was it Mr John Francis Goodeve, his nephew, who claimed the title as *nearest* heir? There was no patent in existence to settle the point as there was in the Kellie Earldom. Lord Kellie argued that the Erskines, his ancestors, were *created* Earls of Mar, and that as nothing was left on record as to the descent of it the established rule in such cases must be followed, and by this rule it would come to him as heir male.

Mr Goodeve argued that Queen Mary had *restored* the old title to the Erskines who were the heirs to it, and who had been unjustly deprived of it at first, and kept out of it afterwards—that, therefore, as it came to the Erskines through female descent, it should come to him through his descent from the sister of the late Earl.

I will give you a simple table of the relationship of the two claimants, leaving out all names that do not concern us.

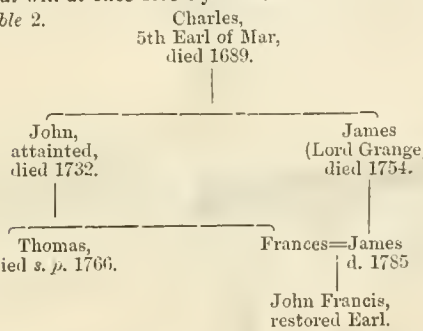
Table 1.



You will see that the late Earl of Mar, and his sister, Lady Frances Goodeve, were first cousins to the late Earl of Kellie. Mr Goodeve and the present Lord Mar are second cousins.

This question of succession has never arisen before, for all the Erskines, Earls of Mar, left sons to succeed them, with one exception, that of Thomas, son of John, the attainted Earl of Mar. He, just as the late Earl of Mar, left no issue, but he also had a sister who survived him. Had it not been that the title was then under attainder, the question would have arisen, did she, the Lady Frances, succeed? or did her cousin, the heir male, succeed? But you will see from the next table what will at once arrest your attention—

Table 2.

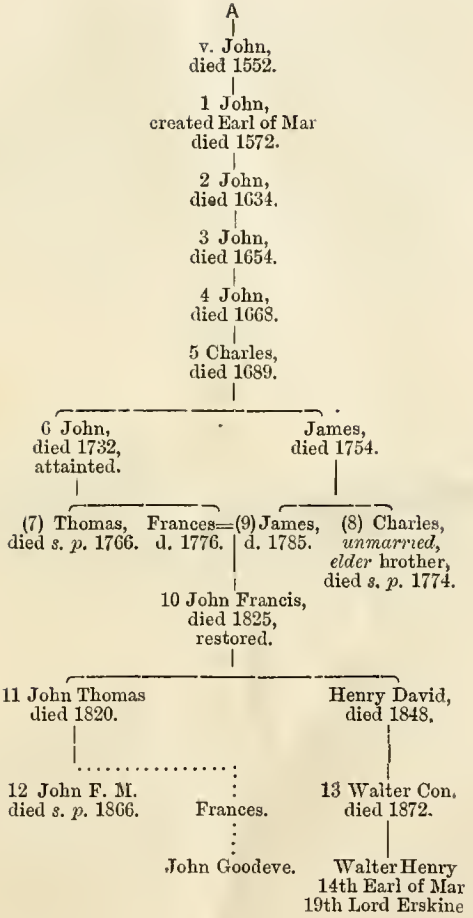


The heir male married the heir general. In table 1 the *separation* of the two lines commences with the two children of John Francis, the restored Earl, and they continue distinct. In table 2 the separation of the two lines commences with the children of Charles, 5th Earl, but they come together again by the marriage of his grand-daughter Francis to his grandson James. John Francis, the issue of that marriage, was restored to the Earldom—he was both heir male and heir general. Neither claimant was in a position to prove whether he was restored as heir male or as heir general. The present decision shows it was because he was heir male.

I will now give you table 3, a pedigree of the Erskines, in order to show how simple the succession of the Earldom was until the death of the attainted Earl's son—

Table 3.

Henry Erskine,
of Erskine on the
Clyde,
alive 1226.
|
John,
alive 1252.
|
John,
alive 1296.
|
Sir John,
alive 1309.
|
Sir William,
died 1329.
|
Sir Robert,
Great Chamberlain
of Scotland 1350,
had a grant of
Alloa 1360,
died 1385.
|
Sir Thomas,
died 1419,
married
Janet Barclay or
Keith.
{Here the Mar blood comes in.}
|
i. Robert,
1st Lord Erskine,
died 1453.
|
ii. Thomas,
died 1494.
|
iii. Alexander,
died 1510.
|
iv. Robert,
died 1513.
|
A

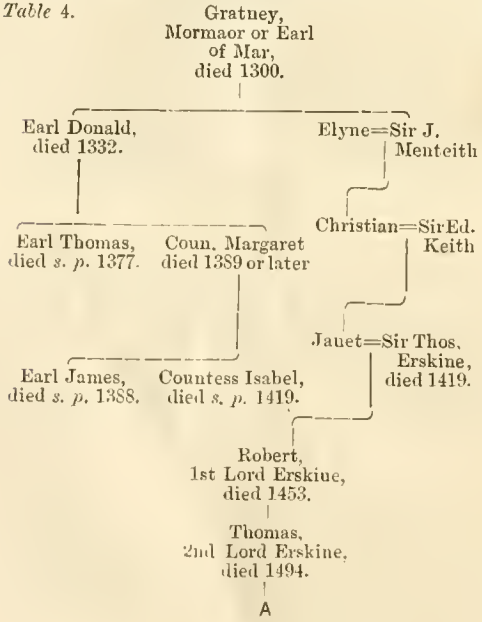

A
v. John, died 1552.
1 John, created Earl of Mar died 1572.
2 John, died 1634.
3 John, died 1654.
4 John, died 1668.
5 Charles, died 1689.
6 John, died 1732, attainted.
James, died 1754.
(7) Thomas, died s. p. 1766.
Frances=(9) James, d. 1776. d. 1785.
(8) Charles, unmarried, elder brother, died s. p. 1774.
10 John Francis, died 1825, restored.
11 John Thomas died 1820.
Henry David, died 1848.
12 John F. M. died s. p. 1866.
Frances.
13 Walter Con. died 1872.
John Goodeve.
Walter Henry 14th Earl of Mar 19th Lord Erskine

Nothing more need be said about this table. We have now to enter upon the field of battle proper.

It will be best to take the case of each claimant separately at first, and commence with Mr Goodeve.

Mr Goodeve regarded himself, before his uncle's death, as his heir to the title of Mar, and was so regarded by the late Earl of Mar. This, of course, has in itself no weight, but explains why he assumed the title, rashly as it has turned out, and in spite of warning that his right to it might come to be questioned and disputed. In the first place, let us see what pedigree Mr Goodeve gives us to support his statement that he is entitled to the old Earldom of Mar. We give it in table 4—

Table 4.



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Alexander,
3rd Lord Erskine,
died 1510.

Robert,
4th Lord Erskine,
died 1513.

John,
5th Lord Erskine,
died 1552.

John,
6th Lord Erskine,
created an Earl,
or, as Mr Goodeve
held, restored to
the old Earldom.
(*see table* 3.)

This pedigree is plain enough. If Isabel held the title in right of her descent from her grandfather, Donald, through her mother, Margaret, then on her death without issue (supposing all nearer descendants of her great grandfather, Gratney, to be extinct) it would at first seem that Sir R. Erskine, who was descended from her grand-aunt, Elyne, would be her heir; but, by the law of Scotland, *heirship cannot be traced upward through a female*, so that even had the title been wrongfully taken from the family of Mar, and had it been restored to the Countess Isabel's heirs, the Erskines though (by this pedegree) nearest in blood, yet, by Scotch law, were not her heirs. (*See Appendix A, page* xvii.) But Lord Kellie did not allow that the pedigree Mr Goodeve produced was correct. Yet apart from that there are two obstacles to the assertion that the Erskines were the rightful successors of the Countess Isabel, and the latter of the two has proved insurmountable. Let us consider them in order. We may take it for granted that the descent of Earl Donald from Earl Gratney is correct—and that Earl Donald had a son Thomas who succeeded him, but left no children—and a daughter, Margaret. Now when Earl Thomas

died, it is by no means certain that Margaret did succeed him *as a matter of course*. I need not enter into this matter, farther, than to state that there is great reason for believing that Earl Thomas (the last male of the line as far as we know), either left by will or entailed in his lifetime, the Earldom or Comitatus which bore along with it the title to his sister and her husband, the Earl of Douglas, if so it would go to their heirs. Her husband, is always called Earl of Douglas *and Mar* (not Mar and Douglas, though Douglas was a new title, yet the title of Mar seems even more recent). Her husband died in 1383 or 1384, his wife survived him, yet his son James became Earl of Douglas *and Mar*, though his mother held as survivor the Mar property or Comitatus—which could not have happened if the title of Mar, which Earl Douglas joined to Douglas, had been the old territorial title. This Earl James died in 1388, his mother being still alive, and having remarried Sir John Swinton, who is called Lord of Mar—not Earl of Mar as he would have been in those days had his wife been Countess of the territorial Earldom of Mar.

After Earl James' death in 1388 the title of Douglas went according to some entail now lost to a Sir Archibald Douglas. Isabel, his sister, succeeded on her mother's death to the Mar estates in 1402. Being then a widow, she styles herself Lady of Mar and of the Regality of Garrioch; in 1403 she styles herself Countess of Mar and Lady of Garrioch. Now the consideration of these facts shows us that the title did not descend as a matter of course and in the same manner from the time of Earl Gratney to the Countess Isabel, a change in the manner of descent, in fact in the the nature of the title took place at the death of Earl Thomas the last of the male line.

But the great and insurmountable obstacle now presents itself. Isabel daughter and finally sole descendant of Earl Donald, being at the time a childless widow married Sir Alexander Stewart. On the 12th August 1404 she, in pursuance of a contract of

marriage, granted a charter of the Earldom to Sir A. Stewart, the heirs lawfully begotten or to be begotten of his body, whom failing, the lawful heirs of Alexander whomsoever. (Sir A. only had a bastard son, so the king became his heir)—this was registered upon the mandate of K. James III, in 1476. On the 9th December 1404, Sir A. Stewart having stormed her Castle of Kildrummie, rendered to her the keys of the Castle with all charters, &c., but did not name or refer to the Earldom. On the same day she accepted him as her husband, and granted (afresh it would seem) the Territorial Earldom to him and the issue begotten between them. This charter was partially confirmed by King Robert, Decr. 9, 1404; but this alteration was made "to the lawful heirs of Isabella in the said lands in case she should die without any issue of her marriage." This charter being made on the marriage of the grantees, it was truly a grant to him, and, as the result shows, it was competent for him, the survivor, to change the destination, just as it had been competent for his wife to change it while she had possession of it. It is true certain conditions were attached to this grant of the Earldom to Sir A. Stewart but as he had already shown no compunction in using strong arguments while wooing the wealthy widow—it need not surprise us that after her death he tried to rid himself of inconvenient conditions. The Countess died in 1407, her husband, who bore the title of Earl of Mar and Garrioch survived till 1435. In the year 1426 he resigned the Earldom to the Crown, and while thus disrobed of it became simple "Alexander Stewart, Knight." He, however, immediately received a fresh grant of it with remainder to his illegitimate son, Thomas, and his heirs, which failing to the king and his heirs. He was again Earl of Mar and Garrioch, but his illegitimate son Thomas died in his lifetime without issue, so that in 1435 the earldom reverted to the Crown. The title of Mar was subsequently granted to different members of the royal family, in 1466 to John, a brother of James III.—he had no issue;

in 1482 again to Alexander, Duke of Albany—we mention this to draw attention to the fact, that Thomas Lord Erskine (who according to Mr Goodeve, was then de jure Earl of Mar) was the first witness to the charter granting to this new Earl the territorial Earldom *and title*. Of course the Erskines were not altogether silent, but their protests were of no avail in the face of the resignation of Isabel and her husband. It may be said the act of Earl Alexander Stewart was unjust in a high degree, but his act was not illegal, and he found the greater ease in doing it from the fact that it was the policy of the Royal House of Stewart to break the power of the old Mormaors, and indeed of all the territorial Earls. Other cases exist which were never remedied, though complaints were made often enough. An Erskine, when Earl of Mar, had influence enough to divert the succession of the Earldom of Buchan from the proper heirs, to the descendants of a younger son of his own, whose only connection with the title was that his elder brother was the Countess of Buchan's husband, so that in fact, the present Earl of Buchan is an Erskine, without any Buchan blood in his veins. *(See Appendixes D.)* If Thomas, the illegitimate son of Earl Alexander Stewart, had left issue, they would, without doubt, have succeeded, as would in like manner the issue of the Earls of Mar created after his death, had there been any, and the Erskines would never have attempted to claim the old title. Queen Mary, herself, made her illegitimate brother Earl of Mar, he resigned that title and took Moray instead, doubtless, to allow of the creation of Lord Erskine to a title connected with his family, but not as, we see, belonging to him de jure.

But we have still a very serious obstacle to deal with. The pedigree put in by Mr Goodeve, even if it declares the truth, does not declare *all* the truth. Lord Kellie has proved that it is most uncertain whether, on the death of the Countess Isabel, Sir Robert Erskine was the heir general of

Gratney, Earl of Mar, he might claim to be so—he might even procure official returns to that effect, for he and his descendants possessed vast territorial and political influence, and there is the strongest probability amounting almost to certainty that this influence was brought to bear to gain his object—viz., the recognition of himself as nearest heir to Earl Gratney, for he might well hope that a day would come when he could enjoy both the territorial Earldom and the dignity attached to it.

Let us now give (a table 5) the pedigree put forward by Lord Kellie—

Table 5.

Earl Gratney.

Earl Donald. (*see table* 4.)	David, married, but nothing more known of him.	Elyne, probably twice married, uncertain which husband was first; one of them was Sir J. Monteith, the assumed ancestor of the Erskines through a daughter. From Elyne also must descend the Lyles, who as co-heirs with the Erskines claimed the other half of the Earldom.
Margaret, Countess of Douglas and Mar.		
Isabel, Countess of Mar and Garrioch, died *s. p.*		

P.S.—Further information has led us to change slightly Table 5 from its original form. Everything connected with Elyne and her marriages and offspring is most obscure—her connection with the family of Johnston (see p. 16) is of very uncertain character. We therefore ask our readers to regard our remarks about the Johnstons in page 16 more as suggestions supported by some amount of evidence than as statements of facts *fully* proved.—A. W. H.

In the first place we see that Earl Donald had not only a sister Elyne, but a brother David ; there is proof that this David was married. Mr Goodeve should have proved that he left no issue, for otherwise his descendants would succeed before his sister's children. This he did not do. But more, Donald and David's sister Elyne was married twice--besides Sir John Monteith she had a husband Sir — Garrioch, who had a son Sir Andrew Garrioch, whose daughter Margaret married Sir--Johnston of Caskieben, and her heirs exist, and bear the Mar and Garrioch arms (*see Appendix E.*) It is true this other marriage of Elyne's is not so clearly proved, but the Johnstons of Caskieben in the 17th century took proceedings to assert their right as against the then Lord Mar. They were not powerful, however, and seem to have been bought off, as the case was never thoroughly heard. But there is yet another point which Mr Goodeve would have had to have cleared up. We find that Sir R. Lyle married one of the descendants of Earl Gratney—either a sister of Elyne, or of her daughter Christian, or of her grand-daughter Janet. The descendants of Lord Lyle quarter their arms with Mar, as the Erskines do (*see Appendix E*), and what is even more to the point, Robert Lord Lyle, soon after the death of his father, Sir Robert Lyle, in 1424, claimed *as his inheritance a half part of the Earldom of Mar and Lordship of Garrioch*, which is all the Erskines, the other co-heirs ever did. The family however in 1544 were oppressed with "great and urgent necessities," and a daughter carried on the line which still exists—it was hardly likely they could stand before the powerful Lord Erskine—but justice would require Mr Goodeve to prove that the Erskines were descended from the *eldest* co-heirs. This has never been done and would be well nigh impossible. Elyne also is said to have left a son, Sir J. Monteith, who was married—his line must be proved extinct. Also Sir Thomas Erskine's wife is called in charters, Janet Barclay. There is much needing explanation here. I have said enough to show that though the Erskines may be (as Mr Goodeve asserts they are) the true heirs

others had counter-claims which were never officially disposed of, but which would require strict investigation before it can be said that Mr Goodeve is the undoubted heir general of Earl Gratney of Mar.

We now come to a fresh stage, are we to hold that all other claims were disposed of by Mary and did she thus set that matter at rest by placing Lord Erskine in the position which his undoubted ancestor Earl Gratney held? *This the House of Lords has now decided she did not do.* It is true that Lord Erskine made great claims and produced many documents, but some of these documents are proved to be unworthy of credit, and others, if genuine, were not sufficient for his purpose. His ancestors had, it is true, claimed *half* the territorial earldom, but that is a vastly different thing from claiming it *all.* If they even ever obtained half the territory (or Comitatus) that would not have made them Earls—*all* the territory was necessary, *even if we allow that Earl Thomas did not change the destination of it.* As a matter of fact which there is no withstanding, the Earldom was broken up after Earl Alexander Stewart's death in 1435. Earls of Mar of other families held portions of it made into new earldoms—other influential families had their share. Lord Erskine knew well enough he could never obtain the old Earldom as it had been in the days of the Countess Isabel, whose heir he *professed* to be. Queen Mary knew well enough that she could never give him what was already the property of powerful families.

"All the Queen's horses and all the Queen's men
Could not pull the old Earldom together again."

But it may be said she could constitute his actual posessions into a territorial Earldom and *restore* the *old* title as a dignity attached to this new territory, and destined to pass through females as it had come through females. But in Queen Mary's reign territorial Mormaorships had ceased to be created or restored, and if the power of thus re-constituting the old Mormaorship of Mar still existed, it could only be exercised in a formal manner, and would probably

require the sanction of Parliament. Was this done for Lord Erskine? No. Was there any other method of making him Earl of Mar? Yes. Would this make him the regular successor to the old Earls or Mormaors? No. Did Queen Mary use this method? Yes. Therefore Lord Erskine, when made Earl of Mar, could not be regarded as the regular successor of the old Earls. Therefore his successors could not by reason of her act claim to succeed as did the descendants of the territorial Earls or Mormaors of Mar. It is true that in June 23, 1565, Queen Mary did what she could to grant a territorial Earldom or estate of Mar to Lord Erskine; but not a word was said (as would have been necessary if she had made him an Earl) about the dignity, nor did Lord Erskine assume the dignity till after his separate and distinct creation to it on July 29th or 30th, 1565, between these two dates, he continued to sit at the Council as Lord Erskine. I have said there was a method of making Lord Erskine Earl of Mar without restoring him to the status of the old territorial Earls, and I have said that Queen Mary employed this method. Let us see what it was and what reason we have to know that she did employ it.

The dignity of the Peerage of Scotland could be created without writing or charter. "The King created Lord Hailes an Earl by girding him with the sword *as was the usage.*" So says a chronicler, hence the term "a belted Earl," and it has been decided that Queen Mary made Lord Erskine a belted Earl at her marriage feast. Randolph, in his dispatch to Queen Elizabeth, says —"To honour the feast the Lord Erskine was made Earl of Mar." And at the same time other persons were raised to the Peerage. Not a word of *restoration*, but it may be said restoration might be *intended*. In answer to this, let us mark one significant fact. This new Earl of Mar sat at the Council on the 1st of August, 1565, as junior Earl. If he had been restored to the old honours, he would have been senior Earl, indeed, the only representative of the 7 old Mormaors. It is true that in 1606, precedence was given to the then

Earl of Mar to 1457—the reason for this is uncertain—but the act is not unique, and does not in any way prove that he was regarded as the successor of the old Earls, but rather the reverse, a new Earl might be glad to get a century added to the age of his dignity; a successor to the old Earls would be content with nothing less than his place as premier Earl of all Scotland. Had the Earl of Mar thought himself entitled to this position, he had vast wealth and influence—with these to help him he never attained it. There is also another very important fact which shows that the first Earls of the Erskine family must have known that theirs was a new creation—had they been successors to the old Earls, the title would have gone through heirs female as they had received it. If they were "belted Earls" the title would go to heirs male, now with their full knowledge of their position—how did they settle the destination of that property which made them so powerful as Earls, without which they would only be titled paupers? Succeeding Earls of Mar in 1620, 1642, 1677, and 1699, made changes in their estates, yet in every case left the estates, when re-arranged, to "heirs male whomsoever," so that under these destinations (made at a time when the manner of descent was best known) Mr Goodeve could not have succeeded to the Mar Estates, and yet he claimed to be Earl of Mar as rightful successor to the old Earls, who were only Earls in dignity, because they had the Earldom or Estate in possession. No doubt the impression that this Earldom of Mar was the same as the ancient Earldom, arose from the natural fact that it was more acceptable to the pardonable pride of John the attainted Earl of Mar—whose character was ambitious. He at one time had hopes of rising to political power under Queen Anne, and after he joined the Stuart cause he had a Dukedom given him by the exiled Prince, and would, it is certain, have had great influence had his cause succeeded. He may naturally have hoped that in that event the ancient dignity would have been, in some formal and sufficient manner, allowed to be his nor would the possession of it

have injured the status of the other Earls of Scotland, for he as a Duke, would of course have taken precedence of all of them. His factor and favourite, one George Erskine, wrote a history of the family which still exists in MS. He of course would take the view most favourable to the wishes of his Chief, but the paper, as a legal document, has no more weight in a court of justice than these notes of mine, and another MS. of even greater antiquity in the same charter chest overturns some of his most important statements.

In concluding this subject let me sum up. The territorial Earldom *probably* underwent a change when Margaret, Countess of Douglas and Mar, held it with her husband. It *certainly* underwent a change when her daughter Isabel and her husband, Sir A. Stewart, held it. On her death her husband, the survivor and possessor of it, again changed the destination of it, and on his death it passed to the Crown, in terms of that destination. The Crown being in possession of it granted portions of it to other families, and created as Earls of Mar men quite unconnected with the old Earls. The heirs of these Earls failed or there would have been an Earl of Mar in existence in Queen Mary's reign, and Lord Erskine would have never been so created. The Erskines never claimed the whole Earldom or Comitatus in its entirety—their descent from the old Earls of Mar has never been proved as accurately as would be requisite to admit a claim to a peerage. John Lord Erskine was created Earl of Mar. Neither he or his successors claimed to be premier Earls of Scotland (except that the late Earl of Mar and Kellie protested in writing against any Earl being called before him on the roll, but he never took further steps). They left their lands over and over again to heirs male, which they would surely not have done had they conceived it possible that the title could descend to a female. On these grounds the House of Lords has decided that Walter Henry Earl of Kellie is Earl of Mar, as heir male of John Lord Erskine, created Earl of Mar by Queen Mary.

The Law Lords were unanimous not only that Queen Mary's was a new creation, but that the old Earldom is and was before Queen Mary's reign extinct.

Lord Chelmsford says—

"That whether the original dignity was territorial or not, or was not descendable to females, is wholly immaterial, inasmuch as it had it some way or another come to an end more than a century before Queen Mary's time."

Lord Redesdale says—

"In 1460 the ancient Earldom was treated by the King as extinct, for he created his son Earl of Mar." Again—"This undisputed admission of the extinction of the peerage by the Crown under six Sovereigns, and by six Lord Erskines in succession, from the death of Alexander in 1435 to the grant by Queen Mary in 1565—a period of no less than 130 years—must be looked upon as a settlement of the question which it would be very dangerous to disturb."

Lord Chancelor Cairns, while adhering to what the two previous noble Lords had said, adds—

"It appears to me perfectly obvious from every part of the evidence that in the greater part of the Month of July (1565), and before that creation, there was no title of Mar properly in existence."

And now that the case is finally settled, let us express a hope that the family of Erskine may long hold the title, and long hold to the motto of one of their titles, viz., that of Kellie—

"*Decori decus addit avito.*"
"He adds glory to ancestral glory."

APPENDIX A.

JUDGMENT and RESOLUTION of the COMMITTEE of PRIVILIGES of the HOUSE of LORDS.

FEBRUARY 25, 1875.

LORD CHELMSFORD — My Lords, the claim of the Petitioner to the dignity of the Earl of Mar is involved in some difficulty, in consequence of the evidence being extremely voluminous, and its construction and effect being in parts in no inconsiderable degree doubtful. It is easy to state the question shortly, upon the determination of which the establishment of the claim must ultimately depend, viz., whether Queen Mary, in conferring the dignity on Lord Erskine in 1565, meant to restore a former dignity, or to create a new one simply, or to give to the newly created dignity the same course of succession as belonged to the ancient one. But in order to arrive at a satisfactory conclusion, it is necessary not only to examine the circumstances connected with the dignity in early times, but also to consider many of the matters occurring subsequently to its creation in 1565 which may tend to throw light upon the question of the disputed succession.

It seems to be proved with sufficient clearness that Mar was originally a territorial dignity, and that the Earls of Mar were of the number of the seven Earls of Scotland who at an early period of the history of that kingdom possessed some undefined pre-eminence over others of a similar rank. It was denied by the opposing Petitioner that the dignity was territorial in the sense of being a dignity by tenure, or dependent upon the seizin of the lands. But as far as we can trace its early history we find the dignity and the lands always enjoyed by the same person. From the first Earl of Mar eleven male descents took place, interrupted by two apparent intruders upon the succession (no relationship being traceable between them and the descendants of the first Earl), who with the possession of the lands assumed the title of Earl of Mar, the dispossessed Earls resuming the title upon repossessing themselves of the lands. Whatever, therefore, may have been the exact nature of the tie between the dignity and the lands, it is evident that at the beginning they were not separable or at least not actually separate from each other.

This, however, is a matter of less importance than the question how the dignity, or the dignity with the lands, was originally descendible? Although it is probable that in limiting lands connected with, or which carried a dignity with them, they would be granted by preference to male heirs, there is no reason to believe that in such cases females were always excluded. In the competition between Bruce and Baliol for the crown of Scotland, the assessors appointed by King Edward, in answers to questions put to them, stated that "Earldoms in the Kingdom of Scotland were not divisible, and that if an Earldom devolved upon daughters, the eldest born carried off the whole in entirety," thus speaking of a descent to females as a possible event. Lord Mansfield, therefore, in the Cassilis case (Maidment, page 45) uses language too unqualified in saying of earldoms and other territorial dignities, they most certainly descended "to the issue male."

The fact of there having been a continued lineal descent of males from the first Earl down to Earl Thomas, the last of the male line before Queen Mary's charter, by no means removes one of the great difficulties in the case, which is to ascertain in what right Margaret the sister of Earl Thomas, and after her her daughter Isabella, had successively possession of the earldom or comitatus, and respectively assumed the title of Countess of Mar. Margaret, in her brother Thomas's lifetime, had married William the first Earl of Douglas (which dignity he acquired

after the marriage), who assumed the title of Earl of Douglas and Mar. The latter of these titles belonged to him in right of his wife, if she were Countess of Mar by inheritance, and she bore that title both before and after her husband's death.

But on the other hand, the question is embarrassed by the fact that William Earl of Douglas upon two or three occasions dealt with the lands of Mar as in his own right. In the matter of the Terce of Margaret the widow of Earl Thomas out of the lands of Mar and Garioch which she assigned for an annuity to the Earl, and Margaret his spouse, and the longer liver, and the heirs (not of both the spouses, but only) of the Earl, the Earl alone warranted for himself, his spouse, and his heirs the dowager's re-entry into the lands in default of payment of the annuity. If the Earl had held the earldom in right of his wife, the warranty, without her joining in it, would of course have been invalid. Again, shortly after Earl Thomas's death on the 26th July, 1377, Earl William held a court for his earldom of Mar at Kildrummy, and accepted a resignation of certain lands in the earldom, and re-granted them to hold of him and his heirs. And on the 10th August in the same year, Earl William confirmed a grant of lands in Mar by Earl Thomas, and warranted that grant for himself and his heirs.

To account for these acts of dominion by Earl William, it was suggested on the part of the Petitioner that there must have been a new charter of the earldoms of Mar and Douglas granted to him. The evidence to warrant this suggestion is of the most meagre description. No charter of creation has been discovered, but in the Douglas charter chest, folded up in a notarial copy of a charter granted by Isabella, styling herself Lady of Mar, and her husband, Malcolm Lord Drummond to George Earl of Angus, the following memorandum was found:—"Memo-"randum (either for or from) y^e^ Registeris 102 Roull contening "25 Chart granted be King Robert the 2^nd^ wherein there is "ain Charter granted to W^m^ Earl of Douglas and Mar, con-"cesse." This word "concesse" is difficult to understand, and no satisfactory explanation of it was afforded us during the argument. If, as suggested, it means "granted," it is altogether superfluous and an unmeaning repetition. There is nothing in the memorandum to show what was the subject of the charter, which, for anything that appears, although in favour of the Earl of Douglas and Mar, may have been a grant of something wholly unconnected with the earldom or comitatus of Mar. At all events, I do not think that this loose memorandum can be accepted as any proof that there had been a resignation of the

earldom into the King's hands, and a re-grant following upon it, of which resignation not a trace appears.

There are further difficulties surrounding the question of the foundation of the title of Margaret to the Earldom of Mar. She survived her husband William Earl of Douglas. If she had been Countess of Mar in her own right, James her son must have waited for the succession till it opened to him by her death. But on the death of his father he assumed the title of Earl of Mar, and by that title, in the lifetime of his mother, confirmed a charter granted by his father. Margaret survived her son, who was killed in the battle of Otterburne. She afterwards married John Swynton, who, if she were Countess of Mar by descent, would, by the law of Scotland, have become Earl of Mar in her right; but in a bond made to them in 1389 he is styled "John Swynton Lord of Mar," and she "Margaret his spouse Countess of Douglas and Mar." It cannot be alleged that he did not assume the dignity because he was not in possession of the lands, for his possession of the lands was stated by the Counsel for the opposing Petitioner as the reason why he called himself Lord of Mar.

Such is the perplexity in which the first alleged instance of the descent of the dignity of Mar in the female line is left. It renders it not altogether improbable that there may have been some new destination of the earldom or comitatus, although no record of any such destination can now be found. This presumption is in some degree strengthened by the circumstances accompanying the possession of Isabella the daughter of Margaret, which is founded upon by the opposing Petitioner as evidence of a second descent of the dignity in the female line. Isabella married Sir Malcolm Drummond, whose sister was the Queen of Robert the Third. He never assumed the title of Earl of Mar, but was always styled "Sir Malcolm of Drummond," or "Sir Malcolm of Drummond Lord of Mar," or "Lord of Mar and Garioch." And although Robert the Third in charters granted in 1397 styled Isabella in one Countess of Mar, and in another Countess of Mar and Garioch, yet it is remarkable that till the year 1403 she never called herself Countess of Mar, but only Lady of Mar and Garioch.

After the death of Drummond, Isabella married Alexander Stewart, an illegitimate son of the Earl of Buchan, brother of King Robert the Third. The dealings with the earldom or comitatus before and after this marriage demand particular attention. Taking the case of the opposing Petitioner to be correct, that Isabella had the Earldom of Mar by descent, she

on the 12th of August, 1404, by charter styling herself Countess of Mar and Garioch granted by reason of a contract of marriage the earldom of Mar and Garioch to Alexander Stewart and the heirs to be begotten between them, whom failing to the heirs and assigns of Alexander. This charter was recognised and relied upon as valid in a proceeding in 1457, held for the purpose of inquiring into the validity of a retour of service of Robert Lord Erskine, as heir to a moiety of the earldom of Mar, to which I shall have occasion to advert more particularly hereafter.

Upon the marriage of Alexander Stewart with Isabella, a new charter was granted, which was preceded by the following ceremony,—Alexander Stewart, in the presence of witnesses before the castle of Kildrummy, "did present and deliver up to "the Lady Isabella the whole castle of Kildrummy, with all "the charters and evidences of the same, and all the keys of the "said castle, so that she could freely, without any hindrance, "of her free will dispone with all her lands, the castle, and all "things being in the same and her body; which having been "done, the said lady Isabella held the keys in her hand, and "with deliberate advice chose the said Alexander for her "husband, and gave to the same in free marriage the said "castle, with the appurtenances, the earldom of Mar with the "tenants of the same, the lordship of Garioch, and other "baronies and lordships, to have and to hold to the said "Alexander, and to the longer liver of them, and the heirs "to be begotten between them, whom perchance failing to the "lawful heirs of the said lady." This ceremony was immediately followed by a charter, dated the 9th December 1404, by Isabella styling herself Countess of Mar and Garioch, by which, reciting that first having settled a solemn and careful treaty she granted, and by that charter confirmed, to Alexander Stewart in free marriage the earldom of Mar and castle of Kildrummy, the lordship of Garioch, &c., to hold to him and the heirs between him and herself begotten, whom failing to her lawful heirs on either side. It is difficult to understand how, after the charter of the 12th August 1404, in which the ultimate destination of the earldom or comitatus is to Alexander Stewart his heirs and assigns, Isabella had any power to grant the charter of December without a re-grant to her, to which the ceremony preceding the marriage called in the charter a treaty can hardly amount.

A good deal of controversy arose as to the proper translation of the habendum in this charter of December. The words of

the ultimate destination are "*hæredibus nostris legitimis ex "utráque parte semper reservatis liberis tenementis.*" The Petitioner contended that the words "*ex utráque parte*" are applicable not to the heirs but to the lands on both sides which it was said was clear from a former part of the charter in which Isabella confirmed to Alexander Stewart "all right and claim "which we have in any lands soever unjustly detained from us "*tam ex parte patris quam ex parte matris.*" The words "*ex utráque parte*" were interpreted by the Lords of Session in an action brought by the Earl of Mar against Lord Elphinstone in 1624 to mean that "Dame Isabella Douglas ordained that the "lands which fell to her on her father's side, in case of her "decease without children of her own body, should pertain to "her nearest and righteous heirs upon her father's side, and "that the lands which fell to her by her mother should in case "foresaid pertain to her nearest and righteous heirs on her "mother's side." This construction of the words (which appears to me to be correct) is necessary to be maintained by the opposing Petitioner, as he derives his title from Isabella, who, as he alleges, took by descent from her mother Margaret.

The charter of Isabella, of December 1404, was confirmed by a charter of King Robert the Third, stating the final destination of the lands to be to "the lawful heirs of Isabella," but omiting the works "*ex utráque parte,*" from which it was inferred either that the King thought the words applied to the lands and did not affect the destination or that he advisedly rejected them from his confirmation.

The subsequent dealings with the earldom or comitatus may render the questions which arise upon this charter of December 1404 wholly immaterial.

Isabella died in 1407, and Alexander Stewart who survived her lived till 1435. During his wife's life he bore the title of Earl of Mar and Garioch, and after her death by the same title he dealt with the lands of the earldom. In 1426 King James the First confirmed a charter granted by Alexander Stewart Earl of Mar and Garioch, to Alexander de Forbes of the lands of Glencarure and Le Orde, the *habendum* of the charter being "to have and to hold of us and our heirs, successors, or "assigns, Earls of Mar." On the 28th May 1426 a most important dealing with the earldom took place. King James the First, by charter reciting that Alexander Stewart, Knight, and his natural son Thomas Stewart, Knight, had of their free will resigned into the hands of the King all the right and claim of themselves and their heirs to the earldom of Mar and lordship

of Garioch, granted "all and whole the said earldom and lord-"ship to be held by Alexander for the whole time of his life, "and after his decease to Thomas and the heirs male of his "body, whom failing to revert freely to us and our heirs." It nowhere appears what right Thomas had in the lands. It will be observed that in the charter, Alexander is called Alexander Stewart, Knight, from which it may be inferred that the dignity was connected with the lands, and that when a person holding a territorial dignity resigned the lands into the hands of the King to receive a new grant, between the times of the resignation and the re-grant he ceased to be a peer. This is rendered probable from the fact that King James the First, shortly before this charter, and in the same year, 1426 (as already mentioned), confirmed a charter of Alexander Stewart Earl of Mar and Garioch, and a few months after the charter again styled him Earl of Mar, and in a subsequent charter of the same King he is mentioned as having sat in Parliament under that title.

From all the foregoing circumstances, I think it may fairly be assumed that down to the death of Alexander Stewart in 1435 the dignity of Mar continued to be territorial, at least in the sense of its not being enjoyed separately from the lands.

Thomas Stewart died without heirs in the lifetime of his father. On the death of Alexander Stewart Earl of Mar, the earldom or comitatus was considered to have reverted to the Crown under the charter of 1426, and thereby the territorial dignity ceased to exist. At all events, there were no Earls of Mar with an acknowledged title between the time of the death of Alexander, and the charter of Queen Mary in 1565, a period of nearly 140 years, except some occasional grants of the dignity in the interval.

While the lands of Mar were thus in the hands of the Crown, it dealt with them and also with the dignity. In 1460 King James the Second granted the earldom and the dignity of Earl of Mar and Garioch to his son, Prince John Stewart. The Prince sat in Parliament as Earl of Mar; and it is worthy of notice that Lord Erskine, the common ancestor of the contending parties, frequently sat with him in the same Parliament. In 1482 King James the Third granted the earldom (*i.e.*, the lands) of Mar and Garioch to his brother the Duke of Albany and the heirs whomsoever of his body, the charter being witnessed by Lord Erskine. The Duke was "fore faulted" and escaped to France, upon which the Crown took possession of the lands and retained possession of them till 1562, a period of 80 years. The Duke died in France, and his son Alexander

became Duke of Albany and afterwards Regent of Scotland, and was acknowledged by the then Estates of the Realm to possess (amongst other titles) that of Earl of Mar and Garioch. I cannot understand in what right he could have assumed this title. His father is not stated to have had any grant of the dignity, and if it belonged to him as necessarily accompanying the grant of the lands it could not descend to his son, as at the time of his father's death the lands were in the hands of the Crown. Besides thus granting the dignity of Earl of Mar the Crown from time to time made grants of considerable portions of the Mar lands, thus severing them from the earldom or comitatus, and thereby, as it was contended, breaking it up and preventing the possibility of restoring the territorial dignity in its integrity.

It is natural to ask what was done by the Lords Erskine (from whom both the Petitioner and the opposing Petitioner derive title) during the long interval when the Crown was conferring the dignity and dealing with the lands of Mar at its pleasure, to the prejudice of their assumed right to the succession which opened to them, as it is alleged, on the death in 1407 of Isabella Countess of Mar without issue. I have already adverted to the fact that in 1466 the Lord Erskine of that day sat in Parliament with an Earl of Mar created by King James the Second, and that he was also a witness to a Royal Chapter of the earldom of Mar in prejudice of his hereditary claim. And it appears most conclusively that the Lords Erskine never at any time claimed the entire earldom or comitatus of Mar, to which alone (if at all) the dignity could be joined, but invariably limited their claim to one half of the earldom or comitatus, and never asserted any right to the dignity itself. In 1390, during the life of Isabella, a supplication was presented to the King in Parliament by Thomas Lord Erskine, stating that if Isabella should die without issue, his wife, formerly Janet Barclay, would be entitled to one half part of the earldom of Mar and lordship of Garioch, and praying the King not to confirm any contract in relation to the lands to the prejudice of the rights of his wife. It is unnecessary to inquire into the nature of the title of Janet Erskine, my object in noticing this proceeding being to show that from the very first the claim of the Erskines was confined to one half of the earldom.

After the death of Alexander Stewart Earl of Mar in 1435, when, as already observed, the dignity of Earl of Mar practically at least ceased to exist, Sir Robert Erskine in April 1438 obtained a retour of himself as heir of Isabella Countess of Mar

and Garioch. The circumstances connected with this and a subsequent return of the same year lay them open to a good deal of observation. Soon after the death of Alexander Stewart, as a preparatory to these judicial proceedings, Sir Robert Erskine and his son entered into an agreement with Sir Alexander Forbes, the sheriff depute of Aberdeen, before whom the proceeding for a retour would be held, to secure his services in their favour (covered with the decent pretext of his doing all his business and diligent care to help and to further them with his advice and counsel) by a grant to him of certain lands in Mar as soon as they should be recovered out of the King's hands. At this time Sir Robert Erskine claimed as co-heir or co-parcener with Lord Lyle. In this retour of April 1438 the jury found that "Sir Robert is the lawful nearest heir of the Lady "Isabella of one half of the lands of the earldom of Mar and "lordship of Garioch, which are in the hands of the King by "reason of the death of Alexander Stewart, who held the lands "by gift of the Lady Isabella for the term of his life." This retour is false in fact, for the lands were not in the hands of the King on the death of Alexander Stewart who held under the gift of Lady Isabella for his life, but were claimed and possessed by the Crown by reason of the reversion in the charter of 1426 which vested in possession on the death of Alexander.

In the month of October 1438 Sir Robert Erskine obtained another retour as to one half of the earldom of Mar, upon which some controversy arose. On the part of the opposing Petitioner it was asserted that this was a retour of the other half of the earldom, though without explaining why, if Sir Robert Erskine's claim was to the whole of the lands of Mar, there should have been separate retours of the two halves, there not being a shadow of evidence that he had acquired the other half after the April retour. On the other side, it was urged with great probability that the October retour was obtained to correct the former one, which had erroneously found that Sir Robert had right to half of the lordship of Garioch, which at that time was held by Thomas Stewart's widow. And it was said that infeftment not being taken till November, it could not apply to the April retour, because it was beyond six months after the date of the precept of infeftment by virtue of that retour, and, by the rule in force at that time, such infeftment would have been too late. And notwithstanding this second retour it will be found that many years afterwards Lord Erskine persisted in his claim to only half of the earldom.

Pursuing the inquiry as to the conduct of the Erskines during the period when no one held the dignity of Earl of Mar, it appears that after the retours of 1438 Robert Lord Erskine in two or three private charters styled himself Earl of Mar, but after a proceeding in 1457 to which I shall presently refer, there is no evidence of any of the Lords Erskine having assumed that title. But all of them, from Robert the first to John the sixth Lord, sat in Parliament by their title of Lord Erskine, and not one of them claimed to possess the higher dignity.

After Sir Robert Erskine had, not improbably by means of the purchased assistance of the sheriff depute, succeeded in obtaining in 1438 a retour as heir to Isabella, he seems to have got possession of some part of the lands of Mar, for on the 10th August 1440 the King (being then under age) and his council, in order (as it was said) to preserve the peace of the kingdom, entered into an agreement with Sir Robert, then Lord Erskine, under which he was permitted to retain the castle of Kildrummy, holding it on behalf of the King until the King should come of age and then to be delivered to the King, and Lord Erskine was then to make and establish his claim before the King and three estates. And it was further agreed that the fruits and revenues of one half of the earldom of Mar, which Lord Erskine claimed as his property, should be received by him until the judgment were had, he being accountable for them in case judgment should be given against him and for the King. This agreement proves that the claim of Lord Erskine continued to be to one half of the earldom only, notwithstanding the two retours of 1438 by which it was asserted he obtained service as heir to the whole. On the 22nd May 1449 the King by letters under his Privy Seal directed Lord Erskine and his son, Sir Thomas Erskine, to deliver up the castle of Kildrummy to persons named, and it seems to have been delivered up accordingly.

Nothing was done towards obtaining a judgment upon Lord Erskine's claim to one half of the earldom of Mar until the year 1457, when proceedings were taken against some of the jurors who sat upon the inquest of 1438, for an unjust deliverance of the retour upon such inquest. The delinquent jurors begged pardon of the King and were pardoned. Then the following proceeding took place. The King with the Chancellor and Lords passed into the Town Hall (of Aberdeen) for justice to be done to Lord Erskine with respect to his claim of the lands of the earldom of Mar. An inquest was chosen. Lord Erskine alleged that the deceased Robert Lord Erskine his father had last died vested and seised as of fee of half of the earldom of

Mar, and that he was the heir of his father. Issue was taken upon this allegation, the Chancellor answering that although Lord Erskine was heir of his father he was not heir to the said lands, and that the lands were in the hands of the King as his own property. Lord Erskine in support of his claim produced the charter of Isabella of the 9th December 1404 granted upon her marriage with Alexander Stewart; in answer to which the Lord Chancellor on behalf of the King "publicly produced a "certain Charter of Taillie of the deceased Isabella of a date "preceding the date of the other charter" (being Isabella's charter of the 12th August 1404) "made to the deceased "Alexander Earl of Mar her husband and the heirs lawfully "begotten or to be begotten of his body" (the true destination being "to the heirs to be begotten between them") "whom failing "to the lawful heirs of Alexander whomsoever." By virtue of that charter the Chancellor declared the King the true heir and lawful possessor of the said lands, Alexander having died a bastard vested and seised as of fee of the said earldom of Mar, and the King being lawful heir by reason of bastardy. The jurors retoured that Robert Lord Erskine did not die seised of the half of the lands of the earldom of Mar claimed by him, and that the said lands were in the hands of the King by reason of the death of the late King.

In this proceeding for questioning the claim of Lord Erskine to one half of the earldom of Mar no mention is made of the charter of the 28th May 1426, under which the King became entitled to the reversion of the earldom of Mar, and took possession of it on the death of Alexander Stewart; his son Thomas Stewart having died in his father's lifetime without issue. Whether this arose from any doubt as to the validity of this charter, or whether Lord Erskine having relied upon the charter of Isabella of December 1404, it was thought sufficient to show that she had disabled herself from making it by her having granted the earlier charter of August 1404, I am unable to form an opinion.

Thus matters stood for more than 100 years, when, in the year 1561, Queen Mary revived the title of Earl of Mar by granting the earldom together with the dignity to her natural brother James (afterwards the Regent Murray) and his heirs male. He sat on the council as Earl of Mar; Lord Erskine, who was his uncle, sitting with him upon several occasions. He subsequently resigned the dignity and the lands of Mar, and was created Earl of Moray.

I have thonght it necessary to go fnlly into the history of the dignity prior to Queen Mary's charter because it appears to me that it may materially assist in determining the question of the limitation of the dignity to which the Petitioner lays claim.

On the 5th May 1565, being about six weeks before Queen Mary's charter, and not improbably with a view to it, John the 6th Lord Erskine procured himself by a general retour to be served heir to his ancestor Robert the 1st Lord Erskine, who is styled Robert Earl of Mar and Garioch and Lord Erskine. It has been already shown that although Robert the 1st Lord Erskine in some private deeds called himself Earl of Mar, he never publicly assnmed that title. And it is a significant fact that, although Queen Mary acted upon this retour, and recited it in her charter, she did not adopt the description of Robert as Earl of Mar, but changed it to Robert Lord Erskine, as if refusing to recognize his right to the higher dignity.

In examining Queen Mary's charter, which is dated the 23rd Jnne 1565, it must be borne in mind that it does not relate in any way to the dignity of Earl of Mar, bnt only to the earldom or comitatus which is described as containing the lands of Strathdone, Bramar, Cromare, and Strathdee, and is granted, together with the lordship of Garioch, to John Lord Erskine, his heirs and assigns. It is clear that this could not have been the ancient earldom or comitatns with which the dignity was originally connected because it no longer existed in its entirety, part of the lands having been severed from it and vested in strangers, and other parts having been annexed to the Crown by Act of Parliament.

The charter contains recitals which, if the slightest inquiry had been made, would have been ascertained to be false. For instance, it is stated that John Lord Erskine was retonred as lawful heir of Robert Lord Erskine, the heir of Isabella in respect of the earldom, whereas his service was a general service as heir, and of course without application to the lands, and if it had been a special service he could not have been found heir to more than half of the earldom, which was all that Robert Lord Erskine ever claimed. Again, the charter recites in strong terms that John Lord Erskine had the undoubted hereditary right to the earldom, lordship, and regality, notwithstanding his predecessors were unjustly kept out of possession of the same. Now, in addition to the fact of the claim of the Erskine's having been invariably confined to half of the earldom, if either the charter of the 12th August 1404, or that of the 28th May 1426, was valid, (and there is nothing apparently to impeach either of

them,) the possession of the Crown was by title and not by usurpation. At this time also the solemn adjudication against the claim of Lord Erskine to one half of the earldom upon the inquest held in 1457 had not been in any degree impeached, and the alleged "undoubted hereditary right" had been allowed to slumber during the whole of the long period of the Crown's possession of the lands.

The charter, singularly enough, contains two distinct and separate grants of the earldom or comitatus,—one founded upon the restoration of an inheritance of which the grantee's predecessors had been unjustly deprived, and also upon their good services to the Queen's predecessors, the other expressed to be "for good and faithful services" without more. An explanation of this double grant was suggested in argument founded upon what Lord Mansfield said in the Cassilis case (Maidment, page 53), viz., "Charters "pass *periculo petentis*. Many lands are inserted in charters "to which the grantee has no title; nothing can pass by "such right." Therefore it was said that as the first grant in the charter was founded upon an allegation of a title which the grantee never possessed, it was liable to challenge on that ground, and out of abundant caution the grant on account of services alone was added.

As already observed, Queen Mary's charter contains nothing with respect to the dignity of Mar. This, I think, was not disputed in the argument, and it is proved by the fact that the charter being of the date of the 23rd June, the grantee sat almost daily in the council from the 8th to the 28th July as Lord Erskine, and appeared at the board for the first time as Earl of Mar on the 1st August. He must, therefore, have obtained the dignity by creation in some way or other before this day. The question arises, When and how did this creation take place? There is no writing or evidence of any kind to assist us. It was suggested, with great probability, that Queen Mary's marriage with Lord Darnley having taken place on the 30th July, and Lord Erskine having sat in the council by his old title of Erskine on the 28th July, and as Earl of Mar on the 1st of August, he must have been created an earl upon the occasion of the marriage, and probably by a ceremony well-known to those days called "belting." To this it was objected, that, according to the remarks of Lord Hailes upon the Spynie case (Maidment, page 11), this ceremony could only take place in Parliament, and that if

this was the manner of the creation some record of it would have appeared. But Lord Loughborough, in the Glencairn case (Maidment, page 16), proved that Lord Hailes was in error in limiting as he did the place of the ceremony of belting, for he mentioned three cases of the creation of earls by belting elsewhere than in Parliament.

Whether Lord Erskine's creation was in this particular form and manner seems to me not to be very material. It is certain that he must have been created Earl of Mar about the time of the Queen's marriage, and, as no record of the creation is in existence, the limitation of the dignity must be left to the ordinary presumption of law, unless there is something in the case to rebut this presumption. Lord Mansfield, in the Sutherland case (Maidment, page 9), said "I take it to be settled, and well settled, that where "no instrument of creation or limitation of the honor "appears, the presumption of law is in favour of the heir "male, always open to be contradicted by the heir female "upon evidence shown to the contrary"; and a similar statement of the presumption in favour of the heir male was made by Lord Loughborough in the Glencairn case (Maidment, page 25). The *primâ facie* presumption, therefore, is that the dignity of Mar, created by Queen Mary, is descendible to heirs male.

But, on the part of the opposing Petitioner, it was argued that various circumstances in the case tend to rebut the presumption, and to establish, not the probability merely, (that would not be enough,) but clear proof that the title is descendible to heirs female.

What was chiefly relied upon as indicating the intention of the Queen, either to restore the old dignity of Mar, which was said to be descendible to females, or that if she created a new dignity she meant it to descend in the same channel of limitation, is the language of that part of the charter in which the Queen states that she was moved by conscience to restore the earldom to the rightful heirs from whom it had been unjustly detained, and that acting from this motive she restored the lands to the grantee, his heirs and assigns. And it was argued that the dignity being revived about the same time as the charter, the Queen must have intended to create the dignity with similar limitations in order that it might never be separated from the lands. This, however, is pure conjecture. There is nothing in the charter to point to the intentional or

probable revival of the dignity, and it is not at all a necessary conclusion that because the Queen was desirous of giving back the lands of Mar, which she was prevailed upon to believe had been unjustly withheld from Lord Erskine and his predecessors, she therefore contemplated reviving a dignity which had not been practically in existence for nearly 140 years, and granting it with a limitation to heirs whomsoever. Even if the intention to connect the lands with a dignity about to be created can be assumed, there was no necessity to make the limitations correspond, because, by giving the lands to the person ennobled, his heirs and assigns, he would have the power of directing the succession to the lands in the same line as the descent of the dignity. And the power of alienation by the grantee of the lands disposes of the suggestion as to the Queen's intention that the dignity and the lands should never be separated. The reasoning on this subject indeed is altogether speculative, and, at the utmost, raises nothing more than the very slightest probability.

A strong inference against this presumption of the limitation of the dignity, so as to extend to heirs female, may, I think, be derived from the fact (already mentioned) that only four years before the charter in question, the Queen, when giving the same dignity of Mar to her brother, limited it strictly to his heirs male.

In adverting to the case of the opposing Petitioner, where it relies upon matters which occurred after Queen Mary's charter, I cannot see in any of them evidence in support of the descent of the dignity for which he contends. Great stress was laid upon an Act of Parliament passed in 1587, which ratified the charter. This Act, however, has no greater force and effect than the charter itself. Erskine, writing upon parliamentry ratifications of grants made by the Crown in favour of particular persons, says, in his Institutes, Book I., Title, I., Section 39, "ratifications by "their nature carry no new right; they barely confirm "that which was formerly granted, without adding any "new strength to it by their interposition." The Act therefore cannot give any efficacy to the charter which it did not previously possess, and it does not, any more than the charter, affect or pretend to affect the dignity.

The dignity appears at first to have been claimed as depending solely upon the creation by Queen Mary, for the new earl sat in the council and was ranked as the

junior earl. Again, in two Commissions issued by the Crown in relation to matters in Parliament, when, as Lord Loughborough said in the Glencairn case (Maidment, page 17), "a due precedency would probably be given to the several noblemen," the Earl of Mar is named as junior earl. I am not disposed to lay any stress upon the order of precedence prior to the Decreet of Ranking, because I cannot discover any uniform practice as to the placing of the Earls of Mar in Parliament previously.

This Decreet of Ranking was issued on the 5th of March 1606 (39 James VI.). It recited that, considering and remembering the great contentions and differences which many times occurred and fell out amongst the nobility of Scotland, with relation to their precedence and priority in ranking and voting in Parliament, His Majesty had appointed a commission consisting of the nobility and council to convene and call before them the whole noblemen of the kingdom, and according to their productions and verifications of their antiquities, to set down every man's rank and place.

Under this commission each nobleman in order to establish his precedence offered to the commissioners such evidence of his title as he chose, their power being necessarily limited to the verification of the documents produced, and to forming their judgment upon them, and having no means of knowing whether anything was withheld from them which would affect the order of precedence, founded upon the proof presented. Therefore their decision can carry no weight on the investigation of a claim to a title which depends upon facts not laid before them.

The Earl of Mar, in support of his title to precedence, produced to the Lords Commissioners the charter of Dame Isabella Countess of Mar of the 9th December 1404, and the King's charter of confirmation, the Act of Parliament of 1587, and an extract of a retour of the 20th March 1588, whereby John Earl of Mar was served nearest and lawful heir to Dame Isabella Douglas Countess of Mar. The relationship to Isabel found by this retour is thus traced. She was a granddaughter of Donald Earl of Mar, who was the brother of Helen of Mar, who was the great-grandmother of Robert, who was the grandfather of Alexander, the great-grandfather of John the Earl whose claim to precedence was in proof. No records of the

ancient dignity, and nothing prior to the charter of December of 1404, were produced to the commissioners. Isabel's charter of the 12th of August 1404 seems to have been purposely kept from them. The finding of the commissioners that John Earl of Mar was heir to Isabella through Helen of Mar was erroneous in a double sense. He could not have been heir to Isabella who was heir to Margaret, the law of Scotland not allowing heirship to be traced through the mother, and he could not legally claim by heirship of blood to Helen, as by the same law there is no succession to land upwards through females (Erskine's Institutes, Book III., Title VIII., Sections 9 and 10).

By the Decreet the remedy of reduction was reserved to all who should find themselves prejudiced by their ranking. And in 1622 an action for reduction of the retour of the 20th March 1588 was brought by six earls who, under the decreet, were ranked below the Earl of Mar. In searching through the voluminous evidence I have not been able to find any account of the result of this action of reduction, which, however, shows that the claim of precedence by the Earl of Mar, and founded upon the retour of 1588, was not suffered to go unchallenged.

During the whole of the inquiry as to the ranking of the Earl of Mar, whose claim to precedence was founded on his right of succession to the ancient dignity, but the proof of which went no further back than the year 1404, the Lords Commissioners appear to have been in ignorance of the charter of resignation of Alexander Stewart and his son Thomas to the king and the re-grant to them in 1426, and of the fact that the claims of the Earl of Mar to this ancient dignity had been allowed by his predecessors to remain dormant for nearly 140 years, while they had acquiesced in the crown conferring the dignity of Earl of Mar, and granting the lands connected with it to persons in no way related to the former possessors of that dignity. Had the commissioners been furnished with this information there can be little doubt that they would have determined the precedence of the Earl of Mar by reference to the creation of the dignity of Queen Mary.

The proceedings of the six earls to reduce the retour of 1588, by which the Earl of Mar was served heir to Isabella Douglas, Countess of Mar, seem to have stimulated his activity to obtain some further support to his claim of precedence. Accordingly, on the 22nd January 1628, he procured no fewer than five retours finding him heir respectively to Donald Earl

of Mar, to Gratney Earl of Mar, to Donald Earl of Mar, the son of Gratney, to Thomas Earl of Mar, the son of Donald, and to Margaret, the sister of Thomas and mother of Isabella. If these retours prove nothing else, they show how easily in those days retours could be procured and consequently how little reliance can be placed upon them. Retour jurors are usually chosen on account of their supposed knowledge of the facts upon which the service as heir to the person last feudally vested depends. But these five retours were taken in respect of alleged heirship to persons who had died feudally vested from 250 to 350 years before. Whatever value may be supposed to belong to retours, which of course found only the fact of heirship generally, and determined nothing more than the existence of that relation with the several persons named, they can have no effect whatever upon the question whether the succession to the dignity of Earl of Mar was open to an heir female. It may be observed that the judicial proceeding of service of heirs does not apply to honours and dignities. And it may fairly be asked why in his claim of precedence before the commissioners, founded upon his title to the ancient dignity, the Earl of Mar did not bring forward the proof of his heirship to the predecessors of Isabella upon which he afterwards obtained these retours.

The opposing petitioner, to establish that the descent of the dignity was in the female line, relied upon the Act of the 5th George IV. for the reversal of the attainder and the restoration of the dignity.

John, the sixth Earl of Mar, was attainted in the year 1715. His relations purchased the forfeited estates. After selling the Mar estates, they settled the Erskine estates upon Thomas Lord Erskine, the only son of the attainted earl, and the heirs male of his body, whom failing upon the heirs female of his body, whom failing upon Lady Frances Erskine, the daughter of the attainted earl, and the heirs male of her body, whom failing upon the heirs female of her body, whom failing upon James Erskine, the brother of the attainted earl, and the heirs male of his body.

Thomas, the son of the attainted earl, died without issue. Lady Frances then succeeded under the destination in the settlement. She married James Erskine, who eventually became the eldest surviving son of her uncle James, the brother of the attainted earl. Lady Frances died in 1776, and her husband in 1785. Their son, John Francis Erskine, then became both heir male and heir of line of John Lord Erskine, upon whom Queen Mary conferred the dignity of Earl of Mar.

The Act restoring John Francis Erskine and all entitled after him to the honours, dignities, and titles of Earl of Mar, recites that he is the grandson and lineal representative of John Earl of Mar. He was the grandson of John Earl of Mar, through his mother Lady Frances Erskine. Upon this fact the counsel for the opposing petitioner argued that it was intended by the Act to restore the dignity to the person entitled as the lineal representative of the attainted earl, and as the person restored was only lineally descended from John Earl of Mar through a female it amounted to a parliamentary recognition that the dignity before the attainder was descendible to females.

There is not, in my opinion, a shadow of foundation for this argument. The intention of the Act was to restore John Francis Erskine to the dignity. He was undoubtedly the nearest in blood in succession to the attainted earl, and he had a preferable claim to every other person to be restored. The recital in the Act that he is the grandson and lineal representative of the attainted earl is an accurate description of his title, without reference to the course of descent by which it was deprived. There was not the slightest occasion to make any inquiry as to the succession to the restored title, and probably none was made. It was enough to restore the dignity to whatever person was best entitled to it, and when restored it would, as a necessary consequence, be subject to the course of descent which was incident to it before the attainder. My Lords, upon a review of all the circumstances of the case, I have arrived at the conclusion that the determination of it must depend solely on the effect of the creation of the dignity of Queen Mary, and on that alone. That whether the original dignity was territorial or not, or was or was not descendible to females, is wholly immaterial, inasmuch as it had in some way or other come to an end more than a century before Queen Mary's time. That the creation of the dignity by her was an entirely new creation, and there being no charter or instrument of creation in existence, and nothing to show what was to be the course of descent of this dignity, the *primâ facie* presumption of law is that it is descendible to heirs male, which presumption has not in this case been rebutted by any evidence to the contrary.

I am therefore of opinion that the dignity of Earl of Mar created by Queen Mary is descendible to the heirs male of the person ennobled, and that the Earl of Kellie, having proved his descent as such heir male, has established his right to the dignity.

LORD REDESDALE.—My Lords, the ancient earldom of Mar was probably held by tenure of the comitatus. The earldom we have to decide on is the peerage independant of the comitatus, and it is important and necessary in considering this case to treat the peerage and comitatus separately.

The inquiry may be said to commence with Gratney Earl of Mar, who died before 1300. From his son Donald the peerage and comitatus descended in direct succession to Thomas the last heir male. From Gratney's daughter Helen the Erskines claim to be his heirs on the extinction of the female representative of Donald in Isabella, niece to Thomas, in 1407. There is no record of the creation of this ancient earldom, and I presume therefore that the committee will accept Lord Mansfield's dictim in the Sutherland case as the ruling principle in this claim. On that occasion he said "I "take it to be settled, and well settled, that when no instru- "ment of creation or limitation of honours appears, the "presumption of law is in favonr of the heir male, always "open to be contradicted by the heir female upon evidence "shown to the contrary. The presumption in favour of heirs "male has its foundation in law and in truth." Is this presumption of law contradicted by the female in this as it was successfully in the Sutherland claim? In that case it was shown that the peerage descended to Elizabeth the wife of Adam Gordon, on the death of her brother without issue in 1514, as heir of the body of William who was Earl of Sutherland in 1275; that it was assumed by her husband, and from her had descended to the heirs male, who were heirs of her body, to the death of the last earl in 1766 without any objection on the part of the male line of the said William. Thus a continuous and undisputed succession to the heir female was shown from 1514 to 1766, a period of 252 years, while there was a male line to contend for the earldom in existence had the descent been limited to males,

In the case before us it appears to me that the opposing petitioner asks the committee to adopt the reverse of Lord Mansfield's dictum, and to hold that the presumption of law is in favour of the heir female. The force of the evidence before us is against his claim, unless we allow it to be constantly overruled by such a presumption.

On the death of Thomas Earl of Mar, the last heir male, William Earl of Douglas, the husband of his only sister Margaret, was called Earl of Douglas and Mar. He may have assumed the latter title for one or other of three reasons; as being in possession of the comitatus; in right of his wife's

succession to the peerage as heir general ; or by a new creation There is the clearest evidence that at that time it might have been allowed to him in courtesy only as holding the comitatus. His daughter, Isabella, called herself Countess of Garioch in the surrender of the comitatus of Mar to her husband Alexander Stewart ; and in the crown charter confirming the same she is called Conntess of Mar and Garioch. There cannot be a doubt that in her Garioch was only a lordship The opposing petitioner, to whon the point is of vital importance, does not pretend to assert that it was a peerage earldom ; and, though the Earl of Douglas may for a time have claimed the earldom of Mar, there is evidence which makes it doubtful whether, under whatever claim he may have first assumed the title on his brother-in-law's death, he always continued to assert that claim and to use the title. In the Scotch Roll of Richard the second (1377) he is Earl of Douglas and Mar. In those of February 1381 and March 1383, he is Earl of Douglas only (pp. 743, 4, 5), and, though he is called Earl of Douglas and Mar in 1383, it is only when mentioned as a witness in two royal charters (pp. 28 and 618). These are the only documents in which he is called Earl of Mar after 1381 ; and in the only two charters of his wife after that date. while she calls herself Countess of Douglas, she styles herself only Lady of Mar and Garioch, putting these latter titles on a par, and as inferior to that of Douglas (pp. 383, 490). Her late husband being called Earl of Douglas only, in the charter (p. 490), together with her own change in title, is a very siguificant fact. The importance of this distinction between the titles of countess and lady will be noticed hereafter.

Did Earl Douglas become Earl of Mar in right of his wife's succession to the peerage as heir general to her brother ? There is no evidence whatever of the title having been recognised as a peerage while held by William, who lived to 1384, or by his son James, who called himself Earl of Douglas and Mar in 1388, iu a charter (p. 346), and Earl of Douglas only in another charter of about the same, or perhaps rather earlier, date (page 721). He fell at Otterburn in 1388. The period of ten or twelve years is not a long one, and proof of parliamentary recoguition of a peerage in those days is not of very frequent occurence ; but we must not forget that the presumption of law is against Margaret's inheriting the peerage ; and so far as there is evidence before us there is none that she, or her husband, or her son, were ever in possession of it. It is further to be observed that the ancient earldom of Mar was many

centuries older than that of Douglas, and yet it was always placed after it, and that when after the earl's death she married John of Swynton, he became, even after the death of her son, Lord of Mar only, and never was Earl of Mar (p. 724). It is important also to notice that in all the contemporary documents in evidence a countess peeress is always a countess. The widow of Thomas Earl of Mar is countess of Mar and Angus, not lady of Angus like the Countess of Douglas and Lady of Mar. The Countess of Angus too, though so in her own right, always puts Mar before Angus as the more ancient title, both in her being peerages.

The evidence before us shows clearly that when a peerage was attached to a comitatus the holder of it was earl, and when a peerage was not attached, lord only. In page 362, in the charter of Robert the First, granting to his brother Edward Bruce "*totum comitatum de Carrick*," he is made an earl by the following words " *Cum nomine, jure et dignitate* " *comitis*," he died without legitimate issue. In the same page a charter of David the Second grants to William de Conyngham " *totum comitatum de Carrick*," without those words ; and in a charter of this William de Conyngham he is " *dominus de* " *Carrick*," only. The case of Garioch affords similar evidence. In Isabella's charter (p. 745) she, calling herself Countess of Mar, but only Lady of Garioch, confirms the charter of David, formerly Earl of Garioch, brother to King William. David had only one son, who died without issue, and the peerage earldom became extinct ; and although Isabella usually when she called herself Countess of Mar called herself also Countess Garioch, there cannot be a doubt that on the extinction of the peerage Garioch became in law a lordship only, and that in dealing with the lands which she had inherited, she assumed no higher title, though confirming the act of her predecessor an Earl of Garioch. The same is to be observed in her charter (p. 489) and in that of Alexander her husband, confirming the same after the marriage, in which he calls himself Earl of Mar and Lord of Garioch only.

To prevent the committee from attaching the importance to the use of the title of lady, which these facts disclose, Mr Hawkins contended that it was the proper one in dealing with the lands of the comitatus. It is only necessary to refer to the Charters of Thomas Earl of Mar (pp. 27, 380, 616), and of William Earl of Douglas and Mar (pp. 27, 332), and to that of the Earl of Wigton (page 334), to show that where the

holder of a comitatus was an earl he used that title only in dealing with the lands.

Did William Earl of Douglas become Earl of Mar by a new creation?

There is no evidence of such creation. The Lord Advocate, as counsel for the Earl of Kellie, called the attention of the committee to a memorandum (p. 331.) in which a charter is mentioned granting to William Earl of Douglas the earldoms of Douglas and Mar "concesse," as having been with other documents in a roll of twenty-five charters of Robert III. But as the charter itself is not forthcoming, it is impossible for the committee to accept the memorandum as evidence that it was a new creation of the peerage earldom of Mar. Moreover, the great inaccuracy of the description in the memorandum of the contents of the notarial copy of the charter in which it was found, renders it of little value, except as proving that a charter of Robert II. relating to the earldom of Mar as connected with William Earl of Douglas was once in existence, but has been lost or destroyed since that memorandum was made, to which fact I shall refer hereafter. Probably the charter referred to the comitatus only; the word "concesse," which is not of any certain interpretation, appearing to me most likely to mean "surrendered." Margaret's son James, calling himself Earl of Mar in her lifetime, in the charter before referred to, was quoted in favour of a new creation; but his styling himself Earl of Douglas only in other charters is against it. The former is probably the latest in date, and he may have assumed the title if his mother had then surrendered the comitatus to him, which she may have done after her second marriage. John of Swynton is not Lord of Mar, as witness to the charter of James (p. 721) but is so in the obligation in 1389 (p. 724), after his death.

Margaret died in 1390, and was succeeded in the comitatus by her only daughter Isabella, and in the peerage earldom, if such was in existence. She was the wife of Malcolm Drummond. In November 1390, probably after Margaret's death, he is Malcolm de Drummond, Knight, in a license from the crown to build a tower at Kindrocht in Mar (p. 619). Probably, as John de Swynton was Lord of Mar in right of his marriage with Margaret, Malcolm was unable to assume that title till some arrangement was come to about it. In March 1391 the King confirms a grant from Malcolm de Drummond, Knight, to John de Swynton, Knight, (neither calling himself

Lord of Mar in this transaction) of 200 marks annual rent (p. 29), and in 1393, in a royal charter (p. 619), which granted forty pounds sterling annually to Malcolm, he is called Lord of Mar, and he bore that title till he died before March in 1402. He is proved, therefore, to have been about twelve years husband to Isabella after her succession to the comitatus, and yet he never became Earl of Mar. He is Lord of Mar and Garioch, and she Lady of Mar, Garioch, and Liddisdale in the important charter of 19th April 1400 (p. 330), cited in the notarial copy of it, which is the only charter in evidence made by her in his lifetime. He evidently did not allow her to call herself countess, because she was not entitled to the peerage, which, if she had been, would have made him earl. He was nearly related to the King, who had married his sister, and was in favour, as is proved by the before-mentioned grant. Under these circumstances the evidence afforded by the above-mentioned charter of 1400 is conclusive against a continuous succession to the peerage earldom.

In the first charter after Drummond's death (p. 617) she still calls herself Lady of Mar and Garioch. In a charter, 13th March 1403, she is Countess of Mar and Lady of Garioch. In the following year she and her castle were taken forcible possession of by Alexander Stewart, the natural son of the Earl of Buchan, third son of Robert II., and brother to King Robert III. Without entering into particulars with which the committee must be familiar, on 9th November 1404, she surrendered the comitatus to him calling herself Countess of Mar and Garioch "in *pura et liberatâ viduitate*" (p. 90), and the same day gave him seizin thereof, and no longer a widow "*eligit in maritum*" in the presence, among others, of the Bishop of Ross, who probably was there for the purpose of performing the marriage ceremony. These charters were confirmed by the king calling her Countess of Mar and Garioch, and the succession to the comitatus was thereby settled on herself and her husband and the longest liver of them, and to the heirs to be then procreated between them, whom failing to her heirs. These charters related to the territorial comitatus only.

Many years after, in 1430 (p. 586), Alexander is shown to have sat in Parliament as Earl of Mar. Did he assume that title immediately after his marriage? We have evidence before us that this was not the case. From the Forbes charter chest a receipt from him has been produced (p. 725), dated 2nd January 1405, as Lord of Mar and Garioch only; nearly

a month after he had seizin of the comitatus; soon after, however, he assumed the title of earl. But in order properly to understand this point and others which follow it, it becomes necessary to enter into the history of Scotland at the time, which I am surprised was not more referred to than it was by the counsel on either side.

Robert the Third was a man of weak character, and a sickly constitution. His brother, the Duke of Albany, in fact ruled, and is charged with having imprisoned and starved to death the king's eldest son, with the purpose of acquiring the crown. Robert, in order to save his only remaining son James, then about nine years old, from a similar fate, resolved to send him to France, but the ship in which he sailed was taken by the English, and the child sent to London and kept there by Henry the Fourth, who refused to give him up. This caused his father great grief, and he died 4th April 1406, when the Duke of Albany became regent, and the country fell into a sad state of anarchy. What evidence have we of Alexander's transactions during that period? The regent was his uncle. On 6th April and 6th September 1406, he had letters of safe conduct from Henry the Fourth as Comes de Mar, de Garioch, de Scotia, and on 11th December in the same year as Ambassador, and on 29th December, on his return from France. Those documents prove how he was trusted and employed by his uncle, as arbitrary and unscrupulous a man as himself. That he should be allowed to call himself Earl of Mar and Garioch under such authority can be easily accounted for.

The regent was dead before the king's return to Scotland, but some evidence of the character of his acts is afforded by the memorandum by the king's chamberlain between the waters of the Dee and Spey, from the Exchequer Roll in 1456 (p. 35), from which it appears that he had accepted a surrender of the comitatus of Mar from Alexander, whom the Chamberlain calls "*Assertus Comes de Mar*" (self-called Earl of Mar) and granted it to him, and his natural son Thomas, and his heirs. The king on his arrival summoned a parliament in 1424, and commenced active proceedings in regard to the illegal acts done during his minority and absence. Murdo Duke of Albany, son to the regent, was tried by his peers and executed, and Alexander, no doubt apprehensive of the questions which might be raised as to the surrender and re-grant of the comitatus under the regent, made terms with the king.

Thus we come to the surrender and re-grant of 1426, when the king confirmed to Alexander and Thomas the comitatus which *they* surrendered to him (thus acknowledging the validity of what had been done under the regent) and re-granted it to them, and to Thomas's heirs male, failing whom with remainder to the crown. This latter condition was probably rewarded by a grant of a peerage earldom with remainder to Thomas. The policy pursued by the king after his return from England, and which ultimately cost him his life, was to increase the territorial influence of the crown, and to reduce that of the nobles; and this reversion of the lands of Mar on the death of a youth of perhaps a weak constitution, for he died before his father, was well worth a peerage concession. And we find the first and only proof of Alexander's sitting in parliament in the charter of James the First in 1429 (p. 586). He died in 1435, and his natural son Thomas having died before him, the comitatus under the settlement of 1426 lapsed to the crown.

In considering what then occurred, we must again refer to the state of Scotland. James the First had so offended and alarmed the nobility by his acts, that some of them conspired against him and he was murdered in 1437. His son was a minor, and there was a regency. In 1438 Robert Lord Erskine got himself served heir to Isabella in half the comitatus, and, notwithstanding the remainder to the crown in Alexander's settlement of 1426, got possession of that half, as will be hereafter shown. In 1440 we find him calling himself Earl of Mar, but sitting in parliament as Lord Erskine. Mr Hawkins says, "the crown kept him out of the earldom." Is it credible that a regency, the result of a rising against the late king, whose acts against the aristocracy the nobles were determined to resist, could have prevented such a man as Lord Erskine from taking a seat in parliament to which he had lawfully succeeded? If the ancient earldom was in existence as descendible to heirs general, he had a right to it as heir to Earl Gratney. Every peer had an interest in the question of such a succession, and late events had proved that they were not so weak or the crown so strong as to render such a refusal possible. Lord Erskine was not the man, nor in the position, to be so treated. Look at the agreement in 1440 (p. 588) in which the king, with the advice of his council, delivers the castle of Kildrummy to him, and allows that "the revenues of half the earldom of Mar, *which Lord Erskine* "*claims as his own*, shall *remain* with them till the crown

"allows him a sufficient fee for keeping the castle." It is clear from this document that Lord Erskine was, under the retour of 1438, in possession of half the lands of the comitatus which the crown claimed under Alexander's charter, but which the regency was unable to get from him, and which probably remained with the Erskines until the retour of 1438 was set aside in 1457. It must also be noticed that the ancient peerage, if in existence, descended to him independently of the comitatus as heir general of Gartney, and that the claim of the crown to the comitatus was based on acts done in relation to it by Isabella and her husband, in no way to be affected by Lord Erskine's possession of the peerage.

As regards the assumption by him of the title of Earl of Mar, we find that in all the documents in which he so styles himself, he invariably adds Lord Erskine, evidently knowing that under the latter designation alone he could act legally. The charter of James the Second (p. 364) is conclusive on this point. In it a charter is recited of Robert Earl of Mar Lord Erskine granting certain lands to Andrew Culdane in 1440, which the king confirms in 1449 as a charter of Robert Lord Erskine. In 1460 the ancient earldom was treated by the king as extinct, for he created his son Earl of Mar; and the royal power was similarly exercised on subsequent occasions, and Robert's successors, none of whom ever assumed the title of Earl of Mar, continued to sit as Lords Erskine, sometimes with newly created Earls of Mar, and sometimes without any such bar to their claiming the title.

This undisputed admission of the extinction of the peerage by the crown under six sovereigns, and by six Lord Erskines in succession, from the death of Alexander in 1435 to the grant by Queen Mary in 1565, a period of no less than 130 years, must be looked upon as a settlement of the question which it would be very dangerous to disturb. Our decision should be governed in a great degree by that which was held to be the law at the time, which appears to confirm the dictum of Lord Mansfield, and to have considered the ancient earldom to have become extinct on failure of heirs male.

The argument in support of the grant of the earldom by Queen Mary in 1565 being a restoration and not a new creation must be next considered. The last preceding grant of the comitatus was by that queen to her natural brother James, by Charter in 1562, in which a right to a seat in Parliament was specially provided, thereby proving (if it were necessary to do so) that the comitatus did not then confer a

peerage. James surrendered both in the same year, sitting as Earl of Mar on the 10th September, and as Earl of Moray on 15th October. On the 23rd June, nearly three years afterwards, the queen granted the comitatus to Lord Erskine in a charter in which she acknowledged him to be heir to Isabella, and that he and his ancestors had been unlawfully deprived of the comitatus. Still he continued to sit as Lord Erskine, as is proved by the records of sederunt in the Privy Council, in which he is found as Lord Erskine on 28th July, more than a month after he had been declared by the crown heir to Isabella. Stronger proof cannot be required to show that there was no earldom for him to succeed to through her. On the 1st August he is in the council as Earl of Mar. Between those days the queen's marriage took place, and without accepting Randolph's letter as evidence, common sense tells us that he was created Earl of Mar on that occasion. If it was thought necessary that some course should be taken to prevent any idea of the restoration of the old peerage, none could be devised more decided than insisting on time being allowed to intervene between the restoration of the comitatus to him as heir to Isabella and his recognition as earl.

Taking all these circumstances into consideration, I am of opinion that the earldom which John Lord Erskine of 28th July is recorded to have enjoyed on the 1st August 1587 was a new creation, and probably by charter. Why that instrument is not now forthcoming, I will discuss hereafter.

In support of the opinion that at a later period the ancient peerage was held to be extinct, I would refer to the documents lodged by the Earl of Mar in 1606 for the decreet of ranking. These were the surrender by Isabella in 1404, and the re-grant to herself and Alexander, and to her heirs, and the confirmation thereof by Robert the Third: a letter from that king to Sir Thomas Erskine in 1390 promising that he would not recognise any resignation of the comitatus to his prejudice; and the Act of Parliament of 1585 which ratified the grant of the comitatus by Queen Mary. All these documents related to the territorial earldom only. No records of the ancient peerage were produced, and the ranking sought was confined to whatever might have been granted in 1404, which would give a precedence of 161 years over that given by Queen Mary in 1565. Mr Hawkins, in answer to a question why earlier documents were not produced, said that the earl probably produced the earliest crown charters he could find, and that as far as he was aware there were no earlier docu-

ments on the Mar title, omitting to notice the Acts of Parliament at pages 591 to 597 of the evidence, in which Donald Earl of Mar in 1283 is mentioued, and Thomas, Isabella's uncle, in 1369, public documents as accessible to the earl on that occasion as for the present inquiry.

The ranking sought for was obtained, and a necessity thereupon arose for destroying all records which would, if discovered and produced at any future period, take away that precedence. If the charter referred to in the memorandum before mentioned granted a peerage earldom of Mar to William Earl of Douglas and his heirs male by Margaret, or if, as is more probable, it dealt with the comitatus in a manner adverse to its having a peerage attached to it, it might be fatal to the ranking obtaiued through the production of Isabella's charter of 1404, and the destruction of the deed is thus accounted for. If Alexander had obtained a grant of peerage in 1426 to himself with remainder to his natural son, or an earlier one to himself and his heirs male or general by Isabella, the production of either would upset the ranking obtained by means of the charter relating to the comitatus with remainder to her heirs general. Equally fatal would be a charter by Queen Mary granting the earldom as a new creation in 1565. Having obtained a ranking to which he was not entitled by the production of documents which the present inquiry has shown related to the lands of the comitatus only, the destruction of charters which were no longer wanted for the purposes for which they were granted, but which would be fatal to the retention of that ranking, appears a probable and almost a necessary consequence; and the memorandum relating to the charter of Robert III. affords some evidence that such destruction may have taken place.

In summing up the evidence before us in this case given in support of the claim of the heir female, let us compare it with that which was accepted in the Sutherland case as contradicting the legal presumption in favour of heirs male. The sole point of resemblance is that the Earl of Douglas assumed the title of the Earl of Mar on the death of the heir male as Adam Gordon did that of Earl of Sutherland, but it is far from certain that he continued to do so at a later period. That Gordon's assumption of the title was of right was proved by a continued and uninterrupted succession of heirs in the direct line for 252 years, with representatives of the male line in existence to contend for the title, had the descent been properly under that limitation. In this case there was no succession

to the peerage earldom. The Earl of Douglas's wife survived him and her son, but her second husband was Lord of Mar only. After her death Isabella, the next heir female, was for twelve years Lady of Mar only, and her husband Lord of Mar and not Earl, though brother-in-law to the King. The evidence derived from the assumption of the title by her second husband, Alexander Stewart, a lawless man in a lawless time, under the government of his infamous uncle the regent, cannot be held of the same value as that which took place during her first marriage. All her recorded deeds relate to the territorial comitatus only. Alexander dealt with the latter illegally after her death, and his last settlement of it contained a bribe to the crown which probably obtained for him a grant of peerage with remainder to his natural son who was to succeed him in the comitatus. It has been stated as a probable reason why neither Swynton nor Drummond became Earls of Mar in right of their wives' peerages that they had no issue by them. If there is any force in this objection it is equally good against the assumption of the title by Alexander being in right of his wife's peerage, and would add to the probability of his having been created Earl of Mar as suggested in 1426. After the Erskines became heirs general, one only is recorded to have ever called himself Earl of Mar, and none of them for 130 years attempted to claim the peerage. This fact, and the fact of the crown during that long period having treated it as extinct by new creations, are fatal blows to the claim. The interval of more than a month after the public acknowledgment by the crown of Lord Erskine as heir to Isabella (which gave him the ancient earldom if it was held to descend to heirs female) before he became earl at the time of the queen's marriage is the final and conclusive blow to it. No other earldom but that could be in Isabella, and the earl did not presume to contend for it in the decreet of ranking, but set up a fancy title commencing with her. It was too well known in 1606 that the old peerage was held to be extinct in 1565 for him to attempt to get it.

The only point remaining to be considered is what shall be held to be the remainder under Queen Mary's creation. The presumption is in favour of heirs male. What is there in the evidence before us to contradict that presumption? The only points urged are the charter restoring the comitatus to heirs general, and the fact of the person to whom the earldom was restored after the attainder being called in the Act the "grandson and lineal representative" of the attainted earl, he

being grandson only through a female. The charter being a restoration to the heirs of Isabella before the new peerage was created, naturally left the comitatus to the old limitations, and the words quoted from the Act of Parliament cannot be held to determine a matter not then inquired into, when the person obtaining the earldom was heir male as well as grandson through an heir female. There cannot be any doubt of the Barony of Erskine going to heirs male under the presumption before mentioned, and the same presumption leads me to consider that when John Lord Erskine was created Earl of Mar, that earldom must be held to go with the barony to heirs male.

Under these circumstances, my Lords, I consider that the Earl of Kellie has made good his claim to the earldom of Mar created by Queen Mary in 1565, and that there is not any other earldom of Mar now existing. As for the title of Baron Garioch assumed by the opposing Petitioner, there is not any evidence before the Committee showing that the territorial lordship of Garioch was ever recognised as a peerage barony.

Lord Chancellor (LORD CAIRNS)—My Lords, the consideration of this case has given to me, as I know it has given to those of your Lordships who have already spoken, very great anxiety, and the case has stood over from time to time in order that we might more perfectly acquaint ourselves with the mass of documentary evidence which has been placed before us. I have had the advantage of perusing the opinions which have just now been expressed to your Lordships, and I not myself propose to do more than to add one or two sentences.

My Lords, I am of opinion that it is clearly made out that the title of Mar which now exists was created by Queen Mary some time between the 28th of July and the 1st of August in the year 1565. It appears to me perfectly obvious from every part of the evidence that in the greater part of the month of July, and before that creation, there was no title of Mar properly in existence. And, my Lords, it appears to me that the question and the only question in the case, and the question which has caused, as I have said, great anxiety to myself in the consideration of it, is whether that peerage so created by Queen Mary should be taken to be according to the ordinary

rule, a peerage descendible to male heirs only, or whether by reason of any surrounding circumstances that *primâ facie* presumption should be held to be excluded, and it should be taken to be a peerage descendible to heirs general. Now the *primâ facie* presumption being that which I have mentioned, it appears to me beyond doubt that the burden is thrown upon those who assert that the peerage was descendible to heirs general to make out their case ; and it appears to me that in the case, in order to discharge that burden, the opposing petitioner is able to do nothing more than to make suggestions and to put forward surmises ; but that there is absolutely nothing which can be taken to be evidence in any way countervailing the *primâ facie* presumption with regard to the ordinary descent of title created as this title was created.

My Lords, the burden of proof lies upon the opposing petitioner, and, it not having been in any way discharged, I am compelled to arrive at the conclusion at which my noble friends who have already addresssed the committee have arrived, namely, that this must be taken to be a dignity descendible to heirs male, and therefore that it is now vested in the Earl of Kellie.

It was then resolved—

"That it is the opinion of this committee that the claimant, Walter Henry, Earl of Kellie, Vicount Feuton, Lord Erskine and Lord Dirleton in the peerage of Scotland, hath made out his claim to the honour and dignity of Earl of Mar in the peerage of Scotland created in 1565."

And—

"That report thereof be made to the House."

APPENDIX B.

The fate of the old Mormaors is to be found in Douglas' Peerage at some length. We give a brief summary.

1. *Angus.*—This Earldom descended through an heiress to the Norman family of Umfraville. Robert de Umfraville, 9th Earl of Angus, was forfeited by King Robert I., and died about 1326. His descendents certainly exist, but have never claimed the Earldom, which was granted about 1329 to Sir John Stewart of Bonkyll, a cousin of the King.
   (Mearns was never held as a separate title.)

2. *Athol.*—David, 11th Earl, a descendant of King Donald Bane, was also High Constable of Scotland. He, however, revolted against Bruce, his estates were forfeited, and he becomes thereafter *dudum comes Atholiæ*. His descendants were wealthy proprietors in England, and his heirs exist. The Earldom and title was granted to Sir Neil Campbell, who died *s.p.* 1333, when they reverted to the Crown. Then to Sir William Douglas, who resigned it to the Crown in 1341. Then to Walter, 2nd son of Robert II. by Euphemia Ross, who was beheaded and forfeited in 1437. Then in 1357 to Sir John Stewart of Balveny, of the Bonkyll family related to the King. The eldest daughter of the 5th Earl married the 2nd Earl of Tullibardine—her son was served heir to the first William (Stewart) Earl of Athol, and a grant of 1629 contains a Novodamus of the title and dignity. The heirs of the old Mormaorship never have claimed it.
   Goverin or *Gowrie* was not a separate title till William, 4th Lord Ruthven and Dirleton, was created Earl in 1581 —forfeited 1600.

3. *Caithness.*—John Earl of Caithness was alive 1296. The succession is involved in perplexity ; it would seem he was succeeded by a daughter or sister, wife of Magnus Earl of Orkney, who had two daughters. The second of whom left

4 daughters co-heiresses, and so the old Mormaorship was broken up. David, son of Robert II., was created Earl of Caithness—forfeited 1437. Sir George Crichton, created Earl 1452—extinct 1455. William Sinclair (who had the blood of the old Mormaors in his veins, but never claimed to be their heir) was created Earl 1455, *with remainder to his second son*, excluding the eldest, whose heirs still exist.

4. *Fife.*—Isabel, 13th in the Earldom, married 4 husbands, all called in her right Earls of Fife—she had no children. She in 1371, by indenture, acknowledges Robert Earl of Menteith, afterwards Duke of Albany, 3rd son of Robert II., her heir. On her death, he succeeded to the exclusion of the heirs of line, the title was forfeited and annexed to the Crown—1455. Sir William Duff (the Duffs have no known descent from the original Earls of Fife) was created ("in consideration of his descent from Macduff") Earl of Fife in the Peerage of Ireland in 1759.

(Forthreve was never a distinct title—Viscount Forth is the second title of the Earl of Perth).

5. *Mar.*—Of that see the "Paper."

Buchan.—The first Earl on record is Fergus, *temp* William the Lion. His daughter Marjory married as second husband, William Cumyn—his line ended in two co-heiresses, who divided the Earldom—the direct heirs of the eldest daughter are represented by Sir G. Beaumont of Coleorton. Sir Alexander Stewart, fourth son of Robert II, was in 1406 Duke of Albany, Earl of Menteith and Buchan—forfeited 1425. Sir John Stewart, second son of the Black Knight of Lorn—created 1469. His heiress Mary, Countess of Buchan, resigned the Earldom to the heirs male of her husband, James Erskine—the descendants of his next brother now hold it. (*See Appendix D.*)

6. *Moray.*—On the death of John, 3rd Earl of Moray, in 1332, the Earldom should have reverted to the Crown, as it was created in 1315 with remainder to heirs male. The heir of line, Agnes, assumed it, and it was granted to the 2nd son—her eldest being Earl of Dunbar and March: it was forfeited in 1455. James Stewart, natural son of James IV., created Earl 1501, died without issue male. James Stewart, natural son of James V., created Earl of Mar 1561, but resigned it for Moray the same year. (The heirs of the first Earldom never claimed it.)

Ross.—Euphemia, 10th in the Earldom of Ross, resigned it and received a re-grant with remainder to John Stewart, Earl of Buchan, son of the Regent—and lands to the Crown. In 1415 it merged in the crown. The rightful heir, however, assumed the title till John 13th Earl surrendered it to the Crown. Munro Ross of Pitcatline claimed the title in 1778 as heir male, but no decision was come to. The senior co-heir is Mr Binning Home of Argaty.

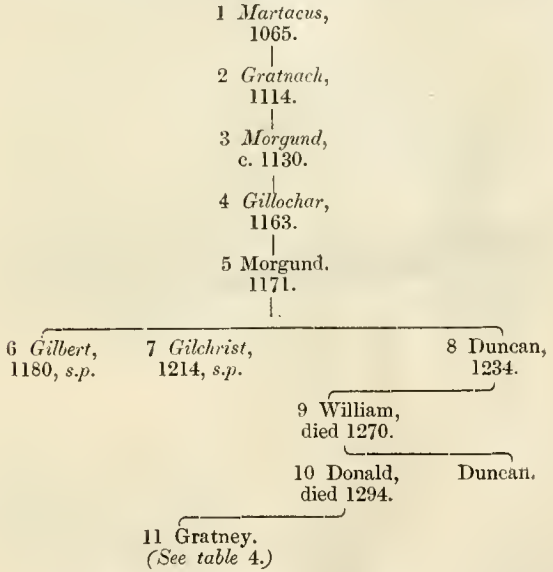
7. *Strathern.*—Malise, 7th Earl of Strathern, died 1333—certainly left daughters, but the Earldom was granted to Sir Maurice Moray, his nephew, on whose death *s.p.* 1346 it reverted to the Crown. Robert Stewart, nephew of King David II., created 1361—annexed to the Crown 1455—but the heirs male again created Earl of Strathern 1634: The heirs of the old Earldom have never claimed it.

Menteith, held by Murdoch, *temp* David I.—his line ended in an heiress, Margaret, who married Rob Stewart, 3rd son of Robert II.—her son was forfeited 1425. Malise, only son of Patrick Earl of Strathern, created Earl of Menteith 1427—his descendant William, 7th Earl of Menteith, was deprived of his title 1633, but was created Earl of Airth, *with precedency to* 1427.

We thus see that in the 14th and 15th centuries the Crown *bestowed on members of the Royal family all the titles which had been borne by the seven Mormaors of Scotland*—to the exclusion of heirs—and not one of these titles has been inherited by the heirs of the old Mormaors.

APPENDIX C.

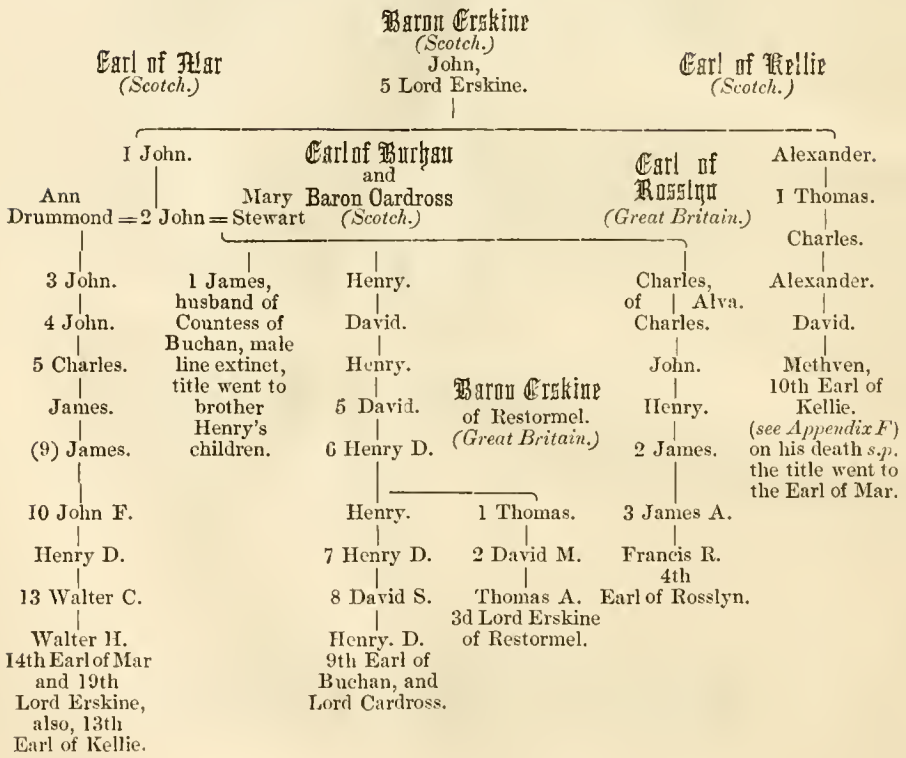
We give the pedigree of the old Mormaors of Mar as in Douglas' Peerage, and copied in most modern Peerages, but it cannot be relied on, as there is proof of the existence of Earls of Mar not mentioned by him, viz—Donald, in 1014; Rotheri, in 1124; Gilchrist, who dispossessed Morgund for a while, but finally succeeded him; William Comyn was Earl of Mar in 1255 and 1264. Simply as a matter of interest, we may add that in 1334 Richard, 2nd Lord Talbot, ancestor of the Earl of Shrewsbury, sat and voted as Earl or perhaps Lord of Mar.



Earl Duncan is proved to have been the heir of Earl Morgund. From him downward the pedigree is probably correct, but there is no proof who Morgund was, or that Gilbert or Gilchrist were his sons at all. The italics in this pedigree are ours.

APPENDIX D.

HONOURS HELD BY THE HOUSE OF ERSKINE.



APPENDIX E.

ARMS OF THE VARIOUS NOBLE FAMILIES CONNECTED WITH THE CASE.

MAR
KELLIE } EARLDOM.—Quarterly; 1st and 4th *azure*; a bend between six cross crosslets *or* for Marr; 2nd and 3rd, *arg*, a pale *sa* for Erskine.

Over all on a shield *Gules*, the crown royal of Scotland *proper* within a double tressure counter flory *or* for the dignity of Kellie.

Crests.—A hand grasping a dagger erect, proper.—*Erskine*, a demi lion rampant *gu.*—*Kellie* Supporters—2 Griffins, *Gules*, winged, beaked, and clawed, *or*

Mottoes. { "*Je pense plus*"—*Erskine.*
{ "*Decori decus addit avito*"—*Kellie.*

N.B.—The present Earl of Mar and Kellie impales the arms of his wife Mary A., daughter of William Forbes, Esqr. of Medwyn, viz., quarterly, grand-quarter, 1st and 4th *azure* on a chevron between three bears' head, couped *arg*, muzzled *gu*—a heart of the last—Forbes of Pitsligo. 2nd and 3rd, quarterly, 1st and 4th *azure*; 3 bears' heads, couped *arg*, muzzled *gu*—Forbes, 2nd and 3rd *azure*, three cinque foils *arg*—Fraser.

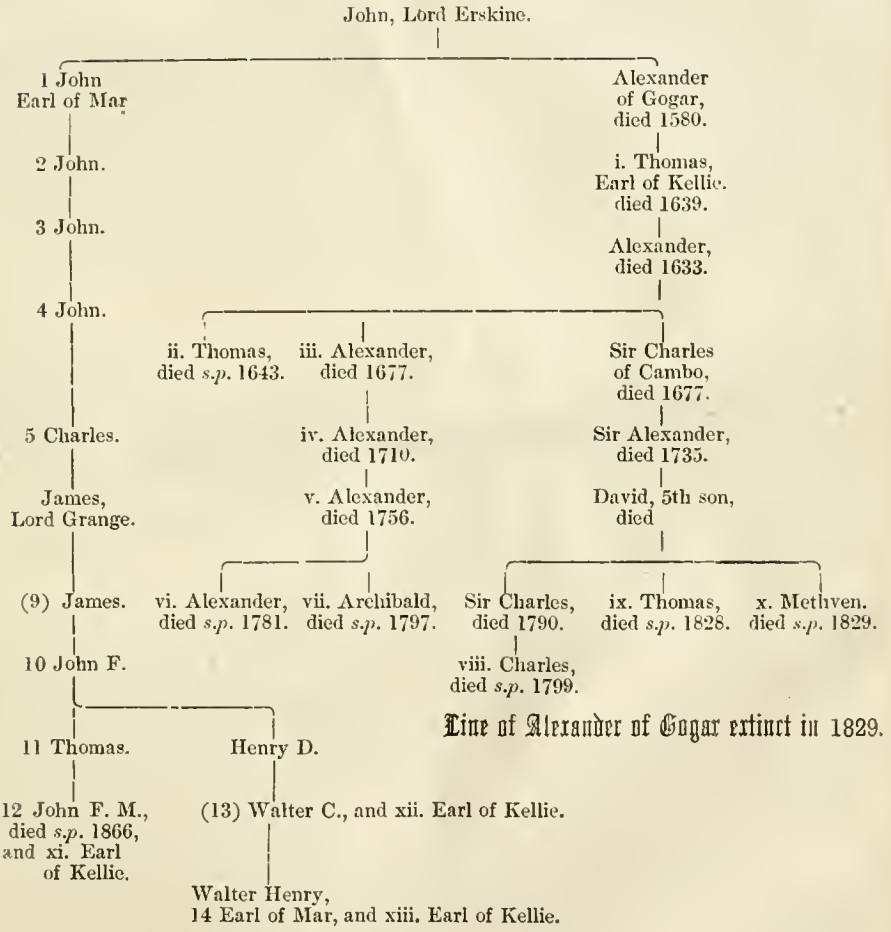
LORD LYLE (now quartered by Sir W. J. Montgomery Cunninghame, Bart., Lord Lyle's heir general), quarterly, 1st and 4th Mar; 2nd and 3rd *gules*, a fret *or* for Lyle, (see page 16).

JOHNSTON, Sir W. B. Bart, of Johnston Co., Aberdeen—1st and 4th *arg*, a saltire *arg*, and on a chief *gu* three cushions *or* for Johnston and Randolph. 2nd and 3rd *azure* on a bend, *or* between three harts' heads erased *arg* attired *or*, as many cross crosslets of the 2nd for Mar and Garioch of Caskieben composed together into one coat (see page 16.)

N.B.—The arms of 17 generations of the family of Erskine from Walter Coningsby, 13th Earl of Mar, upward, with the arms of their wives, are emblazoned on the roof of the Kellie Memorial Aisle, St John's Church, Alloa, and commence at the north west corner.

APPENDIX F.

DESCENT OF THE EARLDOM OF KELLIE.



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NEW POSITION OF THE OLD EARLDOM OF MAR.

REFLECTING on the late most unexpected result of Lord Kellie's claim to the title of Mar—very surprising even to the winners,—"none but itself can be its parallel." In a brief review it may be observed, that the antipathy and resistance to inheritance by or through females began to be dreaded by Sir Thomas Erskine, the husband of the heiress, in 1393, when King Robert III. gave him a letter of assurance of his protection. When the succession opened in 1435, notwithstanding this promise, the opposition began. Robert, Lord Erskine, son of Sir Thomas by the heiress, assumed the title, and was for many years fully recognised as Earl of Mar; but, upon false evidence (as at last acknowledged), was sentenced to be deprived by King James II. in 1457, and his son Thomas, Lord Erskine, being in the Council, was forced to concur in his father's deposition! It took a hundred and eight years to remedy the "iniquity," as Queen Mary in her Charter, and the Act of Parliament confirming it, stated it to be. He who was rightfully Earl of Mar, by the laws of his own country, had a very hard trial, in having his best evidence either disallowed or misconstrued. *Now* the misfortune to the heir-female is, that by the death of Lord Colonsay there was no Scotch lawyer on the Committee to interpret the Acts, and deeds, and forms of the country, regarding which there arose a case of the utmost importance, involving its law of succession for centuries. These remote questions

had little interest, but great obscurity, and it was not to be expected that comparative strangers to Scotch feudal law could give the full and comprehensive consideration which a native could have so patiently and willingly given.

It is now time to turn to the details of the three points on each of which claims for the heir-female, fairly and attentively weighed, can be established. The particulars shall be stated *seriatim*, beginning with the last and nearest.

The proofs consist of Acts of Parliament, Royal Charters, legal recognitions, services or inquisitions throughout the whole line, very long possession, with two intervals and restorations, and repeated successions of or through females. It took twenty-two years to suppress Robert, rightful Earl of Mar, and it has taken eight years to collect a mass of extraneous and irrelevant evidence to arrive at the conclusion that there is not any deed, or anything else, to prove that Lord Kellie has made out any right, as heir-male, to the ancient Earldom of Mar. Therefore a new Earldom is found for him on presumption, while an heir-of-line of the most ancient Earldom of Scotland is deprived a second time, notwithstanding the triple proofs that he was heir-at-law to the long line of Earls who were a part of the history of Scotland, having twice been Regents.

1. The restored Earl of Mar, in 1824, was heir through his MOTHER, as he always declared, and as the Act of Parliament proved; and yet now it is strangely found to be, not an ancient female inheritance, but a comparatively modern male title! Thus the statement in the Act, that he obtained it as the lineal heir to the forfeited Earl (which could only be through his daughter), and the speech of the Prime Minister, Sir Robert Peel, introducing the Bill, and expatiating on the untraceable antiquity of the Earldom (which was necessarily through many previous female links), are absolutely overthrown. The rule of the restorations affecting the four forfeited Peers in 1824 was, that none but lineal descendants, and heirs of the body of

the attainted Peers, could enjoy the benefit of the Acts of Grace. The restoration itself proved it to be the old Earldom, and to be the inheritance of heirs-general, and thereby reaching back, through its place on the Union Roll, to the antiquity granted by the decreet of ranking in 1606, which secured it the date of the Charter of 21st of January 1404–5, and thus ranked the restored Earl above ten Earls created before 1565, the now alleged year of creation of the Earldom of Mar.

This one proof might be sufficient to convince careful and understanding inquirers that the restored Earl was acknowledged to be the heir of Isabel Douglas, Countess of Mar in her own right, according to the Charter of Confirmation by King Robert III., 21st January 1404–5, to her and *her heirs!*

2. The second point which established an antiquity for the Earldom, from 1404–5—now making four hundred and seventy years,—comes next. King James VI., finding an order of precedency in England, and hitherto none in Scotland, undertook to give a complete remedy to that great inconvenience, and cause of feud and bloodshed. He summoned the whole Peers to assemble and investigate the claims of every Peer, according to such information as could be found, and form a grand jury upon each other, to settle the ranking by solemn decree. The then Earl of Mar was at a great disadvantage, as the Mar family deeds were in the custody of Lord Elphinstone, the adverse holder of Kildrummie Castle and the estates. But the Earl produced one decisive authority—the Charter by King Robert III., 23rd January 1404–5, a confirmation regranting the Earldom of Mar, on her own resignation, to Isabel Douglas, Countess of Mar, and her heirs, "ex utraque parte" (both by father and mother). This brought the title, in 1565, to Lord Erskine, as possessing the right, so long iniquitously suspended, from 1435. Thus the Peerage was proved to date from two hundred years before, and was established

5 March 1606.

to be the inheritance of an heir-general, through five female links, and placed him above ten of the great families who had obtained Earldoms between 1405 and 1565. Six of these Earls, twenty-two years afterwards, combined to object to Lord Mar attaining this position, but the unsupported grievance dropped, and that ancient precedency and constitution were maintained till the rebellion of 1715 and the second restoration, and the reported presumption of extinction now explained away. Thus this ancient female Earldom was carried back before 1404, and again the right of the heir-of-line, or heir-female, was proved.

That final judgment on the 5th March 1606 gave precedence from 1404. Recently this solemn decreet of the whole Peers of the Kingdom of Scotland, after having been the rule of the legislature for two hundred and seventy years, came incidentally under review as evidence in an inquiry regarding the right to that most ancient Peerage, as settled by it, when, without having had its validity ever questioned, and without any revision or alteration of law, or pretence of conquest, it was overruled and set at naught!

The question has arisen, Who is the heir to these two restored Earls of Mar—the last Earl's sister's son and heir-general, or his uncle's son, the collateral heir-male, a character hitherto unknown in the history of Mar? It happened to be inquired into by a Committee before whom Scotch Peerage cases come only incidentally and at intervals, and consequently without having the natural regard or intimacy which might have been looked for in English cases. The old laws and customs lost their due influence, and deeds and forms, which would have commanded attention at home, were disregarded as of no weight. When the most important evidence was overruled as incompetent, the Earldom was given to the heir-male without any documentary evidence, but upon presumption in favour of heirs-male, against all the PROOFS for the heir-female. No time was given to resist this lately raised presumption, and the papers to show the steps and examination for the

restoration in 1824 were not allowed to be produced, as they had been in the contemporary and similar claim for the Peerage of Nairne. The result was, the title was conferred on the heir-male without any claim but presumption, against what was almost universally believed, including many friends of the successful party, to be a certainty. But if it had been surmised that he was to have it whether there was or was not evidence in his favour, there could have been no doubt as to the finding. The leaning to heirs-male is, in this case, contrary to a long succession of female descent, supported by the general practice of females inheriting everything whenever they were heirs-of-line in ancient times.

3. The third stage comprises Queen Mary's gracious restitution, after an acknowledged continual course of iniquity and persecution for one hundred and thirty years. She did this upon full inquiry, lamentiug the injustice of her (five) predecessors to the family of her most faithful subjects; and by her Royal Charter confirmed the succession to John, Lord Erskine and his heirs (23 June 1565), putting him in the place of his ancestor, Robert, Lord Erskine, properly Earl of Mar, who had rightfully succeeded Isabel Douglas in her Earldom of Mar, as declared by Queen Mary, and whose Charter was ratified by Parliament in 1567, when the strongest language was used as to the "diuturnitie" of time during which the Erskine family had been prevented recovering their rightful dignities and possessions. Queen Mary's Charter was again ratified by King James VI. in 1587, with similar terms of redress. It had taken effect in little more than a month after the Act of Grace, and so proved that the Erskines, Earls of Mar, inherited the ancient Earldom, which Queen Mary recognised as their lawful right in the Charter of 23rd June 1565. The feudal delays of infeftment were quite immaterial. Alexander Stewart, who became Earl by his marriage, and the charter of his wife, Isabel, Countess of Mar, had to wait a

month after his nuptials, ere he was recognised as Earl of Mar in her right. The cases of Rothes, Erroll, and Gray, were all much longer ere the heirs could assume these titles on getting feudal possession of the ennobled fiefs.*

I sum up the whole concisely as a trial in which was collected on one side, for the heir-general, a superabundance of evidence, such as a Royal Charter, explaining and reversing former deeds of gross injustice, two contemporary Acts of Parliament, ratifying the rights granted by that Charter, Decree by Royal Commission of all the Peers as a jury, settling their own rank for the first time, ancient and modern Inquests of sworn testimony as to titles and successions—all attempted to be explained away as unavailing and inadequate; while, on the other side, no documentary evidence could be shown for the heir-male. There could be no objections raised against his proofs, as he confessedly had none to produce. It was inferred for him, that there must have been, or should have been, a patent or charter, which he required, and that it must have been in favour of heirs-male, which was also absolutely needful for him, but which had never been heard of, and not even surmised, for above three hundred years, and this to supersede the existing charter of 1565 in favour of heirs-general, on which the opposing party confidently relied.

It is difficult to understand, how, with all these facts amply proved, any one could assert that Queen Mary did not know what she was doing, and exceeded her powers, though her Act of Grace and Restitution was ratified by Parliament; or that Sir Robert Peel, the Prime Minister, did not understand the case he stated so eloquently to the House.

How far keen advocates may go to support a favourite theory, such as heirs-male against the heirs-female, may be seen when it could be surmised that a great nobleman of unblemished character, nearly three hundred years ago, conspired with the highest legal authority of his day to

* *Vide* Appendix.

destroy a Royal Charter, which, having never been seen or heard of, has to be invented before it can be destroyed, which related to a public event only forty years before, which the other Earls who alone could have been interested in it did not pretend had ever existed, and which the two personages now first accused could never have conceived, as they had already what they thought abundant proof, fully recognised in those days, and which, if they could have imagined such a case, they could only consider the creation of such a supposititious document an impossibility. Thus human fame is never safe!

When such a conjectural and useless crime can be posthumously imputed to two highly honourable characters, it may be left to its own contempt. The previous alleged destruction of deeds seems equally gratuitous, and proves that weak arguments require any support that can be found.

If presumption be admitted as proof, no one need despair of anything being made out. A presumed document may be conveniently framed in favour of the inventor, but can any weight be fairly assigned to such an imaginary instrument, or to its necessarily assumed meaning?

If there could be any presumption of difficulty arising from the circumstance that some of the lands of the most ancient Earldom of Mar had been alienated, and thus impaired its totality, the answer is obvious. None of the thirteen ancient Earldoms could have existed under such a test. They all had suffered mutilations, with consent of the Crown, by grants or gifts to younger children or to friendly supporters, or by joint inheritance, and still the Earldom subsisted. The old Earldom of Caithness furnishes a complete example. The original Earldom became divided into four portions, one of which was sufficient to carry the Earldom in 1374, with the *caput comitatus*, to the King's son, David. After many changes, the Sinclairs at last got the residue, in 1455, as a territorial Earldom. It gradually diminished, till the remaining lands of the Earldom were alienated by George, sixth Earl, to a stranger,

in 1672; but the Earldom has continued to the present day without an acre of the ancient estate of the Earldom.

But it may here be stated that the decree in the time of the Baliol and Bruce competition, in 1290, proved that the ancient Earldoms were divisible among female co-heirs, the elder inheriting the title and estates, the younger getting a portion, *ex gratia.*

Margaret, Countess of Angus in her own right, gave lands to her sister, Elizabeth Hamilton, but the Earldom went to her son. It would be useless to quote more of the numerous instances.

In conclusion, it may be remarked, that any number of opinions in our days regarding the ancient Earldom having somehow become extinct before Queen Mary's reign by the alienation of a part of the original territories of the Earldom, cannot avail against the Queen's own declaration of a strong desire to do justice, and her consequent grant of restoration to John, Lord Erskine, recounting his iniquitous treatment by her ancestors, and proving by this Charter her determination to establish his long suspended right, after a hundred and thirty years of oppression and suppression. Surely the ancient honours and privileges of a distinguished family cannot be presumed to be on trial, and taken from them or suspended on conjecture?—disowning or misinterpreting the proofs of his case.

Note.—A man of rank, but not great in law, being appointed to the bench in the West Indies, said he was afraid he could not well explain the reasons for his judgments. The advice he got was, "Give your judgments, but don't give your reasons. You may possibly be right, but your reasons may be wrong. *You may get into a difficulty.*"

APPENDIX.

I TAKE the opportunity of adding three curious cases of feudal delays and impediments, which show how the law worked in comparatively ancient times:—

I. THE EARLDOM OF ROTHES.—It has been generally supposed that George second Earl was killed at Flodden, and was succeeded by his nephew George. This is a mistake. The second Earl was in feudal delinquency when he died in 1512, a year before Flodden, under forfeiture for alienating lands without the King's permission.* His brother and heir, William Leslie, on this account, met with great obstructions in securing the succession. Gift under the Privy Seal by King James IV. to William Leslie, brother and heir of umquhile George, Earl of Rothes —non-entries of Balenbriech, etc.† Mandate by King James IV. to help "his cousin," William Leslie, as heir to his brother, umquhile George, Earl of Rothes.‡ King James IV.'s signature in his favour to William, Bishop of Aberdeen, Keeper of the Privy Seal, because Balenbriech, etc., had been adjudged, for improper alienation, for 2000 merks Scots, of which 1400 merks had been paid.§ 9th S. 1513.

From all this it appears that George, Earl of Rothes, died in 1512; that his brother and heir, William Leslie, who was at Flodden, and was killed there, was the person who is styled Earl of Rothes among the slain; but he had not been feudally infeft in the Earldom, though his right

* Act of Parliament, 31st March 1513.
† Privy Seal, 30th June 1513.
‡ 7th July 1513.
§ Privy Seal, 14th July 1513.

was clear, and he may have been styled Earl, as he only required some feudal forms. The King may perhaps have addressed "his cousin" as Earl. His son George succeeded as heir to his uncle George, and was Earl of Rothes.

II. I now come to the Earldom of Erroll.—On the death of William, sixth Earl of Erroll, 11th April 1541, aged twenty, leaving as his heir a sister, Jean Hay. A family dispute as to the succession arose on a recent settlement between her and the cousin and heir-male, George Hay of Logy. After seven months this was concluded by his getting charters of the Earldom as heir of entail, 5th and 13th December 1541, but still under the name of George Hay; and according to the bargain, George's son and heir, Andrew, married the heiress, and united the claims by contract at Aberdeen, 14th January 1543. But the Earl was kept out of possession from 11th April till 5th and 13th December 1541.

III. The last case I mention is the Lordship of Gray.—It is singular that this instance happened also in April 1541, when Patrick, fourth Lord Gray, died without legitimate issue. The question here arose from his father having been twice married, and having had two families, and turned upon the right of succession of the whole-blood against the half-blood. Patrick, Lord Gray, had two full sisters and a number of half-brothers, the elder of whom had a son, Patrick, the heir-male. Lord Patrick got a charter from the Regent, Duke of Albany, 16th April 1524, to settle the succession on the heirs-male, as the sisters otherwise were the heirs-at-law. The elder married Alexander Straiton of Laurenston; the younger married John, Lord Glammis. But King James V. interfered, and ultimately bought up the Straiton half for 3000 merks from the deceased Lord's nephew, Andrew; forfeited the other half from the grandnephew, John, Lord Glammis; and, on the resignation of Andrew Straiton of Laurenston,

granted a charter of the barony to Patrick Gray, the nephew of the deceased Lord, by which he got the title and estate after a lapse from April 1541 to 28th April 1542. Afterwards, on the 14th September, he got a charter to Patrick, now Lord Gray, confirming the charter of 16th April 1524. King James died three months afterwards.

In these three cases of suspension of Peerages, could it be fairly said that the titles of Rothes, Erroll, and Gray, were not properly in existence, when they all survive to the present day, with the ancient rank? In the same way, the Earldom of Mar was suspended, for the first time, a hundred and thirty years, and the second time for only five weeks, nearly contemporary with Rothes at least seven months, Erroll eight months, and Gray a year!

3.

THE PROCEEDINGS

IN THE

CASE OF

THE

EARLDOM OF MAR:

1867—1885.

A RÉSUMÉ BY R. B. SWINTON.

"My thanes and kinsmen,
Henceforth be Earls; the first that ever Scotland
In such an honor named."

LONDON:
HARRISON AND SONS, 59, PALL MALL,
BOOKSELLERS TO HER MAJESTY AND H.R.H. THE PRINCE OF WALES.

1889.

Price One Shilling.

THE PROCEEDINGS IN THE CASE OF THE EARLDOM OF MAR.

On the 17th July of this year* the Earl of Galloway in the House of Lords moved a resolution regarding the Mar peerage. He desired, in effect, to have it resolved that the present Earl of Mar and Baron Garioch was the only Earl of Mar, and that an order of the House of Lords of February 26th, 1875, which declared the Earl of Kellie to be also an Earl of Mar, should be cancelled:—"What they were asked to do," according to one of the speakers, the Earl of Rosebery, was "to declare that there were not two Earls of Mar; whereas three years ago they had solemnly declared that there were;" and, according to the report of the debate in the "Times," the motion was lost by a majority of 27 in a House of 51.

This is the last public resuscitation of a long-standing and involved dispute; and it is proposed to give some account of the most interesting inquiry of the kind which has taken place in this century—interesting for its intrinsic historical merits and research, and for the perplexed proceedings following upon it—not for any details of questions of disputed legitimacy which often accompany such investigations.

Burke dryly records in his peerages the vicissitudes of this title. In the peerage of 1866, John Francis Miller Erskine was Earl of Mar and Kellie. In 1867, after his death, the name of the son of his sister is inserted as having succeeded to the single title of Earl of Mar, that is the name of John Francis Erskine Goodeve, who after-

* Written in 1888, since which the Earl of Mar and Kellie has been succeeded by his son.

wards added the surname (Erskine) to his name. After a year or two his name disappears, and there is no Earl of Mar at all, but only an Earl of Kellie. Subsequent to the year 1875 we find the Earl of Kellie to be also Earl of Mar. By 1886 Mr. Goodeve Erskine's name appears again as Earl of Mar—the Earl of Kellie also retaining that title. There being now two Earls of Mar in the peerage.

The descent of the two Earls is identical down to three generations back. John Thomas Erskine, the grandfather of the Earl of Mar, was the elder brother of Henry David Erskine, the grandfather of the Earl of Mar and Kellie. Their children, the sister of the late Earl, who married Mr. Goodeve, and the father of the present Earl of Mar and Kellie, being first cousins, and the present two Earls being consequently second cousins. Both claimants —so for convenience to term them—were of the same near blood, and here was no romantic case of some long-lost heir being found in obscure circumstances or in a foreign country.

There arose a technical and legal difference; the Earl of Mar was the heir-general, and the Earl of Mar and Kellie was heir-male of the last Earl, and the difference in the meaning of these terms may be illustrated by saying that the son or daughter of a man's eldest sister would be his heir-general, whereas the son of a younger brother passing over the daughter would be heir-male. As in Babbage's calculating machine, although the numbers came out in regular sequence for a long series, there was an inherent though not apparent law which varied the order in due time, so here the question of the nature of the descent of the title did not obtrude itself, the heirs-male being also heirs general. The present Earl succeeded to the title through his mother, the sister of the last Earl, which lady, indeed, had she survived her brother would have been Countess of Mar in her own right, as were *Margaret* and *Isabella* Countesses in the end of the fourteenth and beginning of the fifteenth century. At least, this is

the principle which found expression in the recent Act of Parliament of 1885, restoring the title of the old Earldom of Mar.

It may well be called old. According to the learned Judge and antiquarian Lord Hailes, it was "one of those Earldoms whose origin is lost in its antiquity." It existed before our records, and before the era of genuine history.

Apart from earlier Irish records, the first Scotch charter in which the name appears is of the date 1065. *Martacus* witnessed one granted by *Malcolm Canmore.* Indeed, if it had not been for this ancient custom of getting as many as possible attesting seals of great men to documents executed by their equals or by the King, there would be a gap in many genealogies.

So the line went on like a vein through Scotch history, through *Gratnach* and *Morgundus* to William, in 1258 one of the Regents of Scotland, and Lady Isabel married to King Robert the 1st, and Lady Elyne, through whom the Erskines inherited by intermarriage.

Donald, the 12th Earl, Douglas informs us, was weighed together with a daughter of Bruce and the Bishop of Glasgow against the Earl of Hereford in an exchange of prisoners. He, in 1332, was Regent of Scotland. The last Earl of the direct male line was Thomas, the thirteenth; Margaret his sister came after him; she was married to William Earl Douglas, and her son was the Lord James who was killed at Otterbourne.

After Margaret came her daughter Isabella, a monument of the turbulent domestic history of those times. She was torn away by Alexander Stewart, the illegitimate son of the Earl of Buchan, taken with her castle of Kildrummie, and compelled to execute in August, 1404, a deed of renunciation of all her estates in favour of her enforced husband and *his heirs.* This Alexander Stewart, Earl of Mar through his wife, distinguished himself better afterwards in public life, and fell at the battle of Harlaw. He had a natural son, Thomas, who died before him.

King James* then dealt with the earldom lands according to his royal will, notwithstanding the efforts of Lord Erskine to assert his claims to them through his descent from Lady Elyn Mar. The King said there were no eye-witnesses to the descent! and that after the Stewarts, who were illegitimate, all reverted to the Crown, and to his Crown in particular.

A son of James II next had the lands and dignity, but James III had him bled to death, then Cochrane, a favourite, but the nobles hanged him in 1482 on the bridge of Lauder. Portions of the lands were granted to some families, portions to others by James IV and V, and some were retained in their own hands. At length, Queen Mary by a charter of 1565 restored what remained of the lands and the Earldom to John Lord Erskine, and the line of Erskine, Earls of Mar, continued until, in 1715, the then Earl raised the standard of the Stewarts, was defeated, attainted, and died at Aix-la-Chapelle in 1732, his estates being forfeited and sold by the Crown, but allowed to be bought by near relations at a favourable rate.

In 1824 the attaint was removed by an Act of Parliament, and John Francis Erskine, the grandson of the attainted Earl, was restored, his grandson again being the late Earl of Mar who died in 1866, and who was, at first, quietly succeeded by his sister's son the present Earl.

This Erskine family had obtained their right to the lands and title of Mar by intermarriage in the fourteenth century, and are stated by Douglas to have been flourishing in 1226.

The title thus devolved upon the nephew, all the necessary forms in Scotland being complied with. The Earl and the Countess were presented at Court, and accepted by the relations of the family. The title of Earl of Kellie, which had also been enjoyed by the late Earl of Mar, and about which there was no difference, went in the male Erskine line to Walter Coningsby Erskine. He died

* The King held on to the first charter of Isabella.

in 1872, and was succeeded by his son, who was held in 1875 to be entitled to an Earldom of Mar—one created by Queen Mary in 1565.

By July, 1867, the Earl of Kellie, father of the present Earl, had become acquainted with or had determined to act upon the legal doubts existing as to the right of the Earl of Mar to that title. It is supposed nobody at the outset thought there could be two Earls—and accordingly he petitioned Her Majesty to be graciously pleased to admit his succession to the honour and dignity of the Earl of Mar in the peerage of Scotland. This petition was referred, as usual, to the House of Lords, and by them to the Committee for Privileges. The petition was opposed by the Earl of Mar, Baron Garioch, praying to be heard in opposition to the above claim. The Earl of Mar stood upon the ground that *he* claimed or petitioned for no title, that he always had it. So the contest commenced, and went on from 1867 to 1875.

The Chairman of Committees, the sturdy and experienced Lord Redesdale, the son of an eminent lawyer, though not one actually himself, presided, and ex-Chancellor Lord Chelmsford, and the elegant and eminently learned Lord Cairns, Lord Chancellor. Sir Roundell Palmer brought his candid and persuasive eloquence to the aid of the counter petitioner, the Earl of Mar.

In the case of the Earl of Kellie proving that he was Earl of Mar, the consequence was thought to be inevitable that the then Earl of Mar, *soi disant* he came to be termed during the enquiry, was not entitled to be so. Notwithstanding that the Lords were advised to declare, or advised to advise Her Majesty to declare, that the Earl of Kellie was the only Earl of Mar, Mr. Goodeve Erskine, so to term him for the occasion, stuck to it that he was—in Courts and out of Courts—notwithstanding rebuffs, and it ended by the Act of 1885, introduced by Her Majesty's command, declaring him to hold the old title. Queen Mary, in 1565, made a new peerage by the old name—so

the Lords said in 1875—and one which descended to heirs male, and Mr. Gordon Erskine is not that heir male, but the Earl of Kellie. By the Act of 1885, initiated in that House, they implied that Her Majesty and most people in Scotland including the Scotch peers, but not Lord Redesdale, thought there must have been some mistake, and that the matter had better be compromised by declaring Mr. Goodeve Erskine to be entitled to the old peerage and by leaving to Earl of Kellie the newer title.

The record of the enquiry before the House of Lords with the investigation preliminary to the Act of 1885 make a large volume. The evidence is set forth in full with the daily proceedings and the opinions of the learned Lords.

The research on the part of the Law Agents concerned was most minute, and the use made of the materials was as equally ingenious. No "little l—— printed history" would do for that Court either. The original sources of history had to be produced.

Considering how in bye-gone times Scotland had been harried by fire and sword, and the ravages of time, it was wonderful how so many early parchments were brought to light. The custodians of valuable documents brought them out from their receptacles in England and Scotland—some hundreds—including all down to this century.

Without attempting any order of date or production, it may be mentioned that the Librarian of the Bodleian Library at Oxford produced the manuscript rhyming chronicle of Andrew of Wyntoun, the Bishop of Aberdeen, between A.D. 1450 and 1500, and the Librarian of the Advocates' Library of Scotland another to compare with it. The Assistant Record Keeper of the English Records Office showed the roll in Latin relating to Scotch affairs of the twenty-first year of the reign of King Edward I, in which Donald, Earl of Mar, was permitted to collect farm rents, the proceedings written in Norman French as to the competition for the Crown of Scotland between John Baliol and Robert th Bruce, in the reign of the same King, and

a letter from him to Gratney, Earl of Mar; also the close roll of the fifth year of Edward III, with a letter from that King to Donald, Earl of Mar.

The keeper of the manuscripts of the British Museum showed a letter of Queen Elizabeth to "our trustie and well beloved servant, Thomas Randolph, Esquire," then in Scotland on a special mission, and a letter from the same Randolph of July, 1565. He gave an amusing account from what he heard at the time of the marriage of Queen Mary, and in Pepysian fashion writes: "I was sent for to have been at the super, but lyke a curryshe and uncourtayse carle I refused."

From the Bodleian Library was brought the manuscript of the annals of Ulster written in Irish of the year 1014, in which the then Moermar or Earl of Mar is mentioned. From the Registry of the Great Seal of Scotland, and from the chartularies of abbeys and priories, from the muniment room at Drumlanrig Castle, and the chests of the noble families of Buccleuch, Mar, Douglas, Torphichen, Home, Forbes, Stewart, came heavy faded parchments with hanging seals of the fourteenth and fifteenth century in Latin and old Scotch. In the period before the knights could read what they appended their seals to, seal cutting (and probably seal forging) was an art in requisition. There is a fac simile of a charter of 1377 by William Earl of Douglas and Mar—Mar, too, that is the point, as showing that his wife Margaret was Countess of Mar with "seal hanging by a mere shred," showing the armorial bearings both of Douglas and of Mar.

The charter of Queen Mary of the year 1565 was produced by which she restored to Lord Erskine the territories of the Earldom, immediately after which he sat in Parliament as Earl; and the charter of the same Queen a few years before granting the same to her half brother, James Stewart, afterwards Earl of Moray.*

* "Non adeo multo post ei pro Maria quæ veteri jure Joannis Areskeni fuisse deprihensa est Moravia donata est."—BUCHANAN.

Prolixity, too, does not seem to be a modern invention in legal documents, for the charter of James I to John Earl of Mar of 1620 runs to eleven large closely printed pages of Blue-book size. There is in another document of about the same date a strong family likeness to more recent tribes of words—with "houses, bigings, yairds, orchards, tofts, annex, connexis, pairts, pendicts," &c. And last, but not least, the two charters granted by the much married and troubled Countess Isabella; the 1st of August, 1404, delivering "in her free widowhood," her castle, and all her possessions in contemplation of her marriage with Alexander Senescallus (the Steward), and the second charter of December in the same year in the same terms, with the important exception that whereas by the first, if they had no children, the property was to go to her husband's heirs, by the second it was to go to her heirs. The actual charters had disappeared, but ancient copies were accepted.

What did all this tend to show?—shortly this—that after the death of Thomas, the last Earl in the direct main line, his sister Margaret, the wife of William, Earl Douglas, and the mother of Lord James, succeeded to the lands and title in her own right, as Countess of Mar, her husband becoming, by courtesy, Earl of Mar as well as of Douglas; and that after her, her daughter, Isabella, also in her own right, became Countess; that the action of King James I was violent and illegal in resuming the lands after the death of Isabella's husband, Alex. Stewart, and his natural son, Thomas.

As to the courtesy title of Mar to the Earl of Douglas, her first husband, it was remarked upon, on the other hand, that Margaret's second husband, Sir John Swinton, was termed only *dominus de Mar*, not Earl, as neither was Isabella's first husband, Sir Malcolm de Drummond.

The word Earl is always translated into the Latin, "comes."

The King "founded upon," in Scotch phrase, the

first charter of Isabella of *August*, 1404, and argued that Stewarts, Alexander and Thomas, being illegitimate, could have no heirs, and that, therefore, the estates reverted to the Crown.

How the King further strengthened his claim by accepting from the complacent Alexander Stewart in 1426 a resignation of the Earldom, regranting it with a final remainder to the Crown, and how all this was in opposition to the second charter of Isabella, of December, in which were inserted the words saving her heirs, may be read at large in the exhaustive work, a masterpiece of serene and dignified controversy, by the late Earl of Crawford. Little did the drawers up of these charters think that five hundred years hence their very phrases would be microscopically analysed by a modern Committee of Privileges; and Isabella herself, while going through the picturesque ceremony of standing in front of her castle, receiving and giving back the keys—her chatelaine indeed—to her fierce Lord and Master, Alexander, may have known no more of the curious words of the second charter, "heirs on either side," than a modern young lady of the verbiage of her marriage settlement. The noble but illiterate employers in those days of the legal scribes must have regarded the heavy sheep-skins to which they were required to affix their seals, with a Jack Cadeish suspicion.

There was much argument as to the charter under the Great Seal of 1565 by Queen Mary—whether the effect of it was to restore the old Earldom of Mar to Lord Erskine, which would carry with it descent to heirs general, including females, or whether it created a new dignity by the old name, which, "according to the ordinary rule," would descend to heirs male only, and, therefore, to the Earl of Kellie. The Queen says, in her charter, that she was moved by conscience to this restoration of the Earldom, with all its "castles, towers, fortresses, manors, woods, mills, fisheries, &c."

There was no special mention, as in a modern patent, of a title. The territories were restored, and carried that dignity with them. These very early Earls were found in their places as Kings, and were not made.

Then the Earl and his descendants were left to contest in the Civil Courts for such of the lands as had been long before granted away by the Crown—especially to recover the ancient seat of Kildrummie from the Elphinstone family. They finally succeeded, after sixty years, in getting back the lands by a decree of the Court of Session in Scotland. The original wrong of taking the lands from the Erskines by the King, was remedied by the legal wrong of depriving those who had been in long and peaceful possession.

Finally, great stress was laid in this enquiry about the recent and, indeed, present position of the Earl in the roll of peers which is read out at Holyrood, prior to the voting by all the Scotch peers for the representative peers to be sent to Parliament on the occasion of a new general election. It was argued that if the old Earldom, dating from 1404, or earlier, was restored by Queen Mary, how was it that in this roll an accordingly early place of precedence was not given to it, whereas the actual place in the roll neither accorded with the theory of a new creation by Mary in 1565, nor with the old. The date, in fact, assigned to it was 1457, which still remains unexplained.

As to this roll, the peace-loving James VI, to prevent his nobles from fighting out their rights in the streets of Edinburgh, as their modern successors exchanged "heated conversation" at Holyrood, caused what was termed "a decreet of Ranking," to be made in 1606. The claims of the peers were heard by a commission, and their rank was fixed. Afterwards, in 1707, at the Union of the Crowns, a copy of this decreet was made out, and, according to this list, called the "union roll," the titles of the peerages were called, and continue to be called (with additions and some alterations). The records and reasons upon which

the date 1457 was fixed for the Mar title, have vanished. The wonder is that so much has been recovered from the darkness. Lord Redesdale conjectured that the Earl, having got an earlier date inserted than he was entitled to, and a higher place, burnt his ladders to prevent being found out in future.

At the close of this long enquiry in February, 1875, Lords Chelmsford and Redesdale delivered elaborate opinions, which had the weighty concurrence of Earl Cairns, the Lord Chancellor, in the form of advice to the Committee of Privileges, who reported their resolution to the House of Lords, who ordered it to be "reported to Her Majesty by the Lords with white staves."

The opinions of the two first-named Lords, very briefly, were that the Earl of Kellie had made good his claim to the Earldom of Mar created by Queen Mary in 1565, and that there was not any other Earldom existing, that the dignity thus created was descendible to the heirs male, and that the Earl of Kellie was such heir male. The Lord Chancellor felt "compelled" to come to the same conclusion. It was doubted whether Margaret and Isabella had ever been Countesses of Mar at all in their own right; and, even if they had, that that old title had somehow or another come to an end, and that the effect of Queen Mary's charter of 1565 was to create a new dignity—the old body with a new soul. It was considered that this charter conferring the Earl-lands did not, indeed, in itself confer any dignity, but that there must have been some separate patent ensuing immediately on it which was not forthcoming, or that by a ceremony of "belting" Lord Erskine was made Earl of Mar.

The Committee held that they were bound to follow certain former decisions of the House of Lords in Scotch peerage cases, and that the presumption of descent was in favour of heirs male, and therefore in favour of the Earl of Kellie. This was a "killing decree," after a most exhaustive enquiry on the whole merits of the two claims. The

Earl of Kellie may afterwards well have exclaimed with Macbeth—

> "The times have been that when
> The brains were out, the man would die,
> And there an end."

The opinions of the learned Lords, thus baldly stated, found point in a resolution of the Committee that the Earl of Kellie had made out his claim to the Earldom of Mar created in 1565, and in the approval next day by the House of Lords, which approval resulted in an order to the Clerk of the Parliament to send the resolution to the Lord Clerk Register of Scotland, the official presiding over the Scotch peer elections. There was also an order at the same time to the before named official to call the title of the Earl of Mar according to its place on the roll of the peers of Scotland, and to count the vote of the Earl of Mar claiming to vote in right of the said Earldom.

This last seemingly formal and innocent order was a nest egg of controversy and debate, both at election times in Holyrood Palace and in the House of Lords, until the use of the old title of Earl of Mar was sanctioned to Mr. Goodeve Erskine in 1885. Here was the inconsistency:— The House of Lords had decided that the title of the (new) Earl of Mar took its origin in 1565; but the only accepted way the Lord Clerk Register had of calling over the title of Mar at election times was when he came to it, in order, on the roll of peers which was based upon the decreet of ranking, and in that roll Mar came in the year 1457, the year being marked by its exact position before and after other peers, all ready to resist anybody being called before them who were not so indicated in the roll. The new Earl of Mar of 1565 could not answer to a Mar title of 1457, which would have thrust him before several peers created between 1457 and 1565; and the old Earl of Mar (for the nonce Mr. Goodeve Erskine) was out of it altogether.

An attempt to cut the knot by altering the roll was

afterwards made in the House of Lords but without success, and the Lord Clerk Register presiding at the elections had to arrange matters warmly contested and to receive the protests of the peers.

According to the Earl of Mansfield the poor man was very much puzzled, because he was told by the House of Lords to call the Earldom of Mar as of 1565, but when he came to the union roll it was not there; and on the one side he was told, "You must call the Earldom of Mar in the precedence in which it has always existed;" and the other side, "No, you must call it where the House of Lords has directed."

There were elections at Holyrood during the long enquiry into the title between 1867 and 1875, when although Lord Kellie did not tender his own vote—"waiving" his right—he lodged protests against Mr. Goodeve Erskine voting as Earl of Mar; but the matter became more acute at the election of December, 1876, after the decision of the House of Lords.

According to the report of the proceedings an objection was first raised against "Mr. Goodeve Erskine" taking a seat at all at the table. Afterwards, when the title Earl of Mar was called, as it stood on the roll, both Mr. Goodeve Erskine and the Earl of Kellie rose to answer, the former alleging that the latter's title was not that of the roll but a new one of 1565 to which he laid no claim; the latter claiming to be the only Earl of Mar existing, and declared to be so by the House of Lords. The vote of Mr. Goodeve Erskine was refused by the presiding officer, also even any protest from him signed "Mar."

Then as to written protests handed in:—The Earl of Cassilis protested against the Earl of Kellie voting before him, "as he has no right to the said title of Mar on the union roll, but only to a title of Mar recently found by the House of Lords to have been created in 1565, which creation gives his title of Mar rank below me."

For a similar reason protested the Earls of Morton and

Caithness, while the Marquis of Huntly and Lord Napier concurred on general principles with the long-argued protest of the Earl of Crawford and Balcarres against the discision of the House of Lords root and branch.

Next, at the election of March, 1879, the Earl of Crawford led the van of the Protestants followed by the Earl of Stair and the Marquis of Huntly, who objected shortly that "the Earldom of Mar created in 1565 and resolved to belong to the Earl of Kellie is not the Earldom on the roll of Scotch peers." Viscount Stormont in his protest appealed to "the laws of Scotland reserved inviolate by the Treaty of Union," and Viscount Arbuthnott maintained that 'his'—the Earl of Mar's—position had been in no way affected by the decision of 1875." Strathallan, Saltoun, and Balfour joined.

In April, 1880, the Earl of Kellie's vote was recorded under a shower of protests, one of Lord Napier's reasons being that "the calling of the more recent title in the order of the older one tends to confound the Earldom of Mar which has been lately discovered, to exist with the ancient Earldom familiar to the peerage and history of Scotland."

On the 9th July, 1877, the year following the first contention at Holyrood, the Duke of Buccleuch endeavoured in the House of Lords to introduce a resolution—to square the order of the House of 1875 with the expressed opinions of Lords Chelmsford, Redesdale, and the Earl of Cairns—to the effect that the order to the Lord Clerk Register of February, 1875, should be altered, and that it should be to call the much contested title in the order to which the resolution declared it to be entitled that of 1565. This, if carried, would have obviated the objections of the Earls who protested on the special ground that the order of their titles was transgressed, by at all events putting the new Earl of Mar below them. Such an order certainly seemed the logical outcome of the opinions of the Committee.

The Duke of Buccleuch disclaimed going into the merits of the opinions of the Committee. He said, "it was assisted on both sides by counsel, who produced at the bar upwards of five hundred documents, charters, and writs." The order of the roll of the Scottish peerage was not so inviolable a thing with him as with the other Scotch peers; he would simply alter it by putting Mar down to 1565. He held out the not very encouraging hope that if Mr. Goodeve Erskine or any other gentleman claimed the ancient Earldom, he might begin an enquiry all over again, an opinion which, in the debate of July, 1888, the Lord Chancellor flung out "although he could not encourage it himself."

The Marquess of Huntly moved the previous question to the resolution of the Duke, and earnestly contended that the House had no power to touch this roll—especially to put a peerage to a lower date: as to the date of 1457 assigned to it, he said, "there must have been men living in Scotland at the time of the making of the decreet" of ranking (1606), who were fully aware of what Queen Mary did with regard to a creation of the Earldom of Mar in 1565. He also hoped "in passing, that if no other good arose out of the discussion, it might perhaps lead to their getting what they claimed as their rights, seats as Peers of Scotland in that House."

The Earl of Redesdale stuck to his guns in opposition to the Marquess. "The Noble Marquess," he said, "says that we are asked by this resolution to strike a peerage off the roll. The resolution does nothing of the sort; it only says that a peerage shall not be called as of a certain date; and why? Because it has been most clearly proved that there is no peerage of that date in existence. There never was an Earl of Mar sitting in 1457." He supposed that by some "ingenious arrangement" Lord Erskine had hoisted up his title of Mar to 1457, and that the modern Committee had more ample material before them for ascertaining the state of the case than that of King James of 1606.

The proposal of the Marquess that the House had no jurisdiction in the matter, seemed to him one of the most extraordinary propositions that ever was made. At the same time he admitted that the order they were now asked to make had better have been made two years ago; but in answer to the question of the Marquess why it was done now, said "it was on account of the scene of confusion and trouble which took place at the last peerage election in Scotland when a person came in who had been declared and adjudged by this House not to be Earl of Mar, and voted as Earl of Mar" (tendered his vote his Lordship should have said).

The Earl of Mansfield defied the previous speaker, and defied anybody to find a case of any Scotch peer having been put into a lower place on the union roll, although there were precedents for person having been put up. (It is not easy to see how a peer could be put up without lowering all those he was put over.) As to Mr. Goodeve Erskine, the speaker contended he and nobody else was the Earl of Mar of 1457, and that somebody had imagined a peerage of 1565 for the Earl of Kellie, which the Committee of Privileges gave him. "The foundation of this supposed creation in 1565 rested upon a curious matter. There was a letter from a man of the name of Randolph . . . . who says the Earl of Mar was made on such-and-such a day." As to the order of the Lord Clerk Register, the Earl said in effect that it was sent off in a hurry the same night that the resolution was passed, which had not been reported to the Queen; "he did not know whose fault it was." As to the proposal to strike out the Earldom of Mar of 1457 and insert a later one, he know no reason for it "except it was that they had got into a mess with their order."

Lord Selborne, who, when Sir Roundell Palmer had been Mr. Goodeve Erskine's counsel, spoke at length, and of course with great weight. It can only here be stated that he remarked that "without going at all into the

question whether the decision of 1875 was right or wrong, he submitted reasons which made him think that whatever else their Lordships might deem it right to do they could not, either with prudence or propriety, have adopted the resolution offered by the noble Duke." The effect, he said, would be "to encourage instead of repelling the idea that there were two Earls of Mar," and he could "not conceive anything more destructive of the authority of the decision of 1875."

The Lord Chancellor, the Earl Cairns, referring to the part he took in the original enquiry, did not "remember any case which ever occasioned him more anxiety or in which his sympathy was more enlisted on behalf of the claimant." (Mr. Goodeve Erskine technically was not a claimant at all.) He warned the House that they were asked, under the shape of a resolution, to pronounce a judicial decision affecting rights of peerage, and affecting the union roll, and that the only way that such a question could properly come before them was under the authority of a particular Act of Parliament of 1847, and that this had not come before them in that way. In reiterating, however, the form of the order of 1875, as to calling the title of the Earl of Mar at election times, his Lordship intimated that the order was not a guide to the Lord Register Clerk as to who was to *answer the call.* Finally, the Duke of Buccleuch withdrew his motion, and a Select Committee was appointed to enquire into the matter of the petition of the Earl of Kellie on which the resolution of the Duke of Buccleuch had proceeded.

Two years afterwards another animated debate was raised, on the 11th July, 1879, by the Marquess of Huntly. He had a statement to make and certain questions to found upon it. There had been another election at Holyrood with the usual protests, and the Committee had reported that there were no precedents for altering the order of the peers of Scotland, and that they did not recommend that any order should be made on the petition

of the Earl of Mar and Kellie (embodied in the Duke of Buccleuch's resolution). Thus armed, and after recapitulating former proceedings, the Marquess proceeded to hang up the unfortunate Lord Clerk Register who had allowed the Earl of Kellie to vote in the face of the protests of Mr. Goodeve Erskine and other peers. The report of the committee (it was not stated that it had been communicated to the Lord Clerk Register) was that Lord Kellie had only got a peerage, of 1565, not on the roll. There was also provided, the Marquess pointed out, a machinery by a statute of 1847 under which, in the case of protests at an election, the Lord Clerk Register was bound to transmit to the Clerk of the Parliament a copy of the whole proceedings in order that the House might order the person (in this case the Earl of Kellie) whose vote or claim had been protested against to establish the same before the House. If he had not so reported to the House, why had he not? and could he call this new Earldom of Mar in any place upon the roll at all? the Marquess demanded. To him the Lord Chancellor—who said that although he had no right to interpret the resolutions of February, 1875, he understood them to mean that in the roll of peers there was one, and only one, entry of the Earldom of Mar—it might be in the wrong place or the right—and that the resolution could only have referred to that place. The Lord Clerk Register was to receive the vote of the person adjuged to be Earl of Mar and Kellie if he answered when that title was called. As to other difficulty of the Marquess, the Lord Chancellor said that it did not apply to this case, as the Earl of Mar and Kellie had already established his title in the House, and it could not mean that he was to establish it a second time.

Lord Blantyre, quoting Douglas' peerage, said it was repugnant to common sense that Queen Mary should have made a new creation when she re-established the Erskines. The Earl of Redesdale observed, with his strong common sense, that "none but those who had gone into the whole

case, and investigated all the evidence brought forward, were really competent to form an opinion upon it," and explained and defended his decision at length when on the Committee of Privileges, and said that the date of 1457 given to the peerage, instead of some much earlier date, by the Commissioners at the decreet of ranking of 1606 was a distinct proof that they were determined not to recognize the existence of the ancient Earldom of Mar. If every peer was to act upon his own idea as to whether a judgment was right or not, a most unfortunate confusion would arise. It might be desirable to allow a peerage to be called in the wrong place rather than to take the trouble of altering it.

The Earl of Galloway complained of the last speaker's contemptuous way of speaking of the decreet of ranking, and felt sure his noble friend must have been "living in 1606," as he knew exactly what was done then. This decision of the House, of February, 1875, was in direct opposition to a judgment of the Court of Session of Scotland in 1626 (binding on the House under the Act of Union of 1707), and the Court of Session had declared the ancient Earldom was in existence and descendible through female succession. When Queen Mary restored the title she used the Latin term "restituere," which did not mean to create. To which the Earl of Redesdale interposed that what she restored was the territories. Lord Selborne (counsel for Mr. Goodeve Erskine as Sir Roundell Palmer) really hoped the discussion would be brought to a close, as it seemed to him to be proceeding upon a forgetfulness of what they all knew that even that House was obliged to pay respect to, the law. Without following Lord Redesdale into the soundness of the reasons for the decision of the House in 1875, it was enough that it had been so decided "that a certain peerage of Mar had been created by Queen Mary, and that it belonged to the noble Earl opposite." He considered the Lord Clerk Register had taken the right course.

The Earl of Stair thought it very extraordinary that the Earl of Kellie should answer to the old title.

So the discussion ended, the "Scotch fellows" remaining unsatisfied. In June of next year the Mar peerage came on again. The Earl of Galloway called attention to the report of the Select Committee, in effect, on the Duke of Buccleuch's motion to bring down the title on the roll to 1565. The Committee had reported there was no precedent for altering the order of the roll, and therefore the Earl moved that the order of February, 1875, should be rescinded; and, to complete the matter, that Mr. Goodeve Erskine was entitled to remain in enjoyment of the privileges of the Earldom of Mar. In the course of his long and well argued speech he referred to the expressed opinion of the *English and Scotch law officers*, while the enquiry ending in 1875 was going on, that the succession to the Earldom was in the female line, and therefore not to the Earl of Kellie.

The Lord Chancellor (Lord Selborne) regretted that his noble friend was not "clothed in habiliments similar to his own" when he had to address the House—in fact complimented him highly as an advocate; but as to his object being to uphold the law of the country and to maintain the authority of the House, he (the Lord Chancellor) held that the result of such advice would be to subvert the laws of the country and the order and usages of the House. The weight of his reply was against the second part of the resolution; it was quite inadmissible when there was a serious legal doubt as to a title that the House should declare offhand who had a right to it. As to the precedence question, why did not the noble person claiming to be Earl of Mar tender his vote at a Scotch election, have it objected to, and so bring his case up by the report of the Lord Clerk Register, under the Act of 1847, for regular judicial decision?

The Earls of Mansfield and Camperdown, and the Marquess of Huntly, who said though "this might be a

very dull matter to English peers, it was a question which Scotch peers thought very strongly about," joined in the debate, as did the Duke of Buccleuch and Lord Blantyre. Lord Houghton said that the points relating to the disputed Earldom could only be decided after a "serious historical enquiry." Had he seen the Blue Book report of the enquiry with its mass of the documents that make history?

The House divided, and with the Archbishop of Canterbury heading the list of contents, the first resolution, the second having been withdrawn, was carried by a majority of eight over forty-one.

The Earl of Galloway had obtained an apparent triumph; but he had reckoned without old Earl Redesdale, as the sequel showed. A week afterwards (June 21) the Marquess of Huntly ventured to ask the Lord Chancellor if, in accordance with the resolution, any intimation had been made to the Lord Clerk Register, who replied that that could not be, as the resolution only was that "it was incumbent on the House to rescind their order of the 26th February, 1875," and that it required another distinct vote to rescind it, besides, what should be substituted: would any one who moved the new order make it to put two Earldoms on the union roll, or to change the precedence of the one there?

The Earl of Galloway said that the resolution he had obtained was virtually the same, and that only to avoid offence in form had he struck out the words "and it is hereby rescinded," but that he would give notice of motion that the order be rescinded, which he did June 22nd—it coming on to be debated on the 1st July. The Earl remarked that he had said to himself, "Now it would be rather an affront to their Lordships to add these words: for if their Lordships agreed with me that it is incumbent on them to rescind the order, they will, as a matter of course, carry that resolution into effect."

Not so thought, however, the Earl of Redesdale, who

moved an amendment that on further consideration it would be inexpedient to rescind the order. It was a question of the deepest importance to the character of the House, and a judicial decision could not be rescinded in this way, and he again went into the merits of the decision of the Committee of 1875. Lord Blackburn supported the amendment:—If Mr. Goodeve Erskine said he was the Earl of Mar he should petition the Crown, and the previous decision would be no bar. "Their Lordships," he said, "were not to make a rush without evidence, and merely on the authority of antiquaries (did he refer to the Earl of Crawford?) and persons who knew no law."

The Duke of Argyll thought the House on the 14th of June had been hurried into giving a vote. The Earl of Mansfield said that "in Edinburgh all the lawyers in Parliament House were of one opinion," against the decision of 1875. Lord Selborne claimed to speak impartially: he had not sat as a Lord on the Committee, having been counsel for Mr. Goodeve Erskine; it would be most unprecedented and dangerous to rescind a judicial order without making some other" (as to this order the Earl of Mansfield had said that nobody knew how it came to be given out). The Duke of Richmond thought that the House would do well to follow the advice of the Lord Chancellor and the Earl of Redesdale, and by a majority of 28 over 52 the motion to rescind was rejected. So the matter stood over for another four or five years, and the present Earl of Mar's name remained absent from Burke.

An opinion however grew up that somehow or another substantial justice had not been done. In 1884, a hundred and six peers had petitioned Her Majesty to restore the ancient title. In May, 1885, the Earl of Rosebery brought in a Bill by Her Majesty's command for that purpose, and at the second reading said it was with the object of clearing up the misunderstanding of three centuries. He let down King James II as gently as he could with reference to taking the Earldom, as he did not wish to

"impute any incorrect motive to the monarchs of his native country." Tender Earl!

The Earl of Redesdale, logical to the last, resisted the Bill. It was referred to a Special Committee to take evidence of the *facts* of its Preamble, and they went over again some of the documents and charters which were before produced before the Committee of Privileges, and other documents, and heard Counsel.* In the Committee Lord Blackburn broke in with a supposition that the Preamble was shirking the question, and that the real object of the Bill was to make a compromise. When the report was brought up at a Committee of the whole House, Earl Redesdale pronounced it to be a wholly unprecedented measure, and that the gentleman affected had never applied to the Crown, claiming to be entitled to the dignity. (The Earl of Mar always said he had it and made no claim.) The Earl of Selborne smoothed matters, and on the 6th August the Bill received the Royal Assent. Sir G. Campbell, in the Lower House, barked at it a little, but was at once put upon the Committee, or proposed for it. The thing to do was to restore the old title to the Earl of Mar, without allowing that there had been any mistake by the House in not finding it was in him before. After a lengthy and pregnant preamble as to Isabella and the King, and the charters, it resolved to place Mr. Goodeve Erskine by the authority of Parliament, as if the ancient title had not been taken to be surrendered.

The Act expressly disclaims interference with any land or heritage, and directs the title to be called on the roll in its old place, and that of Mar and Kellie to be called as of 1565.

But the matter was again mooted in July of last year, and discussed in July this year in the House of Lords, as intimated at the beginning of this paper. The Earl of Galloway, a staunch adherent of the cause, moved that the Order of the House of 1875 should be expunged from

* W. A. Lindsay. The Earl of Mar and Kellie did not oppose.

the Journals, as inconsistent with the Act of 1885. That Order had been sent, he said, "in indecent haste, without the Queen having seen the decision," that it was supposed to have been the composition of Sir W. Fraser, "the Earl maker," and was now "illogical."

The Earl of Selborne was "surprised at and regretted that the matter was not settled. The decision was a judicial one and final, settled by the most eminent men." Lord Abinger said that "if a mistake had been made it ought to be corrected." The Earl of Mar himself described the Act as a most extraordinary document, and went on to contend that he had been prejudiced in a claim to the lands by not having his title then recognised. The Earl of Rosebery said, "they were really asked to assist the noble Earl in certain proceedings . . . to recover his estates." The Lord Chancellor remarked that the Earl of Mar "threw by altogether the Act of Parliament by virtue of which he now sat and spoke, and that they were asked to rescind a resolution, in itself but a corollary of the former decision." After the Earl of Wemyss the Earl of Galloway replied, "that it was perfectly absurd to keep this Order on the Journals of the House, when, by Act of Parliament, it had actually and practically rescinded it." Upon a division the resolution was lost.

The narrative has been much compressed with the view, originally, of insertion in a magazine, otherwise a further account of the trial and documents might have been given for the money.

APPENDIX.

QUEEN MARY'S charter is ". . . . etiam conscientia mote ut nobis decet legitimos heredes ad suas justas hereditates restituere . . . ."

Isabella's first charter to Alexander of August, 1404. ". . . . Izabella Comitissa de Mar et Garviach salutem in omnium salvatore . . . . tenenda et habenda eidem Alexandro et hæredibus suis inter ipsum et nos procreandis quibus forte deficientibus *veris et legitimis hæredibus vel assignatis prædicti Alexandri* . . . ."

Isabella's second charter of December ". . . . tenenda et habenda predicto Alexandro et hæredibus inter ipsum et nos procreandis quibus forte deficientibus *hæredibus nostris legitimis ex utraque parte* . . . ."

Robert III, January, 1404, confirmed the second charter, omitting in its recital the words "ex utraque parte." The first charter contained the words that Isabella had not been moved by fear or compulsion, "vi aut metu ducta," omitted in the second.

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