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THE APOLOGY

This book has been written in order that those who may hereafter wish for information eoneerning an eventful period in the history of THE Earldom of MAR may be informed of all the matters in dispute.

The statements herein advanced are substantiated by reference to doeumentary evidence, and the questions propounded are framed with regard to issues whieh must remain open until the said questions are answered by competent authority.

The work is intended also as some record, brief and imperfeetly written though it be, of the endeavours made by the *heir of line to the ancient Earldom of Mar* to preserve intact the honours transmitted through a long and famous ancestry.

The whole body of the nobility of the United Knigdom is direetly interested in the integral maintenance of the rights of one of its members.

The heir of line of the House of Mar stands not as one who, having failed to establish his claim, cavils at the decision of the authority to which he has appealed, for he appeared in this suit merely as objecting to a modern peerage ealled Mar (unknown till the ycar 1875) being eoneeded to his eousin Lord Kellie. The titlc deeds of the ancient and historic Earldom of Mar are too deeply graven on the reeords of Scotland to be casily effaced. In the result every effort to prevent what is still believed to be an erroneous award has been unsuceessful; but confidence in the justice of his eause which has upheld Lord Kellie's opponent during a protracted struggle of years is in no way diminished. With that confidence unshaken he is mindful for himself and his successors of the lesson conveyed in the story of his forefathers. In the time of their weakness they were deprived of rights and honours : in the day of prosperity the self same rights and honours were restored. He refuses to abandon the position so nobly asserted by his ancestor Robert Earl of Mar.

The natures and motives of men and the causes of certain events have not greatly changed since the times of the Jameses, but the Wheel of Fortune turns for ever and History which repeats itself today may do so yet again.

Copies of the "Judgment", the official "Minutes of Evidence" in the Mar Peerage case, the "Cases" on each side (including the late Lord Kellie's original "Case" of 1868 and the present Lord Kellie's *rejected* "Case" of 1874) with the speeches of Counsel thoroughout and the officially printed opinion of the Law officers on behalf of the "Crown" in 1874, may be seen at 283 Regent Street London, and will be afterwards lodged for public inspection in Edinburgh.

The Reader is requested to see that the statements made in the above "Cases" and "Speeches", etc., are verified by the "Minutes of Evidence" and other well authenticated documents.

Errata.

Page	1	Line	9.—For "valliantly," *read* "valiantly."
„	16	„	1.—For "Forbes *v.* Trefusis," *read* "Forbes-Trefusis."
„	23	„	28.—After "heir of line," *add* "or heir general."
„	35	„	9.—For "with other usurpers," *read* "like other pretenders to."
„	49	„	21.—For "taillies," *read* "tallies."
„	49	„	25.—*Erase* "and."
„	50	„	51.—For "cautions," *read* "cautious."
„	52	„	33.—After "Decreet of ranking," *insert* "in the Mar case with that."
„	56	„	9.—For "persuming," *read* "presuming."
„	57	„	15.—After "line," *add* "or heirs general."
„	63	„	30.—For "sould," *read* "would."
„	65	„	47.—For "set it aside," *read* "set them aside."

Short History of the Family of Mar.

It is an historical fact that the dignity of Mar is one of the most ancient on record. The illustrious line of Mar has been traced in uninterrupted succession to the old Pictish period when the title was called "*Maormor*" a dignity inferior only to that of King, and which existed long before the ducal rank had been heard of in Britain.

Among the principal warriors in the ninth century was Melbrigdor, Maormor of Mar, and we are indebted to Sir Bernard Burke for the following remarkable adventure which befel him. He valliantly opposed Sigurd, the first Scandinavian Earl of Orkney, who had conquered the greater portion of the North of Scotland, but was slain in battle by the invader.

The death of this great Chief, the Maormor of Mar, was revenged upon Sigurd in a most remarkable manner, Melbrigda possessed a very prominent tooth, and Sigurd, having cut off his head, suspended it to his saddle-bow and galloped in triumph over the field of his victory. The violence of the motion caused the head of Melbrigda to knock about, and his prominent tooth inflicted a wound in Sigurd's thigh, which festered, mortified, and caused his death.

In course of time the dignity of *Maormor* was exchanged for that of *Earl*, and all the maormorships became extinct except that of Mar, whose title has been handed down, in the *female* line, to our day.

Space will not allow us to enter into the history of the earlier earls of Mar, but it may suffice to start with Gratney, Earl of Mar, who married the Lady Christian, sister of the King Robert the Bruce. Gratney was succeeded in the Earldom by his son Donald who was slain at the battle of Dupplin in 1332, and he was succeeded by his son Thomas who, dying without issue, was succeeded by his sister Margaret who married William Earl of Douglas by whom she had two children James and Isabella : she afterwards married Sir John de Swinton by whom she had no issue. James died without issue, in the lifetime of his mother Margaret, being slaim in the battle of Otterburn in 1338.

Margaret was succeeded in the Earldom of Mar by her daughter Isabella (or Isabel), the Earldom of Douglas passing to her father's male heirs. Isabella married first Sir Malcolm Drummond, and afterwards Alexander Stewart, but had no issue by either marriage.

While the Countess Isabel was a widow the said Alexander Stewart (who was a bastard son of the notorious "Wolf of Badenoch") besieged her in her castle of Kildrummie, in Aberdeenshire, and, before her marriage with him, forced her to make a charter, dated 12 August 1404, purporting to give the Earldom of Mar, failing the heirs of her body, to *him and his*

heirs. But though coerced so far, she was soon after released of this, and on the 9th, December in the same year, in the presence of the Bishop of Ross and various men of rank and position, Alexander "went upon his knees " and declared that he delivered back to the Lady Isabel Countess of Mar the " Castle, with the charters, evidents, silver plates, etc,, freely and with " good heart, for her to dispose of as she pleased."

Whereupon the Countess Isabel made a charter dated 9 Dec. 1404, destining the Earldom to her *own heirs whatsoever*, failing the heirs of her body. This charter of the 9th Dec. was comfirmed by a Royal charter of Robert III.

Thus the former charter of the 12th August 1404 (which was *never comfirmed* by royal charter and which on the face of it was unjust, for the *heirs of Alexander*, independently of Isabel clearly had *nothing to do with the Earldom of Mar*) became ineffective and was at once *annulled*.

Neverthelss, on the death of Isabel (without issue) Alexander Stewart seized the Earldom and in order to strengthen his usurpation of it, he resigned it to the King James I in such a way that on the 28th May 1426 the King regranted it to him and the heirs male of his body, whom failing, to revert freely to the King and his heirs. Alexander died without issue.

Then began the struggle between the rightful heirs of Isabel Countess of Mar and the grasping Kings.

On the death of Isabel Countess of Mar in her own right the succession to the Mar earldom opened to Robert Erskine (who married the daughter of Robert Lord of Lorne) for the heirs of the body of Earls Donald, and Thomas and of Margaret and Isabella, Countess in their own right had failed.

Robert's right was derived from his great grand mother the Lady Helen de Mar, daughter of Gratney Earl of Mar, in this way. Helen married Sir John Menteith and left no son. Her eldest daughter Christian married Sir Edward Keith. They had no son. Their eldest daughter Janet married Sir Thomas Erskine and their son, the said Robert (afterwards made Lord Erskine) thus claimed the Mar earldom through his mother Janet, through his grandmother Christian, through his great grandmother Helen eldest daughter of Gratney Earl of Mar.

Thus we sec that the Erskine family were connected with that of Mar *only by this marriage*, and the Erskines were no more entitled to the Mar earldom (except through marriage with the *heiress* of Mar) than the Keiths, or Menteiths or Douglases or Stewarts or any other family who happened to marry an heiress of Mar.

Robert having been "served heir" to Isabel, in the Earldom of Mar and *"retoured"* as such in April and October 1438, was clearly recognized as *Earl of Mar* and he was so styled in several charters. However King James II, determined to possess himself of this much coveted Earldom, called together his counsellors in 1457 and had it declared that Robert was not entitled to the Earldom of Mar but that the Earldom was lawfully in the hands of his father James I. To give colour to this iniquitous usurpation, the King relied on Isabel's uncomfirmed charter of Aug. 12. 1404, made under coercion, as we have shown, but would have nothing to say to Isabel's later charter which rescinded and entirely upset the earlier one of Aug. 12 in the same year, and by which

later charter the succession to the Earldom of Mar came naturally to *her* heirs. This *later charter* of the Countess Isabel's *of 9th Dec.* was confirmed *most plainly,* by Queen Mary in 1565, by Act of Parliament in 1587, and further the Lords of Session in 1626 and 1635, ruled that it rendered "*null and void*" the charter of the 12th August. Now Queen Mary was "moved by conscience to *restore* the lawful heirs to their just inheritance" and restored, by her charter 23rd June 1565 (1) John Lord Erskine, the great great great grandson of the unjustly dispossessed Robert, to *all* his hereditary rights.

After Queen Mary's Act of Restoration we find Robert, who in the iniquitous proceedings of 1457 was declared to have died "not Earl of Mar," styled on all occasions as Robert *Earl of Mar*, and in an Act of Parliament, July 29, 1587, (2) he is called *Robert Earl of Mar* no less than ten times, and the Lords of Session in 1626 and 1635 ruled that Robert died rightfully in possession of the *Earldom of Mar* on the ground of his having proved himself heir through Lady Helen de Mar to Isabel Countess of Mar. Therefore we see that Queen Mary's restoration of the Earldom of Mar was not confined to John Lord Erskine then living, but it recognized the long dead Robert and his heirs to have been rightfully Earls of Mar though "by the iniquitie of the tyme" which Queen Mary deplored and by her charter she redressed, they were not allowed to call themselves so.

At this time and for many years afterwards there was no system of ranking among the Scotch peers, and we find in the sitting at the Privy Council the peers were entered at random and sometimes a Baron placed above an Earl, and so on. But in 1606 by a Decreet of the King and the Lords of Session (3) a formal precedence of all the Scotch nobility was established and each peer was ranked "*according to the antiquity*" of the documents he then produced to prove his precedence and leave was given to all who could afterwards prove themselves entitled to a *higher* precedence to obtain such higher ranking.

The Earl of Mar produced for this Decreet of Ranking in 1606 documents which proved his heirship to Isabel Countess of Mar in her own right, and was accordingly ranked with a precedence, (be it remembered) of *more than a century before* Queen Mary's act of Restoration in 1565.

Since the time of this Decreet of Ranking, on which, by the way, the "Union Roll" of Scotch Peers was founded, the Earls of Mar for generations made formal protests at the elections of Scotch representative Peers for still higher precedency (4).

In 1626 the Earl of Mar had a lawsuit with Lord Elphinston in the Court of session (the highest court in Scotland and from which there was no appeal) and, in the course of those proceedings Robert, (through whom John Lord Erskine was restored by Queen Mary to the Earldom as heir to the Countess Isabella) was declared to have been lawfully Earl of Mar, and further the

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(1) Printed on the first and last pages in the Appendix to this book.
(2) Reprinted in Appendix, p. V.
(3) See Appendix, p. VIII.
(4) See Appendix, p. XII.

iniquitous proceedings of 1457 when the King usurped the Earldom of Mar, were condemned by the Lords of Session as illegal and the usurpations declared "*null and void*". (1)

From Robert up to 1715 the Earldom of Mar continued in the Erskine family, simply from the accidental circumstance that for several generations there happened to be a regular succession of sons; but it must be remembered that just as the Erskine family enjoyed the Mar honours *only through the marriage of Sir T. Erskine with Janet Keith the heiress of Mar* (through her mother and grandmother) so of course the succession to the Mar earldom would naturally open to any other family who might marry a future heiress of Mar.

John Francis Earl of Mar, was attainted in 1715, as is well known, and on the death, without issue, of his only son Thomas, in 1766, the succession opened to Thomas' sister, the Lady Frances (in the same way as it did to Margaret countess of Mar, on the death of her brother, also Thomas in 1377.)

Lady Frances would thus of course have been Countess of Mar in her own right but for the attaint.

We may here state that the old estates of Mar, which were of great value, were confiscated in 1715, but (as was arranged in other families) they were, by the grace of the Crown, sold very greatly under their value and partly bought back by trustees for the benefit of the families who would have had them but for the forfeiture, through the attaint.

These Mar estates were settled by the trustees first on Thomas only son of the attainted Earl, and on his death, without issue, (he died leaving no child in 1766) they were settled by an Entail Deed (dated Jan. 6, 1739, founded on a certain "Back Bond" dated 23rd March 1725,) on his *half sister* Lady Frances, daughter of the attainted Earl (by his wife Lady Frances daughter of the Duke of Kingston) and the heirs of her body, the entailers, be it noted, *preferring Lady Frances and her* heirs to James the *heir male* of the family, who lived until 1754, and his son after him; thus showing that the Mar estates were descendible *to and through ladies* in the same manner as the old Mar Earldom.

Lady Frances enjoyed these Mar estates till her death in 1776, and *in that year* her son John Francis Erskine succeeded to them, *in right of his mother* as is shown by the fact that his father (her cousin and the *heir male*) lived till 1785.

On June 17, 1824 the above John Francis Erskine was restored to the *ancient* Earldom of Mar, by Act of Parliament (see Appendix, p. III) as "*Grandson and lineal representative*" of the attainted Earl of 1715, being such through his *mother Lady Frances,* his father (the heir male) being completed ignored therein.

This restored Earl John Francis was succeeded in 1825 in the old Mar title and estates by his son John, and he again in 1828 by his son John Francis who fought at Waterloo. On the death on June 19, 1866 of the above John Francis, without issue and leaving no brother, the succession to the old Mar

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(1) See Appendix, p. XXXI.

title and estates would naturally have opened to his elder sister Lady Frances Erskine Goodeve, mother of Lord Kellie's opponent (but she died on June 19, 1842) just as Margaret succeeded her brother in 1377, and Frances her brother in 1766.

Relative Position of the Parties concerned since 1865.

Before entering into the legal aspect of the succession to the Earldom of Mar we will show the relationship and position of the parties now concerned.

Lord Kellie's opponent is nephew and next of kin of the late Lord Mar and Kellie (who died on June 19, 1866) being the only son of Lady Frances, the elder sister of the late Lord.

Lord Kellie is first cousin once removed and collateral heir male of the said late Lord Mar and Kellie.

The Earldoms of Mar and Kellie are quite distinct and were united for the first time in the late Earl of Mar, who had succeeded his father as Earl of *Mar only*, in 1828.

The Earldom of Kellie had not been held by one any one for six years. On the 2nd September 1835 the late Earl of Mar established his pedigree as collateral heir male to the Earldom of Kellie. In the "Minutes of Evidence" in the Kellie Peerage (pp. 69-70), Lord Colville of Culross and Viscount Arbuthnot gave evidence that Earl Thomas, the ninth Earl of Kellie was apprehensive that the honours of Kellie would remain unclaimed as he did not suppose that Lord Mar, who was believed to be the next heir male in the collateral branch, would claim the Earldom of Kellie, it being a much less ancient title than that of Mar. The ninth Earl of Kellie ensured the making by Lord Mar of the claim by settling Kellie Castle and lands adjacent upon trust for the benefit of such person as could prove himself to be Earl of Kellie (*a*).

(*a*) See Appendix to this book, p. xiv.

Lord Kellie's opponent, on the death (in 1842) of his mother Lady Frances (who if she had survived her brother would have become Countess of Mar) became through his mother heir to the ancient Earldom, and was entered in all the "Peerages" etc., as the heir, without question or opposition from any one, from that date up to 1866.

He was always recognized by his uncle as his future successor to the *ancient* Earldom and while on a visit to him at Alloa Park in September 1852, the Earl gave his nephew two documents relating to the Earldom of Mar, one of which was a copy of a petition claiming the ancient precedency of the Earldom (*b*) and showing the descent through several ladies of Mar, the other being a printed paper on the same subject.

(*b*) See Appendix, p. xv.

The Earl of Mar and Kellie died, as before stated, on June 19, 1866, whereon his nephew Lord Kellie's opponent *as a matter of course* succeeded his uncle in the Earldom of Mar, and his possession of the Earldom was recognized in the usual form required by Scotch Peers, by his "service" (*c*) before the Sheriff of Chancery, and by the registration of his honours and arms

(*c*) See Appendix, p. xxvi.

(*d*) See Appendix, pp. XXVIII, XXIX.

by the "Lyon King" at the Register office in Edinburgh (*d*). His cousin Colonel Erskine, father of the present Lord Kellie, succeeded at the same time to the Earldom of Kellie (that title being restricted to heirs male) and was formally recognized as Lord Kellie, precisely (no more nor less) in the same manner as his cousin had been as Earl of Mar (1).

No opposition was made by Lord Kellie at this time; on the contrary, he recognized his cousin, in every way, as Lord Mar, both at the funeral of the late Earl (*e*) and afterwards, as will be seen by his letters, further on.

(*e*) See "Supplemental Case" for opposing Petitioner, p. 64, and Appendix, p. XXVIII.

It has been most unfairly said by Lord Kellie and his friends that Lord Mar (as we must now call him) was wrong in assuming the Mar title. Is it possible that anyone having been universally regarded from his earliest childhood (as Lord Mar was) as the heir to an Earldom, on the succession naturally opening to him, could be expected to drop his title though received and legally recognized without opposition as the undoubted possessor of the dignity? Such an extraordinary proceeding could never have suggested itself.

Supposing, for instance, some one started up unexpectedly and claimed the peerage, say, of Lauderdale, Lord Lauderdale's right to his Earldom having been recognized in just the same way as Lord Mar's, before Lord Kellie's most unexpected attack, would anyone have said that Lord Lauderdale should never have assumed his title, and that his lordship ought at once to drop it on the appearance of an opponent?

It must here be remarked that nearly a year had elapsed since Lord Mar's succession to his uncle's *ancient* Earldom before Lord Kellie (father of the present Lord) claimed an Earldom of Mar.

We may observe that in response to the "petition" and "cases" lodged before the House of Lords by Lord Kellie in furtherance of his claim to an Earldom of Mar, his opponent of course lodged a counter-petition which with his printed "case" following it, a year after, were drawn up and *received* as those of the Earl of Mar. Thus he did not appear before the House as a claimant but merely as opposing Lord Kellie's claim, he having been regarded by all authorities as in possession of the old Earldom and having been recognized by the usual legal forms required by Scotch peers, the old law requiring a Scotch peer to obtain recognition from the House of Lords having been *lately rescinded* as we see below. (1)

This was not a litigation in which two persons claimed a particular and known peerage and in which the pedigrees and heirships are called in question, and one claimant having succeeded in establishing his right to the said peerage the other claimant necessarily fails; but it is a case in which one man claimed a Scotch peerage *never before heard of* nor even hinted at in any authenticated document and which has *no place* in the "Union Roll" of Scotch peers, while another person who was then established in his possession of the *ancient* Earldom of Mar (as fully as law and custom require of a Scotch peer) and regarded for some months at least by Lord Kellie

(1) The old act of 13th May 1822, requiring the recognition of Scotch Peers by the House of Lords, was rescinded by the House of Lords on 25th July 1862.

himself as Earl of Mar, objects to Lord Kellie's attempt to get an Earldom called Mar, and hence appeared at the House of Lords as the "Opposing Petitioner."

However, some three or four years after the reception of his "petition" and "case" as those of Lord Mar, in his short "supplementary case" which he lodged in 1873 (in reply to the additional voluminous "cases" lodged by Lord Kellie) he was ordered by one or two of the Committee of Privileges to have this "supplementary case" drawn up as that of "John Francis Erskine claiming to be Earl of Mar and Baron Garioch." But notwithstanding this his counsel (*e*) insisted that his client did not appear as a claimant using these words "my client although he is a petitioner is not claiming anything before your lordships. He is opposing, —he is undertaking to say that he has an interest, and your lordships have considered that he has an interest which entitles him to come here and oppose the claim of Lord Kellie (*f*).

(*e*) Mr. Vaughan Hawkins.

(*f*) See "Speeches" Mar case, p. 306.

Notwithstanding that Lord Kellie was voluntarily *the "claimant"* and his opponent compelled *nolens volens* by their lordships, long after the litigation began, to appear as a claimant, yet *Lord Kellie was allowed,* while his opponent did not enjoy, all the advantages of a claimant, which are his being at liberty to arrange his own time for lodging "cases" and by the production of more "cases" to delay the hearings and the pleadings, and further having the privilege of opening the case and having also an additional speech after his opponents rejoinder (and thus two to one). On the other hand the only disadvantage that a claimant generally has, namely, that the responsibility or *onus* of proof lies with him, was thrust upon Lord Kellie's opponent : for Lord Cairns says : (*g*) "The burden of proof lies upon the opposing Petitioner."

(*g*) See "Judgment," p. 49.

From the above facts it would almost appear that "somehow or other" and "in some way or other" this has been made a special case.

The reader is here begged to note that Lord Kellie never claimed the ancient Earldom of Mar, (of which the late Lord Mar was so proud) but set up a claim to a *new* and and "fancy title" of Mar, and to have it *presumed* that it was *"created"* in or about 1565, for the benefit of the Erskine family *alone;* and in accordance with this the imaginary "creation" has been *presumed* and thus *a new title called Mar* bestowed on him and his heirs male. The shadowy nature of this "creation" we will fully show presently.

At the elections of Scotch representative peers at Holyrood, Lord Mar has habitually *voted* (of course as Earl of Mar) and his vote has always *been received and counted* in spite of the protests and opposition of Lord Kellie and his son after him. Moreover on one occasion (in Dec. 1868) Lord Mar's vote caused a *"tie"* between two candidates, Lords Rollo and Kellie, whereupon Lord Kellie tried to get Lord Mar's vote declared void (which would then have give him the majority of one vote over Lord Rollo) but in this Lord Kellie failed, and a fresh election had to take place in consequence of the *"tie"*, Lord Mar's vote being deemed valid.

It is a matter of regret that it is necessary for the full understanding of this case in all its bearings that the reader should be made aware of what passed between Lord Kellie (then Colonel Erskine) and his cousin (then John Francis Erskine Goodeve) at the time of the late Lord Mar's death.

Colonel Erskine (father of the present Lord Kellie) was living at Tillicoultry a few miles from Alloa, the seat of the late Lord Mar and was with him when he died. Lord Mar's nephew (who was then in England) was not made aware of his uncle's serious illness untill he heard of his death.

The Earl's funeral took place on the 26th June 1866 and immediately afterwards (as is usual) Lord Mar and Lord Kellie adopted their respective dignities, and signed the "minutes of proceedings" after the funeral accordingly (*h*). Lord Mar, signing *Mar*, first, as nearest relation, and inheriting his uncle's senior title. No objection was made to this by Lord Kellie or by his legal adviser who was present. On the other hand Lord Mar, under legal advice, objected to Lord Kellie's son signing as Lord Erskine, as he had doubts whether that title did not go with that of Mar, accordingly Lord Kellie's son did not sign the "minutes" though he was present.

(*h*) See Appendix, p. xxviii.

We may here remark that Lord Kellie having spent many years in India, the cousins, though friendly, had not seen much of each other. Lord Kellie was then 56 and Lord Mar 30.

It so happened that just at this time Lord Mar had invested a little money in a Mining Company and consequently had become liable for the sum of £1,150; — and it must be noticed, to understand the gist of what follows, that Lord Mar was taking legal advice as to whether the Mar estates ought not to accompany the ancient title, when the following letters were received by Lord Mar from Lord Kellie. They will speak for themselves :

Tillicoutry House, Stirling.
27 June 1866 (*i*)

(*i*) Three days after the funeral of the late Lord Mar.

My dear Cousin,

Your letter of the 27th having been addressed to Alloa I only received it at home yesterday and had no time to reply to it at the Park. I have much pleasure in sending your solicitors a cheque for £1,150 in payment of all your liabilities and I enclose you a copy of my letter to your solicitors. Allow me to express how much I feel your fine gentlemanly conduct when we met on such a melancholy and trying occasion as Tuesday last and I hope we shall not only continue cousins, but intimate friends, and perhaps you will come and pay us a visit before long. Excuse more at present and believe me your affectionate cousin,

Kellie.

Postscript. *I hope to be able to make you some allowance, but cannot be certain of its amount until I can properly look into my affairs* (1).

The reader may be amused to learn that the "fine gentlemanly conduct" consisted in Lord Mar trusting to his cousin's honor so completely that he did

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(1) This offer of money was spontaneous on Lord Kellie's part. We cannot think from all the circumstances which followed that it was done for love of his cousin whom, as soon as the mask of friendship was threwn off, he opposed most bitterly and in the most hostile manner, as is well known.

not make full enquiries about what other Mar deeds there might be besides those produced by Lord Kellie at the funeral as he had not the slightest notion that there were many chests of Mar deeds in Lord Kellie's hands.

We will now show that Lord Kellie had in his possession many more *Mar documents*, besides those produced at the funeral.

On being examined with regard to these, at the House of Lords on the 3rd May 1870, his lordship said (*j*). "I found five boxes of documents of different kinds and I also found a number of old documents or miscellaneous documents, in a closet in the old Tower. I put those which I have spoken of last into another box. That made the sixth box of documents."

(*j*) See Minutes of Evidence, p. 414.

Further we see that Lord Kellie became possessed of still more boxes of *Mar deeds* in the following remarkable manner.

On his further examination, being asked if he knew whether there were any of the *Mar documents* in the General Register House in Edinburgh he replied "I heard that there were some boxes in an empty room and that they had been there for a long time and did not belong to the register office. I applied to the Lord Clerk Register (Sir W. Gibson Craig), and he kindly made them over to me." Then Lord Kellie being asked whom did he direct to receive these Mar deeds, he replied : "My agent Mr Brodie of Messrs Gibson Craig and Co." How or when Lord Kellie heard of these boxes of Mar deeds being in the Register office he does not say. Is it not strange that these *Mar deeds* could have been thus given over into Lord Kellie's hands without opportunity having been afforded to Lord Mar's agents also to have access to them? If they had been handed over to Lord Kellie *before* any hint of a coming litigation, why was his cousin (for whom Lord Kellie then professed such friendship and whom he recognized fully as Lord Mar) to be shut out from inspection and even an inventory of those deeds? But if these Mar deeds were given up to Lord Kellie after he had commenced his claim for *a new Mar title* (directly and totally opposed to the convictions of the Mar family and indeed of all Scotland for centuries) on what ground was he to be supplied by a public official with boxes of *Mar documents* and thus to be in a position to produce such only as he might select for inspection? Lord Kellie on being further asked if he had withheld from his opponent a single document, replied. "Not a single document, I requested " Mr Fraser and Mr Brodie to give to him and his agents every document that " they might name." Now it was all very well for Lord Kellie to say he had given his opponent and his agents "every document *they might name*," but how were they to guess at the contents (without an inventory) of these many boxes of Mar deeds? Such power being placed in the hands of one side only will no doubt attract the attention of the reader.

That the " allowance " (alluded to in Lord Kellie's letter of the 29th June 1866 just quoted) was made and was not long after *withdrawn* will be seen by the two following letters from Lord Kellie's agent (not his legal adviser) at Alloa.

Alloa, 9th Feb. 1869.

My Lord,

I think it right to inform your lordship that I lately received

instructions from the Earl of Kellie not to make any further remittances. While I make this intimation I also think it right in the circumstances that I should tell your lordship that Lord Kellie took offence at your protesting through your agents at the last election of Peers against his using the Erskine title which undoubtedly belongs to him and probably a letter of explanation from you to him may put the matter straight. Lord Kellie leaves this for London to day for some months and his address will as formerly be at 28 Eaton Square, Belgravia. Be kind enough to treat this letter as somewhat confidential and believe me to be my Lord.

Yours sincerely,
James Moir.

The Right Hon^ble^,
The Earl of Mar, etc., etc.

To this letter Lord Mar did not reply. Whereupon he received, a fortnight after, the following letter.

Alloa, 23rd Feb. 1869.

My Lord,

As I have had no communication as to my letter to your lordship of 9th inst, I venture to ask whether you have written to Lord Kellie (whose address is 28 Eaton Place, London) I think it will be worth while to make some explanation and I shall be very sorry if the good feeling that existed between your lordships should be broken off. Your lordship will be so good as to hold this letter confidential.

I have the honor to be My Lord,

Yours sincerely,
James Moir.

The Right Hon^ble^ the Earl of Mar.

To this letter also Lord Mar did not condescend to reply. Thus ended the correspondence and it is almost needless to add that, since 1868, Lord Mar received no more money directly or indirectly from the late Lord Kellie or from his son the present Lord Kellie.

We take this opportunity to contradict the rumour that has been widely circulated that Lord Kellie *has generously paid his opponent's law expenses* in the late suit before the House of Lords. It is untrue: for Lord Kellie has *in no way*, directly or indirectly, paid any of the expenses incurred in the suit by his opponent.

Having diverged a little we now return to the time shortly after the death of the late Lord Mar (June 19, 1866) and the following letters will show the position of the cousins towards each.

Tillicoultry House, Tillicoultry, N. B. 27 June, 66.

My dear Cousin,

I have sent you a small parcel by train (paid) containing the best

impression of the Mar seals which I can make. It is addressed to the care of J. Hamilton Esq., Hilston Park, Monmouth.

I would have sent you one of the original seals, but I believe they are hereditary and go with the estate, but I will look out some other little things which belonged to your uncle and send them to you before long.

I wish you would tell me the names and places of abode of your own sisters, for we should like to make their acquaintance and we hope to see "Lady Mar" (1) some day this year. By the bye I think I can find the cards and card plates of the Earl and Countess of Mar and if so I will send them to you. Lady Mar had no *jewels*, at least if there were any he sent them to her family nor was there any plate to speak of.

All the old family jewels which were of great value were burnt or lost when the old house was burnt down in 1800. Amongst the things lost was an original picture of Mary Queen of Scotland. I do not know the motto of the Mars before Lord Erskine succeeded to the Mar title (2). The Erskine's motto is as you know "Je pense plus" but given long before the Erskines had the Mar title. When the titles were united, the Earl took "Unione Fortior," as a second motto but it was seldom used. The Mar supporters were lions, those of the Erskines were griffins. I am called to dinner so must close. Believe me your affectionate cousin.

KELLIE.

Tillicoultry House, Tillicoultry, N. B.
24th June 66.

My dear Cousin,

I yesterday received your letter of the 21st complaining that my solicitors had refused to stay my petition to be served heir. I am not aware why they should withdraw it. You never asked me to stay it and I never thought of doing so. On the contrary I understood from you that you had filed or were about to file a contrary claim. My petition (3) was filed in due course long ago and I have done nothing since, nor do I intend doing any thing in the matter unless your counsel agrees with your W. S., and after a perusal of the Deed of Entail I think both *you* and he will see that the objection made by your agents all proceed on wrong premises, i. e., on the supposed wording of a Bond, *which does not exist.*

Your affecte cousin,
KELLIE.

We beg the reader especially to remark that here Lord Kellie states that a certain Bond "*does not exist*". This Bond here spoken of is the "*Back*

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(1) This was about six weeks before Lord Mar's marriage with Miss Hamilton.

(2) Lord Kellie's remark at this date is quite inconsistant with the *now presumed* "creation" of the Mar title to Lord Erskine's descendant in 1565.

(3) The "Petition" here referred to is the petition of Lord Kellie to be "served heir" to the Mar *estates*.

Bond" on which the entail of the *Mar estates* was constructed. To this Back Bond we shall soon again allude, as it is a deed of much importance and may be regarded perhaps as the *backbone* of the whole litigation.

We now reprint another letter as follows.

Tillicoultry House, Tillicoultry, N. B.
25 June 66.

My dear Cousin,

I have your note of the 24th and telegram saying you will be here to-morrow.

We shall be very glad to see you but hope you will stay longer than you propose.

I feel sure that when you have read the Deed of Entail attentively you will see that your lawyers have altogether argued on wrong premises. There is no "Back Bond" such as they supposed and the reference in the entail to one is not a quotation from it, nor does it pretend to be so. — The Bond was clearly one between Lord Grange and the Commissioners of sale and in it he stipulated to pay certain sums for the Estate on certain days and happily added that he would transfer it to the heirs of the attainted Earl, but there could have been no stipulatiou between Lord G. and the Commissr of sale to transfer it to any specified heirs. He must have been at perfect liberty to make his Entail as he liked and after the failure of heirs of the body of Lord Erskine he entailed it on the *heirs male* of Lady Frances Erskine.

Every lawyer in Scotland will tell you, that I am the heir male of the body of Lady Frances.

What ever you do I think it will be better we meet, but if you propose to contest my being served heir I can assure you that it will cost you a considerable sum of money and *to no purpose whatever* except to retard the service and to oblige us to pay the lawyers money which may be very much better laid out.

Trains leave Edr from Stirling at 6.25, 9.15, 1.20, 4.0, 6.20, and the time occupied in reaching Tillicoultry from Edr is about 2 hours. There are also 5 trains from this to Edr.

Your affecte cousin,
Kellie.

It will be observed in the above letter (of the day following the previous letter) that Lord Kellie is still uneasy in his mind as to the *" Back Bond, "* and though he says *"there is no Back Bond"* he proceeds to relate its contents and he remarks that by the Deed of Entail, which is clearly constructed on and in virtue of, this Back Bond, as will be seen on reference to the Deed itself, too long now to print in full (*a*), the Mar estates were entailed on the heirs male of Lady Frances but he is silent as to the estates having been entailed on Lady Frances herself, showing no restriction to males, and after Lady Frances he omits to add (to the words heirs male) the words " to be procreate of the body" of Lady Frances, which omitted words are highly important as we will show hereafter.

(*a*) The whole Deed is on, pp. 261 and 275 in the " Minutes of Evidence."

Some time after the commencement of the litigation with regard to the (or rather *an*) Earldom of Mar, Lord Mar's agents applied to Lord Kellie's agents to produce the said Back Bond, and from the following correspondence it will be seen that the said "Back Bond" has disappeared in a most mysterious manner.

We will here reprint a letter to Lord Kellie's agents and their reply thereto.

Edinburgh, 4th March 1870.

MAR PEERAGE.

Dear Sirs, — We have to request that you will send us the *Back Bond* of date 23rd March 1725, mentioned at the bottom of page 264 of Lord Kellie's evidence. We will give you a borrowing receipt for the deed, undertaking to return it to you in two days.

We are, Dear Sirs, yours truly,
HUNTER, BLAIR & COWAN.

Messrs Gibson Craig, Dalziel and Brodies, W. S. Thistle Street.

Edinburgh, 7th March 1870.

MAR PEERAGE.

Dear Sirs, — We have your favour of the 4th inst. requesting us to send you the back-bond of date 23rd March 1725, mentioned at the bottom of page 264 of Lord Kellie's evidence. That back-bond is not in our possession, and on inquiry we are informed it had gone amissing at least as early as the year 1826.

Yours truly,
GIBSON, CRAIG, DALZIEL & BRODIES.

Messrs Hunter, Blair and Cowan, W. S.

We now quote a letter from Lord Kellie, dated a few days after Lord Mar's marriage.

Tillicoultry House, Tillicoultry, N. B. 18 Sept. 1866.

My dear Cousin,

If my congratulations have been late in coming believe me they are still warm, and I most sincerely hope you and Lady Mar may have a large share of this world's happiness. I would have written before but did not know where to find you. Lady Kellie is still at St Andrews but returns tomorrow, she tells me she has written to Lady Mar to ask you to come to us on the 27th but I doubt if her letter reaches you, as I suspect it is addressed to the P. O. Edinburgh. However I beg to repeat the invitation and to say if that day will not suit you we shall be glad to see you for two or three days on any day you may fix, but as we are to have a good many friends to visit us this and next month and I have to go to Edinburgh on the 26th and to Cumberland on business before long, I must ask to you to be so good as to write soon.

We have 5 trains a day from Stirling, viz.
Leave Stirling at 8.20, 10.50, 2.30, 5.25, 7.45.
Arrive at Tillicoultry 9.0, 11.25, 3.5, 6.10, 8.20.

Now if you will tell me on what day and by what train you will come I will have a carriage ready at our station to bring you up to this house. We are very glad you and Lady Mar liked the clock.

Our second son who is in the 16th Lancers, came home from India on leave a few days ago, and you will find him and his youngest brother here. He is a schoolboy, but has lately had the whooping cough and cannot return to Radley for some weeks yet. Our eldest son is in Edinburgh for his wife's confinement. — Hoping to see you soon and with kind congratulations to you and Lady Mar, believe me your affectionate cousin.

KELLIE.

P. S. *We wish to ask Lord and Lady Rollo to come and meet you here.*

The cousins were now on a friendly footing and, availing themselves of the above invitation during their tour of visits in Scotland, Lord and Lady Mar stayed with Lord and Lady Kellie at Tillicoultry and they parted on the best of terms.

After this friendly intercourse between the cousins it can be imagined what was the astonishment with which Lord Kellie's intimation, some months afterwards, that he was about to claim the (or rather *a* Mar title) was received by his cousin. If Lord Kellie's friendship had been sincere in the first instance surely he would have allowed his cousin (or an agent on his behalf) to have inspected the *many chests of Mar deeds,* which he since confessed (as we have shown) were in his possession (*a*); but on the contrary no inventory of these deeds was forthcoming (*a*), so Lord Mar and his agents were obliged to guess at what might be in these chests and content themselves with such few as Lord Kellie might produce.

(*a*) See Minutes of Evidence in Mar Case, p. 415.

Had Lord Kellie on the death of the late Lord Mar avowed his intention to claim a Mar Peerage his cousin would have been on his guard, and the Court of Session would have been applied to, as happened in the competition for the Roxburgh estates and honours, to sequestrate the Mar muniments, with liberty of access, under proper security to the competitors to examine the contents, — a measure which would have put both parties on an equality in the preparation of evidence. (*The reader is particularly requested to refer to the Appendix to this book, p.* XXXV.)

In spite of this great disadvantage with which Lord Mar laboured he happily got access to several documents from the charter chests of some of the chief Scottish families, and from the public offices, the Register House in Edinburgh, etc., as well as some he knew were in the hands of Lord Kellie and was thus enabled to show his right to the *ancient* Earldom of Mar very clearly as we venture to state.

If Lord Kellie had any belief that he might eventually lay claim to an Earldom of Mar, *with any chance of success,* he kept it wonderfully secret up to this time and during the life of the late Lord Mar, whose veneration for the *ancient* Earldom of Mar was well known (1) as shown by his frequent protests

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(1) In April 1871, Lord Kellie who commenced the claim, (carried on by his son the present Lord Kellie), for a *new* Earldom of Mar, erected a brass tablet in Alloa Church bearing the following inscription "Sacred to the memory of John Francis Miller Erskine,

for precedency (as premier Earl) at the Elections of Scotch representative peers, and by the papers to support such precedence which he gave to his nephew (Lord Kellie's opponent) maintaining the existence of the *ancient* Earldom of Mar as vested in himself and its succession to him *through several Countesses of Mar in their own right* (c). However it answered Lord Kellie's purpose better to make *no stir at once after* the death of the late Lord Mar in this way but to wait until he had possessed himself of the Mar estates and all the documents (except those of course in the public offices) relating to the Mar title and estates.

(c) See Appendix, p. XVI.

Lord Mar having being awakened as to his right to the Mar Estates by the extraordinairy efforts on Lord Kellie's part to obtain *a new* Mar Earldom, which would give but litle precedence over his rank as Earl of Kellie, was advised to claim the estates in the Court of Session though the litigation with regard to Lord Kellie's claim to a *new* Mar peerage was still pending. Finding that Lord Kellie (as the claimant) delayed the hearing of the peerage case year after year (1) by lodging new and voluminious printed cases (2) Lord Mar was determined to wait no longer, and he pursued his claim to the Mar Estates in the Court of Session, but was unsuccessful: however Lord Deas (as seen by the shorthand writers' notes) concurred in the decision *with reluctance,* as he said it was the very evident intention of the Entailers that these Mar Estates should go with the Mar title, showing that he considered Lord Kellie's opponent in right of the Earldom of Mar but that he thought the intention of the Entailers had not been carried out.

It is important to observe here that at this time the Court of Session had

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ninth Earl of Mar and eleventh Earl of Kellie, who died on the 19th day of June 1866, in the 71st year of his age. This tablet was erected by the founder of this church, Walter Coningsby Erskine, twelfth Earl of Kellie, etc., *as a mark of esteem and affection* for his cousin whose remains rest in the adjoining family vault."

The said late Earl of Mar claimed to be premier Earl of Scotland, and should be ranked 33rd Earl of Mar, and he continually protested at the elections at Holyrood for this precedency. What a "mark of esteem and affection for his cousin" and what a compliment paid to his memory by the late Lord Kellie to inscribe on brass near his dear cousin's remains in a sacred building what is the direct opposite of his most cherished convictions. We can almost fancy the dry bones struggling to kick off so hateful a libel. But there is something *ære perennius,* (more enduring than brass) and that is TRUTH.

(1) So that the pleadings did not commence till 1873.

(2) The father of the present Lord Kellie (who died in Jan. 1872) lodged several of these "cases", and shortly before his death his counsel stated before the House of Lords that his "evidence" was now complete and the peerage claim would be ready for hearing the following session. But on his death his son threw over these "cases" on which his father had grounded all his hopes and lodged two other new and voluminous cases, and on 5th June 1874, though his counsel had at length concluded their pleadings, Lord Kellie attempted to lodge yet another new "case" (of about 100 pages) containing among other things *two perfectly unauthenticated documents* to support the *idea of a new "creation"* of an earldom of Mar.

However this "case" on behalf of Lord Kellie the Lords ruled could not be admitted and the pretended "evidence" was likewise rejected by their Lordships as being quite unauthenticated.

not before them the judgment of the House of Lords in the Forbes *v.* Trefusis case (17 June 1873) the terms of which decision most strongly support the contentions of Lord Mar with reference to the entail of the Mar Estates, and tend to show that the reading of the disponing clauses of the entail deed would agree with the evident intention of the entailer, that the person holding the Mar title, descendible to and through females, should also be entitled to these Mar Estates.

Lord Mar was thereupon advised to appeal to the House of Lords, and after the Law Officers of the "Crown" had so emphatically declared (June 16, 1874) that *Lord Kellie had completely failed to establish his claim* to an Earldom of Mar (*h*), His Lordship gave notice of appeal in the estates matter, and had entered into his "recognizances" at the House of Lords, with regard to the question of these estates, only about a fortnight before the House of Lords pronounced their extraordinary judgment in favour of Lord Kellie, which amounts to this (using the words of their Lordships) namely that "somehow or other" the ancient earldom of Mar had come to an end, and that "in some way or other" a new title of Mar had been created for the Erskine family alone. It is of course not possible to conceive that Lord Mar's determination to appeal to the House of Lords in the Mar estates question could have had any thing to do with this extraordinary decision.

(*h*) See Attorney general's Speech, on Mar Case, pp. 402 and 421.

However it is still open to Lord Kellie's opponent to carry on this appeal; and it remains to be seen whether he will not still pursue his claim to the estates as heir to the *old* Earldom for the benefit of which the Mar estates were clearly entailed.

The Entail of the Mar Estates.

We cannot pass on without drawing the reader's attention to the construction of the Entail Deed of the Mar Estates in 1739, following not long after the attaint in 1715, as it has a very strong bearing on the Mar Peerage case in showing the generally accepted belief that the Mar title, as well as the Mar Estates, were and are rightly descendible to and through females. Some may be inclined to add that this might account for the extraordinary anxiety on the part of Lord Kellie and his friends that he should became possessed of *an* Earldom of Mar, even one which would give him a precedence of only fifty years over the honours he already held.

Lord Kellie would have "in some way or other" a new Earldom called Mar, restricted to heirs male, for only such a limitation could accord with his pretentions.

Let us view the Entail of the old Mar Estates in connection with such a limitation.

Entails, like wills and settlements generally, are made for all contingencies of marriages and deaths. On reference to the Deed of Entail of the Mar Estates (*b*) we find that they were settled first on Thomas, the only son of the attainted Earl of 1715 and "the heirs male lawfully to be procreate of his body,"

(*b*) See Minutes of Evidence, Mar Peerage Case, p. 261.

" whom failing to the heirs whatsomever deseending of the said Thomas Lord " Erskine his body, whom failing to Lady Frances Erskine his sister and the " heirs male to be procreate of her body, whom failing to the heirs whatsomever " descending of her body, whom failing (1) to me the said James Erskine and " the heirs male lawfully procreate or to be procreate of my body, whom " failing to the heirs male whatsomever descending of the body of me the said " James Erskine, whom failing to the nearest agnate of the said Thomas Lord " Erskine of the surname of Erskine, whom failing to the said Thomas Lord " Erskine his heirs and assignees whatsomever, heritably and irredeemably " without any manner of reversion, redemption or regress whatsomever, the " *eldest heir female* and the *descendants of her body* excluding all other heirs " portioners and succeeding always without division through the whole course " of succession in all time coming, with and under the conditions, provisions, " declarations, burdens, faculties, restrictions, limitations, clauses irritant and " resolutive after mentioned, and no other ways *all and hail* the Earldom of " Mar which sometime belonged to John late Earl of Mar. "

Now if the said Thomas had left a daughter and no son his daughter would without question have had the Mar Estates, but (according to Lord Kellie's view that the title is restricted to males) she could not have had the title of Mar, if it had been restored then instead for in 1824, and thus the title of Mar and the Mar Estates would have been at once separated.

It must be noticed in passing that the entail was made in 1739, so as to pass over entirely James Erskine, who lived until 1754, uncle of Thomas (and who became the heir male of the family on the death of Thomas) and preferring a daughter or *even a half sister* of Thomas) or any *daughter of Lady Frances;* so at the outset it is clear that the entail of these Mar estates was *by no means* an ordinary heir-male mode of succession.

It cannot be disputed that Thomas or Lady Frances could have been succeeded by a daughter if there had been no sons, and if there had happened to be no sons for successive generations, women would have held the estates for any length of time. Of course, this succession of ladies would have been quite consistent in an entail made for the benefit of the holders of the *ancient* Mar title, descendible to and through females, but it is wholly inconsistent with a new Mar title restricted to heirs male.

Thus supposing the Mar title to be restricted to heirs male, as Lord Kellie and his supporters would have it, the entailers left it to the chances of marriage and birth whether the Mar Estates and title of Mar should not at once, or very soon, be separated, but this was evidently not their intention as will be shown presently.

We will now look at what might further have happened taking Lord Kellie's interpretation of the words "heirs male to be procreate of the body," viz. that *all* the heirs male *however remote* from the person last possessed are to succeed to the Estates before any nearer female heirs (or heirs through a female).

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(1) It must be noted that they *did not fail*, as Lady Frances left a son, the Earl restored in 1824, and he left issue, and so on.

It cannot be denied that according to the Entail Thomas Lord Erskine might have been succeeded in the Mar Estates by a *daughter,* and we will suppose that this occurred and that this daughter had two sons, the elder son leaving daughters only and the younger son a son. According to Lord Kellie the son of the younger son would have succeeded to the Estates in preference to the daughter of the elder son, which would have been absurd in this case. For as this son of the younger son would have been heir male of the *daughter* of Thomas, he could not have inherited the *title of Mar if limited* to succession through *males* only (as Lord Kellie contends) for he would have been grandson not of the son but of the daughter of Thomas and the title would have gone round to James Erskine, as heir male.

Thus title and estates would in this case also have been soon separated.

Again this *son of the younger son,* would have had the Mar Estates, according to Lord Kellie's view, while the title, if it were *not* limited to male succession, would of course have gone to the daughter of the elder son who would thus have been Countess of Mar in her own right, and yet she would have been excluded from the Mar Estates.

Therefore in these cases, any of which might easily have arisen (through possible contingencies of births) the person who held the Mar Estates could not in any way be entitled to the Mar title (according to Lord Kellie's reading of the entail deed) whether the Mar *title* be descendible to heirs general (to or through a female, failing *direct* male issue) or whether restricted to heirs male.

Can it be believed that the entailers wished to make such an absurd arrangement as this ?

We will now consider the Entail of the Mar Estates from the point of view taken by the family and by the entailers (as we will further prove) viz, that the Mar title was descendible to "heirs of line" or "heirs general" (*whether male or female*) and we will show that it was the very evident *intention* of the entailers that (holding the succession to the *title* to be in this manner) they made every possible provision that the Mar Estates should be held by the very person that would naturally succeed to the ancient earldom of Mar as descendible to and through females (failing *direct* male issue); and further that *no inconsistency could arise* in carrying out this intention through *any contingency* of marriage, birth, or death, follows from the fact that the successive persons named in the Entail Deed to succeed to the Mar Estates are *always* the *heirs of line* of the former Earls of Mar and such heirs male as could succeed by the said Entail Deed are *always the heir of line as well,* and it will be observed that *no heir male* could succeed to the estates *to the exclusion* (1) *of the heir of line* (or heir general).

That no inconsistency did or could arise from this understanding and intention of the entailers is evident, in the first instance, by their preferring Lady Frances to James Erskine, the heir male then living. Lady Frances being the only surviving child of the attainted Earl of 1715 (her only brother

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(1) The Mar estates and the Earldom of Mar have *never been held by any but the heir of line*, up to the death of the late Lord Mar in 1866.

Thomas dying without issue) would have been *Countess of Mar in her own right,* but for the attaint.

Now having arrived at the possession of the Mar Estates by *Lady Frances in her own right,* which is an *undisputed fact,* and to further prove that the Entail reads consistently with the view we maintain, viz. that the ancient Earldom of Mar is not restricted to males, we will take the following suppositious case of descendants and successors to Lady Frances, which might easily have happened. Suppose Lady Frances had had a *daughter* but no son (this daughter would of course have succeeded her mother in the Mar title and estates) and that this daughter had left two sons, the elder of whom having a daughter but no son, and the younger having a son. In this position and following the similar ruling in the Forbes-Trefusis case (*a*), of which more hereafter, the elder son's daughter would, if the attainder had been reversed, have had the estates and of course the title also, according to the view of the Entailers, as shown by the following provision in the Entail Deed regarding the heirs "male *as well as female*", viz. (*b*) "that the *eldest female heir* and the "descendants of her body should exclude the younger and her descendants, "as heir portioners, and shall succeed always *without division*, and that the "whole heirs of Tailie, *as well male as female,* and the descendants of their "bodies who should happen to succeed to the said lands and estates by virtue "of the before recited destination shall be obliged in all time after their "succession to assume and constantly use and bear the surname of Erskine "and take and carry the arms which before the attainder of the said John late "Earl of Mar were worn by the family of Erskine and Mar, and in case the "attainder of the said John late Earl of Mar should be reversed, the title "dignity and honours (*c*) of the family of Erskine of Mar and the arms thereof "as their own proper surname and arms in all time thereafter.

(*a*) House of Lords, June 17, 1875.

(*b*) See Entail Deed, Minutes of Evidence, p. 272.

(*c*) Namely MAR AND GARIOCH, for the Kellie title was never held by an Earl of Mar, until 2 Sept. 1835. See Appendix, p.XIV.)

This provision would be clearly quite superfluous and absurd *if the estates and the title of Mar were restricted to males.*

But according to Lord Kellie's view, the above mentioned younger son's son would have had the Mar Estates though he could *in no case* have had the Mar title, for if the title be limited to male succession he would have been shut out as grandson of the daughter of Lady Frances, and if the title be descendible to heirs general or heirs of line, he would have been excluded by the daughter of his elder brother.

Thus we see, if the Entail be read and the succession to the Mar title be as Lord Kellie presumes, what confusion would have arisen from contingencies of births and deaths, and how antagonistic such succession is to what the Entailers so clearly intended and provided, in arranging, (as we have shewn they did) that the ancient Mar title (if restored) should be held by the *same person* who naturally would succeed to the Estates, *male or female.*

To leave suppositions and address ourselves to facts. Lady Frances, in Oct 1740 (15 years after the making of the "*Back-Bond*" on which the Entail deed dated 6th Jan. 1739 is confessedly constructed) married her cousin James Erskine's son who happened to be the heir male and who would have had the Mar title supposing it to have been restricted to heirs male as Lord Kellie contends. Any attempt to exaggerate, on Lord Kellie's behalf as an important point, this accident of marriage is frustrated by the following plain facts which

neither Lord Kellie nor any one else can distort, still less upset, namely that the Entailers preferred Lady Frances to him and to his father before him in the succession to the Estates, though they were the heirs male.

Further on the death of Lady Frances in 1776 her son John Francis Erskine of Mar succeeded to these old Mar Estates *in right of his mother* (*d*) while his father the said heir male was still living (he lived till 1785). Moreover it is a fact that the said John Francis was "served" *heir to his mother* to these Mar Estates by a "special service" (*e*) *five years before his father's death* and that the ancient Earldom of Mar was restored to him by Act of Parliament (June 17, 1824) in which it was recited as the *ground* of Restoration "Whereas John Francis Erskine is *Grandson and lineal representative* of the attainted Earl," etc., and this position he held through his said *mother* the Lady Frances, and it is further remarkable that his *father* though heir male is *completely ignored* in the said Act of Restoration.

(*d*) See Douglas "Peerage," vol. II, p. 206.

(*e*) Dated 8 May 1780

(*f*) See Act of Restoration, Appendix, p. III, and Minutes of Evidence, p. 323.

Again, the "Back Bond" being dated 25 March 1725 and the Deed of Entail (disponing in virtue of said Back Bond) being dated 6 June 1739, nearly two years before Lady Frances' marriage with her cousin, were clearly independant of such marriage (there are no injunctions or restrictions in the Entail Deed as to her marriage with any particular individual). Thus Lady Frances could have married whom she pleased, and so, after her the succession might have opened to any other family.

We will now see who was to succeed by the entail *after* Lady Frances. It was to be (*a*) *the heir male to be procreated of Lady Frances' body, whom failing to the heirs whatsomever descending of her body.*"

(*a*) See the disponing part of the Entail Deed. Minutes of Evidence, p. 265.

Lord Kellie has read the words "heirs male to be procreated of her body" etc. to suit himself as a limitation strictly to male heirs only (*which it certainly is not*) and against the very evident intention of the Entailers.

The question is whether "heirs male *procreated of her body*" meant Lady Frances' sons only or males of all generations.

In the Forbes-Trefusis case, decided by the House of Lords, 17 June 1873 (*b*) the destination was to "heirs male to be procreated of the marriage and the heirs male of their bodies respectively, whom failing to the heirs female to be procreated of the marriage," and the contention lay between a *daughter of a son* and the *next heir male procreated* of the marriage. The three learned Law Lords Selborne (Lord Chancellor), Colonsay and Chelmsford, who gave the judgment, decided unanimously (though the last named reluctantly) in favor of the *lady*. Lord Selborne said "the words *procreale* of the marriage" "are certainly more appropriate to issue of the *first generation* than to any "afterwards who are truly and literally *procreated* of *other* persons though "their immediate parents may be traced back to the persons named, the *first* "heirs male procreated being the authors of a *'stirps'* or line." Their lordships viewed "*heirs male procreated*" in its context in the deed and found nothing at variance with the more appropriate meaning (1). On the contrary they

(*b*) "Scottish Law Reporter," vol. X, pp. 491-493.

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(1) In the Mar Entail Deed there is not only found "nothing at variance" with this "more appropriate meaning, but everything to support such meaning, and thus to include *females, failing males in each one generation only.*

found "procreated" introduced to distinguish the *first generation* of heirs male (sons to take before daughters in each one generation only) *not* comprising sons of all generations to the *exclusion of a nearer female heir* (1).

Now the word "respectively" occurs after heirs male of their bodies in the Forbes-Trefusis case and not in the Mar Entail Deed. But this renders the position in the Mar case *still stronger* for the succession opening to a *female*, because in the Forbes-Trefusis case after heirs male procreated of the marriage come heirs male of their bodies respectively and *after them* the heirs whatsoever of the said heirs male, thus showing a postponement of the opening to females. While in the Mar case the estates were by the disponing part of the Deed entailed on "Lady Frances and the heirs male *to be procreate of her body* whom failing to *the heirs whatsoever descending of her body*" (with no such postponement as in the Forbes-Trefusis case) thus bringing in females *at once after the sons alone* of Lady Frances' body.

Further in the Forbes-Trefusis case Lord Selborne laid great weight on the exact meaning of the words "whom failing" in a Deed of Entail. His Lordship said : "The question is not as to the effect of the word "*failing*" but as to the " effect of the word "*whom*", and what is the antecedent to which the word " *whom*" is relative?" Then further on, the effect of the words "whom fail- " ing" being, his Lordship adds "that the heirs of the body of each *stirps* are to " succeed thus, the heirs male of *that* "*stirps*" first, the heirs female of that " "stirps" afterwards. "

Let us now view the Mar Entail under the light of these remarks of the Lord Chancellor Selborne.

The Mar destination will now read "to the *sons* of Lady Frances, whom " failing to the heirs *whatsomever* descending of her body" (2).

Now what is the antecedent to the word "whom"? It cannot possibly be other than Lady Frances' sons, each son *in his turn* in that *one generation only*.

Any other supposition is absurd. For suppose two sons existed and read the "whom failing" to be after both are dead, and the elder died leaving a son: who inherits under this view? clearly the uncle to the exclusion of the nephew. But now read "whom failing" as applicable to *each* son in turn, and you get at once an intelligible and natural order of descent laid down; the ordinary legal one, each son being called as a "stirps" in the order of their birth, to be succeeded by the descendants of his body, *male or female*, male before female in *each one generation only* and these would of course be the descendants of Lady Frances' body. Further this construction is perfectly in accordance with every other clause in the entail deed and moreover it agrees exactly with the order of succession in the recital of the entail deed constructed by virtue of the " *Back Bond* " as the following quotation from the Entail

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(1) In like manner in the Polwarth patent, 26 Dec. 1690, "heirs male of the body and to their heirs" was lately taken by the House of Lords to include heirs female, see "Riddell on Scotch Peerage Law", vol. I, p. 212.

(2) Lord Kellie's opponent is the undisputed "*heir whatsomever*" of the body of said Lady Frances which Lord Kellie cannot claim to be.

(d) See Minutes of Evidence, Mar Peerage Case, p. 264.

deed (*d*) shows. "In like manner we by our Back Bond of the date 23rd March "1725 for the behoove of Thomas Lord Erskine only, lawful son to the said "John late Earl of Marr and the other persons after named therefore we "thereby band and obliged us our heirs and successors to dispone the same "to and in favour of the said Thomas Lord Erskine and the heirs of his "body, whom failing to *any lawful sister* of the said Thomas Lord Erskine "and the *heirs of her body*, with and under the provisions and conditions "therein mentioned and underwritten as the said *Back Bond* containing "thereintill several other obligements and clauses *more fully bears.*"

By this we see that there was no restriction to heirs male, and after the son or sons of Lady Frances her eldest *daughter* or the eldest daughter of any one of her descendants would clearly thus be preferred to a more remote male descendant of her body.

That this construction is right is further suggested by considering what would result from a different construction. It will be found (as in the Forbes-Trefusis case) that this, the ordinary rule of descent, cannot be departed from without raising difficulties in the way of construction not easily accounted for or surmounted. Thus supposing the heirs male of Lady Frances' body and their heirs male to have failed, who would have been entitled to succeed? The heir female of Lady Frances' eldest son or the heir female of the last heir male or the eldest daughter of Lady Frances or her descendant? All were descendants of Lady Frances. But from this dilemma you are at once freed by the natural interpretation that the sons of Lady Frances are called as a "stirps" each to be succeeded by the descendants of his body, *male or female*, (only in each one generation a brother to take before a sister), or as Lord Selborne put it "each stirps" was to take one after another in the order of primogeniture.

Thus interpreting the expression in the Entail of the old Mar Estates "heirs male *to be procreated of the body* of Lady Frances, whom failing the *heirs whatsoever descending of her body*" in the same way as their Lordships ruled in the above mentioned Forbes-Trefusis case and other cases, viz. that such means *sons in the first generation only*, or Lady Frances' *sons only* (not grandsons) and *after them her "heirs of line"* or *heirs general being descendants of her body*, it descends thus to Lord Kellie's opponent the undisputed heir of line and eldest heir general descending of Lady Frances' body. The succession of the heirs as named in the Mar Entail *agrees with the evident intention* of the Entailers and leads to no such inconsistency and confusion as would easily arise from almost every contingency of the marriage and birth if the Entail of the Mar Estates (and the succession to the old Mar title) be constructed so as to suit Lord Kellie. That the intention of the Entailers was clearly that the Mar Estates were descendible to and through females and meant to be held with the old Earldom of Mar, so descendible, is proved (as we have shown) first by their

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(1) It is noteworthy that Lord Kellie and his agents, who have had the Mar Charter chests exclusively their control, though repeatedly requested to produce this *Back Bond*, have failed to produce it or to account satisfactorily for its non appearance at the present day. (See correspondence, p. 13.)

having preferred Lady Franees to James Erskine (the heir male) then living, secondly by the provision that should the old Earldom of Mar be restored, the sueeessor to the Mar Estates "*whether male or female*" should be the person earrying the old title of Mar, (1) and thirdly by the provision that the "eldest *female* heir should suceeed without division."

A *new title called Mar*, as that lately granted to Lord Kellie on "*presumption*" *alone* (and by a further "*presumption*" restrieted to *heirs male*) eannot be *the* title to benefit the holders of whieh the old Mar Estates were partially reeovered (through the graee of the Government after the attainder of 1715) and whieh were entailed on the old Mar family. For it eannot be denied that Thomas (son of the attainted Earl), on whom the estates were first settled by the Entail, might have been suceeeded by a *daughter*, that on his death without issue Lady Franees (his half sister) *did* succeed to these estates, and if she had left no son the said Mar estates would have gone to *her daughter*, and so on. This sueeession to the estates, as provided in the Entail is perfeetly eonsistent with the sueeession of the ancient Mar title to heirs of line (male or female) but wholly ineonsistent and foolish if viewed as an Entail made for the benefit of any Earldom restrieted to heirs male, as Lord Kellie's *new* title ealled Mar is restrieted.

These estates having passed from the said Lady Franees first to her son (in the lifetime of his *father* the heir male as we have shown) then to her grandson, and then to his son John Francis the late Lord Mar, who died in June 1866 without issue and leaving no brother, the suecession to these Mar Estates as well as the old Mar title would have naturally opened to his elder sister the Lady Frances Erskine Goodeve, but, having pre-deceased her brother on June 19, 1842, her son John Franeis Erskine (Lord Kellie's opponent) naturally beeame the heir in her plaee, as heir general to the last Lord Mar and heir of line of all the former Earls and Countesses of Mar in their own right.

That the opinion of the Entailers that the Mar estates (with the old Mar title) are descendible to and through females (as we have plainly shown by the Entail Deed itself) was shared by the family of Mar more reeently is elearly proved further by the Bond of Provision (*e*) made in 1826 (2) by John Thomas Erskine Earl of Mar (grand-father of Lord Kellie's *opponent*) and from whieh we quote as follows. "Therefore I the said John Thomas Erskine now Earl "of Mar, in eontemplation of my said marriage and in the event of my "sueeeeding to the Estates and Earldom of Mar and in virtue of the powers "reserved to the heirs of Tailzio, bound and obliged myself and my heirs and "suecessors to make payment to the younger ehild or ehildren that might "happen to be proereated of said marriage, besides the heirs sueceeding to "the aforesaid Lands and Estates, or to the *daughters* of said marriage, "*ineluding the eldest* as well as the youngest in case of their being exeluded

(*e*) Dated Feb. 9, 1826, and registered in the Books of Session Edinb. 14 Sept. 1826.

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(1) We may here note again that the Kellie title had never been held with the Mar Earldom and it was not until 1835 that they were temporarily united through the late Lord Mar claiming (as collateral heir male) the Kellie title.

(2) It is remarkable that this 1826 is the very year since which Lord Kellie stated that the "*Back Bond*" has "*gone amissing*". (See p. 13.)

" from the succession to the said Lands and Estates by an heir male of *my body* " of any subsequent marriage, of the sums following," and so on.

From this it is quite evident that John Thomas Erskine held that undoubtedly his elder daughter (Lady Frances Erskine Goodeve, mother of Lord Kellie's opponent) would succeed him in these Mar Estates, failing his only son without issue and failing any other son he might eventually have. Thus he provided for his *elder* daughter, in case of her being excluded from the Mar Estates by any son he might have or by that son's issue. It must be borne in mind, in passing, that from the above mentioned John Thomas Erskine, who made the above bond in 1826 showing the succession could be to and through *females*, (and evidently with the Deed of Entail and the "Back Bond" on which it is constructed, before him at the time) Lord Kellie is not descended in any way.

As it happened the said John Thomas Erskine Earl of Mar died in 1828 and was succeeded by his *only* son John Francis (the last Lord Mar) who died leaving no issue on June 19. 1866, and thus the succession to these Mar Estates would have then opened to his elder sister the Lady Frances Erskine Goodeve, but she predeceased her brother on June 19. 1842, and so of course the succession naturally opened to her (only) son John Francis Erskine of Mar, (Lord Kellie's opponent) just as it opened to Lady Frances on the death of her brother Thomas (who left no issue and no brother) in 1766.

The "JUDGMENT" discussed.

We will now discuss the terms of the "Judgment," by which Lords Chelmsford, Redesdale, and Cairns conceded to Lord Kellie (1) a *new* earldom called Mar, on Feb. 25th 1875, directly against the expressed opinion of the Law Officers of the "Crown" who declared *"that Lord Kellie has not made out his claim to the dignity of Earl Mar in the Peerage of Scotland."*

The first few paragraphs of the "Judgment" leave little to be disputed on either side.

We proceed to page 2 where we notice that Lord Chelmsford appears to find difficulties with regard to Margaret daughter of Donald Earl of Mar (who was slain at the battle of Dupplin in 1332) and sister of Thomas Earl of Mar, who died without issue. In a charter dated 26. March 1371 (*a*) we see Thomas Earl of Mar and William Earl of Douglas mentioned as two separate individuals. Hence we find that in the lifetime of Thomas Earl of Mar the said William is Earl of Douglas only. We find after the death of Thomas Earl of Mar, William Earl of Douglas who married said Margaret sister of Thomas Earl of Mar (who died without issue) becomes Earl of Douglas and Mar (*b*).

(*a*) See "Minutes of Evidence," Mar Peerage Case, p. 385.

(*b*) See Charter, 26 July 1377. "Minutes of Evidence, p. 332 and Appendix, p. xix.

(1) It must be noted that Lord Kellie was generally termed the "Petitioner" or the "Claimant", and his opponent the "Opposing Petitioner" and sometimes the "Respondent."

That Margaret succeeded her brother Thomas Earl of Mar and thus became Countess of Mar *in her own right* is shown by several charters in which she is styled Countess of Douglas *and Mar* : it will be sufficient to name two charters one dated Aug. 20, 1387 (*c*) the other (a short charter) dated 5 Dec. 1389 which we reprint in the appendix to this book (*d*).

(*c*) See Minutes of Evidence, p. 682.
(*d*) Page XXII and Minutes of Evidence, p. 724.

Now William Earl of Douglas was undoubtedly Earl of Mar in right of his wife (1). How is it possible he could have become Earl of Mar by any other right, being no relation to the family of Mar, and connected with that family only through his marriage with Margaret daughter of Donald Earl of Mar ?

It will be seen that Lord Kellie tried to get over the plain fact of Margaret having succeeded to the Earldom of Mar in her own right by pretending there *must have been a new creation* of the Earldom of Mar to William Earl of Douglas, but he utterly fails to prove this unfounded assertion, and, as Lord Chelmsford observes, " The evidence to warrant this suggestion is of the most meagre description. " (*e*)

(*e*) See "Judgment" p. 2.

Thus it is plainly shown that Margaret succeeded her brother (who died without issue) as Countess of Mar in her own right and so she and her husband became Earl and Countess of Douglas and Mar.

Notwithstanding that Lord Chelmsford cannot deny the above, his Lordship makes difficulties by saying that James the son of William and Margaret, Earl and Countess of Douglas and Mar, on the death of his father " assumed the title of Earl of Mar in the lifetime of his mother. "(*f*)

(*f*) See "Judgment" p. 2.

To clear away all difficulties we will show that James did *not* become Earl of Mar, as a matter of course, on the death of his father, as is proved by the following charters which were quoted to support this by the Attorney General on behalf of the " Crown " in the Mar case (*g*), namely, one dated 15th Aug. 1384 (*h*) another dated 21 Sep. 1384 (*i*) and one without date (2) in all of which he is described as *Earl of Douglas only* (*j*).

(*g*) 16 June 1874, see Attorney General's Speech, p. 416.
(*h*) See Appendix, p. XXIII.
(*i*) See Minutes of Evidence, p. 29.
(*j*) See Minutes of Evidence, p. 721.

Against these three charters in which he appears as Earl of *Douglas only* there is a single charter (*k*) executed a month before he died in which he appears as James Earl of Douglas and Mar. This may be explained by what was decided in the "Herries case" (1858) viz. that, "By the Scotch Peerage Law

(*k*) See Minutes of Evidence, p. 346.

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(1) From the proceedings in Mar Case 24th July 1873, we quote MR. MARTEN (Counsel for the opposing Petitioner) " I submit that on the death of Thomas, William Earl of Douglas, assumed the title of Earl of Mar in right of his wife, in accordance with the perfectly established rule of law in Scotland that a husband in those days was entitled to assume a dignity in right of his wife when his wife succeeded. "

LORD CAIRNS. " I do not suppose that it is disputed"

MR MARTEN. " Your Lordships will find it late down in the Balfour of Burley Case" (1868).

MR. FLEMING. (Counsel for Lord Kellie) " It is not disputed at all. " (*Speeches*, p. 253.)

(2) But which the Attorney General on behalf of the "Crown", remarked to their Lordships must date between 1384 and 1388, as he was slain at Otterburn in 1388. (See Speeches, p. 416.)

a Peeress might resign her dignity in favour of her eldest son" (1). But at any rate, against this *single* charter there are the *three* previous charters, in *all* of which he is styled Earl of Douglas only, after the death of his father (the Earl of Douglas.)

Surely this quite upsets Lord Chelmsford's idea that he succeeded to the Earldom of Mar as a matter of right "on the death of his father and in the lifetime of his mother."

Lord Redesdale lays much weight on the fact that Margaret and her husband William were styled (*a*) Countess and Earl of Douglas and Mar, instead of Mar and Douglas, and he then notices that the Dowager Countess of Mar, widow of Earl Thomas, always styled herself Countess of Mar and Angus. In answer to this the widow of Earl Thomas who afterwards became Countess of Angus in her own right, was Countess of Mar, being wife of Thomas Earl of Mar *before* she became Countess of Angus and thus she naturally put Mar first, as she held that title first. In the same way Margaret was Countess of Douglas by marriage *before* she became Countess of Mar in her own right on the death (without issue) of her brother Thomas, so she naturally called herself Countess of Douglas and Mar. Lord Redesdale adds, with regard to this Dowager, "both in her being peerages," but we venture to state that the peerage of Mar was not in her *except as a Dowager*.

(*a*) See Judgment, p. 13.

Further Lord Redesdale adds (*b*) "We must not forget that the presumption of law is against Margaret inheriting the peerage," in reply to which we may state that *the fact* that Margaret and her daughter inherited and enjoyed the peerage *rebuts* this "presumption" and (*c*) (as Lord Mansfield laid down) "*the presumption is always open to be contradicted by the heir female, upon evidence shown to the contrary.*" It is remarkable that Lord Redesdale does not try and throw doubts on the Countess of Angus by saying "the presumption of law is against" THAT good lady being a Countess in her own right.

b Judgment, p. 13.

(*c*) See Judgment, p. 9 and "Sutherland Case" p. 9.

Margaret Countess of Mar (in her own right, as we have shown) had, by her first husband William, two children only, James (slain at Otterburn) who died without issue, and Isabella or Isabel.

After the death of the said William Earl of Douglas and Mar his widow Margaret married John de Swintoun, but by this marriage there was no issue.

Lord Chelmsford here tries to make a point, which would at most amount to a very trivial one, by saying that this second husband of Margaret styled himself, after his marriage with her, as "John Swyntoun Lord of Mar, and Margaret his spouse as Countess of Douglas and Mar" (*l*). That he chose to call himself so is a matter of little moment for it is clearly established, as we have shown a little further back that "a husband in those days was entitled to assume a dignity in right of his wife", and as Margaret's first husband William, as we have proved, chose to call himself "Earl of Mar" in right of his wife, so her second husband had equal right to call himself "Lord of Mar", or Earl of Mar, as he might choose (2).

(*l*) See "Judgment", p. 3.

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(1) This explanation was tendered to their Lordship by the Attorney General, on behalf of the "Crown". (See Speeches, in Mar Case, p. 405.)

(2) Lord Redesdale observed (House of Lords 17 July 1873, see Speeches, p. 63)

It having been observed for Lord Kellie in the course of the Mar case that William Earl of Douglas adopted the Mar *arms* also with those of Douglas, we may refer the reader to the sketch of the said arms (*m*) in which the *Mar* arms appear in the "*inferior*" place, (heraldically speaking) which was quite in accordance with the early practice in the case of persons who *married heiresses* (1). Further, Lord Chelmsford, evidently looking for some or any other *new* destination of the Earldom says (*n*) "there *may* have been some new destination of the Earldom;" but his Lordship does not attempt to prove this, and he admits "no record of any such destination can now be found." Again though Lord Chelmsford cannot dispute it, for he states (a few lines further on) that "Robert III styled Isabella (daughter of the above Margaret) in one charter Countess of Mar, and in another Countess of Mar and Garioch" his Lordship thinks it remarkable that she is sometimes called "Lady of Mar and Garioch". This may be remarkable, but there it ends, for she *was* Lady of Mar and Garioch.

(*m*) See Minutes of Evidence, p. 332.

(*n*) See "Judgment", p. 3.

Lord Redesdale also remarks (*o*) that "Isabella was for 12 years Lady of Mar only." One would gather from this that there was a continuous succession of charters by Isabella styling herself Lady of Mar during that period, but we have searched in vain to find more than one charter (8 Nov. 1402.) wherein she is so called Lady only (*p*) and why it should be concluded from this single charter that for 12 years she was called Lady of Mar only we cannot see. This was one of Lord Kellie's points, if a point it can be called. But against this one charter there are numerous charters, Acts of Parliament and Royal Decreets in which she is called *Countess* of Mar, and there may be many more such not produced by Lord Kellie from the Mar Charter chest, of which he has exclusive possession and of whose contents he refused to produce any inventory, so that his opponent could obtain only those that he could prove by collateral evidence are or were in the said Mar Charter chest.

(*o*) See Judgment, p. 18.

(*p*) See Minutes of Evidence, p. 617.

With regard to the position of Margaret and her daughter Isabel as *Countesses of Mar in their own right*, it will not be out of place here to quote the expressions delivered in the House of Lords, 16 June 1874 (*q*) by the Attorney General for England on behalf of himself and the Solicitor General for Scotland, as Law officers of the "Crown" (and in which they declared *against* Lord Kellie's claim) as follows:

(*q*) See Speeches "Mar Peerage Case" p. 417.

"What appears to be important in the case is this, that you have got the "Earldom of Mar to which Thomas Earl of Mar was entitled assumed on his "death in 1377 by his sister, and the benefit of it also taken by the sister's

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"I think you will find that the styles 'Lord of Mar' and 'Earl of Mar' mean pretty much the same thing," and the Attorney General on behalf of the "Crown" expressed himself to the same effect.

(1) As an authority for the above, we note in Nisbet's "System of Heraldry" (Edinburgh 1804) that Ferdinand King of Castile married the daughter of the King of Leon, and Nisbet states that the arms of Leon, *though the more ancient* Kingdom, appear in the more *inferior place*, because the King had Castile in his own right and Leon in right of his wife. The same writer speaks of the seal of the said William Earl of Douglas and Mar, which he says he had seen in the Mar Charter chest, and attributes his thus quartering the Mar arms to his assuming the Mar title *in right of his wife*.

" husband, through the courtesy. You have got this further, that after the " death of Margaret and after the death of the only son of Margaret, when " Isabella is the only remaining child of Margaret, Isabella is again " described as the Countess. Therefore certainly at this period of time you " have got the *title of Mar* capable of being held and enjoyed, and actually " held and enjoyed by *females*. "

We venture to state that, instead of Margaret's position being left in the state of " perplexity " which Lord Chelmsford is pleased to assert, it is most clearly established that that good Lady inherited the dignity of the Earldom of Mar from her brother Thomas, son of Donald Earl of Mar, and thus became COUNTESS OF MAR IN HER OWN RIGHT.

ISABELLA, COUNTESS OF MAR.

Before proceeding further to prove that Isabella daughter of the above Countess Margaret was also Countess of Mar in HER OWN RIGHT, it is important to call the attention of the reader to the fact that many of the old Earldoms held at the present day as personal honours were originally *territorial*.

When peerages ceased to be territorial they did not become extinct nor did they need fresh creation, because, as Lord Mansfield laid down in the judgment in the Sutherland case in 1771, (*a*) "the idea of a connection between the territory and the title of honour did not wear out all at once but by degrees, " and we find the same families who had originally begun to hold their honours in right of territory, afterwards continued to hold them as personal honours, inherited through blood. (Among many others we may mention Sutherland). Surely there are only two ways of holding honours, through territory or in right of blood.

(*a*) See Maidment's Reports "Sutherland Case".

Before further entering into the history of Isabella Countess of Mar in her own right, we will notice Lord Redesdale's observations about this Lady and the curious term he adopts viz : " peerage earldom ", as attached, and yet sometimes not attached, to a territorial comitatus (or earldom.)

However we find that, as Lord Mansfield ruled in the said Sutherland case (p. 10) we quote his words : " Another thing is clear that *when peerages were* " *territorial* THE HEIR *succeeded to the person last seized of the estate and* " *thereupon* TOOK BOTH ESTATE AND HONOUR. " Here we have it clearly laid down that HOLDING THE TERRITORY CARRIED THE HONOURS.

Moreover Lord Chelmsford admits (*b*) that " it may be fairly assumed that down to the death of Alexander Stewart in 1435 the dignity of Mar continued to be territorial. " Hence it is clear that, according to Lord Mansfield's ruling up to that date the *comitatus* of Mar embraced the dignity and *honours* of Mar as well as the lands and, as Lord Mansfield laid down, *was inheritable* " *by the heir*. "

(*b*) See Judgment, p. 4.

Yet we find Lord Redesdale continually speaking of the territorial

"*comitatus*" (or earldom) as if the dignity could not possibly be united to it. For instance he says (*c*) "All her (the Countess Isabella's) recorded deeds relate to the territorial *comitatus* only." Again, his Lordship alluding to other of her charters says: "These charters relate to the territorial *comitatus* only." Further Lord Redesdale adds: "Margaret was succeeded in the *comitatus* by her only daughter Isabella and in the peerage earldom, if such was in existence."

(*c*) See Judgment, pp. 14, 15, 14.

In answer to this we again quote from Lord Mansfield's ruling in the Sutherland case in 1771 (*d*). "When Peerages were territorial it cannot be doubted that the dignity followed the estate."

(*d*) See Report of Sutherland Case, p. 10

Thus we see that Lord Redesdale's attempt to separate *in the Mar case* the succession to the *dignity* from the territorial *comitatus*, while it was, as Lord Chelmsford acknowledged, still territorial, falls to the ground and it looks as if Lord Redesdale started this strange theory with the view of throwing discredit on the many charters which shew that Margaret and her daughter Isabella were Countesses of Mar in their own right (1).

With the object of disparaging the position of Isabella as Countess of Mar, Lord Redesdale refers to the charter of 19 April 1400 (*a*) in these words (*b*): "He "(Malcolm de Drummond) is Lord of Mar and Garioch and she Lady of Mar, "Garioch and Liddesdale 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. Under these circumstances the evidence "afforded by the above mentioned charter of 1400 is conclusive against a "continuous succession to the peerage earldom."

(*a*) See Minutes of Evidence, p. 330 and Appendix, p. XX.
(*b*) See Judgment, p. 14.

First we note that the heading of this charter is as follows: "Notarial Copy of a Charter by Malcolm of Drummonde to George Earl of Angus of the Lands of Ledalisdale, dated on the 19th of April 1400." Hence it appears that this is not a charter made by the Countess Isabel, but by her husband. We further notice that, though she is in one part of the charter called Isabella de Douglas Lady of Mar and Garioch and Liddisdale, she is called (at line 6 of the said charter) *Isabel de Douglas, Countess* of Mar and of Angus and (on line 4) we find mention of *Margaret*, Countess of Mar and Angus.

Now this Margaret was Dowager Countess of Mar, widow of Thomas Earl of Mar, and Countess of *Angus in her own right*. Therefore we are at a loss to understand why *Isabel* de Douglas, Countess of Mar, should have on this occasion, *alone*, the title of Angus appended to that of Mar. We see that Isabel de Dorglas could not have been Countess of Angus, because Isabel was, connected with Margaret Countess of Mar *and Angus* in this way. Isabel was through her mother Margaret (Countess of Mar) niece to Thomas

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(1) The reader will observe that the Lords found their "Judgment" to a great extent on Lord Mansfield's theory of "presumption" in favour of heirs male, but they make little of his ruling that "such is always open to be contradicted by the female heir upon evidence "being shewn to the contrary." Lord Mansfield adds (p. 10) "How long Peerages "continued to be territorial no person has presumed to say."

Earl of Mar, whose *widow*, also named Margaret was *Countess of Angus in her own right.* So we cannot see how Isabel de Douglas could possibly have become Countess of Angus. In fact, she never was Countess of Angus, and this only shows how egregiously incorrect and nonsensical this charter is. How "the evidence afforded by this charter is conclusive against a "continuous succession to the peerage Earldom of Mar," as Lord Redesdale observes, we will leave the reader to learn on referring to the reprint of the charter in the appendix to this (*c*).

(*c*) See Appendix, p. xx

At any rate if the point that Lord Redesdale wishes to make is that she is called in this charter *Lady* of Mar only, we have then to repeat that she is called *Countess of Mar* also in this same charter, and moreover that Lord Redesdale himself said during the pleadings of the Mar case with reference to this charter (*d*) : "In the document at the bottom of page 330 she is called "Countess of Mar at line 6."

(*d*) See Speeches, p. 39.

We further notice, with respect to this charter, Lord Redesdale lays much stress on the fact that here Malcolm Drummond, husband of Isabel Countess of Mar is styled only "Lord" intead of EARL of Mar and Garioch, and yet we actually find his Lordship stated during the Mar case, on 17th July 1873 (*f*) : "I think you will find that the styles "Lord of Mar" and "Earl of Mar" "*mean pretty much the same thing.*"

(*f*) See Speeches, p. 63.

After the death of this Malcolm de Drummond Isabel married Alexander Stewart, who was styled Earl of Mar in *her* right, but this again does not please Lord Redesdale : for we find his accounting for Alexander thus becoming Earl of Mar in right of his wife the Countess Isabel, by saying (*g*) that "Robert III was a man of weak character and sickly constitution : that his brother the Duke of Albany is charged with having imprisoned and starved to death the King's eldest son, and that his brother became regent", and thus (as Lord Redesdale adds) "that he should be allowed to call himself Earl of Mar and Garioch under such authority can be easily accounted for."

(*g*) See Judgment, p. 15.

This very coherent and acute observation of Lord Redesdale's needs little comment, but we cannot imagine what the sickliness of Robert III or the imputations(which Lord Redesdale drags in) against his brother the Duke of Albany could possibly have to do with the fact that Alexander merely adopted the usage of his country. For it was too well known to be disputed, even by Lord Kellie's counsel as we may again remind our readers, that, by the custom then prevailing in Scotland a husband could and often did adopt the dignity and privileges of his wife as a Peeress, and indeed sometimes continued to enjoy the same after her death.

Among other charters (1) plainly proving that Isabel was *Countess of Mar in her own right,* and acted as such, we may quote one of Dec. 9th 1404 (*h*) in which she is dealing with the lands *in her own right as Countess of Mar,* and a Royal charter by Robert III confirming this (*j*). In both of these charters she is styled Countess of Mar and Garioch.

(*h*) See Minutes of Evidence, p. 90. and Appendix, p. xvii.

(*j*) See Minutes of Evidence, p. 91, and Appendix, p. xix.

In the above mentioned charter of 9th Dec. 1404 Isabella, as Countess of

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(1) The charters establishing this fact are too numerous and lengthy to reprint *in full* but wo reprint a few and refer to others,

Mar is arranging for the destination of her lands to her lawful heirs on each side (the charter reads *heredibus nostris legitimis ex utraque parte*), and said charter which was confirmed by Robert III, stated the final destination of the heirs to be to the *lawful heirs of Isabella.*

These words above quoted, "*ex utraque parte*" were interpreted by the Lords of Session as Lord Chelmsford admits (*l*) in an action brought by the Earl of Mar against Lord Elphinston in 1624 (*m*) to mean that "Dame "Isabella Douglas ordained that the lands which fell to her on her father's "side (1) 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 (2) should in case foresaid pertain "to her nearest and righteous heirs on her mother's side."

(*l*) See Judgment, p. 4.

(*m*) See Minutes of Evidence, p 452. See also Decree of the Lords of Session, 1st July 1626. Minutes of Evidence, p. 453.

This is clear evidence that this destination by Isabel recognized and provided that the heirs who would succeed to property on her father's side were *not* those who would succeed to the *Mar* lands which she inherited through her mother Margaret, Countess of Mar.

"This construction of the words ("*ex utraque parte*") Lord Chelmsford observes (*n*), "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."

(*n*) Judgment, p. 4.

Surely this word "*alleges*" is hardly fair. For there is no dispute that Donald was Earl of Mar, and that he (being slain in the battle of Dupplin, 1332) was succeeded by his son Thomas in the Earldom of Mar. We have shown that on the death of Thomas without issue, Margaret his sister, who married William Earl of Douglas, then became Countess of Douglas and Mar (2). Margaret's only son James died before his mother and her only surviving child was Isabel, who (as we have shown and will still further prove) became Countess of Mar and Garioch on the death of her mother, but not Countess of Douglas, for that peerage on the death of her brother James passed to her father's male heirs.

Thus Isabel is grand daughter and heir of Donald Earl of Mar, through Margaret Countess of Mar her mother. What pedigree and heirship could be simpler and plainer than this? (3).

If it be needed further to refute Lord Redesdale's *conclusion* "against a "continuous succession to the peerage Earldom in the person of Isabel" and to further establish that this good Lady was *Countess of Mar in her own right*, we may refer to the two following charters viz. one by Isabel herself, 1st Dec. 1404, and a charter confirming this, 26 Oct 1408, in both of which she appears as Isabella Douglas, Countess of Mar and Garioch (*t*).

(*t*) See Minutes of Evidence, p. 31, line 5, and p. 30.

Besides these contemporaneous charters we may mention Queen Mary's

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(1) Her father was William Earl of Douglas, afterwards Earl of Mar also, in right of his wife.

(2) Margaret Countess of Douglas and Mar, Douglas through her husband, Mar in her own right.

(3) It must be remembered that *no male heir* disputed the succession of Margaret and Isabel as Countesses of Mar in their own right.

charter of restoration of the Mar Earldom to John Lord Erskine as " heir to Isabella Countess of Mar" (23 June 1565), to be seen in the original Latin at the beginning, and translation thereof at the end of the Appendix to this book, and also the Act of Parliament (*w*) confirming this restoration *to Isabel's heirs* (29 July 1587) in which Isabel appears most prominently as *Countess of Mar in her own right.*

(*w*) See Appendix. p. IV, and Minutes of Evidence, p. 436.

Further to support the rights of the Countess Isabel we may again quote the views of the Law Officers on behalf of the Crown, as expressed by the Attorney General on June 16th 1874 in the following words (*z*).

(*z*) See Speeches, House of Lords, p. 417.

" What appears to be important in the case is this that you have got the " Earldom of Mar, to which Thomas Earl of Mar was entitled, assumed on his " death in 1377 by his *sister*, and the benefit of it also taken by the sister's " husband through the courtesy. You have got this further that after the " death of Margaret and after the death of the only son of Margaret, when " Isabella is the only remaining child of Margaret, Isabella is again " described as the Countess. Therefore certainly at this period of time you " have got the *title of Mar* capable of being held and enjoyed, and actually " *held and enjoyed by* FEMALES. "

It is a well known fact that the heirs of Isabella (or Isabel), countess of Mar, were kept out of their rights through the injustice of the Jameses for 130 years before the time of Mary Queen of Scots.

Now let us look at what these injustices consisted of and on what ground they were perpetrated.

The Countess Isabel was besieged in her castle of Kildrummy by Alexander Stewart, after the death of her first husband, Sir Malcolm Drummond, and was coerced by Alexander before her marriage with him into making a charter destining the Earldom of Mar to Alexander and his heirs. This charter dated 12 Aug. 1404 (*a*) was obviously ineffective (1), as she clearly had no right to destine the Earldom away from her own heirs, and moreover the said charter was speedily annuled in the following way. " Alexander, in the " presence of the Bishop of Ross and others declared that he delivered " back to the Countess Isabel the castle with the charters evidents etc., " freely and with good heart for her to dispose of as she pleased?" (*b*).

(*a*) See Appendix. p. XVII.

(*b*) See "Judgment", p. 3.

This was speedily followed by Isabella making a charter (*c*) dated 9th Dec. in the same year destining the Earldom of Mar to her own heirs. We may here remark that even if Isabella had omitted to make any such destination of the Earldom, it would have gone to *her* heirs, because, as Lord Mansfield, in his judgment upon the celebrated Sutherland case in 1771 (*d*) said " another thing is clear that, when peerages were territorial, *the heir* " succeeded to the person last seized of the estate and thereupon took both " estate *and honour.* "

(*c*) See Appendix, p. XVII.

(*d*) See "Judgment" Report on Sutherland Case.

(1) Lord Redesdale observed (see Speeches 17 June 1873, p. 51). " Does it not appear that the 12 August Charter was an illegal one, because Isabella had no power to grant to the heirs of Alexander? "

And it will further be seen as Lord Chelmsford admits (*e*) "that down "to the death of Alexander Stewart in 1435 the dignity of Mar continued to "be territorial," therefore it is plain that the Earldom would have gone in any case to Isabel's heir.

(*e*) See Judgment, p 4.

Here we see Lord Chelmsford acknowledges the Earldom of Mar to be territorial at this period; we further see that, by the ruling of Lord Mansfield, the heir of Isabel was the person entitled to succeed to the territorial Earldom of Mar which also conveyed the honours.

Notwithstanding the clear hereditary right of the heir of Isabel to succeed and her charter of the 9th of Dec. 1404 to the same effect, to which we have alluded, Alexander Stuart on the death of Isabel seized the Earldom and in order to make his usurpation surer entered into the following arrangement with the King.

On the 28th May 1426, (*f*) Alexander resigned the Earldom to the King and had it regranted to himself and his son, whom failing, to revert to the King and his heirs.

(*f*) See Minutes of Evidence, p. 33.

On the death of Alexander in 1435 the heir of Isabel, Robert Erskine, took the title of Earl of Mar to which, according to what has been laid down by Lord Mansfield and by Erskine's "Institutes" (*g*) he was entitled as her "*next heir*". Now, how did Robert become Isabel's heir? The heirs of the body of Donald only son of Gratney Earl of Mar, and his son Thomas Earl of Mar, and his sister Margaret, Countess of Mar, and her daughter Isabel, Countess of Mar, having all failed, Robert became heir to Isabel, for he was through his mother Janet, through his grandmother Christian, and through his great-grandmother Ellen de Mar (daughter of Gratney Earl of Mar,) great-great grandson of Gratney and the nearest heir to Isabel (*a*) who was great-granddaughter of the said Gratney Earl of Mar.

(*g*) Book III. tit. VIII. sec. 77.

(*a*) See "Service", March 20, 1588. Appendix, p. XXI.

So we find that the Erskines were connected with the Mar family only through the marriage of Sir Thomas Erskine with the heiress of Mar, and their son Robert claimed *not* as an Erskine, but through his mother, grand-mother and great-grandmother the daughter of Gratney Earl of Mar.

Lord Chelmsford remarks that the Erskines never asserted any right to the dignity itself (*b*) yet he says, Robert Lord Erskine in two or three private charters styled himself Earl of Mar; is not this assserting his right to the dignity?

(*b*) See Judgment, p. 5 and 6.

In April 1438 Robert was "*retoured*" to one half of the land of the Earldom (*c*) and in October to the *other half*, we cannot therefore be wrong in estimating these two halves as the *whole* estate.

(*c*) See Appendix, p. XXV.

Lord Chelmsford says (*d*) "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 aequired the other half "after the April retour."

(*d*) See Judgment, p. 6.

"On the other side (Lord Chelmsford continues) it was urged with great "probability that the October retour was obtained to correct the former one."

The answer to this on behalf of Lord Kellie's opponent is very plain; for, as the Attorney General, on behalf of the Crown observed to their Lordships, (*a*) "now, according to the view which was taken by the court of Session

(*a*) See Speeches, "House of Lords" June 16, 1874, p. 418.

" in 1626 (*b*), the two retours apply to two portions, *each to one half*, and the " second of them was *not a second retour to the same half, but it was a* " *retour to the second half* of the lands.

(*b*) See Minutes of Evidence, p. 453.

It is plain that the Lords of Session distinctly ruled that Robert was thus retoured to the *whole* lands, and Lord Kellie's opponent had therefore proof of what he maintained; however the reader will notice that as usual, probabilities suggested on Lord Kellie's behalf are thought to be of more weight than his opponent's documentary evidence and the rulings of the Lords of Session.

It is evident that Robert *was* retoured to the whole territorial Earldom of Mar and so according to the decision (*c*) of Lord Mansfield in the Sutherland case (we quote his words) " It is clear that when peerages were territorial " the heir succeeded to the person last seized of the estate, and thereupon took " both estate and *honour*" in this manner Robert became rightfully Earl of Mar by heirship to Isabella Countess of Mar and by territorial right.

(*c*) See Report of Sutherland Case.

Lord Redesdale remarks that King James would not altogether acknowledge Robert's right to the Earldom of Mar and would not allow him to sit in Parliament as Earl of Mar: (*d*) now this was but a foreshadowing of the gross injustice done to the rights of Robert and his heirs after his death. At any rate Robert continued to style himself Earl of Mar and had possession of the Mar lands.

(*d*) See Judgment, p. 16.

After the death of Robert in 1457 we find Thomas son of this Robert Earl of Mar asserting his right to succeed to his father, whereupon the king called together his counsellors and chancellor and producing the pretended charter of the 12th August, by which Alexander seized the Earldom on the death of the Countess Isabel, they made out that Alexander had obtained the Earldom under this charter and that by reason of the bastardy of Alexander he (the King) was lawful heir (*e*).

(*e*) See Minutes of Evidence, p. 95.

Now this action of the King in 1457 was not only oppressive but illegal, for as we have shown, on Lord Mansfield's authority, Robert was naturally entitled to succeed Isabel and as her heir to succeed to the estates and honours, whereas it must be remembered that the said Alexander Stewart was in no way related to the family of Mar except through his marriage with the Countess Isabel and he became Earl of Mar according to the well established custom in Scotland (as we have shown) simply *by courtesy through his wife*. If more were needed to strengthen the right of Thomas (son of Robert Earl of Mar the heir of Isabel) we may remind our readers that the charter of the 12th Aug, 1404 (*f*) thus made use of by the King in order to give colour to his usurpation was the charter made by Isabella under coercion, in which she destined the Earldom to the heirs of Alexander. But it must be remembered that (as we have seen) before their marriage Alexander went down upon his knees and delivered back the lands to Isabel to dispone as she would, whereupon immediately (*g*) Isabel made the charter of the 9th December 1404 in which she destined the Earldom failing the heirs of her body to her own heirs and this charter was confirmed (*h*) by Robert III (1). However all these charters made by Isabel seem to have been of very little moment in reality, because, according to Lord Mansfield, the territorial

(*f*) See Appendix, p. xvii.

(*g*) See Appendix, p. xvii.

(*h*) See Appendix, p. xix.

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(1) The charter of 12th August 1404, was never confirmed.

Earldom would naturally be vested in the *next heir and would carry the honours;* in fact, as Lord Redesdale observed (*i*) on July 17 1873, during the hearing of this case, " does it not appear that the 12 Aug. charter was an illegal one, because Isabella had no power to grant to the heirs of Alexander?"

(*i*) See Speeches, House of Lords, p. 51.

We have now seen how the King James usurped the Earldom of Mar and on what absurd grounds. For 130 years the rightful heirs of the Countess Isabel were kept out of their just inheritance and the Earldom was bandied about to the kings' favourites : for example, among other usurpers, to a stone mason (who, it is said, ended his life by the rope) with other usurpers of ancient titles, victims to the fury and resentment of the enraged nobles.

We will now show that this judgment in 1875 is nothing more nor less than a revival and perpetuation of this very injustice done to the heirs of Isabel in 1457, and we will give their lordships' observations and show that they perpetuate this wrong and will allow none of the subsequent acts of restitution and restoration to have any weight, though these very acts which they now ignore and repudiate have been considered by all authorities for 300 years to have restored the heirs of Isabel to all their just inheritance.

We will collect their lordships' scattered observations on this point and will shew that they were determined to *assume* that the ancient Earldom of Mar had come to an end.

Lord Chelmsford says (*a*). "If either the charter of 12th August 1404 or "that of May 28 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." Lord Redesdale says (*b*) "the *comitatus* under the settlement of 28th May 1426 lapsed to the Crown", and (*c*) Lord Chelmsford, apparently displeased with the *female* succession and unable to prove the "*extinction*" of the old title of Mar, observes "whether the original dignity 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."

(*a*) See Judgment, p. 8.

(*b*) See Judgment, p. 16.

(*c*) See Judgment, p. 12.

It is generally supposed that peerages come to an end by attainder or failure of heirs, and a vast field for conjecture may be opened by the assumption that they may lapse "*in some way or other*". The vagueness of the expression is no faint index of the confusion of thought which must have given rise to it.

We have thus seen that Lord Chelmsford asserts the *validity* of these two charters, viz.

12th Aug. 1404 (See above, line 3.)	by which the Countess Isabel is supposed to have granted the Earldom to Alexander Stewart (her future husband) and *his* heirs independently of her heirs.
28th May 1426	by which Alexander, grounding on the above charter, resigned to the King the Earldom, and had it re-granted to him and his heirs, whom failing to revert to the crown,

and also the *validity* of the usurpations by the Crown in 1457, which were founded on the above charter of the 12 August 1404, by which the King James II *pretended* that Alexander was possessed of the Earldom, and that on Alexander's bastardy the earldom reverted to the crown. By this the King *pretended* that Robert, the heir of the Countess Isabel (through his great grandmother the Lady Helen de Mar) who lived and died asserting his right to the lands and *dignity* of Mar "died *not* last vest and seized of the Earldom of Mar."

Lord Chelmsford further asserts that "the solemn adjudication, against the claim of Lord Erskine to one half (1) of the Earldom of Mar upon the inquest held in 1457 had not been in any degree impeached" and Lord Redesdale said, that "the *comitatus* (or earldom) under the settlement of 1426, May 28, lapsed to the Crown" (*f*).

(*e*) See Judgment, p. 8.

(*f*) See Judgment, p. 16.

To enable the reader to judge of the accuracy of Lord Chelmsford's statement that the validity of these charters has never been impugned, it may be remembered that at the very outset the charter of 12 Aug. 1404, made by the Countess Isabel under coercion, was *rescinded* by her charter of 9th Dec. in the same year, and the *latter* was confirmed by Royal Charter.

Further, this charter of 12 Aug. 1404, with that of the 28th May 1426, and the usurpation of the Earldom by James II in 1457 were all *invalidated* by Queen Mary's charter of restoration (*g*) June 23, 1565, and the Act of Parliament, July 29, 1587 (*h*) (of which more hereafter), but for greater convenience we procced to show that these pretended charters and the iniquitous proceedings of 1457, founded thereon, were most emphatically rendered inoperative and pronounced *null and void* by the two Judgments of the Court of Session July 1, 1626 (*j*) and March 26, 1635. (*k*)

(*g*) See Appendix, first and last pages.

(*h*) See Appendix, p. IV.

(*j*) See Minutes of Evidence, p. 453.

(*k*) See Minutes of Evidence, p. 670.

Now these two judgments were decisions by the Lords of Session in actions brought by John Earl of Mar, the former against Lord Elphinston, and the latter against several of his vassals in the North.

In each of these actions Lord Mar founded on the Countess Isabel's charter of the 9th Dec. 1404 (which was royally confirmed), on Queen Mary's charter of restoration of June 23, 1565, and on the Act of Parliament, July 29, 1587, while the charters of the 12 Aug. 1404, 28th May 1426, and the usurpations of 1457 and subsequent years were urged against him, but without success, for these latter were each and all condemned and completely upset by the Lords of Session who ruled in 1626 as follows :

"THE LORDS OF COUNSALL, *reduceis, retreittis, rescindis, cassis, and annullis,* "*the foirsaidis haill pretendit chartouris, infefmentis, confirmatiounes, decreittis,* "*testimoniallis services, retouris, and vtheris generallie and particularlie* "*abouespecifeit, callit for to be producit as said is, and speciallie the saidis* "*chartouris and infefmentis grantit to the said vmquhill Alexander, erle of* "*Mar, and to the said vmquhill Thomas Stewart, his sone, off the daittis,* "*tenouris, and contentis forsaidis :* AND DECERNIS AND DECLAIRES *the samyne to* "*have been fra the beginninge, and to be now and in all tyme cuminge,* NULL "AND OF NANE AVAILL, FORCE, NOR EFFECT, *with all that has followit or may follow* "*thairrpoun,* AND THAIRFORE THE SAIDIS LORDIS OF COUNSALL DECERNES AND "DECLARES THE SAID PRETENDIT SERVICE NEGATIVE, *quhairby it is alledgit to be* "*fund that the said umquhill Robert erle of Mar, died not last vest and seasit* "*in the said erledome of Mar, and lordschipe of Garrioche, but that the samyne* "*was lauchfullie in the handis of vmquhill King James the Second, be deceis of* "*the said vmquhill King James the First, his father, and continealtie fra the* "*tyme thairof, as haveing no other ground nor fundament bot the saidis*

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(1) We have plainly shewn that the claim was to the *whole*, and not to one half only, as Lord Chelmsford persists in declaring.

"*pretendit infeftmentis grantit to the said vmquhill Alexander erle of Mar,* "*and the said vmquhill Thomas Stewart, his sone,* with the PRETENDIT "POSSESSIOUN APPREHENDIT BE THE SAID KING JAMES THE FIRST, *or efter his deeeis* "*be the said vmquhill King James the Secund,* of worthie memorie, with the "said *pretendit Act of Parliament maid for continuatioun of his possessioun* "to his perfyt age, TO BE NULL AND OF NANE AVAILL, *with all that hes followit or* "*may follow thairvpoun, and to* FALL IN CONSEQUENTIAM."

We have shown that, after the death of Alexander, Robert was "*reloured*" to the *whole* Earldom of Mar, first to one half of the lands, and then to the *other* half of the same, as ruled by the Court of Session in July 1, 1626, (of which the Attorney General on behalf of the Crown reminded their Lordships on June 16, 1864), and Robert lived and died using the dignity of *Earl of Mar.* After his death, when the King by the proceedings of 1457 *usurped* the Earldom, Robert was called Lord Erskine only and was declared to have "died *not* last "vest and seized of the Earldom."

We have just seen that this usurpation of the King was ruled by the Lords of Session to be "NULL AND VOID AND TO FALL IN CONSEQUENCE." and hence we find Robert declared not only to have been *legally* possessed of the whole lands of the Earldom but styled, as he always asserted his right to be styled, Robert Earl of Mar.

With respect to Lord Chelmsford's assertion that "the territorial dignity "ceased to exist, on the death of Alexander" (*a*) we appeal to the common sense of our readers, and ask, if this assertion of Lord Chelmsford's is to carry weight, and among other specious arguments to affect the stability of an ancient peerage, how is it that Robert not only persisted in asserting his right to the *dignity*, but, notwithstanding the usurpation of the King, his doing so was in unmistakeable terms upheld by the Lords of Session, and his right to the *dignity* with the lands of Mar held to be just?

(*a*) See Judgment, p. 4.

The question we have just suggested it is impossible to answer, especially when we again call to mind the fact that the *pretended charters* by which Lords Chelmsford and Redesdale assert that "the Earldom lapsed to the Crown", and that "the possession of the Crown was by title and not by usurpation" were most formally pronounced by the Lords of Session in 1626 and 1635 to be NULL AND VOID.

Any impartial reader must be very much astonished at the fact that this decision of the Court of Session (the highest Scotch tribunal, then existing, being before the "Union", and from which there was no appeal) has been so studiously evaded by their Lordships. Surely if such evidence as this is thus to be ignored, the word "Judgment" is a misnomer and evidence of the most weighty description practically useless before the Committee of Privileges.

We have been tempted to diverge somewhat from the chronological order of events, to show our readers how completely the proceedings of 1457, were set aside by the Court of Session, and how the usurpations by the King, were, by that Court, pronounced *null and void.* With regard to the interval of about 130 years during which the heirs of Isabel countess of Mar were kept out of their rights, we find their Lordships' observations on the conduct of these heirs somewhat contradictory.

Lord Chelmsford (*a*) says: "it appears most conclusively that the Lords

(*a*) See Judgment, p. 5.

" 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 claims to one half of the Earldom or comitatus and *never asserted* any " right to the *dignity* itself." Yet, his Lordship says (*b*) " Robert Lord Erskine " in two or three private charters styled himself Earl of Mar. Is not this an assertion of a right to the dignity? We in fact see most conclusively that Robert *did assert* his right to the *dignity* as well as to the *whole* of the lands, as we have previously shown it was subsequently ruled by the Court of Session in 1626; and further in the Marian charter(*c*) there is *not one word* said of a claim to *half* the lands on the part of the heirs of Isabel. The expression, on the contrary, is " *all and haill* the Earldom of Mar" and in the Act of Parliament passed twenty two years after the Marian Charter and bearing date 29 July 1587 (*d*) we find, among many other confirmations of this view, the following sentence "and " he (i. e. Lord Erskine) to have full right thereby as heir by progress to his " said predecessors to *all and whole* the said lands wherein the said umquhile " dame Isabel Countess, or umquhile Robert, *Earl of Mar her heir*, died vest, " seised, and retoured ".

(*b*) See Judgment, p. 6.

(*c*) See Appendix, first and last pages.

(*d*) See Appendix, p. iv,

Lord Redesdale says (*e*): " This undisputed admission of the extinction of " the peerage, by the Crown under six Sovereigns and by six Lords Erskine " 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 on as a " settlement of the question, which it would be very dangerous to disturb." But (at page 18) we find his Lordship says: " 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. "

(*e*) See Judgment, p. 16.

However we see (1) that Thomas the son of Robert Earl of Mar *did* assert his right to succeed his father in the *dignity and whole* of the lands which were lawfully his father's, as decided by the Court of Session in 1626, and not to one half the lands as their Lordships choose to say, and it was after this assertion of his rights by Thomas that took place what Lord Chelmsford calls " the solemn

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(1) We find Thomas on 21st March 1453 made the following formal protest for his rights to the Earldom of Mar and Garioch (*not* the half thereof) viz :

" Ane protestatioun of Thomas Lord Erskine for Justice. "

" In Dei noie amen Per hoc pns deg anno ab incarne dnce Im ccce quiquagesimo secundo mensis mtii die xxi etc. in pretorio de Edinburt in concilio grali ibid tento per excellentissim principem ae dum nra metuendissimo dum Jacobu regem illustrm eid dno regi cora tribus regni sui statibus ibid congregatis nobilis et potens dns Thomas dns Erskine quad suppne papiro script per qua supplicao nem humiliter requisiuit dum nru regem *pro justicia* sibi faeienda penes tras *comitatuu de Mar et de Garvioch* hmlir putanit qua suppne auditu et intelleeta nobilis et potens dus Willns dus Creichtoune cacellarius Scotiæ assuit dicto dno Erskyne qtus nr rex proponit dco duce infra breve post festn Penthecostes pxme futur in ptibus borialibus sui regni existen t ipo suppmo dno nro rege ibid existent justicia eid dno Erskyne sup quidecim diez premonitione faeen fieri put incubit. Super quibus ee. "

He entered also a previous " requisition for justice " on 27th Jan. 1450. (*These " instruments" are to be seen in " Minutes of Evidence, Mar Peerage Case," p.* 94.

adjudication of 1457." The apparent silence of the next three heirs might be very fairly reconciled with a due regard to the safety of their heads. But Queen Mary in her charter (*i*) says on this very point that the restored Earl's predecessors were kept "out of the possession of the same; partly by reason of the quarrels "occurring at the time, and partly by the unjust refutation and hindrance made "by obstinate and partial rulers and officers refusing the reasonable prayers "and petitions made by the predecessors of our said cousin *often and earnestly* "*praying and soliciting* their entry into the hereditary possession of the same."

(*i*) See Appendix, first and last pages.

Now this is what Lord Redesdale calls "the undisputed admission of the "extinction of the peerage under six Sovereigns!"

Can it be supposed that their Lordships' committee sitting in 1875 are naturally more competent to judge of the events of the time than the advisers of Queen Mary who were almost eye-witnesses to them?

We have now reached that most important epoch of the Marian Charter which for 300 years has been considered as a restoration of the lands and a *recognition of the dignity* of the Earldom, as vested in the heirs of the Countess Isabel, who would have been Earls of Mar in uninterrupted succession if it had not been for the Royal usurpations and the injustice perpetrated in 1457. As a preliminary to the approaching restoration of Lord Erskine to his hereditary rights by Queen Mary on 23 June 1565, we find that he "*expede a service*" on the 5th of May in the same year (*a*) (before the sheriffs of Aberdeen Stirling, and Clackmannan, obtained upon evidence before a jury headed by David Earl of Crawford, Patrick Lord Lindesay, Sir James Douglas, and others) in virtue of a commission from the Crown, wherein he was declared to be "*the nearest and lawful heir of Robert Earl of Mar,*" and on this "service," which was *not of the lands* but to show his *right of blood* Queen Mary issued a precept (*b*) for her said charter of restoration (*c*) on the ground of his *hereditary right to the dignity of Earl of Mar*. The precept and Charter are dated on the same day.

(*a*) See Appendix, p. VI.

(*b*) See Minutes of Evidence, p. 121.
(*c*) See Minutes of Evidence, p. 122, and Appendix, p. I.

This Charter, every word of which is weighty with the anxiety of Queen Mary to remove all traces of the ancient injustice and usurpations, will be found reprinted from the original Latin on page I, and also correctly translated at page XXXVI in the "Appendix" to this book.

It is here necessary to inform our readers that the translation laid before the Lords' Committee by the Earl of Kellie (*e*) was inaccurate in an apparently slight matter but really of much importance to a due construction of its intention, for twice over in the same page he *omits* to translate the Latin word *cum* (with), *leaving out altogether* this important word "*with*" (the lands) so that in effect it would appear as if the intention of the wording of the grant had been to treat the Earldom and the lands appertaining to the dignity as synonymous terms, and we are justified in enquiring what is the meaning of the word which is so carefully treated as immaterial in the translation.

(*e*) See Lord Kellie's Appendix to his Case, page W.

Lord Kellie's translation also fails to record the *place* PERTH where the Charter was signed and further omits to give the list of notable persons who

witnessed it. We are prepared to show hereafter the importance of these omissions (*d*).

(*d*) See list of Witnesses Appendix p. xxxviii.

Lord Chelmsford makes it a significant fact that Queen Mary in her charter calls Robert, Lord Erskine, and not Robert Earl of Mar as he is designated in the "*retour*" obtained, as above shown, by John Lord Erskine on the 5th of May (*e*). But the Queen's intention was to make a charter removing the injustice by which Robert was pronounced by the Crown in 1457 to be only Lord Erskine : had he been styled Earl of Mar in her charter, the need of a remedy for this injustice would not have been apparent on the face of it.

(*e*) See Appendix, p. vi.

We notice that in other acts of restoration the person about to be restored is not described in the acts themselves as if already in possession of the dignity to which the acts are about to restore him. So of course Queen Mary in making her charter with the view to restore the rights of Robert and his descendants (as heirs of Isabel Countess of Mar)would not in the charter of restoration itself have styled him as Earl of Mar (as if these rights had never been usurped) but, *after* the Queen's Act of restoration was *completed,* the said charter signed, sealed, and witnessed, such recognition and restoration then became effectual. Henceforth *Robert* was always styled *Earl of Mar.*

In the act of Parliament on July 29, 1587 (*m*) which confirmed Queen Mary's restoration to John Lord Erskine as heir to Robert and to the Countess Isabel, we find said Robert styled *Earl of Mar* no less than ten times.

(*m*) See Appendix, p. iv.

Thus by Queen Mary's charter of 1565, and by subsequent acts of Parliament and Decreets of the Lords of Session (the highest tribunal at the time) as we fully shew, not only was the living Lord Erskine in 1565 restored to *all* his hereditary rights, on the ground of his heirship through the said Robert and the Lady Helen de Mar to Isabel, but the dead Robert and his descendants were recognized as having been *legally in right of the dignity* of the old Mar Earldom as heirs of Isabel Countess of Mar.

It is remarkable, however, that with regard to these several most complete recognitions of the rights of Robert and his descendants, as heirs of the Countess Isabel, not only of the lands but of the title and honours of the Earldom of Mar, their Lordships in their "Judgment" are *totally and discreetly silent.*

This reticence is however hardly to be wondered at when we consider that their Lordships assert that the Earldom "*in some way or other*" came to an end on the death of Alexander Stewart husband of the Countess Isabel.

It was after the death of this said Alexander that Robert asserted his rights and lived and died calling himself Earl of Mar, and we have seen how after Queen Mary's act of restoration, the King in Parliament styles him always *Robert Earl of Mar,* while Queen Mary stigmatises Lord Chelmsford's "solemn adjudication" of 1457 (*a*) as "*the unjust refutation and hindrance made by obstinate and partial rulers*" (*b*) and this very same "solemn adjudication" we have shown was after due and careful inquiry denounced by the Lords of Session as a "pretended" act of Parliament, NULL AND OF NO "AVAIL TO FALL IN CONSEQUENTIAM". We crave the reader's indulgence for the length of our dissertation on this Robert Earl of Mar, rendered necessary by their Lordships' failure to notice his subsequent recognition in his ancestral rights by the highest powers of the realm.

(*a*) See Judgment, p. 8.

(*b*) See Appendix, pp. I and xxxvi.

Lord Chelmsford (*c*) attacks the Marian charter which for 300 years has been regarded as a restoration of the Earldom and a recognition of the dignity appertaining thereto, on the ground of its relating only to the lands.

(*c*) See Judgment, p. 8.

Then let the charter speak for itself, and we shall discover from its own internal evidence how far Lord Chelmsford is correct in this statement.

John Lord Erskine by the "service" of the 5th May 1565 was *retoured* heir of Robert Earl of Mar (*d*); then the charter recites that in virtue of his *retour* "John now Lord Erskine who is retoured lawful and next heir to the "said umquhile Robert Lord Erskine heir of the said umquhile Isabella hath "the undoubted *hereditary* right of the said Earldom Lordship and regality "notwithstanding that his predecessors were kept out of the possession of the "same partly by reason of the quarrels occurring at the time and partly by "the *unjust refutation* and hindrance made by *obstinate and partial rulers and* "*officers* refusing the reasonable prayers and petitions made by the predecessors "of our said cousin *often and earnestly praying and soliciting* their entry into "the *hereditary* possession of the same."

(*d*) See Appendix, p. vi.

Up to this point the charter is certainly correct if we read the words Earldom Lordship and regality with the construction which for 300 years has been put upon them — the meaning is to define an *heirship by blood* to the Earldom. This being done, the charter goes on to say — "Which premises "being now by ourself carefully viewed and considered we *not alone* on "account of good services rendered by the predecessors of John Lord Erskine, "but also *moved by conscience* as behoveth us to RESTORE THE LAWFUL HEIRS to "their *just inheritance*, have given and granted and by the tenor of our "present charter do give and grant to our said cousin John Lord Erskine his "heirs and assigns, HERITABLY, ALL AND HAILL the said Earldom of Mar "containing the Lands following Strathdone, Braemar, etc." Thus the charter first finds John to be the heir of Robert, as proved by the *retour* of the 5th of May which related *only to the heirship by blood*, and in consequence of that heirship he had the undoubted hereditary right to the said Earldom.

Having established this right, the charter proceeds to state that a grant is made of the lands appertaining *as of old time* to the Earldom.

Lord Chelmsford (*e*) finds that "the charter contains recitals which if the "slightest enquiry had been made would have been ascertained to be false, for "instance," continues His Lordship, "it is stated that John Lord Erskine was "retoured as lawful heir of Robert Lord Erskine the heir of Isabella in respect "of the Earldom. Whereas his service is a general service as heir and of "course without application to the lands."

(*e*) See Judgment, p. 8.

Here Lord Chelmsford involves himself in a needless difficulty by choosing to read the word "Earldom" as signifying only the lands. Clearly *as John had never, at this time been retoured heir to the Lands*, the assertion in the charter that he had been retoured in due order *lawful and next heir* of Robert and Isabel constitutes a recognition of the *dignity* as his *in right of blood*.

Read the words as a recognition of this fact and then the charter tallies with the "retour" or "service" of the 5th May, and is perfectly correct and intelligible. It amounts to this; that Lord Chelmsford gives a wrong interpretation to plain words and then finds fault with the veracity of the charter for failing to bear out his illogical sequence.

The simple facts are as follows :

First the charter defines John Lord Erskine as heir by right of blood to Robert and heir (through Helen de Mar) to Isabel Countess of Mar. It then states that *in right of that blood* he is in right of the Earldom though his ancestors have been unjustly deprived of it, and lastly it contains a grant of the lands belonging to the Earldom. Again Lord Chelmsford (*a*) says if he (John Lord Erskine) had taken a special service (before the Marian charter) to lands, he could not have been found heir to more than half of the Earldom which is all that Robert Lord Erskine ever claimed. To this we reply first, that as adjudged by the Court of Session in 1626, [*b*]) Robert Earl of Mar, (as he is by that Court styled) died " vest and seised of the *whole* Earldom" and secondly that John after Queen Mary had granted him the lands by her charter, took, on March the 20th 1588 (*c*) a " *Special Service* " to the *whole* lands of Mar, in right of his descent from Robert Earl of Mar, and HELEN DE MAR (daughter of Gratney Earl of Mar) and as heir to ISABELLA COUNTESS OF MAR. This fact was pointed out to their Lordships by the Attorney General in his speech on behalf of the "Crown" on 16th June 1874 (*d*). Now supposing, for the sake of argument, that the charter of Queen Mary in restoring the comitatus did not embrace the dignity, it must be conceded that its sum and substance amounts to her saying to John Lord Erskine " Your " pedigree and heirship to the Earls and Countesses of Mar in their own right " have been proved to the satisfaction of myself and counsellors, and *therefore* " I give back all that has been unjustly detained from you, to wit, the estates. " The *dignity* is already yours *by virtue of your heirship.* "

(*a*) See Judgment, p. 8.

(*b*) See Appendix, p. XXXIV.

(*c*) See Appendix, p. XXI.

(*d*) See Speeches, House of Lords, p. 413.

That the *Comitatus* embraced the *Dignity* has, we venture to assert, been held for the last three centuries by every authority. In the decision (*a*) on the Sutherland case in 1771, the committee (among whom were Lords Camden and Mansfield) fully recognized the Earldom of Mar, as restored by Queen Mary, to have been and to continue to be descendible *in the female line,* and they founded their ruling in (favour of the *lady* claimant) on the descent in the Mar Peerage.

(*a*) See Report, Sutherland case.

Queen Mary in January 30, 1561 (*e*) granted the *comitatūs* of Moray to her natural brother James and his *heirs male,* as a sort of " make up " for his resigning the Mar Earldom (after a short tenure of it) in favour of the rightful heir whom Queen Mary in 1565 restored to his " just inheritance. "

(*e*) See Minutes of Evidence, p. 56.

Now it will be observed that in the charter of restoration of the Mar Earldom, in 1565, there is *no restriction* (as in Moray) to *heirs male,* and very naturally, for the grant of the *comitatus* of Mar was an *hereditary* right through *female* succession.

In adjudging the Moray claim, June 16, 1793, (*f*) Lord Chancellor Rosslyn (Lord Loughborough) ruled that the *comitatus of Mar* carried the honours and dignity. His Lordship also declared that " John Lord Erskine got the *ancient* " dignity of his family and became Earl of Mar, for a charter (confessedly " Queen Mary's charter of the *comitatus* in 1565) from the crown passed in his " favour that was ratified by Parliament in 1567 (1). "

(*f*) See Lords Journal and Riddell, vol. I p 259, and vol. II p. 784.

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(1) Riddell adds (vol. II, p. 784) " For proof independent of what may else be addueed of grants of a *Comitatus* and even *Baronia* carrying the honours, see pp. 44, 45, 532, 687. "

To the above we may add the opinion of the well known authority Lord Hailes, as well as of the distinguished Peerage historian Sir R. Douglas and his successor Wood.

Riddell (to whom we have just referred) in his great work on Scotch Peerage Law (*h*), the most exhaustive book on the successions in Scotch Peerages and on the decisions given by various Law Lords in disputed cases, incidentally but frequently refers to Mar.

(*h*) In 2 vols published by T. Clark, 38 George St., Edinburgh, 1842.

Writing in 1842, he speaks of the *then* existing Earldom of Mar (*a*) as "the "oldest Scottish Earldom by descent; it is in many respects the most "remarkable in the Empire, for the present Earl (Uncle of Lord Kellie's "opponent) is the direct heir at law through a long and illustrious ancestry of "personages who were Earls of Mar *ab initio.*" Again he says (*b*) "The "House of Peers in 1771 adjudged the Earldom of Sutherland to the mother of "the Earl, who has recently succeeded, on the *sole* ground of its having "devolved in 1514 to the *female heir of line.* They in effect found that the "honour was like a barony in fee in England, descendible to heirs general, "and what is very singular the *ratio decidendi* applies *a fortiori* to Mar, for "that ancient Earldom twice in the 14th century and once in the 15th has in "the same way gone to the heirs of line, in the first two instances to *females* "*seriatim* and in the last to a male descendant through another female, "while not only all these but the present Earl (1842) were the *heirs general* of "the original ancestors."

(*a*) See Riddell, vol. 1, p. 469.

(*b*) See Riddell, p. 468.

Tytler, in his History of Scotland, Sir Bernard Burke and the Lyon King at Arms and many others have upheld the *female descent* as the established line in the Mar succession. Lastly in 1874, June 16th, the Attorney General as Senior Law Officer on behalf of the "Crown", with the concurrence of the Solicitor general for Scotland, advised their Lordships that the succession to the Earldom is clearly established to continue vested in the heirs of line or heirs general, and hence that the heir male "*the Earl of Kellie has* NOT made out his claim to the dignity of Earl of Mar in the Peerage of Scotland (*c*)."

(*c*) See House of Lords, Attorney General's Speech, pp. 402, 21.

The Presumed "NEW CREATION" of AN EARLDOM OF MAR in 1565.

In introducing the question of the "*new creation*", it seems advisable to lay before our reader the presumption of Law on which their Lordships are supposed to have acted in the Mar case.

Accordingly we give the rulings of the following eminent Law Lords on this subject. Lord Mansfield says (*e*) "I take it to be settled, and "well settled, that, where no instrument of creation or limitation of the honour "appears, the presumption of law is in favour of the heir-male: *always open* "*to be contradicted by the heir female on evidence shown to the contrary.*"

(*e*) See Judgment, p. 9.

(f) See Maqueen's reports p. 586. Attorney General's speech, Mar case p. 405.

Lord Cranworth said in the Herries Peerage Case, June 1858 (*f*) " It is a " settled rule of law as to the Scotch peerages that where the *origin* of the " honour is lost in antiquity and so does not appear in any direct proof, the " presumption is, that it was in its creation limited to males only. Though " however this is indoubtedly the rule, yet as it was always in the power of " the Sovereign to make an honour descendible on females as well as males, *this* " *general presumption will give way whenever there are circumstances sufficient* " *to show in any particular case that females as well as males were included* " *in the* ORIGINAL *destination* (1). "

Lord Brougham said on the same occasion (see same pages) " It is the " presumption in Scotch peerage law that where the patent of creation does not " appear the descent is limited to heirs male ; on the other hand it is equally " certain and equally clear that *that presumption may be rebutted.* "

The presumption thus laid down by these three learned Lords seems a reasonable one. It *cannot* however limit the Earldom of Mar to heirs male, for, as pointed out by the law officers on behalf the Crown, in the Mar case,

(h) See Speeches, House of Lords, p. 417.

on June 16, 1874, (*h*) " it (the Mar Earldom) was capable of being held and " enjoyed, and was actually held and enjoyed by *females* (2). "

This succession was interrupted *only* by injustice and usurpation, denounced as such in the strongest possible language by two Sovereigns, with the concurrence of the Scotch Parliament and condemned by the supreme court of the realm (as we have shown), but restoration of the rights of the heir was at length made, after due enquiry into his heirship and connexion with the former holders of the Earldom held by FEMALES, — a connexion traced through three ladies in succession.

This heir became Earl of Mar and there is *not the slightest vestige* of collateral evidence, to say nothing of proof, that there was any new " creation. " Yet their Lordships have chosen to *presume* a new " creation ", and then availing themselves of one half alone of Lord Mansfield's *dictum*, further *presume* a destination to heirs-male and will allow nothing to rebut that presumption.

We have yet to learn whether any power is vested in their Lordship's committee to *create a purely hypothetical peerage* founded on more presumption with a limitation restricting it to the *heirs male* of a family whose *only connexion with the Mars is by the marriage of an ancestor with the heiress* of that illustrious house.

There is absolutely nothing in the *dicta* of Lords Mansfield, Brougham,

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(1) However the President of the Count of Session, Robert Craigie of Glendoick (allowed to be the greatest fendal lawyer in his time) declared on 17 Dec. 1754, with regard to the old Barony of Ross, that " By the Law of Scotland a Peerage is an estate of inheritance descendible to heirs, and where the descent of the Peerage is not limited by a deed, or by the Patent, it descends to *heirs general*, or *heirs of line* ". (See Riddell, vol. I, p. 192.

(2) Riddell in his learned and exhaustive work an Scottish Peerage Law, says (vol. II, p. 597). " It cannot escape attention how " *a fortiori* the *original* Earldom of Mar " *now* (1842) vests in the present Earl of Mar, the *lineal* heir, and in his HEIRS GENERAL (not heirs male) owing to the ancient *invariable* and repeated descents of the dignity to *heirs female* ". He adds " The Earl of Mar may be justly considered the *premier* Earl of Scotland ".

and Cranworth, to warrant a presumption in favour of a new "creation", yet we actually find Lord Redesdale saying (*j*) "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 the failure of "heirs male." Now the male heirs failed between 1370-80, on the death of Earl Thomas without issue, when his sister Margaret and Isabel her daughter successively became countesses of Mar in their own right. But Lord Redesdale with singular inconsistency says, "at the death of Alexander in 1435 the "comitatus under the settlement of 1426 lapsed to the crown (*l*)."

(*j*) "See Judgment", p. 16.

(*l*) See "Judgment", p. 16.

But Lord Chelmsford says (*m*). "It may fairly be assumed that down to the "death of Alexander Stewart in 1435 the *dignity* of Mar continued to be "territorial." We have very seriously to ask their Lordships how a peerage which is said to have become *extinct* on the failure of male heirs in or about 1370, could have "*lapsed to the crown* in 1435?"

(*m*) See "Judgment" p. 4

Lords Chelmsford and Redesdale lay very great stress on the fact that between the execution of the Marian charter and the first recorded appearance of John Lord Erskine as Earl of Mar at the Privy Council there elapsed an interval of 39 days. No account is taken of the fact that the charter was executed at Perth while Erskine was about that time constantly in Edinburgh as shown by the minutes (*a*) of the Privy Council (the translation of the charter propounded by the Earl of Kellie, curiously enough omitted to show the place from which the original is dated).

(*a*) See Minutes of Evidence, pp. 62, etc.

We may explain this delay by the fact that, though the warrant for infeftment of the restored Earl in his hereditaty right was issued on June 23, 1565, and at Perth (*b*), it does not appear at what exact period the instruments of infeftment were returned to Edinburgh and put in possession of the officials to whom they had to be delivered. The official return of the completion of this process with respect to the Earldom of Mar has *not* been produced by Lord Kellie (who on the late Earl of Mar and Kellie's death took possession of the Mar *Charter Chest* and all the family papers,) but it is remarkable that the joint document as to Garrioch, ordered by the same warrant to the same official has been delivered up and is dated at Perth, 24 July 1565 (*c*).

(*b*) See Minutes of Evidence, p. 124.

An infeftment, or investiture, needed a long time to complete in a remote rugged Highland district held by a hostile family of great importance and aided by other noble and interested families. Before the completion of this legal process, in those days when (as Lord Mansfield observed) the idea of a connexion between the territory and the title of honour had not worn itself out, "Lord Erskine" as we here call him, was not entitled to take his seat as Earl of Mar; for although *restored* to the possession of what had been so ruthlessley torn from his ancestor Earl Robert, he could not until feudally reinvested and the charters of restoration and infeftment were produced in Parliament, be legally and officially inserted in the roll of Peers in Edinburgh as Earl of Mar. Further the royal marriage was fixed for August 1st; nothing is more probable or consistent with courtesy and contemporary custom than that the Earl may have delayed the assumption of his *restored* dignity until the date of the Queen's marriage which event had not a little to do with this

(*c*) See Minutes of Evidence, p. 390.

restitution of his ancestral rights. The restored Earl would have been guilty of something more than an ungraceful act in assuming his Earldom before he could show possession of a single rood of the Mar lands. Similar delays are remarkably illustrated in other cases : we may name Rothes, Errol and Gray; while in the Herries case an exactly similar delay in assuming the dignity occurred, the title not being taken up until the baptism of a Royal infant.

Lord Chelmsford observes that Lord Erskine "must have obtained the "dignity *in some way or other*" (*o*) before this day (August 1), adding "the "question arises when and how did this creation take place? There is *no writing* "*or evidence of any kind to assist us.*" Lord Chelmsford continues "he was "created probably by a ceremony called belting," but adds "Whether Lord "Erskine's creation was in this particular form and manner seems to me to be "not very material." His Lordship does well not to be too positive in his explanation of the "way" in which it might have taken place : unquestionably he would have been puzzled to find a "way" in accordance with the usages of the time, for in all the Scotch creations of that period the words expressing the creation were added in the body of the deed containing a grant of the Lands. Now, as we have seen, the Lands were already granted as a hereditary right derived from the Countess of Mar. A deed of creation of an honour, simply, would have been at this time a curiosity not as yet presented to the world. Hence it follows that had Queen Mary contemplated a new "creation", or had one been required, the charter of the lands would have contained the words granting the new dignity. As regards the suggested but *unrecorded* "creation" by *belting;* we have only to quote Lord Chelmsford's own words on a former occasion when (on the 18th July 1873) he says (*p*) "the ceremony did not create him but the ceremony would be necessary to complete the title." It is no doubt difficult for Lord Kellie and his friends to produce evidence of the *completion* of that which *never had a beginning.*

(*o*) See Judgment, p. 8.

(*p*) See Speeches, House of Lords, p. 109.

We find that Lord Chelmsford (*f*) will not allow that the settlement in the Marian charter of the lands of Mar on heirs and assigns raises any but the very slightest presumption in favour of the Queen's intentions that the lands and dignity should never be alienated. "Because, (says his Lordship) 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."

(*f*) See "Judgment" p. 9.

But in the Bruce of Kinloss case when a peerage *through female descent* was claimed and established (*a*) by the Duke of Buckingham, 21st July 1868, heirs and assigns was read by their Lordships to mean *heirs general, male or female,* and we cannot find that the words carried any power of alienation. Further his Lordship has omitted to add the word *hereditarily*" (*b*) as it occurs in the Marian charter immediately following the words "heirs and assigns" and we may notice here that in the Act of Parliament of 1587 (*c*) passed 22 years after the now supposed new "creation" limited to males, power is given to John Earl of Mar and his *heirs* to recover and possess the lands in the following words "and that a sufficient right and action be established *in his person and his heirs* for recovering of the said lands and possession thereof."

(*a*) See Speeches, House of Lords, 24 July 1873, pp. 239 243.

(*b*) See Queen Mary's Charter, Appendix, p. xxxvi.

(*c*) See Appendix, p. iv.

Thus, as the Earl's heir might have been a daughter or other female heir, there being *no limitation to heirs male,* this act would empower such lady, as his heir, to recover and possess these lands. So that the Earl instead of getting the act passed to harmonise with a *presumed* "newly created" title limited to heirs male, actually has the lands confirmed to his *heirs general.*

We think every one of our readers, whether Lawyer or Layman, will by this time perceive the extraordinary complexion which their Lordship's Judgment has assumed. They first allow Lord Kellie to beg the whole question *as to whether or not there ever was a new "creation,"* then, instead of requiring him to establish the *proofs* on which alone his claim can vest, they adopt his presumption as a fact and then set themselves to solve the riddle of a proceeding which has never been shown to have taken place. At length obliged to confess the failure of their ingenuous guesses, they are compelled to fall back on the wide possibilities implied in the words "*some way or other* (*c*)."

(*c*) See Judgment, p. 8.

Yet on this groundwork of guesses and fallacies their Lordships have built up a modern peerage and adjudged it to the Earl of Kellie. So that his Lordship is now holder of a title which has no other foundation than an unsupported conjecture on the part of Lord Chelmsford, reinforced however, as we see further on, by the "*common sense*" (*d*) of Lord Redesdale (1) which really developes into a highly poetical and productive faculty, for it assures him that this wonderful Earldom was created, we presume by some occult and unknown process, with a limitation to heirs male for the benefit alone of the Erskine family whose only connexion with the Mars was by the marriage of Sir Thomas Erskine with Janet grand-daughter of Lady Helen de Mar daughter of Gratney Earl of Mar.

(*d*) See Judgment, p. 17.

Whence it may fairly be said that the validity, nay the very existence, of Lord Kellie's new title must always remain simply a matter of opinion.

It is certainly a unique peerage, *it is not to be found on the Union Roll of Peers,* and though evolving from the inner consciousness of Lords Chelmsford and Redesdale as a "creation" of 1565 it has never been heard of from that day to this.

The peculiar doctrine of legal presumption set up on behalf of Lord Kellie is not known to the Law of Scotland. When a deed cannot be produced the rule "*de non apparentibus et non existentibus eadem est ratio*" (*i. e.*)

(I) Lord Redesdale here alludes to the postscript of a letter from a certain Randolph to the Earl of Leieester.

Lord Chelmsford when this document was produced on the part of Lord Kellie said "it is a gossiping letter and nothing more, and partieularly the postscript" and Lord Redesdale as Chairman ruled "It is excluded". The passage relied on is in the postscript and says that Lord Erskine was "made Earl of Mar." We admit that he was "made Earl of Mar" by the *restoration* of his hereditary rights. (*see Speeches, p.* 203, *and "Judgment", p.* 17). Lord Kellie as lately as 1874 attempted to put in more evidence in support of his alleged new "ereation", but this evidence the committee was eompelled to *reject as utterly unauthenticated.* So that not one tittle of evidence was ever lodged with the committee in support of this *new* "creation" (*see Minutes of Evidence,* pp. 774 and 783. 5 June 1874).

"non appearance is tantamount to non existence" is uniformly applied. If its existence at one time can be established as well as the "casus amissionis" (event of loss) a process of proving the tenor is competent, and *if the evidence as to its tenor* is admitted it may in that form be set up but not otherwise, for the process will stop at the very outset unless *direct evidence* be adduced that the *deed once existed* and that the cause of its loss can be accounted for satisfactorily. (See Erskine's Institutes of the Law of Scotland, book IV title I § 54.)

This being the Law of Scotland, in Scotland at least, *Lord Kellie cannot be held to be the Earl of Mar.*

To shew that the Judgment in the Mar case has not been in accordance with established precedent we proceed to quote from Lord Chelmsford's own words in his Judgment (1) in the Balfour of Burley case (July 21 1868) *against the heir male* (*a*). "It is suggested (on the part of Major Balfour, the heir male) that "the circumstances are such as to raise a presumption that either during "the life of Michael Lord Balfour of Burley, or during the three months after "his death within which period Robert Arnott or Balfour must have assumed "the title, there was some *new grant to him and the heirs male of his body.*

(*a*) Printed in "Case" for Lord Kellie's Opponent, p. 177.

"A creation with any other limitation would not suit the case of Major "Balfour, but the process by which this result is arrived at is rather "extraordinary, the committee is called upon from the fact of Robert Arnot or "Balfour possessing the title to *presume* a grant of it to him and then, as no "patent can be produced to adopt the presumption which prevails in cases of "*lost* grants that the dignity was limited to him and the heirs male of his "body." How are we to reconcile these views of Lord Chelmsford, so recently expressed, with the facility displayed by his Lordship in presuming a grant with limitations to heirs male in favour of the Erskines? Lord Chelmsford proceeds (*a*) to draw a strong inference in favour of a limitation to heirs male in his *presumed* "creation" of an Earldom of Mar in 1565, from the fact that four years previously the Queen when giving the same dignity of Mar to her brother 7 Feb. 1561 (*b*) limited it strictly to heirs male. But in 1482 James III in bestowing the same Earldom on the Duke of Albany (*c*) granted it *to "heirs whomsoever"*. Both these creations lie intact before us and the true inference to be drawn is that, when Queen Mary, and even earlier Sovereigns did make creations, they did not melt into thin air. Further, the Queen's brother was *in no way entitled by right of blood* to the Earldom of Mar, and so her Majesty, on finding that John Lord Erskine was entitled by heirship through Robert, Helen de Mar, and the Countess Isabel, to the Mar Earldom, induced her brother to give up that title in favour of the rightful heir to that ancient dignity, and conferred on her brother the Earldom of Moray instead.

(*a*) See Judgment, p. 9.

(*b*) See Minutes of Evidence, p. 57.
(*c*) See Minutes of Evidence, p. 46.

We must now, in order to carry on the thread of their Lordship's Judgment, ask our readers, by an effort of imagination, similar to that of

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(1) In this Judgment it is noteworthy that the Committee consisted of Lords Chelmsford, Westbury, Colonsay and Redesdale. Lords Westbury and Colonsay strongly supported Lord Chelmsford in his decision against a *presumed* "creation" totally unsupported (as in Lord Kellie's claim) by evidence; while Lord Redesdale was apparently silent, as seems consistent with his lordship's usual aversion to *female* successions.

Lords Chelmsford and Redesdale, to suppose that a "creation," limited to heirs male was actually effected in 1565. For the purposes of our enquiry, let this much be *for the present* conceded — and observe what must naturally have ensued on John, the newly created Earl of Mar, seeking to obtain a Parliamentary ratification of the grant of the Lands. — Twenty two years have elapsed since the presumed "creation," the memory of it must be as fresh in the minds of men as the ink with which it is written on the patent, the restored Earl is recognized accordingly as heir to the Lands, but the act stops there, and by no implied or expressed title defines Lord Mar as successor to an Earldom which has been extinct since the Lapse to the Crown in 1426. For example, while reciting Lord Mar's heirship to the lands, through Robert Lord Erskine, who was heir to the Countess Isabel it will expressly and carefully avoid in any manner, suggesting that the dignity as well as heirship to the lands was vested in the said Robert. Surely so much is a reasonable postulate on our part considering the freshness and publicity incidental doubtless to Lord Mar's new "creation," if it ever existed. Now let us pass to *facts* as actually recorded in the history of Scotland. Lord Mar, the son of the supposed "*newly created*" Earl foreseeing, doubtless, the litigation in which his claim to the Mar Estates would involve himself and his heirs, did obtain a Parliamentary recognition of his title, it will be found entire at the end of this volume (see Appendix page IV), and we here proceed to enquire how far it taillies with the imaginary act consequently on a fresh "creation" which we have spoken of above.

The actual instrument which gave the legal sanction of the Scottish parliament to the personal act of grace embodied in the Marian charter bears date and 29th July 1587 that is to say exactly twenty two years afterwards.

It commences (*g*) "*Anent* (concerning) the supplication given in and "presented to our Sovereign Lord and the estates in this present Parliament "by John Earl of Mar Lord Erskine, making mention that whereas the late "dame Isabel Douglas Countess of Mar was *heritably* infeft at the time of "her decease in *all and whole* the Earldom of Mar, Lordship and regality of "Garrioch, Likewise after her decease the late *Robert Earl of Mar* Lord Erskine "the said John Earl of Mar's predecessor was lawfully served and retoured "heir to the said late Isabel of the said Earl son of Mar, Lordship and "regality of Garrioch, to whom likewise the late John Earl of Mar, the said "complainer's father was lawfully retoured heir so next he, as heir to his said "late father who was heir to the said late Robert *Earl of Mar* Lord Erskine "his predecessor and so *heir by progress to the said late Dame Isabel Countess "of Mar* hath the undoubted *heritable right* to the said Earldom of Mar, "Lordship and regality of Garreoch . . . . . eonsidering "that by the laws and custom of the realm *the right of blood, nor yet any "heritable title falls under prescription nor is taken away by whatsoever length "of time or lack of possession* . . . . . (he) shall have as "good right interest title and action in and to the said Earldom Lordship "and Regality as if the said Earl were *immediate heir* to the said dame Isabel "Douglas or to the late Robert Earl of Mar Lord Erskine *her heir* or had "pursued for the same *within year and day* after their decease *not withstanding* "any exception of prescription or lack of possession that may be alleged to the "eontrary."

(*g*) See Appendix, p. IV.

" Let us now observe how their Lordships dispose of this Act of Parliament " which is no doubt a singular instrument if we accept their Lordships theory " of a fresh creation by Queen Mary.

Lord Chelmsford, without any discussion as to the contents of the act, at once proceeds to impugn its value and quoting Erskine's institutes points out that it carries no new weight but barely confirms the Marian charter.

It has never been presumed on the part of Lord Kellie's opponent that any new provisions are contained in this act, but it recites distinctly that all the effects of the royal usurpations were to be and are swept away by the Marian Charter, the only difference is that Queen Mary's restoration having now taken effect, Lord Chelmsford's self styled "*solemn adjudication* of 1457" (by which Robert was illegally declared not to be Earl of Mar) is in this Act of 1587 rendered *null and void.*

Moreover not only John Lord Erskine, who according to Lord Chelmsford became Earl of Mar by an (unproved) *new* " creation ", but the persecuted Earl Robert is now, though long dead, recognized in all his rights, and no less than ten times in this act of the three estates of Scotland declared to have been not only in right of some of the lands as supposed by Lord Chelmsford (*a*) but to have been Earl of Mar.

(*a*) See Judgment, p. 8.

How is it that Lord Chelmsford, after laying such stress on the fact that Queen Mary's charter of restoration defines this Robert as Lord Erskine, can ignore the significance of this title of Earl being accorded to him in the act passed to ratify that restoration?

The charter denounced and swept away the injustice by which Robert was deprived of his title. As a result we find in this public act that he is styled Earl of Mar, and by the same right John Lord Erskine became Earl of Mar, as for 300 years has been conceded, until Lord Chelmsford adopted as his own the spurious offspring of Lord Kellie's imagination. So, as it is impossible to invent a prior new creation by which Robert in 1438 could have been Earl of Mar, the designation of him as such in this act is inconvenient and nothing is said about it. We shall presently notice the same cautions silence observed by their Lordships, regarding the recognition of this Robert as Earl of Mar by the Court of Session, the supreme tribunal of the Kingdom.

On the 16 June 1874 the Attorney General advising their Lordships on behalf of the Crown (*a*) said " You have throughout the motive (if I may use " the expression) of the act (of 1587) stated to be this, that he (John Earl of Mar) " by virtue of his being the heir of Robert Earl of Mar who was the heir of " Isabel Countess of Mar, that he holding these characters and holding *those* " *dignities* was entitled to these lands; then it says that he had been improperly " deprived of them. "

(*a*) See House of Lords' speechs, p. 411.

The learned Attorney General adds " It appears to me that you have " throughout the whole of those proceedings the moving cause of the Queen " and the moving cause of Parliament namely, the fact that he was the heir " of the Earl Robert who was the heir of Isabel. "

The fact is that the designation of Robert as Earl of Mar, and the subsequent definition of him by the Court of Session in 1626 as Robert Earl of Mar (*b*) who died seized of the Earldom, constitute a plain, positive, and direct refutation of their Lordship's theory that the peerage legally " lapsed to the

(*b*) See Appendix, p. xxxiv.

crown" in 1435 under the settlement of 1426 (*c*). Robert designated himself Earl of Mar and Garioch and Lord Erskine in 1451 (*d*) and here we have confirmation of the legality of that designation though their Lordships completely omit to notice it.

(*c*) See Judgment, p. 16.

(*d*) See "Charter of Robert Earl of Mar and Garioch, 7 September 1451, Minutes of Evidence p. 495.

Now as Robert (whose only claim to the Earldom was by lineal descent through his *mother, grandmother and great grandmother*) was Earl of Mar, it follows that Lord Kellie's opponent (*e*) as Robert's direct and lineal heir must be the present Earl.

(*e*) See Pedigree and "Service," p. XXVI.

This Act of Parliament of 1587 and the subsequent judgment of the Court of Session in 1626 are no doubt highly inconvenient to the theory of a "*new creation*" with a limitation to heirs male, but the fact of their Lordships evading this Act of Parliament and ignoring the judgment of the highest Tribunal of the realm in 1626 has not blotted them from the records of Scotland.

As to Lord Mar sitting in the Scottish Council as junior Earl we find on referring to the "Sederunts" of that period (*c*) that Lord Mar appeared in various places, sometimes high and sometimes low, and we note that the most extraordinary confusion in ranking at the sittings prevailed : as a specimen we may take the entry on 30th Oct. 1581, when the Earl of Arran, created two days before, was third, and Sutherland, who dated *several centuries earlier*, appears as twelfth and last (*d*).

(*c*) See Minutes of Evidence, pp. 58, 74 and 417, 427.

(*d*) See Minutes of Evidence, p. 420.

However Lord Chelmsford, it appears, is "not disposed to lay any stress "upon the order of precedence prior to the Decreet of Ranking of 1606" (*e*), and Lord Mansfield observed in 1771, in his remarks on the Sutherland case, (p. 16) "nothing can be drawn from the entries of the Rolls of Parliament of the rank "of the nobility before 1606, because it appears they where all marked at "random as they came severally earlier or later into the house".

(*e*) See Judgment, p. 10.

DECREET OF RANKING 1606.

The Earl of Mar, presumed by the Lords' Committee (in 1875) to have been created in 1565, ranked with precedence from 1404.

It was not till 1606 that the precedency of the Scotch peers was officially established by Royal Decree (*a*). It was then however effected in the most formal manner, and the peers for the most part were represented by their procurators. Lord Mar appeared by his procurator Mr, afterwards Sir Thomas Hope.

(*a*) Dated 5th March, 1606. See Appendix p. VIII, and Minutes of Evidence, p. 439.

The commissioners are instructed to rank each peer only with the precedence which the documents he could lay before them should warrant. The minutest care is enjoined upon them to examine impartially into all evidence and the authority of the commission is under the GREAT SEAL.

The Peers were after such formal and diligent investigation "according to their productions and verifications of their antiquities' ranked as highly as such productions could *then* warrant. But the commissioners obviously aware that some of the peers might not have access at this time to all their most

ancient "evidents" expressly provide that such as should find themselves "prejudged by their present ranking, to have recourse to the ordinar remed of "law be reduction before the Lords of Counsall and scssioun of this present "decreit for recoverie of their owne dew place and rankes be production of "mair ancient and authentick rights nor has beene used in the contair of this "processe".

Now this solemn and well considered investigation took place exactly forty years and eight months after the now *pretended* new "creation" of the year 1565. Yet we find the *supposed* newly created Earldom ranked by the commissioners with a precedence which carries it back to the year 1404 and the time of the Countess Isabel, that is to say one hundred and sixty one years before the new creation of 1565 set up by Lord Kellie in the latter half of the present century.

At the time of this Decreet the then Earl of Mar was at a great disadvantage, as the old Mar family deeds were in the custody of Lord Elphinston, the adverse holder of some of the old Mar estates. However Lord Mar was ranked according to the antiquity of the documents he was able to produce which did not prove his most ancient precedence but clearly established his right through the Lady Helen de Mar back to the Countess Isabel.

The Earl of Sutherland also did not establish at this time his claim to his most ancient precedency, but was ranked according to his evidents(*a*), and we find the Earl of Sutherland, in 1630, protesting before the Lords' Commissioners for higher precedence than was bestowed on him by the Decreet as provided for by the instructions, above quoted. Mar followed precisely the same course and on August 31 1639 entered his first protest for still higher "precedence than was given him by the decreet (1). Yet it has pleased Lord Redesdale to brand the title thus ranked by the Royal Commissioners as a "fancy title," on the ground that Lord Mar did not at this time obtain all the precedence of his ancestors.

(*a*) See Report Sutheriand case, p. 46.

Which is more properly to be called a "fancy title", this one ranked in 1606 or Lord Kellie's presumed new one never ranked at all and not to be found on the Union Roll?

The reader will perceive and appreciate the very different treatment accorded to the authority of this Decreet of ranking in the Sutherland and Herries cases.

In both these suits the Heir Male unable to claim the original dignity set up a "*must have been*" creation, precisely as Lord Kellie has done in the Mar case.

We will just take Lord Mansfield's ruling (see Judgment Sutherland Case, page 16). In showing that the surrounding circumstances completely rebut the presumption of a new creation of Sutherland, his Lordship observes "When a commission was granted in that year (1606) for classing the nobility "according to their several rights, the Earl of Sutherland was ranked and

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(1) The Earls of Mar, discontented with even the old precendency allowed then in 1606, continually and for generations up to the present time made formal protests, personally and through other noble lords, for their ancient precedeney as *premier Earl of Scotland*. Records of seventeen of these protests will be found in Appendix p. xii, and in Minutes of Evidenee, pp. 428 to 435.

"*then* the evidence of a new creation might have appeared *if any had ever* "*existed.* By that ranking the Earl of Sutherland takes place of ten Earls "whose interest it was to have shown a new creation but so little notion "had they of a new creation at that time, that we see the family "soon after complaining that it was not carried to its original." Why did not Lord Mansfield call Sutherland a "fancy title" because it did not by the decreet obtain the whole of its original precedency?"

By Lord Mansfield's ruling this authentic document is allowed to rebut the presumption of the heir male, in the Mar case the bare presumption is allowed to rebut the authentic document.

In the Herries case decided in 1858 in favour of the descent through females against the presumption of a new creation set up by the heir male, Lord Cranworth said "There is one other matter of great importance to which "I have not yet adverted, I mean the decreet of ranking in 1606. That "decreet cannot by any means be taken as conclusively establishing the "*relative rank* of the different peers. (His Lordship here clearly alludes to the "clause above mentioned enabling the peers to claim *higher* precedence) but "it is still a document of weight and it appears that in settling the precedence "at that time John the then Lord Herries who was the grandson of Agnes "claimed and obtain a rank to which he was not entitled if his honour was to "take its date from 1566, but to which he was entitled of it was to date from "1489."

Lord Brougham says, ruling in the same case, "the decreet of ranking in 1606 is very material in this case: it is quite clear that if the peerage had been created in 1567 or thereabouts, the ranking in 1606 would have been according to that date, instead of which it was a ranking according to the prior date of the earlier title."

There is a striking parallel between the dates of the alleged new creation in the Mar and Herries cases, but how wonderfully different is the treatment which they receive when brought to the test of the decreet of ranking. For Lord Chelmsford says, "Had the commissioners been furnished with this "information there can be little doubt they would have determined the "precedence of the Earl of Mar by reference to the creation of the dignity by "Queen Mary (*a*). Lord Chelmsford's pet new "creation" had taken place "*in some way or other*" only forty years before; the commissioners must have known all about it as a matter of course, and even if Lord Mar (1), for his own purposes as suggested by Lord Redesdale, had omitted to inform them of it, it would be positively incredible that not one of the eight or nine nobles unjustly ranked below Mar, should have raised a protest, the validity of which could have been proved by recent documents and living witnesses.

(*a*) See Judgment p. 11.

In short the evidence afforded by this decreet to which Lord Mansfield, Brougham, and Cranworth attached great weight is considered by the Lords'

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(1) It was not until 1875 that an Earldom of Mar was conceded to Lord Kellie resting on a *now* presumed new "creation" of 1565, totally unsupported by evidence and *unrecorded* (because *unknown*). So perhaps Lord Mar in 1606 may be forgiven for not having "furnished the commissioners with this information".

committee as one of those "suggestions and surmises" which Lord Cairns (see Judgment p. 19) says are all that Lord Kellie's opponent is able to "make and to put forward."

Lord Mar produeed before the eommissioners, as has been pointed out by the Attorney General on behalf of the Crown, (*b*) the following evidenee.

(*b*) See speeches House of Lords June 16-1874, p. 413.

The eharter of the 9th December 1404 by Isabella Countess of Mar in her own right, and King Robert the third's charter confirming the same, also a letter made by Robert the third to Sir Thomas Erskine knight, "promising that "the King would not reeeive any resignation of the Earldom of Mar to Isabel "Douglas Countess of Mar", 22 Nov. 1394. Also an Act of Parliament of 1587 "ratifying the haill rights, title and securities made to John Earl of Mar and "his predeeessors of the Earldom of Mar as *heir by progress* to dame Isabel "Douglas *Countess of Mar*". Also an extraet of the Retours of 20th Mareh 1588(*j*) "whereby (as the Retour states) the said John now Earl of Mar is the legitimate "and next heir of the said former Isabella Countess of Mar, regard being had "to the faet that she herself was the grand-daughter of the former Donald "Earl of Mar, her grand-father, who was the brother of the former Lady "Helen of Mar the great-grandmother of the former Robert Earl of Mar the "grandfather of the former Alexander Lord Erskine, who was the great "grandfather of the former John Earl of Mar, who lately died and who was the "father of the said John now Earl of Mar"; the Attorney General then adds, "your Lordships have got in that retour a most eomplete tracing from Isabel "up to Donald her grandfather, who was the brother of *Helen* who was the "*great grandmother of Robert* who was the grandfather of Alexander who was "the great-grandfather of John Earl of Mar" (who produeed this evidenee for his ranking in the said deereet of 1606) "these were the materials", the Attorney General adds, "whieh were before the eommissioners for the purpose of "ranking."

(*j*) See Appendix, p. xxi.

Now Lord Chelmsford (*c*) observes "The finding of the eommissioners that "John Earl of Mar was heir to Isabel through Helen of Mar was erroneous in a "double sense. He eould not have been heir to Isabel who was heir to "Margaret, the Law of Scotland not allowing heirship to be traeed through "the mother, and he eould not legally claim by heirship of blood to Helen, as "by the same law there is no suceession to lands upwards through females." (Erskine's Institutes, book III, title 8, seetions 9 and 10.)

(*c*) See Judgment p. 10.

In our endeavour to understand this extraordinary objection of Lord Chelmsford, we have carefully referred to "Erskine's Institutes" (book III, title 8, and sections 9 and 10) and we find not one word of the Law of Seotland not allowing *titles* of Honour to be traced through the mother.

But as it happens we do find in Erskine that by the law and usage of Scotland a title of honour vests *Jure sanguinis* (by right of blood) in the next heir. (See Institutes, book III, title 8, section 77.) Isabel the last of the elder line was the great granddaughter of Gratney Earl of Mar (13th century). Janet the mother of Robert Earl of Mar, through whom alone he claimed on the failure on the elder line, was also a great granddaughter of Earl Gratney. He was also the nearest heir at Law of the Countess Isabel. (See "Pedigree", also the Retour 20, March 1588, Appendix p. xxi.)

We need hardly inform our readers that many of the old Scottish peerages

are inherited by descent traced through mothers, the Sutherland, Rothes, Sempill, Balfour of Burley, Herries and many others are examples of this descent.

We beg further to point out that the Lords' Commissioners were ranking not lands but dignities, and we see that the same pedigree which proved the hereditary right of the heirs of Isabel to the lands was considered by the Commissioners to prove the hereditary right to the ancient dignity of Mar.

Lord Redesdale says (*a*) that the documents produced before the Commissioners related to lands only. That they related to the pedigree as well as to the lands is patent on the face of them. It would seem almost as if their Lordships insist as a positive necessity that a gentleman should show two pedigrees : one for his land and another for his honours.

(*a*) See Judgment p. 17.

It is no doubt highly inconvenient to Lord Kellie's presumptions that even after the presumed new "creation" *limited to heirs male* Lord Mar should trace his right to both dignity and lands through the *female* line, which descent was allowed by the Royal Commissioners.

As regards the quotation from Erskine that there is no succession to land upwards through females, we may add that though Erskine does say something to this effect as regards *land*, it does not even touch the question of the dignity nor does it alter the positive fact (vide the Marian charter, Appendix pp. I and xxxvi), that by this descent the heirs of Isabel obtained great possessions in land and held them from 1565 till forfeited by attainder in 1715.

We now reach a portion of Lord Redesdale's "Judgment" which we deeply regret to have even to notice and which must for ever remain a cause for resentment to every member of the Mar family.

His Lordship unable to account for the ranking from 1404 given to the heir of Mar in 1606 which is destructive to the theory of a new creation only forty years before, condescends to a chain of presumptions which are surely inconsistent with the dignity of an English Judge.

His Lordship says (*f*) "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 obtained 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 and 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 enquiry 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

(*f*) See Judgment p. 17.

"and almost a necessary consequence, and the memorandum relating to the "charter of Robert III affords some evidence that such a destruction may have " taken place."

Here we find Lord Redesdale alluding to a *supposed* charter *supposed* to be mentioned in a memorandum of the time of Robert III King of Scotland from the Douglas not the Mar charter chest, and which both his Lordship and Lord Chelmsford (see Judgement pp. 2 and 14) are obliged to confess does not show in the least the nature of the charter mentioned in this memorandum. Yet we are astonished to see his Lordship persuming that this vaguely possible charter *must have been* something that *might have been* dangerous to the precedence accorded to Mar in 1606—and that *hence* it must be concluded that the Earl of 1606 *destroyed it*—and that this memorandum of Robert III affords some evidence that such destruction may have taken place!

We beg our readers to turn to page XXX of the appendix and look at this wonderful memorandum which is only two lines and a half in length. Moreover Lord Redesdale so strangely confuses this paragraph, that it would seem as if he himself does really imagine and wishes others to think that the deficiency of the unknown charter mentioned in the memorandum of Robert III from the Douglas charter chest goes to prove that the Earl of 1606 destroyed Queen Mary's equally hypothetical, new " creation" of 1565, notwitstanding the absence of even any collateral proof that it ever existed.

Now we will venture at once to say boldly that in thus charging the Earl of Mar with *fraudulently destroying charters* to obtain higher precedence; Lord Redesdale outrages his own especial attribute of " common sense," because it is impossible that a suppression of a Marian "creation," in 1565, could have passed unchallenged in 1606.

But we have also to prefer against His Lordship the far graver complaint, that he has, on utterly baseless grounds, safely though publicly insulted the memory of a dead man: and we condole with the Earl of Kellie on his having to stoop to accept a tarnished coronet at the hands of one who has assailed the honour of his ancestor (1).

(*a*) See Judgment, p. 10.

Lord Chelmsford's allusion (*a*) to the proceedings taken by the six Earls in 1622 in reduction of the decreet of ranking of 1606 is not fortunate. A position attacked and successfully defended is generally considered stronger than one which has never been impugned.

We must again remind our readers that the important decision of the Court of Session in 1626, in the great suit between Lords Mar and Elphinstone is completely ignored by Lord Chelmsford: this suit of which the decision may be seen in the appendix (p. 31) took place between the time of the six Earls' *unsuccessful* attempt and the finding of the five " retours " of 1628 (*b*) which traced his pedigree back *through several ladies* to Gratney Earl of Mar: It will be remembered that we observed, when discussing the Decreet of Ranking, that Lord Mar failed to get his most ancient precedence, in consequence

(*b*) See Minutes of Evidence, pp. 476 to 479.

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(1) The noble Lords who adjudged the Sutherland and Herries cases (1771 and 1858) did not accuse the Lords Sutherland and Herries of destroying the presumed " creation " set up by the heirs male to account for the precedence given to these Lords in 1606.

of the necessary documents being in the possession of Lord Elphinstone at Kildrummie castle.

So soon as we find Lord Mar installed at Kildrummie and possessor of his family archives he takes "retours" to establish his ancient precedency, and in 1639 commences that series of protests by which down to the present day the Earls of Mar have incessantly claimed higher rank in the roll of Earls than was accorded to them by the decreet of ranking.

From this period up to the Attaint of 1715 nothing which bears particularly on this case occurred (except the continued protests made by the several Earls for precedency, through *female* descent, as *premier Earl*) and the title was kept in the Erskine family simply because they continued prolific in sons, and therefore the old Earldom descended from father to son until Lady Frances became the only surviving child and *heiress* of the attainted Earl. The holders of the Mar title from the earliest ages down to the present day have been *heirs of line*. Lord Kellie does not hold that position but is collateral heir male.

RESTORATION OF THE EARL OF MAR IN 1824.

The right to the Honour traced through his MOTHER.

In order that our readers may be able fully to appreciate the unusual course pursued by their Lordships' committee, we, as on a former occasion, again request them for the time being to imagine that in 1565 Queen Mary did actually "in some way or other" create a title of Mar strictly limited to heirs male, and that this title, having passed under attainder, is to be restored in 1824, and we quote for their information some extracts from the debate which took place on the second reading of the bill reversing the attainder.

It is not our fault if these remarks add considerably to their mystification.

In the House of Commons (*b*) on the 14th June 1824, Mr Secretary (afterwards Sir Robert) Peel moved the reversal of the attainder of the peerages of Mar, Kenmare, Strathallan, and Nairn.

(*b*) See "Hansand", 2nd series, vol. II, p. 1318.

Lord Binning said "connected as I am with the peerage of Scotland it "is a source of unaffected pleasure to see *the ancient and illustrious* House "of Mar restored to its honours."

Mr Abercromby, afterwards Lord Dunfermline, observed that "the "restoration of the Earl of Mar to the *ancient title of his ancestors* would be "hailed with gratitude by the people of Scotland."

Mr Secretary Peel said "I beg just to remark that that Earldom "(of Mar) is *one of the most ancient* in the Kingdom and according to Lord "Hailes existed before any records of Parliament."

Evidently there is a mistake; the title now to be restored cannot be one created in the latter half of the sixteenth century: it is difficult to picture any particular gratitude being excited among the people of Scotland on the resurrection of a dignity of whose previous existence they were in ignorance.

We proceed to look at the Report of enquiry made by the Law officers of the Crown into the descent (limited to heirs male) in right of which Mr Erskine is to be restored to a title certainly not identical with that spoken of by Sir Robert Peel; a copy of the entire document will be found on page XXIX of the Appendix. We must here remind the reader that Lady Frances the only surviving child of the attainted Earl and mother of the restored peer married her cousin who afterwards became the collateral heir male of the family.

Therefore of course we shall find the officers of the Crown tracing the right to the dignity through the father who was the heir male.

Strange to relate, this report on which a solemn act of grace is to be founded makes no mention whatever of the heir male *as such*. The sole ground on which the right to the title about to be restored is traced being that John Francis Erskine is the *son of Lady Frances*, and *her heir*. The fact of his father being the collateral heir male of the family is not mentioned, and he is only alluded to as James Erskine son of Lord Grange and husband of Lady Frances, and the Report concludes by showing that *their* son is *her heir*.

Now is it reasonable to suppose for one moment that, if the restored Peer's right to his dignity had been derived through his father, his heirship to his father and the father's heirship to the Mar family would have been so completely ignored?

After due enquiry into the pedigree had thus been made the Act of Restoration was passed (an entire copy of it will be found in the Appendix) (*c*), and our astonishment reaches its climax on finding that this Act of Parliament makes *no mention whatever* of any right derived by the restored peer through his *father*, the collateral heir male, but says "Whereas John Francis Erskine of "Mar is the grandson and lineal representative (which he was through "his *mother* only) of the said John Earl of Mar", he is to be restored. (*vide* Act.)

(*c*) See Appendix, p. III.

The incident of a title limited to *heirs male* being restored *through the blood of a woman* has never yet been witnessed in Great Britain, yet we are expected to believe that it took place in this instance!

It is here important to point out that every one of the four peers to be restored on this occasion was required to prove a lineal descent which would carry the honour. That such is the fact is proved by a reference to the debate above quoted (*d*) wherein Captain Bruce spoke to the effect that he regretted that, being descended from a *collateral* branch of Burley, he was *excluded* from the reversal of the attainder. And the wording of the three acts restoring the other three peerages at this time is exactly identical with that for Mar, as each of these Peers naturally derived the right to his dignity through the *lineal* descent named in the act and no other. For instance Strathallan, a dignity limited to males, traced the lineal descent through males, while in Mar the same descent is traced through Lady Frances, daughter of the attainted Earl.

(*d*) See "Hansard", 2nd series, vol. II, p. 1318.

Now how does it happen that, if the case of Mar was so extraordinary that it was necessary to restore the blood of a woman, which did not convey the honour, in order to find the collateral heir male entitled to the dignity through his father, Parliament uses the same words exactly as when the lineal descent alone naturally carried the honour which was the case with the other restored peers?

Surely Parliament was at liberty to use words which would have, clearly

expressed its meaning, having regard to the strange process by which, as we are now informed, the restoration of Mar was effected, that is to say *a male title restored in the collateral line through a woman in the direct line!*

We will venture to say that such a monstrous invention as this was never before foisted upon the records of the nobility of Great Britain, and if the restored Earl was entitled only to an Earldom created by Queen Mary limited to heirs male, that Earldom has never been restored at all, for our readers must have perceived by this time that the restoration was certainly of the *ancient* dignity of Mar with its unquestioned female descent. While, as no one had at this time ever dreamed of Lord Kellie's now presumed new "creation", Parliament cannot have restored that of which it had never even heard.

However on this issue we find ourselves directly at variance with Lord Chelmsford who says in his judgment (*a*) "the recital in the act that he (the "restored Earl) 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 has been derived."

(*a*) See Judgment, pp 11, 12.

We beg our readers to study for themselves this most curious sentence of which we have anxiously sought a rational explanation. "Title" apparently here means right of succession, but if that be the proper meaning how are we to reconcile the description (in the recital) "*grandson and lineal representative*" with his Lordship's concluding paragraph "without reference to the course of "descent by which *it* (the title?) had been derived" : how can a recital be an accurate description without reference to the thing described?

His Lordship goes on to say "There was not the slightest occasion to make "any enquiry as to the succession to the restored title and probably none was "made." We suppose from the context that Lord Chelmsford here means that no enquiry was made whether this title was or was not restricted to males. But Mr Secretary Peel in the course of the debate above mentioned said "In "making a choice (of titles to be restored) government found the necessity of "selecting those respecting whom no doubt existed regarding the original "patent."

Now we have seen that in the course of the same debate reference is made by Mr Peel and others to the *great antiquity* of the Mar title then about to be restored, but this antiquity could have been derived *only from the female succession.*

Further, as there was not at this time a collateral heir male whose tenure of the Mar estates required him "*in some way or other*" to presume a new "creation", the family was content with a restoration of the *ancient* dignity, held through *female* descent and the government, satisfied of their right to be restored to that ancient dignity so descendible, did in effect so restore it, completely ignoring as immaterial the accidental fact of the heir of line being also the collateral heir male (1).

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(1) Mr Alexander Sinclair the distinguished genealogist, son of the late Sir J. Sinclair, knew the restored Earl well, and frequently heard him say that, though his father happened to be heir male of the Erskines, the Mar title and the Mar estates were derived *solely from his* MOTHER.

(a) See Judgment, p. 18.

Lord Redesdale says (a) "the act of 1824 cannot be held to determine a matter not then enquired into". Unfortunately for his lordship's accuracy the above quoted "Report by the law officers of the crown" tracing the pedigree of the restored heir in the *female* line, proves positively that the matter was *very carefully enquired into* (b), and we defy their Lordships or any other competent authority to adduce an instance in which the restoration after attainder is expressly by designation in an Act of Parliament made through the blood which does not carry the honour, while the right to the honour is derived through the blood which has not passed under the attaint.

(b) See Appendix, p. xxix.

Suppose, for instance, that an Earl of A had married a daughter of an attainted house B; are we to understand that Lord A's son on succession would have been debarred from the Earldom on account of the attaint of his mother's blood?

It comes to this: if the blood of the *mother* in the Mar instance carried no honour, why was it restored?

It will have been noted by our readers that their Lordships lay great stress on the fact of "*no enquiry*" having been made into the Mar succession prior to this restoration. Incredible as it may seem, the enquiry above mentioned and printed entire in the Appendix to this volume (p. xxix) *was tendered as evidence but refused by their Lordships*, without reason assigned (1) on the 3rd May 1870 (c). Yet in the course of the litigation in the Nairn Peerage Case in 1873, while the Mar Case was still pending, the Committee *received* in evidence an exact counterpart Report of enquiry made preliminary to the restoration of the Nairn title at the same time as that of Mar in 1824.

(c) See Minutes of Evidence, Mar Peerage Case, p. 497.

To anticipate the conclusions that must be arrived at by our readers on learning the facts above stated, is unnecessary.

We may here point out that before this restoration in 1824 the old Mar title had been under attaint for 109 years, yet we find (d) that Lord Chelmsford thought it a most surprising thing that it should have been supposed that Queen Mary wished to revive a dignity (which had never been legally extinguished) after an eclipse which lasted only about 130 years, or about twenty years longer than the period of the attaint (1715 to 1824).

(d) See Judgment, p. 9.

It has been attempted on the part of Lord Kellie to show, by the evidence adduced in the Nairn Peerage case, that no examination as to the constitution of the restored dignities was made when the Acts of Restoration were passed in 1824, and that, because the name of Margaret Nairne was omitted in the preamble of the bill for the restoration of that title, it follows that the limitation of the various honours (including that of Mar) then restored were treated with inexplicable carelessness, and consequently that this alleged negligence on the part of the Crown invalidates the presumption that a Parliamentary recognition

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(1) "Counsel for the Opposing Petitioner proposed to put in Evidence 'A Report by the Law Officers of the Crown of the bill for the restoration of John Francis Erskine, Esquire, to the dignity of of Earl of Mar in 1824', as shewing upon what views the Crown proceeded in assenting to that bill". Mr Fleming, Counsel for Lord Kellie, "objected to the reception of this report and submitted that it could not be used to construe the Act of Parliament." The question suggests itself why did Mr Fleming object if it had no weight against his client the heir male?

of the descent of the Mar Earldom to *heirs general* was involved in the designation of the restored peer as "*grandson and lineal representative*" of the attainted Earl, which he was *through his* MOTHER only. Now the peculiar limitation in the Nairn dignity ensued as a curious condition in the patent, under the Great Seal, dated Jan. 27, 1681, granting the honour to whichever son of the Duke of Athole, except the eldest, should marry Margaret Nairne daughter of Robert Lord Nairn. Lord William Murray accordingly married the said Margaret, and on producing the letters patent and stating his marriage with Margaret Nairne was allowed to take his seat as Lord Nairn. Therefore it was only necessary for the Law Officers of the Crown to verify the fact that the restored peer was great grandson of the Lord Nairn who had acquired the dignity in virtue of the limitation in his patent; for it has not been contended that Margaret Nairne was a peeress in her own right. The designation of William Nairne Esquire as the great grandson of the attainted William "*Lord Nairn*" involves the fact that the latter had qualified for his dignity by his marriage with Margaret Nairne, and the omission of Margarets Nairne's name from the recital proves the extreme care taken by the Law Officers of the Crown to ascertain the conditions of the descent of the honour in this as well as in all the other contemporary restorations.

Lord Kellie's advocate who cited this case to prove carelessness on the part of the "Crown" officials in not tracing to Margaret Nairne has shewn much dexterity in confusing (for his own purposes) a right constituted under peculiar limitations by a marriage with those rights which were derived in the ordinary course of descent.

This William Nairne (the restored peer) was then "great grandson and lineal representative" of both William Lord Nairn and Margaret Nairne his wife, but the honour came to him from Lord Nairn. It is therefore sheer quibbling to attempt (for Lord Kellie's ends) to draw a parallel between this peculiar case and that of Mar. In the one the statement in the preamble of the bill for restoration is incontestably correct : in the other, on Lord Kellie's hypothesis of a limitation to heirs male, it is simply nonsense. The parallel can be drawn only when we take both documents to mean what they state in plain English.

Yet we are now ordered by a Committee for Privileges to believe that the blood, derived through a woman (which by Lord Kellie's contention carried absolutely nothing) was restored by Act of Parliament in order to find a great nephew in the collateral line of an attainted peer, entitled to his dignity, whereas the act recites that he is to be restored as the "grandson and lineal representative" of the attainted Earl which he was in the *direct line through his* MOTHER.

What then is the use of any preamble or form of words whatever if they may be held by three noble Lords sitting in judgment to mean something perfectly different from that which they solemnly recite?

Once more we regret to find that the presumption of a '*must have been*" male descent is dragged in, despite of evidence, precedent, and reason, to do duty as constituting a valid title on behalf of Lord Kellie.

In the Sutherland case the fact of the Earldom having *once* in remote ages passed through a lady was held to prove the clear descent to *heirs*

general. The descent in the Mar title is here shewn to have been quite recently traced through a lady which, even granting a new "creation" in 1565, is destructive to the theory of a restriction to heirs male.

Their lordships are however in no way at a loss : the "*must have been*" expedient is resorted to as before, and Lord Kellie's claim emerges from the difficulty in all the buoyancy of its inflated *presumptions*.

A curious hitch incidental to the theory of a new "creation" occurs with reference to the title of Garioch held by Isabel Countess of Mar and restored, with Mar, to *her heir* in 1565.

Their Lordships do not presume that there was any new creation of that honour : yet the Earls of Mar have borne that title in addition to that of Mar : it was held by the late Earl, uncle of Lord Kellie's opponent, and this is perfectly consistent with the restoration by Queen Mary of the *ancient* dignities of Mar.

(*f*) See Judgment, p. 13 and 19.

Lord Redesdale alone attempting to deal with the title of Garioch says (*f*) "The opposing petitioner to whom the point is of vital importance does not "pretend to assert that it was a peerage Earldom," and again "as for the "title of Baron Garioch, there is not any evidence before the committee showing "that the territorial Lordship of Garioch has been ever recognized as a peerage "Barony." These observations of His Lordship are as superfluous as they are singular; the question was not before the House and Lords Chelmsford and Cairns have not alluded to it; Lord Kellie has not laid claim to the title, as will be seen by reference to his Peerage "cases" (1) and we can well understand the wisdom of this moderation, for the resumption of the ancient dignity of Garioch together with that of Mar by the Erskines denotes positively a restoration of the *ancient* honours of the House of Mar.

The fact is that Lord Redesdale's well known aversion to female succession leads him to attack it under ever possible form, and on every conceivable occasion. He says (*h*) "There cannot be any possible doubt of the barony of Erskine going to heirs male." If there is *no doubt* and the subject not in question before the House, why allude to this favourite limitation?

(*h*) See Judgment, p. 18.

It would seem as if his Lordship has never forgotten the day when he stood in a minority of one in his judgment on the Herries Case and does battle ever since, here, there, and everywhere, in defence of his pet theory.

A last and singular fact which we may mention in this eventful history is that the late Lord Kellie's "case" (claiming to be Earl of Mar) was laid on entirely different grounds from those which have guided their lordships' "judgment," and that in this "case" (which his son discarded to take up a new line) occurs the following memorable paragraph (*j*) which amply bears out many of the facts advanced in this book. "It appears certain "that Queen Mary granted no instrument to Lord Erskine in relation "to the dignity of Earl of Mar. Her charter granting the lands is preserved "and was recorded; and all the documents in relation to Lord Erskine's title "to the Lands are duly preserved, and it is quite impossible to suppose that it

(*j*) See Printed Case lodged by the late Lord Kellie, p. 85.

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(1) Debrett's "Peerage" (1871) enters Lord Kellie as claiming the Barony of Garioch. This is erroneous as proved by Lord Kellie's "Petition" and "Cases" lodged in the House of Lords.

" would not also have been preserved, but not a trace of such a document " has ever been discovered; and when John the second Earl of Mar of the Erskine " family appeared before the commissioners on Precedency in 1606 he made " no reference to any instrument granted by Queen Mary in relation to the " dignity; and the acts of Parliament passed on behalf of Lord Mar the " Grantee 1567, and on behalf of his son in 1587, are *wholly silent* as to any " instrument in connection with the dignity. THE NECESSARY AND INEVITABLE " CONCLUSION IS THAT NO INSTRUMENT WAS GRANTED."

Our gravity almost fails us when we learn that on this admittedly untraceable instrument, this unheard of and unfathomable investiture, the present Lord Kellie has since claimed and their Lordships have adjudged him an Earldom of Mar *supposed* to date from 1565.

The brief observations (*l*) in which the Lord Chancellor attempts to seal the fate of the ancient line of Mar have at least one merit which we have not always been able to find in the perorations of Lords Chelmsford and Redesdale. They are intelligible. We can well understand his Lordship's expressed anxiety in lending the weight of his exalted office in ratification of such judgments, especially as we are informed that they have had the benefit of perusal by his lordship. The Lord Chancellor in the exercise of his high discretion refrains from stating at length the reasons which have guided the formation of his opinion.

(*l*) See Judgment, p. 49.

We cannot however pass unnoticed the terms "suggestions and surmises" used by his Lordship to designate the mass of authentic evidence adduced by the opposing petitioner. They fall with a strange significance, applicable as they are to the case of Lord Kellie who receives an Earldom founded on a "suggestion" and limited to heirs male by a "surmise". An exquisite though perhaps unconscious irony pervades the Lord Chancellor's dictum "with regard to the ordinary descent of title created *as this title was created*".

The British House of Lords is regarded as the inner Temple of Justice which sould be sanctified by her presence though she were banished from the outer world. The time-honoured precincts of Westminster are partly dedicated to her worship and a committee of the House of Lords, whether sitting on a question of Law or Privilege, is in our eyes a tribunal whose infallibility is nearly unimpeachable as its integrity is certainly undoubted.

Thus penetrated with a due sense of these august attributes of the Committees of the Lords' House, we venture, approaching their Lordships with profound respect, to humbly ask the following questions.

I. Why have their Lordships deemed valid the resignation of the Earldom of Mar to the King James I by Alexander Stewart *who was only life-renter in right of his wife* Isabella Countess of Mar, though it has been distinctly proved that before this resignation the Earldom was in his possession only by an illegal seizure, with no grant from the Crown, and on the contrary, in spite of the ratification by King Robert III of the Earldom to the heirs of the Countess Isabel? (*See Appendix, p.* XIX.)

II. Why have their Lordships given the force of law to the usurpations commenced by James the first, although the Marian Charter of restitution

in 1565 pronounced these usurpations to be the result of "unjust "refutations and hindrances made by obstinate and partial rulers" and why have they evaded as worthless the Act of Parliament of 1587 which condemned these usurpations as being owing to the "iniquity of the time and "staying of the ordinary course of Justice", and which besides designated Robert who died in 1452 as EARL OF MAR? (*See Appendix, pp.* XXXVI, IV),

III. Why was the Decreet of Ranking in 1606 held to *rebut* the presumption of a new "creation" in the Sutherland and Herries Peerage Cases (see pp. 52, 53) but regarded as of no avail against the presumption of a new "creation" in the Mar case?

IV. Is it usual in English legal procedures for a learned judge, first at the instance of one of the parties to a suit, to *presume* the existence at one time of an instrument of "creation" when it is confessed (see Lord Chelmsford's Judgment, p. 8), that not a tittle of evidence concerning it is extant, and then in support of the hypothesis to insinuate that this *presumed* instrument has been *wilfully destroyed* by a peer long since dead, when there is no proof (direct or collateral) that he or any one else ever even heard of its existence? (See Judgment pp. 17, 18.)

V. Why is the most formal and authoritative decision in the Supreme Court of Scotland in 1626 (previous to the "Union") not merely evaded but *completely ignored* by their Lordships (*though duly in evidence before them*), whereas this judgment denounced Lord Chelmsford's "solemn adjudication of 1457" (see Judgment Mar Case p. 8) as a "*pretendit* Act "of Parliament, to be *null and of nane availl* with all that has followit "or may follow thairupon and *to fall* in consequentiam"; and whereas by that decision Robert is found to have died legally seized of the whole Earldom and designated as Earl of Mar; and whereas Robert died lawfully Earl of Mar in 1452, thus surviving by seventeen years the date at which Lord Redesdale fixes that the Earldom "lapsed to the Crown? (*See Appendix, p.* XXXI).

VI. By which clause of the articles of the "Union" in 1707 are their Lordships empowered to *blot out* from its place on the *Union Roll of Scotch Peers* the *ancient* Earldom of Mar and to substitute a new one of the same name having no place therein?

VII. By what authority do their Lordships set aside the parliamentary recognition by the restoration in 1824 of the *ancient* Earldom of Mar, grounded on the restored Earl being through his *mother* grandson and lineal representative of the attainted Earl? (*See Appendix, p.* III).

VIII. In view of the "Report" made by the Law officers of the Crown, as preliminary to the Restoration in 1824, which traced the restored Earl's pedigree and title to restoration by descent alone through his *mother (See Appendix p.* XXIX), how is it that their Lordships have ruled that this was a restoration of a *new title restricted to heirs male?*

IX. Why was this above mentioned "Report" in 1824, showing the *female* descent in the restoration of the ancient Mar Earldom *refused* as evidence in the Mar case, though the exactly similar Report of the same date was *received* by their Lordships as evidence in the Nairn case in 1873?

Although it is very generally believed that a decision rendered by a Committee of Privilege of the House of Lords has the force of an Act of Parliament as regards the case enquired into, this presumption is inaccurate, and the very fact that the Committee sits to discuss a peerage claim, under a reference from the Crown, involves a subordinate position; "the committee "advises, does not decide; the Crown is not bound by what they resolve and "can order a reconsideration of the Peerage discussion by themselves or "by others." (*See "Riddell on Scotch Peerage law" page* 649, Vol. 2.)

It is indeed fortunate that this power of reopening a matter of such importance to the position of the Scottish nobility as the tenure of the ancient Mar Peerage exists, for the gravest constitutional questions have been raised by the manner in which their Lordships' committee have arrogated to themselves an arbitrary discretion in dealing with the jurisdiction of former Scottish Sovereigns, Acts of the Scottish Parliament, and above all with the guarantees given for the stability of the Scottish nobility under the Act of "Union" in 1707.

At the time of the "Union" the English Parliament accepted the last roll of the Scottish Parliament based upon the Decreet of Ranking, as the proper and unexceptionable roll of the Scottish peers, according to their respective precedency, existing when the two independent Kingdoms became united under one Sovereign. In this form the roll of Scotch Peers has been ever since used, has been and continues to be called at the elections of the representative peers, and no other can be used until an Act of the United Kingdom has been obtained for that purpose.

Even if it be conceded that a Committee of Privilege has the power of its own initiative to fix upon a "creation" of which even the form, date, and limitation are by their own showing mere matters of conjecture, and to bestow this shadowy dignity upon Lord Kellie as collateral heir male, it by no means follows that the heir of line to the ancient Earldom of Mar, surrounded as it is by every *guarantee* of the Sovereign and laws of Scotland, and consecrated as it is by the cherished traditions of an ancient and independent realm, should acquiesce in a decision which seeks to divorce an illustrious race from its dignities and a time-honoured name from the records of the Scottish nation.

The Decreet of Ranking (1606) and the Union Roll (1707) based thereon, were by the law of Scotland, and still are, valid documents and her nobility are bound by them. If valid originally how can they become inoperative now?

If Judgments in the Scottish courts and the statutes of her Parliaments can be set aside, it is asked under what clause of the "Articles of Union" has such enormous power been conferred on a mere Court of Enquiry?

The matter is far too serious to stand where it is; for if their Lordships have power to sweep away the "Articles of Union", Royal Decrees, and Acts of Parliament of Scotland there is scarcely a peerage in the Kingdom which can be deemed safe from such arbitrary sway. Besides, if the Decreet of Ranking, the Union Roll, and the restoration of the ancient title of Mar by the British Parliament in 1824 are to be touched, this can be done only by an Act of Parliament passed for the purpose, and certainly by the terms of the "Union" no Committee of Privileges has been given jurisdiction to set it aside.

The extraordinary part played by the Crown in this eventful history is

throughout conspicuous, but the climax is reached when we reflect that their Lordships' decision has been given in the very teeth of the opinion of the Crown as tendered by the learned Attorney General for their Lordships' guidance on the 16 June 1874, in the following words (*See Speeches, House of Lords, p.* 421) : "On the part of the Crown, all I can submit to your Lordships " is this, that having regard to all the surrounding circumstances it becomes " immaterial to consider whether there was a re-creation or restoration to the " dignity of Earl of Mar in 1565, inasmuch as if it was a *re-creation* the " surrounding circumstances are sufficient to indicate the intention that the " dignity so created should descend to the heirs general and that it should not " be limited to heirs male. On the other hand if it was a restoration of the " previous dignity there is sufficient evidence in the case to show that the " previous dignity had been in like manner descendible to heirs general." (1)

In this opinion the Solicitor General for Scotland concurred.

We therefore see (to take the most moderate possible view of this extraordinary "Judgment"), that their Lordships were not compelled by some hard and fast rule, some unalterable and inflexible point of Law, to perpetuate and countenance that act of mediæval rapine (Lord Chelmsford's "*Solemn adjudication* of 1457") by which the Scottish Sovereign usurped the patrimony of the heirs of Mar. But contemning every effort of the Crown, from 1565 down to 1874, to remove, repudiate and wipe away that injustice, they have clung to it with a sustained devotion worthy of a better cause.

If this injustice of 1457 had never taken place this case would never have been on record, as there would have been not even a time in which to *presume* a new "creation."

In any case it is incontestable that the succession to the ancient dignity of Mar has never been legally interrupted, for there never has yet arisen one of the three cases in which alone peerages are held to become terminable, viz. failure of heirs, resignation to the crown by an heir, or an attaint unremoved.

Lord Kellie's opponent has been recognized as the rightful possessor of this *ancient* dignity by all the forms required to constitute a legal tenure of a Scotch peerage; the necessity for recognition of a Scotch Peer by the House of Lords having been rescinded by the House on July 25, 1862.

IF therefore it be now held that the injustice of 1457 has never been redressed by Queen Mary, and IF she must now be supposed to have, instead of carrying out her *expressed intentions,* committed a fresh wrong in granting the hereditary estates of Mar (the right to which passed through *female* succession) to John Lord Erskine to dispose of as he pleased, (see Lord Chelmsford's speech, p. 9) and further to have created for him a *new* Earldom of Mar restricted to heirs male, so as to limit the Mar title to the Erskine family whose connection with the Mars was only by the marriage of an ancestor with

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(1) It is remarkable that the "*surmises and suggestions*" (which are all Lord Cairns says were produced by Lord Kellie's opponent) should not only have convinced all authorities for centuries of the descent of the ancient Earldom of Mar through female succession up to the present day, but should have been deemed by the Law Officers of England and Scotland representing the Crown, in 1874, as *conclusive against Lord Kellie's claim.*

the *heiress of Mar*, then bare Justice demands that this old wrong of 1457 should be redressed as speedily as possible.

We beg our readers to consider for themselves the cruel manner in which this ancient wrong is brought to press on the living heir of Isabel Countess of Mar.

It is sought to deprive him of a dignity to which from early youth he was taught by the late Earlof Mar his uncle and all the members of the family to regard himself as the heir.

To this ancient dignity he succeeded as a matter of course in 1866. He complied fully with every legal formality required of a Scotch peer on succession to a title. He was in the most formal manner recognized as Earl of Mar by his late opponent the last Lord Kellie and in the assumption of his title he was supported not only by custom but by the recorded opinion of every authority for the last three centuries.

Yet by the revival and perpetuation of the injustice of the 15th century, he has been represented to a world ignorant of the circumstances as one who, having first unfairly assumed an ancient dignity, has sought by a series of "surmises and suggestions" to establish a doubtful title. Wrong is piled upon wrong, for by the revival of this old injustice, the ground on which he seeks to substantiate a claim to family estates *entailed for the benefit of the ancient title of Mar* is in a measure cut from under his feet.

It has thus been sought by a junior branch of his own family to deprive him at one blow of rank and fortune, thereby visiting an innocent man with penalties hitherto reserved for the worst of traitors to the State.

We are strengthened in our hope and belief that this injustice will be removed, as it is certainly susceptible of removal, by the fact that in 1824, among the Acts of Parliament passed for the restoration of attainted peers, was one (Lord Strafford's barony) which was distinguished by Mr Secretary Peel from the other reversals of attainders as being not an Act of grace but one of just "*reparation for an injustice*". (See "Hansard," 2nd Series, vol. II, page 1318.)

There is not a noble family in Scotland which must not tremble for its honours and fortune if the ancient misdeeds of contending factions are thus strangely given the force of law in spite of subsequent efforts of successive Sovereigns and Parliaments to redress, repudiate and obliterate them.

"Arbitrary authority of any kind is a dangerous possession, and is apt to "grow by invisible accretions in the hands of its possessors; it is only by the "jealous supervision of those for whose ultimate benefit it is conferred, and by "the wise self-restraint of those who wield it, that it can be prevented from "degenerating into a scandal, if not into an absolute instrument of "oppression."

HOUSE OF LORDS

Thursday, 25th February 1875.

MAR PEERAGE CLAIM

LORD REDESDALE in the Chair.

JUDGMENT.

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 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 apparend 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 answer 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: — "Memorandum (either for or from) ye Registeris 102 Roull "contening 25 Chart granted be King Robert the 2nd wherein there is ain Charter "granted to Wm Earl of Douglas and Mar, concesse." 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 by 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 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 words "*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 lordship 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 territoral 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 Charter 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 serviees in their favour (covered with the deeent pretext of his doing all his business and diligent care to help and to further them with his adviee 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, whieh 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 elaimed and possessed by the Crown by reason of the reversion in the eharter 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 eontroversy 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 preeept of infeftment by virtue of that retour, and, by the rule in foree 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 conduet 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 Augusst 1440 the King (being then under age) and his council, in order (as it was said) to preserve the peaee of the kingdom, entered into an agreement with Sir Robert, then Lord Erskine, under whieh 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 reeeived by him until the judgment were had, he being aeeountable 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 eastle of Kildrummy to persons named, and it seems to have beeu delivered up accordingly.

Nothing was done towards obtaining a judgment upon Lord Erskine's elaim 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 begotton of his body " (the true destination being to the heirs " to be begotton 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 thought it necessary to go fully into the history of the dignity prior to Queen Mary's charter because it appears to me that may it 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 assumed 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 June 1565, it must be borne in mind that it does not relate in any way to the dignity of Earl of Mar, but 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 comitatus 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 retoured 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 carldom, 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 carldom 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 arise, 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 in those days, called "belting." To that it was objected, that, according to the remarks of Lord Hailes upon the Sypnie 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 where 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 there 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 descensible 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 the 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 it 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 parliamentary 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 effect 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 Isabel 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 Isabel 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 1404, were produced to the commissioners. Isabel's charter of the 12th of August 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, 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 by 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 he 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 attained 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 is 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 attainded earl is an accurate description of his title, without reference to the course of descent by which it was derived. 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 by 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 independent 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 Gartney 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 Gartney's daughter Helen the Erskines claim to be his heirs on the extinction of the female representative of Donald in Isaballa, 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 dictum 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 instrument of creation or limitation of honours 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. The presumption in favour of heirs male has it "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 Willam. 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 Countess of Mar and Garioch. There cannot be a doubt that in her Garioch was only a lordship. The opposing petitioner, to whom 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 significant 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, in a charter (p. 346), and Earl of Douglas only in another charter of about the same, or perhaps rather earlier, date (p. 721). He fell at Otterburn in 1388. The period of then or twelve years is not a long one, and proof of parliamentary recognition of a peerage in those days is not of very frequent occurrence; 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 at 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 of 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 liberâ 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 "*Assertus comes de Mar*" (self-called Earl of Mar) and granted it calls 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 Gartney. 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 regaads the assumpton 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 Lords 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 documents on the Mar title, omiting to notice the Acts of Parliament at pages 591 to 597 of the evidence, in which Donald Earl of Mar in 1283 is mentioned, 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 obtained 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 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 a later period. That Gordon's assumption of the title was of right was proved by a continued and uninterrupted succession of heirs in 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 Dougla'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 wel 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 by 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 go to 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 recognized 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 do 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 sometime 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 the 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 addressed 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, Viscount Fenton, 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

APPENDIX.

Authenticated copy of ORIGINAL CHARTER of MARY QUEEN OF SCOTS to John Lord Erskine. — dated 23rd June 1565.

(See "Minutes of Evidence" Mar Peerage Case, pp. 122-124.)

Maria Dei gracia regina Scotorum omnibus probis hominibus totius terre sue clericis et laicis salutem Seiatis quia nobis post nostram letigimam et perfectam etatem viginti vnius annorum completam intellectum est q quondam Issobella Dowglas comitissa de Mar hereditaria proprietaria pro tempore comitatus de Mar ac dominii et regilitatis de Gareach infeofamentum confeeit quondam Alexandro Stewart in libero maritagio inter illum et ipsam contrahen de totis et integris dietis comitatu dominio et regalitate tenen ipsis eorumq alteri diutius viuenti et heredibus inter ipsos legitime proerean quibus defieientibus heredibus diete Isobelle quibuseunq de nris nobilissimis progenitoribus optime memorie qui confirmationem desuper coneesserunt prout in dietis infeofamento et confirmatione respectiue late continetur et q postea dieti Alexander et Issobella absq legitimis heredibus inter ipsos proereatis obierunt quibus sie deeidentibus quondam Robertus dominus Erskin per debitum ordinem legitimus et propinquior heres diete quondam Issobelle de pretatis comitatu dominio et regalitate retornatus fuit sie q dileetus noster eonsanguineus Johannes nune dominus Erskin qui retornatus est legitimus et propinquior heres dieto quondam Roberto domino Erskin heredi diete quondam Issobelle indubitatum hereditarium ius diet *comitatus* dominii et regalitatis habet non obstante q sui predeeessores ab eisdem detenti erant et a possessione earundem partim oeeasione iurgiornm pro tempore oeeuren et partim iniusta refutatione et impedimento per obstinatos et partiales gubernatores et offieiarios fact rationabiles supplicationes et petitiones per dieti nri eonsanguinei predeeessores faet refutantes ipsis frequens et intente introitum ad hereditariam possessionem earundem petem et desideran *Quibus premiss per nos nune diligenter eonsideratis et auisatis nos non solum ob eadem et ob bonum fidele et gratuitum seruicium tam nostris predeeessoribus per dictum nostrum eonsanguineum et suos predecessores factum presertim per dicti nri consanguinei quonda patrem et seipsum nris quondam eharissimis patri et matri nobilissime memorie ae per ipsum nobis a deeessu dicte quondam nre eharissime matris sed etiam* CONSCIENCIA MOTE VT NOBIS DECET LEGITIMOS HEREDES AD SUAS IUSTAS HEREDITATES RESTITUERE DEDIMUS ET CONCESSIMUS *ac tenore pntis carte nre damus et concedimus dicto nro consanguineo* Johanni domino Erskin suis heredibus et assignatis *hereditarie* totum et integrum dict comitatum de Mar *eontinen terras subsequentes viz' Strathdone Bramar Crowmar et Strathde cum omnibus et singulis aliis terris eiusdem ex antiquo eidem pertinen neenon omnes et singulas terras dicti dominii et regalitatis de Gareach cum omnibus et singulis eastris turribus fortaliciis manieribus siluis molendinis piscariis partibus pediculis feudifirme firmis anexis eonexis tenentibus tenan libere tenen seruieiis aduocatione donatione et iure patronatus eceliarum eapellaniarum et beneficiorum ac pertinen quibuscumq' diet eomitatus dominii et regalitatis respectiue ipsis ex antiquo aut eorum alieui respectiue pertinen jacen infra vieeeomitatum nostrum de Abirdene. Insuper pro bono fideli et gratuito seruicio nobis et predecessoribus nris per dictum uostrum eonsanguineum et suos predecessores vt premissu est appens damus eoncedimus et disponimus dicto nro eonsanguineo suis heredibus et assignatis totum et integrum predietum comitatum dominiu et regalitatem respectiue* CUM *terris superius speeifieat* dieti comitatus ac CUM omnibus aliis terris eastris

turribus fortaliciis manieribus siluis molendinis piscariis partibus pendieulis feudifirme firmis annexis connexis lie outsettis tenen tenan liberetenen seruiciis aduocatione donatione et iure patronatus eeeliarum capellaniarnm et beneficioru ac pertinentiis quibuscumq dict eomitatus dominii et regalitatis respectiue ac totum ius clameum interesse titnlum et iuris clameum proprietatem et possessionem tam petitorium q possessorium que et quas nos nostri predecessores aut successores habuimus habemus seu habere vel clamare poterimus aut poterint ad easdem aut aliquam earudem parte aut ad firmas profieua et deuoria earundem ratione eschaete forisfacture reeognitionis vltimi heredis totius aut maioris partis alienationis purpresture disclamationis bastardie warde seu nointroitus ex annis et terminis preteritis aut ob quamcunq aliam actionem seu causam retroactam renuneiando quiete clamando et exonerando eisdem dicto nostro consanguineo suis heredibus et assignatis cum paeto de non petendo ac cum supplemento oim defeetuu tam non nominat q nominat quos tanq pro expressis in charta nra habere volumus et similiter volumus et concedimus ac pro nobis et successoribus nris deeernimus et ordinamus q vnica sasina nune per dietum nostrum eonsanguineum et per suos heredes omni tempore affuturo apud *maneriem de Megwie* intra dicta dictum comitatum et apud eastrum de Dunnydure intra dictum dominiu capendia stabit et sufficiens erit sasina pro dietis eomitatu dominio et regalitate respeetine et omnibus terris earundem tam specialiter p generaliter superius specifieatis cum omnibus eastris turribus fortaliciis manieribus siluis molendinis piscariis partibus pendieulis fendifirme firmis annexis connexis tenen tenan libere tenen seruieiis aduocatione donatione et iure patronatus eccliarum eapellaniarum et beneficiorum ae pertinentiis quibuscunq dict comitatus dominii et regalitatis respectiue absq aliqua alia speali seu particulari sasina desuper capien non obstante q eedem non jacent insimul contigue super quo per presentes dispensamus *Tenendum et hebendum totum et integrum dictum comitatum continen dictas terras de Strathdone Bramar Crowmar et Strathde cum omnibus et singulis aliis terris eiusdem ex antiquo eidem pertinen necnon omnes et singulas terras dict dominii et regalitatis de Gareach* cum omnibus et singulis castris turribus fortaliciis maneriebus siluis molendinis piscariis partibus pendieulis fendifirme firmis annexis eonnexis tenen tenan liberetenen seruitiis aduoeatione donatione et iure patronatus eecliarum capellaniarum ac beneficiorum et pertinen quibuscunq dict eomitatus dominii et regalitatis respectine ex antiquo ipsis aut eorum alieui respectiue pertinen *prefato nro consanguineo Johanni domino Erskin suis heredibus et assignatis de nobis et successoribus nris in libero comitatu feodo et hereditate imperpetuum per omnes rectas metas suas antiquas et diuisas prout jacent in longitudine et latitudine in domibus edificiis* boscis planis moris marresiis viis semitis aquis stagniis riuulis patris pascuis et pasturis molendinis multuris et eorum sequelis aucupationibus venationibus piseationibus petariis tnrbariis earbonariis lignis lapicidiis lapide et ealce febrilibus brasinis brueriis et genestis cum curiis et carum exitibus herezeldis bludewitis et mnliernm marchetis cum furca fossa sok sak thole theme infangtheif outfangtheif pitt et gallous cum liberis forestis et potestate forestatns curias tenendi et amerchiamenta earundem leuandi ac cnm plena potestate et liberate regalitatis in dicto dominio de Gareach et priuilegiis eidem speetan ac eum omnibus aliis et singulis libertatibus comoditatibus proficuis et asiamentis ae iustis suis pertinentiis quibuseunq tam non nominat q nominat tam sub terra q snpra terram procul et prope ad predict comitatum dominiu et regalitatem cum castris turribus fortaliciis maneriebus molendinis piscariis partibus pendiculis feudifirme et firmis annexis connexis tenen tenandriis liberetenen seruiciis aduoeatione donatione et iure patronatus eccliarum eapellaniarum ac beneficiorum earund et snis pertinentiis spectantibus sen inste spectare valen quomodolibet in futurum libere quiete plenarie integre honorifiee bene et in pace absq reuoeatione aut eontradictione quaeunq Reddendo inte anuatim dictus noster consanguineus sui heredes et assignati nobis et successoribus nris jura et seruicia nobis et predecessoribus nris de prefatis comitatn dominio et regalitate respeetiue cum pertinentiis prius debita et consueta *In cuius rei testimonium huic pnti carte nri magnu sigillum nostrum apponi precepimus* Testibus reuerendissimo in Xpo patre Johanne archiepo Sanctiandree t

dilectis nris consanguineis Jacobo comite de Mortoun domino Calkeith cancellario nostro Wilelmo comite mariscalli domino Keith dilectis nris familiaribus consiliariis Richardo Maitland de Lethingtoun equite aurato nri secreti sigilli custode magistro Jacobo Makgill de Rankelour Nethir nrorum rotulorum registri ac consilii clerico et Johanne Bellenden de Auchnoule milite nre iusticiarie clerico *Apud Perth vicesimotercio die mensis Junii anno Domini millesimo quingentesimo sexagesimo quinto et regni nri vicesimotercio.*

(L.S.)

(Translation of this will be seen on the last pages of this Appendix.)

An ACT for the Restoration of John Francis Erskine of Mar, to the Dignity and Title of Earl of Mar.

(*17th June* 1824. — *Anno* 5° *Georgij 4th, N°* 249).

Whereas, by an Act passed in the first year of the reign of His Majesty King George the First, intituled "An Act to attaint John, Earl of Mar, William Murray, Esquire, "commonly called Marquess of Tullibardine, James, Earl of Linlithgow, and James "Drummond, Esquire, commonly called Lord Drummond, of High Treason," it was enacted, That from and after the 19th day of January, in the year of our Lord 1715, the said John, Earl of Mar, should stand and be convicted and attainted of High Treason.

And whereas John Francis Erskine, Esquire of Mar, is the *grandson* (1) *and lineal representative* of the said John, Earl of Mar; And whereas the said John Francis Erskine hath upon all occacions conducted himself dutifully and loally towards your Majesty and your Royal Father; May it therefore please your Majesty that it may be enacted, and be it enacted, by the King's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same; That the said John Francis Erskine of Mar, and all other persons who would be entitled after the said John Francis Erskine, to succeed to the Honors, Dignities, and Titles of Earl of Mar, in case the said Act had not been made, be, and are hereby, restored to the Honors, Dignities, and Titles of Earl of Ear, with all rights, privileges, and pre-eminences thereunto belonging, as fully, amply, and honourably as if the said Act had never been made, notwithstanding the said Act, or corruption of blood thereupon ensuing, or of any statute, record, conviction, impediment, judgment, cause, or matter in any way to the contrary: Provided always, and be it enacted, that nothing in this Act contained shall enable, or be construed to enable, the said John Francis Erskine, or any othher of the persons hereby restored in blood, to claim, by virtue of this Act, any real or personal property, or any other right from which he and they is and are now barred or excluded by the said attainder.

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(1) He was grandson and lineal representative through his mother, the only surviving child of the attainted Earl.

ACT of PARLIAMENT, in favour of JOHN EARL OF MAR, dated 29th July 1587.

ANENT [*concerning*] the Supplication given in and presented to our Sovereign Lord and three Estates in this present Parliament, by John, Earl of Mar. Lord Erskin, &c., Making mention that *whereas umquhile* [*the deceased* or *late*] Dame *Issobell Dowglas, countess of Mar* was *heritably* infeft [at] the *the time of her decease*, in All and Whole the Earldom of Mar, Lordship and Regality of Gareauch [*Garioch*], holden immediately of our Sovereign Lord's predecessors, as her Infeftment at more length purports; likeas after her decease, umquhile Robert, Earl of Mar, Lord Erskin, the said John Earl of Mar's predecessor, was *lawfully served and retoured heir to the said umquhile Issobel*, of the said Earldom of Mar, Lordship and Regality of Gareauche, to whom likewise umquhile John, Earl of Mar, the said complainers father, was *lawfully retoured heir*, so next he as heir to his said umquhile father, who was heir to the said umquhile Robert, Earl of Mar, Lord Erskin, his predecessor, and *so heir by progress to the said umquhile Dame Isobell Douglas, Countess of Mar*, has the *undoubted heritable right to the said Earldom of Mar, and Lordship and Regality of Gareauch*, albeit his predecessors have been *wrongously debarred* from the possession of the said lands, Earldom, and Lordship, partly by the occasion of the troubles occurring and intervening, and partly *by the iniquity of* [*the*] *time*, and *staying of the ordinary course of justice to them*, by the *partial dealing of such persons* as had the *government* of our Sovereign Lords predecessor, and realm, and their officers for the time, *notwithstanding* the humble supplications and frequent interpellations made by the said John Earl of Mar's predecessors, as well in Parliament as in Council, for the possession of the said lands, as shall be sufficiently verified by authentic writs and evidents: The which being advisedly considered by our Sovereign Lord's dearest mother, after her perfect age, *and Her Highness moved of conscience*, as became her princely, duty to RESTORE *the lawful heirs unto their just heritage* and possession, after mature deliberation, diligent trial and inquisition taken of the premises, gave, granted, and disponed, heritably, to umquhile John, Earl of Mar, Lord Erskin, the said complainer's father, the said Earldom of Mar, with the lands of the Lordship and regalitaty of Gareauche, with their pertinents, annexis, connexis, and others, speeified in the charter granted by His Highness' dearest mother under the Great Seal, to him thereupon: And seeing, for the said Earl's better security, and that His Highness' dearest mother's *good intention* may take the better effect toward the possession of the said lands, *necessary it is that he be served heir to his predecessors* who died last vest and seised in the said Earldom, Lordship and Regality, and that a sufficient right and action be *established in his person, and his heirs*, for recovering of the said lands and possession thereof, *notwithstauding the diuturnity and length of time* that has intervened; considering that by the laws and custom of the realm, the RIGHT OF BLOOD NOR YET ANY HERITABLE TITLE, falls under prescription, nor is taken away by whatsoever length of time or lack of possession; and therefore desiring His Majesty and Estates, in respect of the premises, to take trial of the rights and infeftments which the said umquhile Dame Issobell Dowglas, Countess of Mar, had of the said Earldom of Mar, Lordship and Regality of Gareauche; and suchlike to take trial if the said umquhile Robert, Earl of Mar, Lord Erskin, his predecessor, was *duly served and retoured heir to the said umquhile Dame Issobell*, of the said Earldom, Regality and Lordship, and that umquhile John, Earl of Mar, the complainer's father, was served and retoured heir to the said umquhile Robert, Earl of Mar; and that His Highness' dearest mother, having *consideration* of the said *rights*, gave

and disponed the said Earldom of Mar, Lordship and Regality of Gareauche, to the said umquhile John, Earl of Mar, his father; the *which rights* being tried by His Majesty and Estates of Parliament to be *lawful, valid, and sufficient*, that the same might be ratified, approven, and confirmed in this present Parliament, and the same declared to have as great strength, force, and effect in the *said complainer's person*, as the same had or might have in the *person* of the said *umquhile Dame Issobell Dowglas*, or umquhile Robert, Earl of Mar Lord Erskin, HER HEIR, and the said Earl of Mar, complainer, to have full right thereby, as *heir by progress* to his said predecessors, to All and Whole the said lands wherein the said *umquhile Dame Issobell Dowglas, Countess of Mar*, or umquhile Robert, Earl of Mar, *her heir*, died vest, seised, and retoured, notwithstanding the length and diuturnity of time which has intervened sinee then, during the which space, he and his predecessors, by *the iniquity of the time*, have been wrongously debarred from the said lands and possession thereof; and to declare by an Act of Parliament that his right to the said Earldom, Lordship and Regality, and action for recovering thereof, and possession of the same, have not nor shall not, prescribe by the course of the said time, but that the said Earl and his heirs have, and shall have, as good right, interest, title, and action, in and to the said Earldom, Lordship and Regality, as if he were immediate heir to the said Dame Issobell Dowglass, or to umquhile Robert, Earl of Mar, Lord Erskin, *her heir* or had pursued for the same within year and day after their decease, notwithstanding any exception of prescription or lack of possession that may be alleged in the contrary; without prejudice always of all other lawful defences competent to the parties having interest; as at more lengt is contained in the said Supplication : Whieh being heard, seen, and considered by His Highness and Estates of Parliament, and after diligent trial and consideration had by them of the rights and infeftments whieh the said umquhile Dame Issobell Dowglas had of the said Earldom of Mar, Lordship and Regality of Gareauche, and of the retours granted to the said umquhile Robert Earl of Mar, and John, Earl of Mar, of the same *successive*, and infeftments granted to the said Earl's father of the same Earldom and Lordship, and of all others writs above written, mentioned in the said Supplication, and produced by the said complainer for verifying of the contents thereof; and they therewith being ripely advised, our said Sovereign Lord and Three Estates of Parliament, finding the rights above specified to be lawful, valid, and sufficient to prove and verify the points of the said Supplieation, Ratify, Approve, and Confirm the same, and decern and declare the foresaid rights to have *as great force strenght and effect*, in the *person* of the said John, Earl of Mar as the same had had might have in the *person* of the *said umquhile Dame Issobell Dowglas*, or umquhile Robert, Earl of Mar, *Lord Erskin, her heir* and he to have full right thereby, as *heir by progress to his said predecessors*, to All and Whole the said lands wherein the said umquhile Dame Issobell Dowglas, Countess, or umquhile Robert, Earl of Mar, her heir, died vest, seised, and retoured, notwithstanding the length and diuturnity of time which has intervened sinee then, during the which space the said Earl and his predeeessors, by the iniquity of the time, have been wrongously debarred from the said lands and possession thereof : And also decern and declare that the said complainer's right to the said Earldom, Lordship and Regality, and action for recovering thereof and possession of the same, have not, nor shall not, prescribe by the course of the said time, but that he and his heirs have, and shall have, as good right, interest, title, and aetion in and so the said Earldom, Lordship and Regality, *as if the said Earl were immediate heir* to the said Dame Issobell Dowglas, or to umquhile Robert, Earl of Mar, Lord Erskin, *her heir*, or had pursued for the same within year and day after their decease, notwithstanding any exception of preseription, or lack of possession, that may be alleged in the eontrary, — without prejudice always of all other lawful defences competent to the parties having interest.

(*See "Minutes of Evidence," Mar Case, pp.* 436 *to* 438.)

RETOUR of the GENERAL SERVICE of JOHN, LORD ERSKINE, as nearest and lawful Heir of ROBERT, EARL of MAR and GARIOCH, and LORD ERSKINE, — dated 5th May 1565 (1).

Hec inquisitio facta fuit in pretorio Burgi de Edinburt, coram honorabilibus viris magistris Johanne Miorebank, Alexandro Sym et Edmundo Hay, vicecomitibus vicecomitatuum de Abirdene Striveling et Clakmanan, in hac parte, per commissionem supreme dne nre regine, cum certis aliis suis collegis, aut vllis eorum duobus, coiunctim spealiter constitut, quinto die mensis Maij, anno Dni millmo quigentesimo sexagesimo quinto, per hos subscriptos, viz, Dauiden Craufurdie comitem, Patricium dum Lindsay de Byris, Jacobum Dowglas de Drulangrig, militem, Jacobum Striveling de Keir, Johannem Grant de Frewchy, Johannem Hume de Blacader, Jacobum Cokburn de Skirling, Simonem Prestoun de eodem, Johannem Somervel de Cambusnethan, Laurentium Mersar de Meklehor, Willm Levingstoun de Kilsyt, Alexandrum Bruce de Airth, Johannem Blacader de Tullyallen, Carolum Murray de Cokpule, et Robertum Drumond de Carnok : Qui jurati dicunt, q quondam Robertus, comes de Mar et Garreauch, ac dns Erskin, auus quond Alexandri dni Erskin, proaui Johanis nunc dni Erskin, latoris pntium, obiit ad paeem et fidem quond supremi dni nri, regis Jacobi seeundi, Dei gra, exeellentissime memorie; et q dictus Johannes, nunc dns Erskin, est legitimus et propinquior heres dicti quond Roberti comitis et dni predict. In cuius rei testimoniu, sigilla quorund eorum qui dicte inquisitioni intererant, sub inclusione sigillorum dictorum vicecomitum, vnacum breuibus regineis intus clausis, pntibus sunt appensa. — Testantibus etiam Dauidis Lawte, notarii publici, ac scribe curie, in premiss signo et chyrographo.

Ita est, Dauid Lawte, notarius pubc, as scriba curie predict, testan meis signo et chirographo.

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(1) From Mar Charter Chest. — Minutes of Evidence p. 121. No 120.

EXTRACT RETOUR of the GENERAL SERVICE of JOHN, EARL of MAR, as nearest and lawfull Heir of ISABELLA DOUGLAS, COUNTESS of MAR, — dated 20th March 1588 (1).

HÆC INQUISITIO facta fuit in pretorio Burgi de Edinburgh, vigesimo die mensis Martii Anno Domini millesimo quingentesimo octuagesimo octavo, virtute dispensationis Dominorum Consilii desuper concesse, Corum honorabilibus viris Joanne Fergussoun et Roberto Stewart, clavigeris ordinariis vicecomitibus in hac parte Vicecomitatus de Abirdene, per comissionem S.D.N. Regis sub testimonio sui magni sigilii datam, specialiter constitutis, per hos nobiles et honoratos viros subcriptos, viz. Willielmum Comitem de Mortoun Dnm de Dalkeith, &c., Alexandrum Dnm Home, Thomam Magrum de Glammyss, Scotic Thesaurarium, Jacobum Comendatarium de Melros, Adamum Commendatarium de Camhuskynnet, Walterum Priorem de Blantyre, Secreti Sigilli Custodem, Jacobum Serymgeour de Dudope, Constabularium de Dundie. Joannem Hadden de Glenhageis, Dnm Jacobum Home de Coldinknowis, militem, Jacobum Steytoun de Tulliebodie, Alexandrum Home de Northberwik, Andream Wode de Largo, Willielmum Scott de Abbottishall, Joannem Levingstoun, Feodatarium de Donypace, et Jacobum Lumisdem de Airdrie : QUI JURATI dicunt, Quod quondam Domina Issobella Dowglas, Comitissa de Mar, consanguinea nobilis et potentis domini, Joannis nunc Comitis de Mar, Domini Erskyn et Alloway &c., Obiit ad fidem et pacem S.D.N. quondam Jacobi Scotorum Regis, nominis primi; ET QUOD dictus Joannes nunc Comes de Mar, est legitimus et propiquior heres dicte quondam Isobelle Comitisse de Mar, respectu habito quod ipsa erat neptis quondam Donaldi Comitis de Mar eius avi, fractis quond. Dominc Helene de Mar, proavie quondam Roberti Comitis de Mar, avi quondam Alexandri Dni Erskyn, qui erat proavus quondam Joannis Comitis de Mar qui ultime decessit, patris dicti Joannis nunc Comitis de Mar. IN CUIUS rei testimonium, Sigilla quorundam eorum qui dicte inquisitioni intererant faciende, sub sigillis dictorum Vicecomitum in hac parte antedict unacum brevi regio intus clauso, pntibus sunt appensa, die, mense, et loco prescriptis; Sic subscribitur ita est Ricardus Cass, notarius publicus ac curie antedicte scriba,—testantibus meis signo et subscriptione manualibus.

Hæc est vera copia principalis retornatus super premiff, in Cancellaria S.D.N. Regis remanen, copiat et collationat per me Dnm Joannem Scott de Scottistarvet, militem, unum Dnorum Secreti Consilii, ac eiusdem Cancellarie Directorem, sub meis signo et subscriptione manualibus.

Jo. SCOTT.

Ferre gratis.

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(1) From the Mar Chester Chest, 8th June 1869. See Minutes of Evidence, pp. 519, 520.

EXTRACT DECREET of RANKING of the NOBILITY of SCOTLAND, dated 5th March 1606, and registered 6th April 1841.

At Edinburgh, the 6th day of April 1841 years—In presence of the Lords of Council and Session — Compeared JOHN HOPE, Esq., Advocate, as Procurator for ALEXANDER MACDONALD, Principal Keeper of the Register of Deeds, &c., ingiver of the Extract Decreit underwritten, desiring that the same might be registered in their Lordships' Books as a Probative Writ, conform to Act of Parliament anent the Registration of Probative Writs, which desire the said Lords found reasonable, and ordained the same to be done accordingly, whereof the tenor follows, viz. : —

At Edinburg the fyft day of March the yeere of God Jajvjc and sax yeeres, anent our Soverane Lords Letters direct Makand mentionn fforsameekle and his Majestie and Lords of Secreit Counsell, Considering and remembering the great contentiouns and differences whilks manie tymes occured and fell out among the Nobilitie of this Kingdome of Scotland anent thair precedencie and prioritie in ranking and voiting in Parliaments, generall Counsells, and how that this thair contentioun lay ever over vnremembred or agitat but at the verie instant of thair meetings at his Majestie's Parliaments and Conventiouns, at whilk tyme thair wes greater mater of impashement offered to the estaits to compone thair differences then to intreat upon the principall subject for whilk thay wer assembled, His Majestie and the said Lords thairfoir being cairfull to have this contentioun removed, and the controverseis and eyleists which arise among the Nobilitie for that caus sattled and pacified, whairthrow the Nobilitie and estaits being fred and releeved of suche mater of contentioun, thay may in peace love and amitie concurre togeter and deliberat upon such maters as sall be intreated and motioned in Parliament hereafter, *His Majestie for this effect* hes givin his Hienesse Commissioun *vnder the great Seale*, to a number of his Hienisse Nobilitie and Counsell who ar most indifferent and na wayes suspect of partialitie, To conveene and call before thame the whole Noblemen of this Kingdome, and *according to thair productiouns and verificatioun of thair antiquities*, to seet down everie man's ranke and place as in the Commissioun foresaid past vnder the great Seale at lenth is conteanit, and anent the charge givijn to Ludouik Duke of Lennox, Johne Marqueis of Hammiltone, George erle of Huntlie, Patrick erle of Orkney, George erle of Caithnesse, Alexander erle of Sutherland, James erle of Murrey, Francis Erle of Errol, Georhe erle Marshall, David erle of Crawfurd, James erle of Atholl, John erle of Mohtrose, erle of Perth, erle of Menteith, Androw erle of Rothesse, Alexander erle of Dumfermling, Archibald erle of Argyle, James erle of Glencarne, Johne erle of Cassils, erle of Elingtoun, William erle of Angus, William erle of Mortoun, Johne erle of Marr, Alexander erle of Linlithgow, Countesse of Buchan, erle of Wyntoun, Alexander erle of Home; Simon Lord Fraser of Lovatt, Edward Lord Bruce of Kinlosse, Johne Lord Forbes, Patrick Lord Glammis, James Lord Ogilvie, Alexander Lord of Spynie, Patrick Lord Gray Lawrence Lord Oliphant, Johne Lord Murray of Tullibardin, David Lord of Skoone, James Lord Lindesay, Lord Sinclair, James Lord of Balmerinoch, Patrick Lord Lundores, James Lord Colvill of Culrose, John Lord Fleming, Alexander Lord Elphingstoun, Andro Lord Stewart of Ochiltrie, Thomas Lord Boyd, Allane Lord Cathcairt,

Hew Lord of Loudoun, Robert Lord Sempill, Claud Lord of Paisley, James Lord Abercone, John Lord Maxwell, James Lord Hereis, Robert Lord Creichtoun of Sanquhare, James Lord Carlile, Robert Lord Roxburgh, Lord Rosse, James Lord Hay of Yester, Marke Lord of Newbottle, James Lord Torphichen, James Lord Borthwick, Lord Thirlestane, Thomas Lord Dirltoun, and Lord Saltoun, and the tutors and curatours of the said Dukes Marqueissis erlis and Lords, if thay any have, To have compeerit before the saids Lords Commissioners at a certane day by gane, and to have brought and produceit with thame suche writts evidents documents and testimonies as they have or can use for acclaming ef that ranke and place of precedencie and prioritie challengit be thame befoir vthers, To have been seene and considerit be the saids Lords Commissioners, and to have heard and seene thair rankes and places of prioritie and precedentie appointit and sett down to thame according to the antiquitie of thair productiouns, and that whilk sould be verified in thair presence, and thay and everie ane of them decernit to take that place whilk sould be appointit and prescryved vnto thane by the saids Lords Commissioners as said is, certifeing all suche persouns as sould not compeere be themselves or thair procuratours in thair names, That the saids Lords Commissioners would goe fordward in setting down everie man's ranke according to that which sould be verified as said is, and sould procced according to the speciall instructions given be his Majestie to the saids Lords Commissioners for this purpose, and that the determinatioun of the saids Lords Commissioners sould stand in full force and effect, ay and whill ane decreit before the Ordinar Judge be recoverit and obteanit in the contrair, Lyke as at mair lenth is conteanit in the said Letters executiouns and indorsations thairof; Quhilks being callit, and diverse termes and dyets being kecpit to this effect, and the said Alexander erle of Dunfermling, Francis erle of Erroll, George erle of Mairshall, and Alexander erle of Linlithgow, compeerand personallie, and the said Alexander erle of Sutherland compeerand be Mr Robert Learmouth his procuratour, *The said Johne erle of Marr compeerand be Mr Thomas Hoip his procuratour*, The said David erle of Crawfurd compeerand be Lawrence Scot his procuratour, The said Andrew erle of Rothesse compeerand be Mr David Aytton his procuratour, The said William erle of Mortoun, compeerand be the said Mr Robert Learmonth his procuratour, The said erle of Menteith compeerand be Grahame is procuratour, The said Hew erle of Eglintoun compeerand be Johne Bell his procuratour, The said Johne erle of Cassils compeerand be Robert Hammiltoun and Gilbert Rosse, And the saids Andrew Lord Stewart of Vchiltrie, James Lord of Balmerinoch, and James Lord Abercorne compeerand personally, The said James Lord Lindesay of the Byres compeerand be the said Mr Robert Learmonth his procuratour, The said Johne Lord Forbesse compeerand be James Fogo his procuratour, The said Patrick Lord Glammis compeerand be Mr Johne Schairp younger his procuratour, The said Patrick Lord Gray Compeerand be Patrick Whytlaw of Newgrange his procuratour, The said Johne Lord Saltoun compeerand be Mr William Livingstoun his procuratour, The said Allane Lord Cathcart compeerand be George Angus his procuratour, The said James Lord Carlile compeerand be the said Robert Hammiltoun his procuratour, The said Robert Lord Sanquhair compeerand be Crichtoun of Lugtoun his procuratour, The said James Lord Hay of Yester compeerand be Mr George Butler his procuratour, The said Robert Lord Sempill compeerand be the said Johne Bell his procuratour, The saids Alexander Lord Elphingstoun compeerand be the said James Fogo his procuratour, The said James Lord Torphichen compeerand be the said Mr Robert Learmonth his procuratour, The said Lord Thirlestane compeerand be Thomas Fleeming procuratour, The said Alexander Lord of Spynie compeerand be the said Mr Robert Learmouth his procuratour; and the haill remanent Lords particularlie above written being of tymes called and not compeerand, diverse termes and dyets being assigned to thame for this effect, — *The writts evidents testimonies and documents produced be the saids persouns compeerand, whairby thay and everie one of thame acclamed thair prioritie and precedencie befoir vthers being diverse tymes, and at dyvers dyets, verie diligently and exactlie sichted tryed examinat and considerit be the*

saids Lords Commissioners, and the saids Lords being thairwith, as alsua with the ranks and places of such erles and Lords as wer promoved and created in His Majesties ownc tyme, weil and throughe advised, — The saids Lords Commissioners hes deeernit deereitti appointit and sett doun, and be thir presents deeernis deereittis appoints and settis doun the rankes and places following, to the haill Noblemen of this Kingdome, To be bruiked keepeed and possesed be thame in all Parliamentis, generall Counsells, and publiet Meetings hereafter, — In the first, The saids Lords Commissioners Decerns and Ordains the Duke of Lennox to have the first plaee, the Marqueis of Hammiltoun the second plaee, and the Marqueis of Huntlie the third place; Becaus by the custome invoilablie observed in all Kingdoms, the plaee of honour and dignitie among nobilitie is first in the persons of Dukes, nixt Marqueissis, and then in the persons of Erles and Lords; and nixt vnto thame, The saids Lords Commissioners Deeerns and Ordainis the Erlis abovewritten, To have, bruike and possesse, thair rankes and plaees, aecording as thay ar heere written ranked and sett doun, in order folloving, vizt., Angus, Crawfurd, Errol, Mairshall, Sutherland, MAR, Rothesse, Mortoun, Menteith, Eglintoun, Montrois, Cassills, Caithness, Glencairne, Buchane, Murrey, Orkney, Atholl, Wyntoun, Linlithgow, Home, Perth, Dumfermling, and Dumbar; and sielyke the saids Lords Commissioners Deeerns and Ordains the Lords particularlie above written, To have, bruike and possesse, thair rankes and places according as thay are heere written ranked and sett doun, in order folloving, viz., Lindesay, Forbes, Glammis, Fleeming, Saltoun, Gray, Vehiltrie, Catheart, Carlile, Sanquhair, Yester, Sempill, Sinclair, Hereis, Elphingstoun, Maxwell, Oliphant, Lovat, Ogilvie, Borthuiek, Rosse, Boyd, Torphichen, Paisley, Newbottle, Thirlestane, Spynie, Roxburgh, Lundores, Lowdoun, Dirlton, Kinlosse, Abireorne, Balmerinoeh, Murray of Tullibardin, Colvill of Culrosse, and Skoone; and Decerns and Ordains all the Erles and Lords particularlie abovewrittin To Keepe, bruike and possesse, thair rankes and plaees in tyme comming, aecording to the ordour and rankis abovewrittin, now appointit prescryvit and sett doun vnto thame, And to make na questioun trouble nor pley in this matter to ani appointed to have place and rank before thame in this matter foresaid; *But prejudice alwayes to suche person or persons as sall find thameselves interest and prejudgit be thair present ranking, to have recourse to the ordinar remeid of law, be reductioun before the Lords of Counsall and Sessioun of this present decreit*, for *recoverie of thair owne dew place and rankes, be productioun of mair ancient and authentick rights nor hes beene used in the contair of this processe*, summoning thairto all suehe persouns as thay sall thinke wrangouslie rankit and placit before thame, and in this meane tyme this present decreit and determinatioun to stand in full force strenth and effect, ay and whill the pairtie interest and prejudgit obteane lawfullie a deereit before the said Lords of Counsall and Sessioun as said is; and ordanis thir presents to be insert and registrat in the bookes of Privie Counsell, and an authentiek extraet heerof to be delyverit to the Clerk of Register, and another extraet to by delyverit to the Lyoun Herauld, to be keeped be thame for thair better knowledge and informatioun of everie mans ranke and place, when the oecasion of thair ranking sall be presented. *Extractum de Libris Actorum Secreti Consilij S.D.N. Regis, per me Jacobum Prymrois, clericum ejusdem sub meis signo et subscriptione manualibus.*

(Signed) Jacobus Prymrois.

Extraeted from the Records in Her Majesty's General Register House, upon this and the thirteen preceding pages of stamped paper, by me, Deputy Keeper of these Records, having commission for that effect from the Lord Clerk Register.

Geo. B. Robertson.

Cpd. G. B. R.

(From Minutes of Evidence, p. 439.*)*

House of Lords, — 3rd May 1870.

(From Minutes of Evidence, pp. 416, 417.)

Then GEORGE BROWN ROBERTSON, Esquire, was again called in, and further examined as follows:

(*Sir Roundell Palmer.*) I think among the Documents which you put in there is one printed at Page 63 of the Evidence, which is an Entry of a Sitting of the Privy Council on the 28th of July 1565?

Yes.

Will you take the printed Evidence in your Hand. Do you see that there are some Words added to the Name of "Joannes Dominus Erskin" "Ye last tyme he sets as lord"?

Yes, I have here the original Sederunt containing those Words *(producing a Book)*.

Are those Words which I have read Part of the original Entry?

No.

Do they appear to have been added in the same or in a different Handwriting?

In a different Handwriting, at a much later Period.

Are you able from your Experience in such Writings to state to their Lordships at what Date or about what Date they were written?

I should say that those Words are at least a Century later than the Record.

Will you do me the Favour also to look at the Entry on the 1st of August in the same Year?

I have it here.

After the Name of "Joannes comes de Mar," the Words are added, "Ye first tyme he sits earle"?

Yes.

Do you make the same Statement as to that as you have made with regard to the other Entry?

Yes, that is manifestly in the same Handwriting as the other.

(*Mr Fleming.*) Do you produce that Book from the Public Record office?

I do.

Has it been in the Public Record Office ever since you have been connected with that Office?

It has.

It has never been in any private Custody?

Never.

Does it appear to be a properly kept Record?

Yes.

(*Sir Roundell Palmer.*) Are there in other Parts of that Book Interpolations of the same Character as these?

There are marginal Jottings evidently made by Parties who have been going over the Book for Purposes of Search, and I have no doubt that these Two Entries which you have referred to are Jottings or Memoranda made by some Persons who have been going through the Book in that way.

(*Lord Chancellor.*) Are such Memoranda allowed to be made on the Face of a public Document?

Not now; but in olden Times I dare say they were not so particular as we are now.

(*Lord Colonsay.*) It was an unwarrantable Proceeding, I suppose?

Most unwarrantable.

List of Protests for Precedency as Premier Earl made by successive Earls of Mar, as follows:

Date of Protest.	Reference to Minutes of Evidence.
31st August 1639, ...	No. 257, p. 428.
1st January 1661, ...	No. 258, p. 428.
28th July 1681, ...	No. 259, p. 428.
23th April 1685, ...	No. 260, p. 429.
14th March 1689, ...	No. 261, p. 429.
8th Sept. 1696, ...	No. 262, p. 429.
19th July 1698, ...	No. 263, p. 430.
9th June 1702, ...	No. 264, p. 430.
6th May 1703, ...	No. 265, p. 431.
6th July 1704, ...	No. 266, p. 431.
28th June 1705, ...	No. 267, p. 431.

(*The gap occurring here is accounted for by the attainder, which existed* 1715-1824.)

	8th July 1824, ...	Nos. 268, 9, p. 432.
	2d June 1825, ...	No. 270, p. 433.
	13th July 1826, ...	No. 271, p. 433.
These four Protests were made by the late Earl	2d Sept. 1830, ...	No. 272, p. 434.
	14th Jan. 1833, ...	No. 273, p. 434.
	24th August 1837, ...	No. 274, p. 435.
	7th Sept. 1847, ...	No. 275, p. 435.

UNION ROLL of Scotch Peers. — An authentick List of the Peerage of the North part of Great Britain call[d] Scotland as it stood the first day of May one thousand seven hundred and seven years.

DUKES.

Duke of Hamilton.
Duke of Buccleugh.
Duke of Lennox.
Duke of Gordon.
Duke of Queensberry.
Duke of Argile.
Duke of Douglass.
Duke of Athole.
Duke of Montrose.
Duke of Roxburgh.

MARQUESSES.

Marquess of Tweeddale.
Marques of Lothian.
Marquess of Annandale.

EARLS.

Earl of Crafurd.
Earl of Erroll.
Earl of Marishall.
Earl of Sutherland.
Earl of Mar.
Earl of Monteith.
Earl of Rothes.
Earl of Morton.
Earl of Buchan.
Earl of Glencairn.
Earl of Eglinton.
Earl of Cassills.
Earl of Caithness.
Earl of Murray.
Earl of Nithsdale.
Earl of Winton.
Earl of Linlithgow.
Earl of Hume.
Earl of Perth.
Earl of Wigton.
Earl of Strathmore.
Earl of Abercorn.
Earl of Kellie.
Earl of Hadinton.
Earl of Galloway.
Earl of Lauderdale.
Earl of Seaforth.
Earl of Kinnoul.
Earl of Loudoun.
Earl of Dumfries.
Earl of Stirling.
Earl of Elgine.
Earl of Southesk.
Earl of Traquair.
Earl of Ancrum.
Earl of Wemyss.
Earl of Dalhoussie.
Earl of Airlie.
Earl of Findlater.
Earl of Carnwath.
Earl of Callender.
Earl of Leven.
Earl of Dysart.
Earl of Panmure.
Earl of Selkirk.
Earl of Northesk.
Earl of Kineardin.
Earl of Belcaras.
Earl of Forfar.
Earl of Aboyne.
Earl of Newburgh.
Earl of Kilmarnock.
Earl of Dundonald.
Earl of Dunbarton.
Earl of Kintore.
Earl of Broadalbain.
Earl of Aberdeen.
Earl of Dunmore.
Earl of Melville.
Earl of Orkney.
Earl of Ruglen.
Earl of March.
Earl of Marchmont.
Earl of Seafield.
Earl of Hyndford.
Earl of Cromarty.
Earl of Stair.
Earl of Roscberie.
Earl of Glasgow.
Earl of Portmore.
Earl of Bute.
Earl of Hopton.
Earl of Delorain.
Earl of Solaway.
Earl of I'lay.

VISCOUNTS.

Viscount of Falkland.
Viscount of Dunbar.
Viscount of Stormont.
Viscount of Kenmuir.
Viscount of Arbuthnott.
Viscount of Kingston.
Viscount of Oxford.
Viscount of Irvine.
Viscount of Kilsyth.
Viscount of Dunblane.
Viscount of Preston.
Viscount of Newhaven.
Viscount of Strathallan.
Viscount of Teviott.
Viscount of Duplin.
Viscount of Garnock.
Viscount of Primrose.

LORDS.

Lord Forbes.
Lord Saltoun.
Lord Gray.
Lord Ochiltree,
Lord Cathcart.
Lord Sinclair.
Lord Mordington.
Lord Semple.

Lord Elphinston.	Lord Madertzie.	Lord Bielhaven.
Lord Oliphant.	Lord Couper.	Lord Abererombie.
Lord Lovat.	Lord Napeir.	Lord Duffies.
Lord Borthwiek.	Lord Cameron.	Lord Rolle.
Lord Ross.	Lord Cramond.	Lord Colvil.
Lord Torphiehen.	Lord Reay.	Lord Ruthven.
Lord Spynzie.	Lord Forrester.	Lord Rutherfort.
Lord Lindoirs.	Lord Pitsligo.	Lord Bellenden.
Lord Balmerinoeh.	Lord Kirkeudbright.	Lord Newark.
Lord Blantyre.	Lord Frazor.	Lord Nairn.
Lord Cardross.	Lord Bargainy.	Lord Heymouth.
Lord Cranston.	Lord Bamfe.	Lord Kinnaird.
Lord Burleigh.	Lord Elibank.	Lord Glassford.
Lord Jedburgh.	Lord Halkerton.	

This is attested by me Sr James Murray of Philliphaugh one of the senators of the College of Justiee Clerk to Her Majesty's Counells Registers & Rolls.

Ja. Murray,
Cl. S. Reg.

Ordered by the Lords Spiritual and Temporal in Parliament assembled that the List and order of the Peerage of the North part of Great Britain eallᵈ Seotland read this day and attested by the Clerk Register shall be reeeivᵈ and entred into the Roll of Peers with the salvo following:

That whereas there are several protests entred on the reeords of Parliament of that part of Great Britain eallᵈ Scotland in relation to the precedency of the Peers the said protests shall be and are of the same force with relation to their claims of precedency as if they had been entred in the Roll of Peers or in the Journal of the House of Lords.

(See Minutes of Evidence, pp. 713-714.*)*

Creation of Earldom of Kellie.

The Earldom of Kellie was ereated by patent, dated 12th Mareh 1619, with a limitation to the heirs-male. Upon the death, in 1829, of Methven, the tenth Earl of Kellie, the last male deseendant of the first Earl of Kellie, the Earldom of Kellie remained dormant for some years. On the 2d of September 1835, John Franeis Miller, Earl of Mar, established his pedigree as eollateral heir-male to the title of Earl of Kellie, and he held this title at the time of his death. In the Minutes of Evidenee in the Kellie Peerage, pp. 69-70, Lord Colville of Culross and Veseount Arbuthnott gave evidence that Earl Thomas, the ninth Earl of Kellie, was apprehensive that the honours of Kellie would remain unelaimed, as he did not suppose that Lord Mar, who was believed to be next heir-male in the eollateral branch, would claim the Earldom of Kellie, it being a mueh less aneient title than that of Mar. The ninth Earl of Kellie insured the making, by Lord Mar, of the elaim, by settling Kellie Castle and lands adjaeent upon trust for the benefit of sueh person as eould prove himself to be Earl of Kellie.

The following is an exact copy of a M. S. given by the late Lord to his Nephew (Lord Kellie's opponent) while on a visit to his Uncle at Alloa Park in September 1852.

The PETITION of John Francis the late Earl of Mar.

Sheweth, —

That the Earldom of Mar, which is at present vested in your Petitioner, is regarded as the oldest subsisting Peerage in Britain, — "its origin," says Lord Hailes "is lost in its antiquity; it existed before our records, and before the era of genuine history." The Earldom of Mar has also this singular and peculiar dignity, that its possessors have never been known at any time under any less eminent title from the 10th to the 19th century. They are recorded in history and in legal documents as Earls, and Earls only, and are never mentioned as unenobled individuals, or even as Barons of Peers of a lower order.

That though the date of the original creation of the Earldom is altogether unknown, your Petitioner is the undoubted representative and descendant of Marticus, who was Earl of Mar in 1065, and who is documented as such in a charter of donation by Malcolm Canmore to the Culdees of Lochleven of the manor of Rilgad Earnock, granted in that year.

That of Earl Gartnach, in 1114, in the reign of Alexander I., of Morgundus his successor, of Gillocherus, the son of Morgundus, and of Morgundus (the second of that name, the son of Gillocherus), successively Earls of Mar in the time of David I., Malcolm the maiden, and William the Lion (from 1124 to 1199), the existence is sufficiently instructed by authentic evidence.

That it is also sufficiently instructed by authentic evidence, that after the death of the said Morgandus Earl of Mar, the Earldom was enjoyed successively by his three sons, Gilbert, Gilchrist, and Duncan; that of these the last Earl Duncan was succeeded by his son Earl William, Earl William by his son Earl Donald, and Earl Donald by his son Earl Gratney.

That of these, the last named, *Gratney* Earl of Mar, married the Lady Christian Bruce, sister of King Robert I., and by her had issue *Donald*, his successor, and one daughter, the Lady Elyne Mar, the direct ancestress of your Petitioner.

That *Donald* Earl of Mar, the son of Gratney, and then Regent of Scotland, fell in battle on the 12th of August 1322, leaving one son, Thomas Earl of Mar, Great Chamberlain of Scotland, and one daughter, Margaret, the wife of William Earl of Douglas.

That the said *Thomas* Earl of Mar died without issue in 1377, when the title passed to the heir-female, his sister Margaret Countess of Douglas.

That the said Margaret, thereafter Countess of Douglas and Mar, died in 1385, leaving one daughter, Isobel, and one son, her successor, John Earl of Douglas and Mar.

That the said John Earl of Douglas and Mar fell at the battle of Otterburn in 1388, and, dying without offspring, the Earldom of Mar was a second time inherited by an heir-female, viz., his only sister Isobel, who married, 1st, Sir Malcolm Drummond of Drummond; and, 2dly, Alexander Stewart, natural son of Alexander Earl of Buchan, and died in 1419, leaving no issue by either marriage.

That on the death of the said Isobel Countess of Mar, the Earldom of right devolved on her cousin, Sir Robert Erskine, Lord of Erskine, great-grandson of Lady Elyne Mar, daughter of Gratney Earl of Mar, and of the Lady Christian Bruce, the sister of King Robert I., already mentioned, this being the third time the dignity had passed to the heir of line.

That although the said Sir Robert Erskine was the undoubted heir of the Earldom, and immediately assumed the style and dignity of Earl of Mar, yet the family of Erskine was deprived of their rightful inheritanee, and the lands and titles were usurped by no less than four Earls of different families without any legal title, until the year 1565, when John Lord Erskine was restored by Queen Mary to these estates and honours, as the charter bears, *per modum justitiæ*, as the righteous and indubitable heir and direct descendant of Sir Robert Erskine, Earl of Mar, to whom the succession opened on the decease of Isobel Countess of Mar, as before narrated.

That from the time of Queen Mary the Earldom of Mar continued in an unbroken lineal male descent, and was enjoyed by six successive Earls, until forfeited in 1715 by the accession of John Earl of Mar to the rebellion in that year.

That in the year 1824 the said attainder was duly reversed by Act of Parliament in favour of John Francis Erskine, Earl of Mar, the heir of line, as well as the heirmale of the attainted Earl.

That the said John Francis Earl of Mar died in August 1825, and was succeeded in his estates and titles by his eldest son, John Thomas Earl of Mar, on whose death, in September 1828, the Earldom devolved on his only son, your Petitioner.

That none of the original constitutions of the ancient Scotch Earldoms are in existence, but the rule was solemnly fixed by your Lordships in the case of Sutherland in 1771, that if anciently such dignity had devolved on the heir of line, as distinguished from the heir-male, it must afterwards, and in all time coming, be held to be so descendible, and to belong exclusively to the eldest co-heir, where there are more than one, — the English rules in reference to the abeyance of Peerages descendible to heirs-general, and to the power of the Sovereign to confer the same on any one of several co-heirs, being unknown in the law of Scotland, and altogether contrary to its usages and principles.

That in the case of Sutherland in 1771, your Lordships resolved and adjudged, "That "the claimant, Elizabeth Sutherland, has right to the said title, honour, and dignity, on "the single fact, that the said title had once devolved (in 1514) on an heir of line, viz., "the Lady Elizabeth Sutherland, the wife of Adam Gordon."

That the Earldom of Mar has no less than three several times devolved on and been inherited by an heir of line — twice in the 14th, and once in the 15th century, as above set forth — and is now, through a long and unbroken chain of lineal succession, vested in your Petitioner, the undoubted heir-general and lineal representative of Marticus, Earl of Mar, in 1065, and of Gillocherus and Morgundus, successively Earls of Mar during the reign of David I.

That none of the existing Earls of Scotland, except your Petitioner, lay claim to a higher antiquity, or to trace the origin of their honours to an earlier period than the latter end of the 13th century, and of these the Earl of Sutherland alone attempts to carry the date of his dignity so far back as the year 1275.

In these circumstances your Petitioner thinks that your Lordships will have no hesitation in deciding that he, as the heir in possession of an Earldom unquestionably existing in the 11th century, is entitled to be placed first upon the roll of the Earls of Scotland, and has right to all the honours, place, and precedency belonging to the Premier Earl of that ancient kingdom.

Your Petitionner therefore prays that your Lordships will be pleased to order that he, as heir in possession of the Earldom of Mar, may be ranked in the first or highest place on the Roll of the Peers of Scotland as the oldest Earl by creation and descent, in such form and manner as your Lordships may judge proper; and your Petitioner will ever pray.

(Signed) MAR.

Charter by Issobella Countess of Mar and Garviach to Alexander Stewart of the Earldom of Mar, 12 August, 1404.

Registratur carta sequens comitatus de Mar et Garviagh de speali mandato dni regis xvjto die mess Aprilis anno Dni millimo quadrinmo septuagesimo sexto.

Carta Isabellæ comitisse de Mar fact Alexro senescalo comitis Buchane.

Omnibus hanc cartam visuris vel audituris *Izabella comitissa de Mar et Garuiach* sltm in oim saluatore Nouit nos in nra pura et legitia viduitate constituta non vi aut metu ducta dedisse concessisse et hac pnti carta nra 9firmasse dilecto nro et spe'ali Alexandro senesc filio pmogenito dni Alexandri scn comitis Buchanie causa contractus matmonij int eudem Alexandrum sen et nos conferend totum et integru coitatum nrm de Mar et de Garuiach forestamq' de Gedworde ducetas marcas de custumis regijs put carta regia nobis inde confecta pportat cu omibus alijs et singlis tris nris tenedijs tenemet et trarum supioritatibz vniuss nobis jure hereditario in regno Scocic vel extra ptinentibz qbuscuq cu ptinen *tened et habend eidem Alex'ro et hedibus suis int ipm et nos pcread quibus forte deficietibus veris et legitis hedibus vel assignat predti Alex'ri quibuscuq*' in feodo t hedee ippetuu in boscis in planis vijs semitis moris marresijs in pratis pascuis et pasturijs mossis stangnis molendinis aquis piscarijs turbarijs petarijs et eoz sequelis cum tenedijs et libe tenetiu suicijs cum curijs et eschaet et eaz exitibus ac cu omibus alijs et singulis 9modi bs libertatibz et asiamet ac justis ptinen quibuscuq tam no noiat qm noiat tam subt tra qm sup tram ad *prefatu comitatu de Mar et de Garuiach* ac alias tras nras et pprietates supseptas spetantibus seu juste spetare valetibus quolibet in futur adeo libere quicte integre honorifice bene et in pace in omnibus et p omnia *sic nos aut pdecessores nri comites Marrie vel de Douglas* aliquo tempore tenuim tenuert vel habuert sine 9tradictoe vel reuocatione quibuscuq per nos vel alique noie nro in futuru reddendo inde dno nro regi suiciu debitu et 9snetu tantu pro omnibus alijs exactoibus questionibus seu demandis que p nos vel heredes nros vel alique noie nro exigi potunt vel requiri In cui rei testiom sigillu nrm pntibz e appesu *apud Kindromy duodecimo die mess Augusti anno Dni millimo quadrinmo quarto* Testibz venabi in Xpo pre Alex'ro epo Rossen Andrea de Lesley Johane Forbes militibz Alex'ro de Forbes filiio Alex'ro de Iruyne Duncano de Forbes Willmo de Cama seniore scutif'is t mult aliis.

Alexr Inglis cancellarius Abdonen clericus registri mau ppa tca .

Et dictus clericus registri pecijt transumptu in forma publica redigend dicte carte et 9tentoz in eisdem ac sigilli supscpte Izabelle appension non viciat neq' suspect etc et desuper pceiit instrm ex parte dni nri reg apud Ediburgh in domo masionis dicti clerici suspscpt die t anno coram hiis testibus magro Jacobo Douglas Bartholomeo Wawane et Georgio Henrison.

Jacobus Carwell pbr Sti Andre diocss notarius publicus manu propria etc.

(From Minutes of Evidence, in Mar case p. 30.)

Charter by Isabella Douglas Countess of Mar and Garioch 9th Dec. 1404.

Omnibus hanc cartam visuris vel audituris nos *Issobella de Douglas comitissa de Mar et Gareach* salute in Dno sempitna Noueritis nos in nra pura et libera viduetate puiso

solempni tractatu et diligent dedisse cocessisse et hac pnti carta nra 9firmasse nobili viro Alexandro scnesc filio nobilis dni et potetis dni Alexri scnesc comitis Buchanie in liberu maritagiu cu psona nra 9trahenda *totum comitatu nrm de Mar castro nro de Kildrymy totu domu nrm de Gareache* cu suitiis libere tenentiu nrorum dict comitatus et domni cu ecclesiaru aduocationibus necnon baronias de Strathewethe infra vicecoitatu de Banff necnon baronia de Creychmond in Buchania cu oibus earud ptinen et ducetas mcas anui redditus custume de Hadingtone necnon forestam dc Jedburghe cu oibus tris ad illa forestam ptinetibus ac etiam omne jus et clameu quod vel que habemus vel habere poterim in quibuscuq terris a nobis iniuste detentis tam ex pte patris qua ex pte matris *Tenend et habend predict Alexro et heredibus int ipm et nos pcreand quibus forte deficientibus heredibus nris legitimis* EX VTRAQ' PTE semp resuatis liberis tenementis o'im pdict terraru cu ptinen dict Alexro et nobis et nroz diutius viuen p toto tempore vite nre cu oibz juribus et 9suetudinibé t pertinen ad dictu comitatu cu castro de Kildrymie domiu de Gareochc pdict et oics alias tras pdict seu annuos redditus spectantibus seu spectare valentibus quoodolibet in futuru exceptis terris clemosinatis et annuis redditibus quas et quos p salute aic nrc antecessores et successores nroz pponim 9ferre p cartas nras et cu licentia dni nri regi reddend de dict oibus terris dno nro regi seruitia debita et 9sueta Volumus etia et cocedimus p nobis et heredibus nris quod nullus heredu nroru habeat introitu aut sasina aut possessionc aliqualem in feodo dict comitatus domnii de Gareochc pdict vel oim aliaru terras aut redditun durate toto tempore vite dict Alexri sic q aliquis heredu nrorum in proprietate possessione et libero tenemeto dict comitatus de Mar cu castro de Kildrymie pdict domii de Garioche pdict vel oim aliaru traru aut redditun pdict nullo modo possit vendicare durate tempore vite pdict Alexri quasquid venditione et ccessione nram obligamus heredes nros ad obsuand dict Alexro in oibus punctis et articulis ante 9cess sine 9tradictione aut exceptione aliquali In cuius rei testium nos libere potestatis existens non vi coacta scd in pntia reudi tc apd castru dc Kildrymy nono Decebris ao tc quadragesimo quarto.

Alexr Stewartis seising vpone ye chart forsaid

In Dei noie amen P hoc pns nouerit vnivsi q anno Dni millesimo quadringesimo quarto mensis Decebris die nona indictionc duodecia pont san in Christo patris ac doi Benedict te in mei notarii publici et testiu subscriptoru et alioru plurimoz pntia 9gregatoru ante porta castri de Kildryme in campis p vtilitate rei publici et gubernatione patrie nobilis dna et potens dna *Issobella de Dowglas comitissa de Mar et Gareache* ibid extetit habens colloquiu cu rndo in Christo patre dno Alexro Dei gratia epo Rossen dno Andrea de Leslie dno de Syde Waltero dc Ogilby dno de Carkorie Wmo de Cama Ricardo Lovell et Thoa Gray cu oiz populo patie accessit ad cam nobilis vir et dns Alexr Sen filius nobilis dni et potentis dni Alexri Sen comitis Buchanie qui conocatis oibus circustantibus pntauit et deliberauit dict dne Issobelle totu castru de Kildrymie cu oibus cartis et euidenciis dict dne cu vaseis argenteis et oibz aliis jocalibus in dict castro existentibus et super hoc oes claues dict castri in manibz dict dne Issobelle dcliberauit libere bonc corde sic q cu oibus terris suis castro pdicto et oib in eod existentibus et corpore disponere potuit libere sine aliquo impedimeto p sue libito voluntatis Quo facto dict dna Issobella dict claues in manu sua tenuit et ex deliberato 9silio dict Alexru elegit in maritu et in libero maritagio eidem dedit dict castru cu pertinen *comitatu de Mar* cu tenentib eisdem *domu de Gareache* baronia de Strattawyt baronia de Creytmound et de domie Bulie Cabeaithe ducetas mcas anui redditus de Haddingtoun et forestam dc Jedword cu oibus tris et ptinen eiusd ac oes alias tras suas infra regnu Scotie vna cu jure et clameo tc Tenend et habend dict Alexro et heredibus int ipsos pcreand et eoz diutius viuen quibus forsan degcientibz heredibz legtis dict dne reuertendis et reseruatis dict dnc et dict dno Alex'ro et eos diutius viuen feodis et liberis tenementis dict terraru

et an'uoru redditun pdiet sie quod nullus heres vel aliquis alius in pprietate feodo aut possessione diet terraru eastri supªdiet et annoz redditun aliquod jus poterit vendieare durate tempore vite earud vel eoru alterius de quibus oibz et singulis dict Alexr petiit instrumetu.

Charter by King Robert the Third, confirming the foregoing.

Robertus Dei gra rex Seottoz omibz probis homibz toeius tre sue elerie et laie salute Seiat nos approbasse ratificasse et hae pnt earta nra eonfirmasse donaeone illam et eoeessione quas feeit dileeta eosanginea nra *Isabella de Douglas coitissa de Marr et Garviacht* dilto nepoti nro Alexo senese filio Alexi eoitis Buehanie in libum maritagiu eu dea Isabella *de toto coitatu de Marr cu castro de Kyndromy et toto dnio de Garviacht* eu suieiis libe teneeiu eosdm eoitatus et dnii eu eeeiaz aduoeaeonibz uenon et baronia de Strathalberh infra vieee de Banf et Baronia de Crethmond in Buehania eu omibz suis pt et de dueet mare anui redditus eustume burgi de Hadyngton neeno et foresta de Jedwortht eu omibz tris ad illa forestam ptinetibz ae de toto iure et elameo quod ul que habet ul habe potuit in quibuseuq tris ab ipa detent tam ex pte patrs q ex pte matrs ptq de baronia de Cauys eu pt infra vieee de Roxburg Tened et hnd pdeo Alex'o ae Isabelle pdee et eoz diueius viuet ae hedibz int ipsos legime perеandis quibz forsan defieientibz legitis heredibz dee Isabelle traz andeaz deas tras eu an'uo redditu supªdeo exeepta pdea baronia de Cauys et tris elemosinaz ae annuis redditibz quos et quas p solute aie sue eadm Isabella p eartas dare pposuit eu omibz et singul libtatibz eomoditatibz aysiamet et iustis ptinee adeo libe et quiete plenarie integre honorifiee bene et in paee sieut earta dee Isabelle sibi inde eonfeeta in se iuste pleni eontinet et pportat reddendo et faeiendo inde nob et hedibz *nris deus Alexr et Isabella et eoz diucius viues et hedes int ipsos legitie pereandi quibz forsan deficietibz legiti heredes dce Isabelte quicuq'* suieia de pdeis tris debita et eosueta et de anuo redditu supªdeo In eui rei testm t eeta.

(The above Charters are from Minutes of Evidence, pp. 90-91.)

Charter of William Earl of Douglas and Mar, to James of Mowat 26th July 1377.

Omibz hane eartam visuris vl audituris *Wills comes de Dougtas et de Marr* salm in Duo nouitis nos dedisse eoneessisse et hae pnti earta nra eonfirmasse dilto nro Jaeobo de Monte Alto p homagio et suieo suo omes tras nras de Esterffowles eu ptin in eomitatu nro de Marr infra vieeeomitatu de Abirden quas tras dns Rieus de Monte Alto eapells quond tenes nost earund nob in euria nra tent ppe castru nru de Kyndromy vieesimo sexto die mens Julii anni Dni milli eeemi septuagesimi septimi p fusti et baelu manualit sursum reddidit et resignauit Tenend et hnd omes tras pdtas eu omibz suis ptin pdto Jaeobo et hedibz suis de nob et hedibz nris in feodo et heditate inppetuu p omes reetas metas suas et diuisas in boseis et planis pªtis paseuis et pasturis in moris marresiis viis et semitis aquis et stagnis venaeoibz aueupaeoibz et piscaeoibs eu curiis et eseaetis in molendis mlturis

et coz sequel cu bracis et fabrib cu pctariis et turbariis et cu omibz libtatibz aliis comoditatibz et aysiametis tam no noiatis q^{a}m noiat tam ppe q^{a}m pcul tam sub tra q^{a}m supa tram ad dtas tra spctantibz seu spctare valntibz infuturu quoquomodo ffaciendo inde an'nati pdtus *Jacobe et heredes sui nob et hedibz nris co'em sectam ad cur nras de Marr tenedas cu* wardis maritagiis et releuiis cu contigint p omi alio suico exacioe vl demanda que dc dtis tris aliqualit exigi potnt vl requi nos vero Wills comes pdtus et hedes nri om'es tras pdtas cu om'ibz suis ptin pdto Jacobo et hedibz suis cont^{a} om'es hoies et ffeias warantizabim acq'etabim et imppetuu defendem In cui rei testiom huic pnti carte nre sigillu nru fecim apponi hiis testibz dnis Willo de Keth maresc Scocie Alexo Frys Willo de Lundessay Nicho de Erskyne militibz Alano dc Lawedr Bernardo dc Cargill Ad^{a}m de Glendonewyne et mltis aliis.

(Minutes of Evidence, p. 332.)

House of Lords, 17 June 1868.

(Examination of Mr. Fraser.)

Do you produce from the Douglas Charter Chest a Notarial Copy of a Charter by Malcolm of Drummonde to George Earl of Angus of the Lands of Ledalisdale, dated on the 19th of April 1400 ?

I do (*producing the same*).

Will you read it ?

The same was read as follows :

In Dei noie amc P hoc pns pub^{cu} inst^{n}metu cunt pateat cuidt q ano ab incarnacoe Dni millo cccc octauo die v^{c} decia mes Nouebr indiccoc scda potifi^{t} scissimi in X^{o} pris ac dni nri dni Benddigu Dei puidecia ppe xiij anno xiiij^{mo} in mei no^{a}rij publi^{ci} et testiu inf^{a}scriptoz pncia p^{a}lr costitnta noblis dna dna *Mgarta coitissa de Marr et de Angо* q^{a}da carta sigillo noblis viri dni Malcolmi de Drom'onde et sigillo *Isabelle de Douglas coitisse de Mar et de Angо* coiug ei sigillata ut mi notario p^{i}ma facie p circuscrpsiones maifeste appuit no ras no abolita n^{c} in aliq^{a} sui pte viciat sed omi vicio et suspicoe caret me notariu pub^{cu} plege fecit et post ipaz lectura ipam accopiar sub manu pub^{ca} suptibz suis et expns me cu instacia rq^{i}siut cui tenor seq^{itr} t est talis Om'ibz hac carta visur ul auditur *Malcolm de Drom'onde dns de Marr et de Garviach* saltm in Dno sepitna Nouti nos ex bona t mera volutate cu cocensu t assesu dilecte 9iug nr *Isabelle de Douglas dne de Mar t de Garviach t de Ledalisdale* dedisse 9cessisse ac pnti carta 9firmasse dilecto nro Georgeo de Douglas coiti de Angо f'ri nre 9iug sup^{a}dce .... ras de Ledalisdale cu pt t oe ius t rectu siue clamen iurisq recti que huim t hem in dict tr de Ledalisdale roe 9iug nre sup^{a}dce ul que her potim q^{o}modolibet infutur ppt o'es tcias de Marr dc Garviach dc Strathalva de Clova in Angо de baroia de Melgthe et o'es alias tcias que ptient t icubut nobli dne Mgarte Stewart mat^{i} dci Georgii coitisse de Angо roe mariti sui bone memorie dni Thoe de Marr quod coit de Marr t dc Garviach vel q^{i}bz tr deflcietibz p morte ipi dne Mgarte ppt cetu libr nob p dem Georgiu annuati solued scdm q p indetras int nos et pdem Georgiu exinde fact clare patet t appet Teued t hud deas tras dc Ledalisdale cu pt s^{i} Georgeo t hedibz suis dc corpe suo legttie pereat ul peread a nob Malcolmo t Isabella 9inge nra pdca t hedibz nris int nos genand

libe qⁱete honorifice bu t in paee p ocs suas rctas metas t diuisas in logitudie t latitudie eu oibz libtatibz 9moditatibz t aysiamet ad dcas tras spctatibz seu spctar valetibz qᵒmodolibet in futur Reddedo nob dict Georgi et hedes sui supᵃdci vl 9iugi nre vl hedibz nris int nos genad vl qⁱbz deficietibz hedibz Isabelle nre 9iug pdce ex suo corpe legttie naseed in qᵒlibet ano vna rosa rubea apᵈ Edynbᵘgh ad festu bti Johis Baptiste noie albe firme si petatʳ p oibz aliis exaccoibz suiciis ul demad que de dcis tr exigi potint ul reqiri Volum tame q soluco siue reddico huimodi rose ut pdicitʳ no faeiat obstaculu seu ipedimetu 9tra solucom centu libraz nob ut pdicitʳ p tepe vite nre soluedaz faciedo dcus Georgi t hedes sui pdicti p dcis tr dno nro regi suiciu debitu t 9suetu In cui rei testio'm puti carte sigillu nru est appesu vna cu sigillo Isabelle 9iug nre supᵃdce apᵈ castᵐ de Kyndromy decio nono die mes April anno Dni millo qᵃdringesio.

(From " Minutes of Evidence " in Mar ease, pp. 330-331.)

Speeial Serviee of John Earl of Mar as heir to Isabella Countess of Mar through Robert Earl of Mar, 20th March 1588.

Hæc inquisitio facta fuit in pretorio burgi de Edinburgh vigesimo die mensis Martii anno Dni millesimo quingentesimo oetuagesimo oetavo virtute dispensationis dnorum consilii desuper eoneess coram honorabilibus viris Joanne Fergussoun et Roberto Stewart elavigeris ordinariis vicecomitibus in hac parte viceeomitatus de Abirdene per comissionem S.D.N. regis sub testimonio sui magni sigilli datam specialiter constitutis per hoc nobiles et honoratos viros subscriptos viz Willielmum comitem de Mortoun dnm de Dalkeith Alexandrum dominum Home Thomam magrum de Glammis Scotie thesaurarium Jaeobum comendatarium de Melros Adamum commendatarium de Cambuskynneth Walterum driorem de Blantyre secreti sigilli eustodem Jacobum Scrymgeour de Dudope constabularium de Dundie Joannem Hadden de Glenhageis dnm Jacobum Home de Coldinknowis militem Jacobum Seytoun de Tulliebodie Alexandrum Home de Northberuik Andream Wode de Largo Willielmum Scott de Abbottishall Joannem Levingstoun feodatarium de Donypace et Jacobum Lumisdene de Airdrie. *Qui jurati dieunt quod quondam domina Isobella Dorglas comitissa de Mar eonsanguinea Joannis nune comitis de Mar et dni de Erskyn etc neptis quondam Donaldi comitis de Mar ac soror quondam domine Helene de Mar proavie quondam Roberti comitis de Mar domini Erskyn etᶜ avi quondam Alexandri dni de Erskyn proavi dicti Joannis nunc comitis de Mar domini Erskyn etc eomitissa integri comitatus de Mar* existen obiit vltimo vestita et sasita vt de feodo ad fidem et pacem quondam S.D.N. Jacobi Scotorum regis eius nominis bone memorie primi de tota et integra illa parte dicti comitatus de Mar nuncupat Stradie et Bramar eum omnibus suis pertinen cum turribus fortaliciis tenentibus tenandriis libere tenentium servitiis vnacum advocatione donatione et jure patronatus beneficiorum et cappellaniarum earundem et suis pertinen jacen infra vicecomitatum de Abirdene *et quod dictus Joannes nunc comes de Mar est legitimus et propinquior heres dicte quondam dne Issobelle eomitisse de Mar de dictis terris et aliis antedietis* et quod est legitime etatis et quod dicte terre tenentur imediate de dicto S.D.N. rege in capite per servitium warde et relevii et quod eedem nunc valent per anum summam ducentarum mercarum et in tempore pacis sumam quadraginta librarum et quod dicte terre cum turribus fortaliciis tenentibus tenandriis et libere tenentium seruitiis advoeatione donatione et jure patronatus fuerunt in manibus dicti S.D.N. regis et

eius predicessorum superiorum earundem a decessu quondam Alexandri Stewart sponse dicte quondam due Issobelle qui fuit in mense Julii anno Domini millesimo quadringentesimo trigesimo octavo per spacium centum et quinquaginta annorum in defectu legitimi heredis jus suum minime prosequentis. In cuius rei testimonium sigilla quorundam eorum qui dicte inquisitioni intererant faciendc sub inclusione sigillorum dictorn vicecomitum in hac parte vnacum breui regio intus clauso pntibus sunt appensa die mense anno et loco prescriptis sic subscribitur ita est Ricardus Cass notarius publicus ac dicte curie scriba testantibus meis signo et subscriptione manualibus.

Hec est vera copia prineipalis retornatus super premiss in cancellaria S.D.N. regis remanen copiat et collationat per me dnm Joannem Scott de Scottistarvet militem vnum dnorum secreti consilii ac eiusdem cancellarie directorem sub meis signo et subscriptione manualibus.

Jo. Scott.

(From Minutes of Evidence, p. 394.*)*

The just coppie of ane band and conditioun maid be John Suyntoun lord of Mar and Margaret his spous countes of Douglas and Mar to Williame Douglas some to vmqle James erle of Douglas &c. as followes (5 Dec. 1389) :

Omnibus hanc cartam visuris vel audituris *Johannes de Suyntoun dominus de Mar et Margareta sponsa sua comitissa de Douglas et de Mar* salutem in Domino sempiterna Noueritis nos vnanimi consensu et assensu fideliter promisisse *Willielmo de Douglas filio quondam domini Jacobi comitis de Douglas domini Vallis de Liddesdaill* quod nunquam contra ipsum questionem aut calumniam quovismodo movebimus nec alius nomine nostro movebit ratione baroniæ de Drumlangrig quodcunq ipsi contigerit possessionem ejusdem obtinere et quod libere dictam baroniam cum pertinen valeat gaudere secundam quandam conditionem in carta prædicti *Jacobi comitis de Douglas filii nostri dicto Willielmo Douglas filio suo desuper dicta baronia confecta* In cujus rei testimonium sigillu nostrum pntibz apposuimus quinto die Decembris ano Domini millesimo tricentesimo octogesimo nono.

Followes the Englische heiroff :

To all and sundrye quho sall sie and heir this pnt charter *Johne of Suyntoan lord of Mar and Margaret his spous countes of Douglas and Mar* helth in our Lord everlasting witt ze us of ane mynd consent and assent to hef faithfullie promeist to *Williame Douglas some to vmq*le *James erle of Douglas lord of Liddesdaill* that we sall nevir in onywayes move any questioun or contraversie against him nor na uthers in our name sall move concerning the baronie of Drumlangrig quhensoevir it sall happen him to obtene possessioun thairof and that he may be able to bruik or enjoy the said baronie with the pertinents frielie conforme to ane 9ditioun in ane chartor of the said *James erle of Douglas our sone of the foirsaid baronie maid to the said Williame Douglas his sone* In witnes of the quhilk thing we hef putt our scalls to thir pnts the fyft day of December the zeir of God Im thrie hundreth fourscoir nyne zeirs.

(From Minutes of Evidence, p. 724.*)*

Charter of Isabella, Countess of Mar and Lady of Garioch 18 March 1402.

Vniversis presentes littas inspectur *Isabella de Douglas eomitissa de Marr ae dna regalitatis de Garviaeht* salute in Dno sempitnam. Noverit universitas vra nos tam ex vera et indubitata informatione proboz et fideliu hoim patrie q ex diligenti inspectome quarudam antiquaz evideciaru eccie Abirdonen nobis et consilio nro per reverendu in Xpo patrem Gilbertu epm Abdonen ostensaru et p nos ac consiliu nrm dilige et cu deliberacone examinat veracit et ad plenu intellixisse q terre de Ardlare cum ptinceiis et terre de Estirtochyr cu ptineciis ac supioritas terraru ecciasticaz de Oven cu ptinenciis iacent in le Garviacht sunt et fuerut necnon esse debent ecclie Abirdonen ab eiusdm ecclie primeva fundacione ac ptinent et ptiner debent ad eccliam antedictam et epos eiusdm qui pro tepe fuerint. *Quoeirea nos in nra pnra simplici et liba viduitate* constitut volentes que Dei sunt Deo et ecclie sue redde desiderantes etiam anime nre salubrit provide de consilio nobilis et potentis principis dni Roberti ducis Albanie comitis de Fyfe et de Menteth ac nobilis dni dni David de Lyndesay comitis de Crauford et plurm alioz de consilio nro spali easdm terras de Ardlare et de Estirtochir ac superioritatem dtaz terraz eccliasticaz de Oven cu ptinenc eid ecclie Abirdonen et epo pdto noie ipius ecclie restituer integralit decrevimus quas etia realit et cu effectu melioribz modo t forma quibus fieri potit restituimus p pntes renunciantes insup expresse *pro nobis et hedtbz nrs* omni juri seu juris clameo que habemus habuimus vel habere poterimus in possessione seu proprietate dtaz traz et supioritatis cum ptinenciis quomodolibet in futurum. Quare camerario nro justiciar vicecomit ballivis et omibus aliis ministris nris dte *regalitatis nre de Garviaeh* qui pro tepe fuerint inhibemus firmit et expresse p pntes ne in dtis tris et superioritate cum ptinenciis de ceto se aliqualit intromittant. In cuius rei testiom sigillum nostru pntibz est appensum apud Kyndromy decimo octavo die mensis Martii anno Dni millesimo quadringentesimo secundo.

(From Minutes of Evidence. p. 489.)

Charter by Margaret Countess of Douglas, Lady of Mar and of Garioch, 15 August 1384.

Cappellania de Colihill t Petgowny apd capella de Garwyach tc.

Omibus hanc cartam visuris ul auditur Mergarcta coitissa de Douglas dna de Marr t de le Garviach filia quod bonc memorie tercij dni Donaldi comitis de Marr etnam in Dno salute. Cum alias p inquisicoem in curia nre regalitatis de le Garviach de mandato dni nri quod dni Willmi comitis de Douglas mariti nostri coram balliuo nro eiusd p plures fidedignos pate fact t ad capella pdti quod dni nostri retornata 9ptu fuit q Alevr de Berclay filius Willi Berclay de Kerkou fuit legitim t ppinqor lies quod Johis de Abnethi frats sui de tr dominij de Bourty cu pt infra regalitate nram de le Garviach andtam et q dce terre de dno supiore de le Garviach tenebantr in capite quia idem Alexander in alienis debitis fuat mltiplicit onatus dtus Alexander concessit t p sua lram obligatoria fidelr manucepit tempe saisine suc

in eisd terris dar ac resignar pdto dno nro quod dno *Willo pmo comiti de Douglas* marito nro ad respectuand sibi solutoem p tempe cto releuij sui andtaz terraz t p dius bnficijs p dtm dnm nrm Willo Berclay pat suo t sibijpi antea diusmode impens decem libratas terre de dtis tris suis de Bourty heditar a dto Alexo hedibus suis t assigat quibuscuq de quibz quide dece libratis terre pdcus dnsnr quod dns Wills maritus nr pposuit capella Beate Marie virgis de le Garviach heditarie infeodar. Et cu intim incompleta couentone andta de resignatone dtaz decem libratas terre pdtus dns nr quod dns Willms maritus nr viam vniuse carnis fuit ingressus accessit postmodu ad nram pntiam in castro nro de Kyndomy dtus Alexander Berclay cu Willo patre suo t sm forma obligatois sue antefacte duas ptes ville de Petgovny et integram villa de Colihill excepto illo campo qui vocatr le Westfelde in tenemeto de Bourty infra regalitate nram andtam p memorat decc libratis tre. no vi aut metu duct sed sua mera t spontanea volutate pure t simpli nob dne sue supiori earud cora dno Willo de Lyndesay milite Walto de Lichton t Johne Wischard filio resignauit ac p fustu t bachu et lram patente resigatonis manualiter sursu reddidt atq dedt. Nos vero Mgareta pdta comitissa de Douglas et dna de Marr t de le Garviach merita deuotois t intentiois dti dni nri quod dni Willmi mariti nost attendentes de infeodatoe dtaz dece libratas tre ad capllam Beate Marie virgis de le Garviach andtam in nra viduitate liba in augmentum cultus diuiui concediu t pleno jure nro donam p salute aie pdti dni nost quodam dni Willmi mariti nost t aie carissimi frats nost quod dni Thome comitis de Marr et p salute aie nre et carissimi filii nostri t hedis * Jacobi coit de Douglas dni Vallis de Liddale t p salute aiarum a'nncessoz t successoz nroz et hac pnti carta nosta in puram t ppetua elemosina confirmamus Deo et Beate Marie mat sue et omibz sanctis Dei ac cuidam capllno viro ydoneo p nos t successores nros elto t eligendo andtas decem libratas terre de duabz ptibz ville de Petgovny et de integ villa de Colihill cu pt suis vnius exto illo campo de le Westfeild andto tenend t hnd Deo t bte Marie t oibz sac Dei ac eidm capllno p nos t successores nros elto t eliged de nob t hedibus nostris siue assignatis in puram t ppetua elemosina in boscis t planis stagnis t aqs viis t semitis pratis pascuis t pastur moris marresijs petarijs t turbarijs aucupaconibz venacoibz t piscariis bracinis fabrilibz molendis et multur cu curijs t curiaz exitibz absq secta aliqa ad curias nras de le Garviach faciend t absq comparencia in curijs justiciarie vl camar pterqm de tansgressoribz capitalia cmia 9mttentibz qui indictati t arrestati in curijs justiciar t camar nre assisam sustinebut t de alijs leuioribz maleficiis ad curia dti capellani libe remttentr et cu omibus alijs libertatibz comoditatibz t aysiametis ad dtas terras nuc sptantibz seu spectar valentibz in futuz adeo libe et quiete plenar t honorifice bene t in pace sicut aliqod tenemetum infra regnu Scotie ab aliquo comite vl barone infra regalitate aliqua in pura t pptuam elemosina liberius vel quieti dari potit seu cocedi. Ad quod quide tenemetum cu ptinetijs a nob t heredibus nris seu assignatis tenend t hnd volum q nos hedes nostri seu assignati p libito nre volutat psona ydonea eligamus qui omia necessaria pro suico Dei t ste Marie mats sue ibid mistrauda t exponend suptibus suis t expens p suo tepore iueniet t psoluet. Quaquide concessione t donatom andtaz decem libratas terre sic p nos fact nos et hedes nost et assignati Deo t sancte Marie mat sue t omibz sanctis ac cuidam capellano ad capella Beate Marie de le Garviach vt supa impetuu desuituro in omibz t p omia conta omes mortales warantizabim t imppetuu defendemus. In pmissoz testioniu pntibz sigillu nrm fecim apponi vna cu sigillo carissimi filii nost t hedis dni *Jacobi comitis de Douglas* dni Vallis de Liddale testibus dno Adam misatone diuina epo Abdonen dnis Jacobo de Sandilandis nepote nro Willo de Lyndesay Patrico de Sandilandis Willmo de Borthwik Willo de Preston Thoma de Coluile militibz Adam de Glendonwyne Johne Mortymer Stepho clico t pluribz aliis. Dat apud Kyndromy in festo assuptois gloriose virgis Marie genitricis Dei sepius memorate anno Dni millesimo cccmo octogesimo qarto (1384).

(From Mar Case, Minutes of Evidence, pp. 490-491.*)*

Retour of Sir Robert Erskine, as Heir of Isabella Douglas Countess of Mar in one half of the Earldom of Mar and Lordship of Garioch, 22 April 1438.

Hæc inquisitio facta fuit apud Aberdeine coram Alexandro de Forbes milite deputato vicecomitis de Aberdeine vicesimo secundo die mensis Apprilis anno Domini millesimo quadringentesimo trigesimo octavo per hos fideles homines subscriptos viz Alexandru de Irving Joannem de Forbes Wilielmu de Forbes Gilbertu de Hay milites Andream de Keyth de Inueruegie Joannem de Ogstane Joannem Cheyne Alexandrum de Meldrum de Fyvie Walterum Barclay Gilbertum Meinzeis Joannem Vaus Gulielmu de Cadzow Andream de Buchane Thomam de Allardes Thomam de Turyn Wilielmu Rid Jacobum de Skeine Jacobum Cuming Gilbertum de Sanqr et Joanne Mowat. *Qui jurati dicunt quod quondam domina Issobella de Dowglas comitissa de Mar et de Gareoch consanguinea domini Roberti de Erskeine* de Eodem militis latoris presentium obiit vestita et sasita ut de feodo ad pacem et fidem domini nri regis *de terris comitatus de Mar et de dominio regalitatis de Garioch* cum pertinen infra vicecomitatum de Aberdeine *Et quod dictus Robertus est legittimus propinquior heres eiusdem quondam due Issobelle consanguinee sue de medietate terrarum dictarum comitatus de Mar et dominii de Garioche cum* pertinen et est legittime etatis et quod dicte terre medietatis *comitatus de Mar et dominij de Gareoch* valent nunc per annu mille mercas et tantum valuerunt tempore pacis et quod dicte terre *comitatus de Mar* tenentur in capite de domino nro rege per wardam et relevium et comunes sectas ad curias vicecomitatus de Aberdeine et terræ de Garioch tenentur in capite de domino nro rege in libera regalitate et terræ medietatis *de Mar nunc sunt in manibus domini uri regis per mortem quondam domini Alexandri Stewart comitis de Mar qui habuit dictas terras per donationem dictæ dominæ Issobellæ pro toto tempore vitæ suæ* Qui quidem dominus Alexander obiit in festo beati Jacobi Apostoli duobus annis elapsis et quod dicta regalitas de Garioch est in manibus dominæ Elizabethæ comitissæ de Buchane sponsæ quondam domini Thomæ Stewart militis causa coniunctæ infeodationis fact per regem vltimo defunctu dictis domino Thomæ et Elizabethæ de dict regalitate et a tempore obitus dicti domini Alexandri comitis de Mar predicti habentis liberum tenementu dictæ regalitatis pro tempore vitæ suæ qui obiit vt supra. In cuius rei testimonium sigilla quorundam qui dictæ inquisitioni intererant pnti retornatui sunt appensa. Dat et claus sub sigillo domini Alexandri de Forbes de eodem militis deput vicecomitatus de Aberdeine anno die et loco supradictis.

Retour of the said Sir Robert Erskine to the other half of the said Earldom, 16 Oct. 1438.

Hæc inquisitio facta fuit apud Aberdeine coram domino Alexandro de Forbs deputato vicecomitatus de Aberdeine decimo sexto die mensis Octobris anno Domini millesimo quadringentesimo trigesimo octauo per hos probos et fideles homines subscriptos viz dominu Alexandrum de Irwing dominu Joannem de Forbes dominu Wilielmu de Forbes dominu Gilbertum Hay Alexandrum de Meldrum Jacobu Cuming Jacobum skeine Gilbertum Meinzeis Joannem Vaus Walterum Barclay Andream Buchan Johannem Mowat Gilbertu de Sanchar Thomam de Cuming Wilielmu de Cadzow Thomam de Allardes Joannem de Scroges Andream Broun Ronaldum Cheyne et Gulielmu Northbet. *Qui jurati dicunt quod quondam Issobella Dowglas comitissa de Mar consanguinea Roberti de Erskeine* de eodem militis latoris presentium *obiit vestita et sasita vt de feodo* ad pacem et fidem domini nri

regis de terris *comitatus de Mar cum* pertinen jacen infra vicecomitatum de Aberdeine *et quod dictus dominus Robertus est legittimus et propinquior heres eiusdem quondam Issobellæ consanguineæ suæ* de medietate *dictarum terraru predict comitatus de Mar cum* pertinen et quod est legitimæ ætatis et quod dicta medietas terrarum dict vicecomitatus cum pertinen valent nunc per annum quingentas mercas et tantum valuerunt tempore pacis et dicta medietas *predict comitatus cum* pertinen tenentur in capite de domino nro rege per seruitium warde et releuij et com'unes sectas ad curias domini nri regis vicecomitatus de Aberdeine et dicta medietas dictarum terrarum dicti comitatus nunc existit in manibus dicti domini regis in warda per mortem quondam domini *Alexandri Stewart comitis de Mar qui totum dictum comitatu habuit per tempus vitæ suæ per donationem dictæ dominæ Issobellæ.* Qui dominus Alexander obiit duobus annis elapsis et vltra per medietatem anni et hoc in defectu veri heredis dictæ dominæ Issobellæ medio tempore non prosequen ius suum. In cuius rei testimonium sigilla quorundam qui dictæ inquisitioni interfuerunt presenti retornatui sunt appensa. Dat et clauss sub sigillo dicti domini Alexandri vicecomitis predict loco die et anno suprascript.

(From Minutes of Evidence, pp. 386-387.)

EXTRACT DECREE of GENERAL SERVICE, John Francis Erskine Goodeve Erskine, Earl of Mar, Baron Garioch, etc. etc., to his Uncle, John Francis Miller Erskine, Earl of Mar, etc. etc., — dated 14th February, and recorded 4th March 1867.

At Edinburgh, the 14th day of February in the year 1867. — Sitting in judgment Patrick Shaw, Esq., Advocate, Sheriff of Chancery, in the Petition of the Right Honourable John Francis Erskine Goodeve Erskine, Earl of Mar, Baron Garioch, etc. etc., found, and hereby finds, that the late Right Honourable John Francis Miller Erskine, Earl of Mar, Baron Garioch, etc. etc., uncle of the Petitioner, died on or about the 19th day of June 1866, and had at the time of his death his ordinary or principal domicile in the county of Clackmannan : That the said late John Francis Miller Erskine, Earl of Mar, Baron Garioch, etc. etc., never had any lawful issue of his body, nor any lawful brother : That he had only two lawful sisters, both being his sisters-german, viz., the now deceased Lady Frances Jemima Erskine or Goodeve, wife of William James Goodeve, Esq of Clifton, and mother of the Petitioner, and the also now deceased Lady Jane Janetta Erskine or Chetwode, wife of Edward Wilmot Chetwode, Esq, of Woodbrook, who left issue : That the said Lady Frances Jemima Erskine or Goodeve, mother of the Petitioner, was the elder of the said two sisters of the said late John Francis Miller Erskine, Earl of Mar, Baron Garioch, etc. etc., and that the Petitioner is the only lawful son of the said Lady Frances Jemima Erskine or Goodeve, and is thus nephew, and one and the elder of the two nearest and lawful heirs-portioners in general of the said late John Francis Miller Erskine, Earl of Mar, Baron Garioch, etc. etc., and therefore served, and hereby serves, the Petitioner, as one and the elder of the two nearest and lawful heirs-portioners in general to the said late John Francis Miller Erskine, Earl of Mar, Baron Garioch, etc. etc., his uncle ; and decerned, and hereby decerns. — Recorded on the 4th day of March in the year 1867, and extracted by me, Director of Chancery.

John M. Lindsay.

(See Mar Peerage " Minutes of Evidence " pp. 479-450)

CORRESPONDENCE between Messrs Hunter, Blair, and Cowan, and Messrs Gibson-Craig, Dalziel, and Brodies.

Messrs Gibson-Craig, Dalziel, and Brodies, W. S.

Edinburgh, 16th June 1869.

Mar Peerage.

Dear Sirs — We were favoured with yours of the 5th, and have to thank you for procuring and sending to us the seven writs which accompanied it, and for which we gave our receipt at the time.

We hope you will still be able to discover, and to lend to us, the other documents enumerated in the list annexed to our letter to you of 21st ultimo. We have not the slightest doubt from what you mention, that they are at present amissing; but some of them are mentioned by the late Mr John Riddell, advocate — by Douglas in his Peerage of Scotland — and by Mr George Erskyn in his Genealogy of the Family of Mar and Erskine — as having been in the Mar Charter-Chest; and, in particular, the Charter by King David II to Sir John de Menteith and Elene de Mar, in relation to the lands of Strongartney (or Strathgartney) in Perthshire, dated in 1357, is mentioned by Mr Riddell as being in the Mar Charter-Chest at the time he wrote, and his Work on Peerage Law is dated so lately as 1842 — so that, if not now in the Mar Charter-Chest, there should surely be some evidence of where the Charter at present is. This remark has more or less application also, to the other documents not received by us.

There are four other writs which we should also be much obliged by your procuring and handing to us, viz. : —

1. Charter by King Robert I to Donald, Earl of Mar, his nephew.
2. Do. by do. to Lady Elyne or Elene de Mar, the sister of Earl Donald.
3. Instrument of Sasine in favour of John (1), Earl of Mar, Lord Erskine, on the Charter by Queen Mary of 23d June 1565, in the *Comitatus of Mar*, or in part thereof, — the Instrument of Sasine which accompanied your letter of the 5th, and which followed upon that Charter, being only in the separate *Lordship of Garioch*.
4. The Commission (if any), appointing Mr George Erskyn to the office of Bailie of Alloa.

We hope you will excuse this trouble, and we remain, dear Sirs, yours truly,

Hunter, Blair, & Cowan.

— Messrs Gibson Craig, Dalziel, and Brodies, to Messrs Hunter, Blair, and Cowan.

Edinburgh, 21st June 1869.

Mar Peerage.

Dear Sirs — We were favoured with your letter of the 16th instant. We have made inquiry as to the documents therein mentioned, but without success. None of them are in our possession. — We remain, dear Sirs, yours truly,

Gibson-Craig, Dalziel, & Brodies.

Messrs Hunter, Blair, and Cowan, W. S.

MINUTE OF MEETING at opening of Repositories of the late Earl of Mar, 26 June 1866.

At Alloa House, on Tuesday the 26th day of June 1866.

Present — The Earl of Mar.
The Earl of Kellie.
Major-General Miller.
James Moir, Esq.
H. J. Rollo, Esq.
Patrick Blair, Esq., W.S.
Agent for the Earl of Mar.
John Clerk Brodie, W.S.
Agent for the Earl of Kellie.

The remains of the late Earl of Mar having been interred to-day in the family-burial-place, the above named met after the funeral for the purpose of opening the Repositories. The Repositories sealed up on the 20th inst. were inspected, and the seals having been found entire the same were opened, and the Repositories were examined. After a careful search there was found in a press under the book-case in the late Lord Mar's sitting-room, Extract Registered General Trust-Disposition and Settlement by the Late Lord, dated 27th, and registered in the Books of Council and Session the 28th March 1829, and also two opinions relative thereto by Mr Andrew R. Clark, Advocate, dated respectively 16th September 1863 and 14th January 1864, and also a relative letter by Mr W. Bennet, clerk to the late Lord Mar, dated 25th February 1862, and an Extract Disposition and Tailzie by Mr James Erskine of Grange and Lord Dun to Thomas Lord Erskine, dated 6th January 1739, and registered 16th February 1753.

There were not found any other papers of a testamentary nature or relative to such papers, and the said General Trust-Disposition and Settlement having been read, the same and the other papers above mentioned were delivered to Mr Brodie to be communicated to Mr Blair and Mr Robertson.

(Signed) MAR.
,, KELLIE.
,, W. H. MILLER.
,, HUGH JAS. ROLLO.
,, JAMES MOIR.
,, PATRICK BLAIR.
,, JOHN C. BRODIE.

MATRICULATION of his Arms by the Nephew and "heir general" of the late Earl of Mar.

(See Register of Arms, vol. VII, p. 46.)

The Right Honourable John Francis Erskine Goodeve Erskine, Earl of Mar and Lord Garioch, having by a petition to the Lyon King of Arms, dated 5th October current, represented that he is the only son of the late William James Goodeve, Esquire, and of the Lady Frances Jemima Erskine, his wife, elder daughter of John Thomas, Earl of Mar; that on the death without issue, on the 19th day of June last, of his uncle, the late John

Francis, Earl of Mar and Kellie. he succeeded to the Earldom of Mar, and has assumed the surname of Erskine in addition to and after that of Goodeve, which assumption he is desirous of having recognised in the Records of the Lyon Court; that he is sixth in descent from and heir of line of Charles, Earl of Mar, whose arms were recorded in the Public Register of all Arms and Bearings in Scotland in or shortly after the year 1672; and the said noble petitioner having prayed that the said arms might be matriculated of new in the said Public Register for him, under the style and title of John Francis Erskine Goodeve Erskine, Earl of Mar and Lord Garioch, the Lyon King of Arms, by interlocutor dated the 6th day of October current, granted warrant to the Lyon Clerk to matriculate of new in the said Public Register, in the name of the said noble petitioner, John Francis Erskine Goodeve Erskine, Earl of Mar and Lord Garioch, the following ensigns armorial, viz.: Quarterly, first and fourth, Azure, a bend between six cross crosslets fitchée Or, for Mar; second and third, Argent, a pale sable, for Erskine. Above the shield is placed his Lordship's coronet, thereon a helmet befitting his degree, with a mantling gules doubled ermine, and issuing out of a wreath argent and sable is set for crest a dexter hand proper holding a cutlass argent, hilted and pommelled, Or, and in an escrol over the same this motto, "Je pense plus;" and, on a compartment below the shield are placed for supporters two griffins argent, armed, beaked, and winged, Or.

Matriculated the 13th day of October 1866.

R. R. Stodart, *Lyon-Clerk-Depute.*

(Register House Edinburgh.)

REPORT by the Law Officers of the Crown on the Bill for the Restoration of John Francis Erskine, Esquire, to the title and dignity of Earl of Mar, in 1824.

TO THE KING'S MOST EXCELLENT MAJESTY.

In humble obedience to your Majesty's commands signified to us by The Right Honorable Robert Peel one of Your Majesty's principal Secretaries of State, referring to us a Bill for the restoration of John Francis Erskine, Esquire of Mar, to the title of Earl of Mar, to report our opinion whether he has satisfactorily made out his Pedigree as stated in the Preamble of the said Bill.

We beg leave to Report that we have considered the evidence submitted to us in this Case, and are of opinion, that he has satisfactorily made out his Pedigree as stated in the Preamble of the said Bill: We beg leave further to state the following as the substance of the evidence which has been produced to us for the purpose of proving the said Pedigree.

In the preamble of the said Bill it is stated that John Francis Erskine Esquire of Mar is the Grandson and lineal representative of the attainted John Earl of Mar.

John Earl of Mar so attainted appears to have had an only son called Thomas, for there was produced to us an original Charter of the Lands and Earldom of Mar under the Great Seal of Scotland dated the 27th day of July 1741 which proceeded upon a Deed of Entail therein recited and purports to have been granted "Prædilecto nostro Thomæ *unico* filio legitimo" demortui Johannis nuper comitis de Mar et hæredibus masculis de ejus corpore legitime procreand quibus deficien hæredibus quibus eunque descenden ex corpore dict Thomæ Erskine armigeri quibus deficien Dominæ Franciseæ Erskine *ejus sorori* et hæredibus masculis ex-ejus corpore legitime procreand.

Thomas the Grantee in this Charter appears to have died without issue for there was produced to us an original Retour dated 31st October 1766 of the service of the said Frances Erskine his sister as nearest and law Heir to him. This Retour bears "Quod "quandam Thomas Erskine de Alloa communiter vocat Dominus Erskine *unicus* Filius de "mortui Johannis nuper comitis de Mar, ac Frater consanguineus Dominæ Francescæ "Erskine unicæ filiæ dict demortui Johannis nuper comitis de Mar ac uxoris Jacobi "Erskine armigeri advocati equitis mariscalli Scotiæ obijt, etc. Et quod dict. Dominæ "Francesca Erskine est legitima et propinquior hæres dict Domini Erskine ejus Fratris."

There was also produced to us an original Crown precept for infefting the said Frances Erskine as Heiress of Entail under the aforesaid Deed of Entail in the Lands and Earldom of Mar dated 8th November 1766 in which Lands and Earldom she accordingly was infeft on 10th of the same month, as appeared from the instrument of Seisin in her favour which was produced to us.

The said Frances Erskine thus Infeft in the hands and Earldom of Mar appears to have had a son John Francis Erskine, for there was produced to us a special Retour dated 25th April 1780 which recites the Deed of Entail recited in the aforesaid Crown Charter dated 27th July 1741, and states "Quod quond Domina Francesca Erskine de Mar" unica "Filia demortui Johannis nuper comitis de Mar, et mater Johannis Francisci Erskine "nunc de Mar armigeri obijt etc. Et quod dict Johannes Franciscus Erskine est Filius "natu maximus dict demortuæ Francescæ Erskine procreat ex nuptijs inter eam et "Jacobum Erskine armigerum Militem Mariscallum Scotiæ filium natu maximum nunc "supertitem dict demortui Jacobi Erskine de Grange, it idcirco est legitimus et "propinquior Hæres Talliæ dut demortuæ Francesca Erskine ejus matris."

And there was also produced a Crown precept under the Great Seal of Scotland dated 8th May 1780 for infefting the said John Francis Erskine as such Heir of Entail in the said hands and Earldom of Mar in which he was so infeft as appears from the instrument of seisin in his favour also produced to us dated 11th May 1780.

In order that the effect of the evidence above detailed may be better apprehended we beg to annex a pedigree of the said John Francis Erskine Esquire as laid before us on the part of the said John Francis Erskine Esquire.

All which we humbly submit to Your Majesty's Royal wisdom.

J. S. Copley. *

Wm Rae.

Memorandum *for ye registeris.*

102. Roull contening 25 chartor grantit be King Robert the 2, the first grof 3 Davidis filii pats burgen de Hadingtone q'nri thair is ane chartor grantit to Wm earl of Douglas of the earldome of Douglas and Mar concesse.

Item one chartor given be Issobella de Douglas comitissa de Mar et Garcoch dna de Liddisdaill of ye land of Cavers Jedburghe Forrest Bin-Jedburgye Drumlanerk and screffchip of Roxburghe given be hir and Malcolme Lord Drum'ond hir husband to George erle of Angus hir broy these chartor ar of the dait at Kildrumie the 7 of August 1400.

(From Minutes of Evidence, Mar Peerage, p. 331.*)*

* Then Attorney General, afterwards Lord Chancellor Lyndhurst.

EXCERPTS from Extract Decreet * by the Lords of Council and Session, in Action of Reduction and Declarator, at the instance of John, Earl of Mar, and John, Lord Erskine, his Son; *against* Alexander, Lord Elphinstone, and Others, — dated 1st July 1626.

The said Johne Erle of Mar, and Johne Lord Erskine his Sone, *Perseweris*, compeirand baith personallie, and *with Maisteris Thomas Hoipe*, Andro Aytoun, and Thomas Nicolsoune, *thair preloquitouris;* The said Alexander Lord Kildrymmie being personallie present, with *Maister Lues Stewart*, his preloquitour, quha also compeirit *as procutour for the said Alexander Lord Elphingstoun*, Dame Elizabeth Drummond, Lady Kildrymmie, spous to the said Alexander Lord Kildrymmie; And the said Maister James Oliphant, advocat depute to our Soueranc Lord, be his Majesteis speeial warrand and directioun compearand personallie for his Majesteis entres in the said matter; *Thairefter the said Maister Thomas Hope, procutor for the saids perseweris*, for instructing of the perseweris interes lybellit, first, secund, and third ressones of the samyne abouewrittin, *produeit the writtis and evidentis following*, and declarit that he vseit the samyne also for preiving and verefeing of the thric ressones of his Summonds, videlicet, The lettres patentis vnder the great Seill, grantit be King Robert the Third, the yeir of his regne, quhairby the said King Robert faythfullie promittit that he sould not confirme nor resave ony alienaciounis or resignatiounis to be maid be Dame Issobell Dowglas, countes of Mar, of the erledome of Mar and Lordschipe of Garrioehe, in prejudice of the aires of Sir Thomas Erskene, knycht, quha war to succeid thairto, and give ony sould be grantit, the samyne to be null; Ane Renuntiatioun vnder forme of Instrument, with thrie seallis appendit thairto, of the dait *the nynt day of September* 1404 *yeires*, quhairby umquhill Alexander Stewart, sone to the Erle of Buchane, compeirand at the castell of Kildrymie, in presens of ane number of Noblemen and of Alexander, bischope of Ross, delyverit to the said Dame Issobell Dowglas hir castell of Kildrymmie, with the haill writtis and evidentis being within the castell, to the effect scho micht dispone vpoune the said castell and hir haill landis with her persone at hir plesour, and immediatlie thairefter aeceptit fra the said Dame Issobell ane donacioun of the said castell, with the erledome of Mar, lordschipe of Garrioche, and certain vther laudis and barroneis specifelt thairin, to the said umquhile Alexander Stewart in fric marriage with the said Dame Issobell, and to the aires to be gottin betwix them, *quhilks failyeinge, to returne to the lauchfull aires of the said vmquhill Dame Issobell*, reserveand to the saidis Dame Issobell and Alexander thair lyfrentis of the samyne, quhairvpone the said Alexander Stewart took instrumentis in the hands of William Creyne, notter publict, Togidder with the authentik double of the foirsaid instrument, transumit befoir the Lordis of Counsall vpoun the day of yeires; Togiddir with ane instrument of the dait the nynt day of December 1404, vnder the hand of the said Williame Creyne, nottar, agreing in tenuour with the said former instrument in all poyntis, except that it wantis the seillis; Togidder also with the chartour and donatioun, conforme to the said instrument, maid and grantit be the said *Dame Isobell Dowglas, Countes of Mar*, vnder hir seill, of the said erledome of Mar and lordschipe of Garrioche, and vthers landis thairin eontenit, to the quhilk scho had richt vpone hir fatheris and motheris syde, to the said vmquhill Alexander Stewart in frie mariage with the said Dame Issobell, and to the aires to be

* Register of Acts and Decreets, vol. 394 General Register House, Edinburgh. (See "Minutes of Evidence." Mar case, p. 453.)

gottin betuix thame, *quhilks failyeing, to hir lauchfull aires ub utraque parte, daited the nynt day of Deeember* 1404 *yeires : And als ane chartour of confirmatioun and donatioun grantit be King Robert the Third in the fyfteine yeir of his regne, daited the tuentie-ane day of Januar* 1404 *yeires, quhairby he confirmes the said chartour maid and grantit be the said Dame Isobell,* of the saidis lendis and erldome of Mar, lordschipe of Garriochc, and vthers thairin mentionat, to the said Dame Issobell and Alexandcr in conjunct fic, quhilkis failyeinge, to return to the said Dame Issobellis lauchfull aires of the saidis landis : *Ane retour of Robert lord Erskine as air to Dame Issobell Dowglas* of *the halff* of the erldome of Mar, daited the tuentie day of Apryll 1438 yeires, with the instrument of seising following thair-vpoun, daitit the tuentie-ane day of November 1438 yeires : *Ane vther retour of the said Robert lord Erskine* to ther *vther halff* of the scid crldomc of Mar and of lordschipe, of Garrioche, daittit in October 1438 yciris : Ane instrument vnder the note of Richard Kedy, nottar, dattit the second day of Mair 1442 yeires, beireing that the said Robert erlc of Mar compeirit in prcsens of counsal, bcing met at Stirling, and complenit of the Lord Creichtoun, chancellar, for detcneing of his retour, an not geving him perceptis thairvpoun : Anc instrument takin be Thomas lord Erskine, in name of Robert erle of Mar, his father, in plaine Parliament, desyreing justice to be done to him for the erldome of Mar [and lordschipe of Garreoche] perteneinge to his father in heretage, and quhilk war vnjustlic detcnit be the King, to quhilk William lord Creichtoun, chancellar, ansucrit that thair was ane Act of Parliamcnt ordaneing the King to bruilk all the landis quhilk war in possessioun of King James the First, quhill he war of perfyte yeires, daittet the tuentie sevint day of Januar 1449 yeires, nottar thairto Dauid Kay : Ane vther instrument taine bc Thomas lord Erskync in Parliament, vpoun anc suplicatioun gevin in be him to King James the Sccund and thrie esteatis, desyreinge justicc to be done to him for the earldome of Mar and lordschipe of Garreoche, to the quhilk Williame lord Creichtoun, chancellar, ausucrit that the King was to be in the northe and he sould haue justice done to him vpoun fyfteine days warninge, daittet the tuentie ane day of Marche 1452 yeiris, nottar thairto Thomas Broune : Ane infeftment vndcr the great seall, grantit be *Qneine Marie, of the erldome of Mar, in favouris of umqnhill Johne, erle of Mar, Regent, daitit the tuentie third day of Junij* 1565*yeires : Ane Act of Parliament ratefeand the said infeftment, daitet the sextene of Aprylt* 1567 *yeires : Ane Act of Partiament made in favouris of the said Johne, erle of Mar, daitet the tuentie nyut day of July* 1587 *yeires :* Ane *retonr of the said Johne. now erle of Mar, as air to the said vmquhill Dame Isobell Dowglass,* serveing him generall *air to hir,* of the dait the tuentie day of March 1588 yeires : *Ane vthir retour* of the said Johne, erle of Mar, serveinge him in *speeiall as air to the said nmquhill Dame Issobell Dowglas,* in that pairt of thc erledome ot Mar callit Stradie and Braymar, of thc dait the said tuentie day of March 1588 yeires, with the instrument of seising following thair-vpoun, vnder the signe amd subscriptioun of Johnc Muschet, notter publict, of the date the sevint day of Novembcr 1589 yeires : Item, ane instrument of seising of the erledom of Mar, grantit to Johne, now erle of Mar, as air to umquhill Johne, erlc of Mar, his father, of the dait the tent day of Apryll 1573 ycires : Ane new infeftment of the erledome of Mar, etc. to Johne, now erle of Mar, with the gift de *novodamus* from his Majestei's vmqnhill derrest father, daitit 1621 ycires, with the precept and instrument of seiseing following thairvpoun : Ane dispositioun of the dait thc tuentie-fourt day of Januar 1622 yeircs, maid be the said Johnc erle of Mar, to the said Johne lord Erskne, his sone, of the foirsaidis landis and baronie of Kildrymmie, with the vther landis thairinspecifeit, lyand within the erldome of Mar, and lordschipe of Garreoche : Ane Act of interloquitour betuix thc Erle of Mar and the Laird of Cors daitit the tuentie-aucht day of Januar 1593 yeares : Anc vther interloquitor betuix the Erle of Mar aud the Bischope of Aberdeine, daitit the tuentie-third day of Junij 1621 yeires : Ane decreit of reductioun obtenit be thc erle of Mar againes the Bischope of

Aberdeine, of the samyne daitt : Ane act of interloquitor vpoun the objectionis maid aganes the probatioun and writtis producit be the Erle of Mar aganes the said Bischope of Aberdeine, for preivinge of his ressone of rednetioun and reply, of the daitt the tuentie-ane day of Junii 1621 yeires : *And siclyk, the said Maister Thomas Hoipe, procutor for the saidis perseweris, producit the writts and evidentis following,* for satisfeing ane pairt of the produetioon in the said caus, *videlicet,* The chartour grantit be the said umquhill *Dame Issobell Dowglas, countes of Mar, to the said umquhill Alexander Stewart, and his aires,* of the said erledome of Mar, and lordschipe of Garreoche, to be haldin of the King, extractit furthe of the Registre of the Great Seill, under the signe and subscriptioun of vmquhill Maister James M'gill, clerk of registre, which chartour is of the dait *the tuelff day of August J^m four hundrethe and four yeires : Ane chartour grantit be King James the First to the vmquhill said Alexander erle of Mar in lyfrent,* and to the said vmquhill Thomas Erle of Mar, his sone, in fie, of the said Erldome of Mar, and lordschipe of Garreoche, extracted furthe of the Registre of the Greit seill, vnder the note and subscriptioun of Sir Johne Hamiltoun of Magdelandis, knycht, clerk of registre, of the dait *the tuentie-aucht day of Maij J^m four hundrethe tuenty-sex yeires :* Ane Aet of Parliament in favouris of King James the Secund, anent the continiatioun of his possessioun of the landis bruiket be his vmquhill father, to his perfyte aige of tuenty-ane yeires compleit, extractit furthe of the Bniks of Parliament, vnder the not and subscriptioun of the said Sir Johne Hammiltoun of Magdalandis, knycht, clerk of registre : Ane extract of the proces of *reductioun of the retour of Robert erle of Mar, quhairby he was seruit air to the said umquhill Dame Issobell Dowglas,* contening also the *service negative* of the said vmquhill Thomas Lord Erskine, of the date *the fyft day of November* 1457 *yeires :* And upoun the prodnetion of the saids writtis and evidentis, the said Maister Thomas Hope, procutor for the saidis perseweris, askit instrumentis : *And syclyk the said Maister Lues Stewart, procutor for the saids defenderis,* for satisfeinge of the productioon in the said caus, askit instrumentis on the produetioun be him of befoir, of the haill writtis and evidentis vnderwritten, videlieet, *Ane chartour grantit be King James the Fourt, to Alexander Elphingstoun,* sone and appearand air to vmquhill Sir Johne Elphingstoun of that Ilk, knycht, of the landis of Inuernochtie, Bellibeg, with the mylne, the glenis of Glenochtie, Inucrnoehtie, Ledmakay, Cnlquhonie, Culquharrie in Straithoun, Meikle Migvie, Ester Migvie, Tulipronie, Blalok, and Currieereif, in Cromar, with thair pertinentis, lyand in the erledome of Mar and Schirefdome of Aberdeine, and als the landis of Duucanstoun, Glanderstoun, with the mylne, Rochnaverall, *etcetera.*

And upoun the production of the foirsaidis haill writtis and evidentis abouewritten, produceit as said is, *the said Master Thomas Hope, procutor for the saids perseweris,* askit instrumentis, and deelarit that he repeitit the saidis writtis producit be the saidis Defenderis, in quantum for preiving and verefeinge of his ressonnes of reductioun : *Thairefter, all the foirsaidis pairteis compearand as said is, richtis, ressones, allegatiounis, with the foirsaidis haill writtis and evidentis abouewrittin,* vtheris writtis and probatiounis producit and repeitit for the saidis perseweris for preiving of the poyntis of thair said summondis, and thrie ressones of reductioun abouespeeifeit, answeires and triplys underwrittin, maid in fortificatioun of the forsaid secund ressone of reduction, *being at lenthe red, hard, sene, and considderit be the saidis Lordis,* and thay thairwith being ryplie advysit (efter that the foirsaidis pairteis, and thair procuratoris had be ordinance of the Lordis of Counsall gevin in thair haill defensis, answeires, duplyis, triplyis, and quadruplyis in writt, and that they war hard to ressone thairvpoun diverss tymes *viva voce* in thair haill presence : The Lords of Counsall, *reduceis, retreittis, rescindis, cassis, and annullis, the foirsaidis haill pretendit chartouris, infefmentis, confirmatiounes, decreittis, testimoniallis services, retouris, and vtheris generallie and particularlie abouespecifeit, callit*

for to be producit as said is, and speciallie the saidis chartouris and infefmentis grantit to the said vqmuhill Alexander, erle of Mar, and to the said vmquhill Thomas Stewart, his sone, off the daittis, tenouris, and contentis forsaidis : AND DECERNIS AND DECLAIRES *the samyne to have been fra the beginninge, and to be now and in all tyme cuminge,* NULL AND OF NANE AVAILL, FORCE, NOR EFFECT, *with all that has followit or may follow thairvpoun,* and that in sa far as the samyne mey be extendit to the landis and lordschipe of Kildrymmie, eastell of Killdrymmie, and the haill vtheris partieular landis abouespeeifeit, contenit in the infeftmentis foirsaidis, grantit to the said Alexander lord Elphingstoun, Alexander lord Kildrymmie, his sone, and thair predeeessouris aboue mentionat, and to the said Alexander master of Elphingstoun, his spous : AND ALS FINDIS AND DECLAIRES *that notwithstanding thairof, the indoubtit heretable richt of the saidis, and lordschipe of Kildrymmie,* whiie the eastell of Kildrymmie, and *haill vtheris landis abouespecifeit,* conteneit in the saidis Lord Ephinstoun and Lord Kildrymmie, his sone, his spous, and thair foirsaidis predeeessouris infefmentis, quhilkis *ar propper pairtis and perlinentis of of the saidis erldome of Mar, and lordschipe of Gareoche, remanit in the persone of the said umquhill Dame Isobell Dowglas, countes of Mar :* AND CONSEQUENTLIE FINDIS AND DECLARES that the said umquhill KING JAMES THE FIRST, of worthie memorie, *be the deceis of the said umquhill Alexander, erle of Mar, of the said umquhill Thomas Stewart, his sone,* AQUYIT NA RICHT OF PROPERTIE OF THE SAIDIS LANDIS and Lordschipe of Kildrymnie, eastell of Kildrymmie, and vtheris abouespeeifeit, *but onlie ane simple and nakit possessioun rpoun* ANE PRETENDIT RICHT OF TITLE OF LAST AIRE, *or bastardrie, of the said vmquhill Alexander erle of Mar, or vpoun the* PRETENDIT RICHT *or title of the pretendit prouisioun of tailyie contenit in the infeftmentis grantit to the said vmquhill Thomas Stewart,* and that after deeeis of the said vmquhill King James the First, the possessioun apprehendit or eontinewit be the said King James the Seeund, of worthie memorie, be his eoronatioun, or be ordinanee, and Act of Parliament ordeininge the said King James the Seeund to remain and eontinew in possessioun of all landis and heritages quhilkis the said umquhill King James the First, his Father, had in his possession, the tyme of his deeeis, tlll his lauchful aige, wes of the nature and qualitie of the samyne possessioun apprehendit be the said umquhill King James the First, his father, and sua *ane simple and nakit possessioun without all richt of propertie :* AND THAIRFORE THE SAIDIS LORDIS OF COUNSALL, DECERNES AND DECLARES THE SAID PRETENDIT SERVICE NEGATIVE. *quhairby it is alledgit to be fund that the said vmquhill Robert erle of Mar died not last vest and seasit in in the said erledome of Mar, and lordschipe of Garreoche, but that the samyne was lauchfullie in the handis of vmquhill King James the Secund, be deceis of the said vmquhill King James the First, his father, and contineallie fra the tyme thairof, as haveing no other ground nor fundament bot the saidis pretendit infeftmentis grantit to the said vmquhill Alexander erle of Mar, and the said vmquhill Thomas Stewart, his sone,* with the PRETENDIT POSSESSIOUN APPREHENDIT BE THE SAID KING JAMES THE FIRST, *or efter his deceis be the said vmquhill King James the Secund,* of worthie memorie, with the said *pretendit Act of Parliament maid for continuatioun of his possessioun* to his perfyt age, TO BE NULL AND OF NANE AVAILL, *with all that hes followit or may follow thairvpoun, and to fall in consequentiam.*

COPY of a LETTER by KING CHARLES THE FIRST to the Earl of Mar. 18th July 1626.

To the Earel of Mar.

Right ete. Whereas wee were formerlie plased to wrett unto the lords of session that ye Marquise of Hamiltone and the Earle of Angus Nithisdale and Annandale

might be secured from awe harme that might arriso vnto them by the aetion depending before the sds lords *betwixt you and the Lord Elphingstoune* ere it were discerned. seeing we heare now that you have obtained you decreet, our pleasure is that yow secure the sd earell of Angus in so farre as doeth concearne him that he have no cause to complaine. In doing wherof yow shall do ws a speeiall pleasure. And so wee bid yow fairewell. Theobalds the 18th of July 1626.

(From Minutes of Evidence, Mar Peerage, p. 77.)

EXTRACT from SPEECH of Mr. A. G. Marten, Q. C., M. P., (Counsel for Lord Kellie's opponent), at the House of Lords, 24 July 1873.

You will find at page 699 that an order was applied for, asking for an inventory of the deeds in the Mar charter chest, and it was refused on the ground that a claim was being made to the estates. So that your Lordships see that the curious part of this ease is that it is brought forward by the elaimant, as I submit, *in derogation of all claims ever made by his ancestors, in opposition to the Acts of Parliament, and in opposition to all declarations three hundred years ago*. And really we have no certain knowledge of what doeuments are contained in his possession, because he refuses to produce them on the ground that a elaim is made for the estates as well. Your Lordships will see the paragraph in page 699, and therefore your Lordships see the position in which the case is presented to your Lordships' House. We are treated with minute discussions and with verbal criticisms upon documents of three or four hundred years ago, those eriticisms being in opposition to the views entertained either by the Act of Parliament, or by the Court of Session, or by the Royal Charters, and *yet they say we will not tell you what documents we have got, they will not give us a list even of the documents* that they have got, *or still less, allow your Lordships to see them*, so that they can make their own selection of documents. They do not tell us what they have got, and yet they ask your Lordships to reverse or disregard all that ever occurred in this case from the time when Robert, Earl of Mar, made that claim down to the time of the decease of the late Earl, and to disregard all that ever was done on the part of the Erskine family with regard to their claim. Your Lordships are asked to disregard all that upon the application of a claimant claiming through those very persons who asserted those rights and who obtained the title of Earl of Mar and the recognition of it, and who, whatever they obtained, obtained it by virtue of claims which they made from time to time and documents which they produced of an official character, and which they got an official recognition of, and yet they ask your Lordships to reverse all that, although they will not tell us what documents they have got in the Mar Charter chest. *Now the Mar Charter chest is a famous collection of documents*, which was open to the inspection of all persons who were interested in genealogy and antiquities for a long time past, and has been well known, and in various books that are published there are many references to the documents which have been seen, or which have been read and produced, and yet this Charter chest, which relates to documents which are a long way preceding the date of that settlement under which the claim is made to your Lordships, (the claim to the lands being made under the settlement of 1793), is to be refused to us on the ground that a claim is made to the lands as well as to the title, and on that ground they decline to give us any list of the documents which they have in the Mar Charter chest. But I ask your Lordships to consider the nature of the way in which this claim is brought forward. *They actually refuse*

us access to or any knowledge at all of the numerous documents that are contained in the Mar Charter chest. They do not tell us the nature of them nor give us any list of them so that we may be able to judge for ourselves whether or not they may be material, and yet they ask your Lordships to decide against such a document as a decree of the Court of Session in 1626, and acted upon in 1635 by the Court of Session, upon such documents as the Act of Parliament of 1587 and other documents by which the Crown and Parliament and the Court of Session have recognised what I submit to your Lordships to be a clear course of devolution of the title, they ask your Lordships to question it upon criticisms on some documents which they have produced at their own choice from the Mar Charter chest, without ever letting us know what the rest of the documents are. Therefore your Lordships will see the way in which *they seek to ask your Lordship to question documents of a formal character, which have received the highest possible sanction that can be received during a long process of time.*

(See Speeches, House of Lords, pp. 274-5.)

Translation of Charter of Mary Queen of Scots restoring to John Lord Erskine, the Earldom of Mar, on the 23rd June 1565.

Mary, by the grace of God, Queen of the Scots. To all good men of her whole Realm Clerks and Laymen greeting. Know ye, that because after Our lawful and full age of twenty one years being completed We have understood that umquhile Isabella Douglas, Countess of Mar Hereditary Proprietor for the time of the Earldom of Mar and of the Lordship and Regality of Garrioch made a feoffment to umquhile Alexander Stewart in free marriage to be contracted between him and herself of all and hail the said Earldom Lordship and Regality to hold to them and the longer liver of them, and the Heirs lawfully to be begotten between them, whom failing to the heirs whomsoever of the said Isabella of our most noble Progenitors of good memory, who thereupon granted confirmation as in the said feoffment and confirmation respectively more fully is contained. And that afterwards the said Alexander and Isabel died without lawful heirs begotten between them, whom so deceasing umquhile (the late) Robert Lord Erskine was *retoured in due order lawful and next heir of the said umquhile Isabella in the aforesaid Earldom Lordship and Regality, notwithstanding that his Predecessors were kept out of the possession of the same partly by reason of the quarrels occurring at the time and partly by the injust refutation and hindrance made by obstinate and partial Rulers and officers* refusing the reasonable prayers and petitions made by the Predecessors of Our said Cousin *often and* earnestly praying and soliciting their entry to the hereditary possession of the same : which premises now by Ourself carefully viewed and considered, We not alone on account of the same and of the good faithful and gratuitous services done as well to our Predecessors by Our said Cousin and his Predecessors, especially by the umquhile father of Our said Cousin and by himself to Our umquhile most dear father and Mother of most noble memory, and by himself to Ourselves since the decease of our said umquhile most dear Mother, but also moved by conscience as behoveth us to restore *the lawful Heirs to their just inheritances,* have given and granted, and by the tenor of our present charter do give and grant to Our said Cousin John Lord Erskine his heirs and assigns *hereditarily* all and hail the said Earldom of Mar containing the lands following that is to say, Strathdone, Bramar, Cromare and Strathdee, with all and singular the other lands of old time to the same pertaining, and also all and singular the lands of the said Lordship and regality of Gareach with all and singular castles towers, fortresses, manors, woods, mills, fisheries, parts feudiels, fee farms,

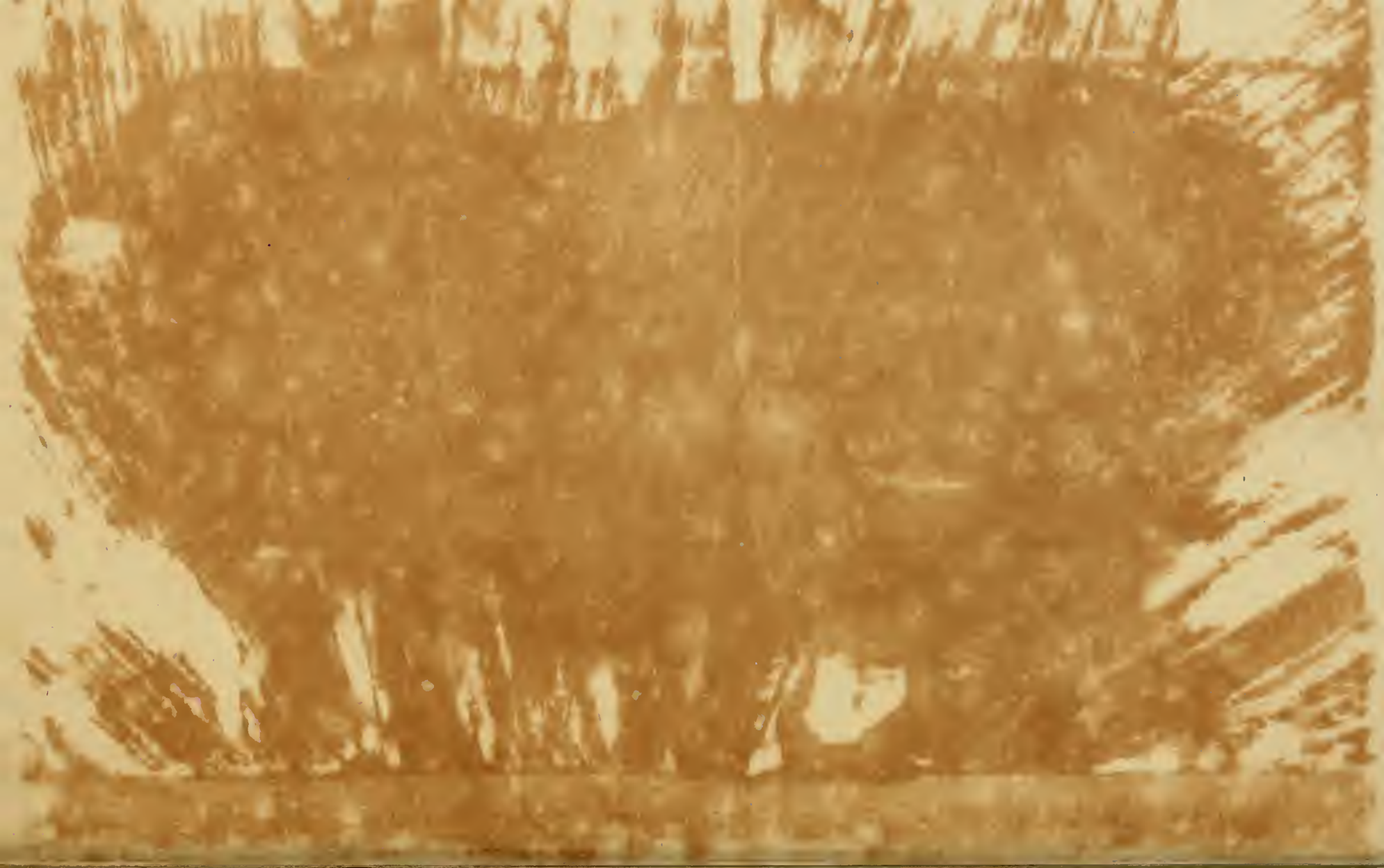
annexes, connexes. tenants, tenandries services of free tenants advowson, donation and right of patronage of churches chapels and benefices and appurtenances whatsoever of the said Earldom Lordship and Regality respectively of old time pertaining to them, or of any of them respectively, lying within our Sheriffdom of Aberdeen. Furthermore, we for the good and gratuitous service rendered to us and Our predecessors, as is aforesaid do give grant and dispone to our said Cousin his heirs and assigns *all and hail the aforesaid Earldom Lordship and Regality* respectively *with* the lands above specified of the said Earldom and *with* all the lands, castles, towers, fortresses, manors, woods, mills fisheries parts pendicles, farms, of fee-farms, annexes, connexes lie outsettis, tenants tenandris services of free tenants advowson, donation and right of patronage of churches charges and benefices and their appurtenances whatsoever of the said Earldom Lordship and Regality respectively, and all right claim interest title and claim of right property and possession as well petitory as possessory which we our Predecessors or Successors, had, have or shall be able to have or claim to the same or any part of the same or to the farms profits and duties of the same by reason of escheat forfeiture reduction of the right of the heir last in possession of the whole or greater part of alienation purpresture disclaimer bastardy wardship or new entry for past years and terms or by reason of any other action or cause gone by. Renouncing quit claiming and discharging the same unto our said cousin *his heirs and assigns* with agreement of not suing and with supplement of all defects as well in naming as in not naming the will to be taken as if expressed in our charter. And likewise we will and grant and for his and our successors do decree and ordain that one seizin only to be taken by our said cousin at present and by his heirs in all time to come at the manor of Migoye within the said lordship shall stand and be sufficient seizin for the said Earldom Lordship and Regality respectively and all lands of the same as well specially as generally above specified with all castles towers fortresses manors woods mills fisheries parts pendicles fee farms annexes connexes tenants tenandries, services of free tenants advowsons donation and right of patronage of churches chapels and benefices and appurtenances whatsoever of the said Earldom Lordship and Regality respectively pertaining, without any other special or particular seizin thereupon to be taken, notwithstanding that the same do not lie together contiguously, whereunto We by these presents do dispense. To hold and to have all and hail the said Earldom containing the said lands of Strathdone Bramar Cromar and Strathdu with all and singular the other lands of old time pertaining to the same, and also all and singular the lands of the said lordship and Regality of Gareach with all and singular castles towers fortresses manors woods mills fisheries parts pendicles farms of free-farms annexes connexes tenants tenandries services free tenants advowsons donation and right of patronage of churches chapels and benefices and appurtenances whatsoever of the said Earldom Lordship and Regality respectively of old time to them or any of them respectively pertaining, to our aforesaid cousin John Lord Erskine his heirs and assigns of his and our successors in free Earldom *and inheritance for ever by all their ancient right* metes and bounds as they lie in length and breath, in houses buildings woods plains woods marshes ways paths waters pools streams meadows feedings and pastures mills mulcturs and their sequels hawkings huntings fishings peateries turbaries coalpits woods stone quarries of stone and chalk smithis breweries furze and heath with courts and their issue heergeld blutwits and markets of women, with gallows pit sak sok tol theam infangthief and outfangthief pit and gallows with free forests and power of holding Forest Courts and levying amerciaments in respect of the same, and with full power and liberty of Regality in the said Lordship of Gareach and the privileges to the same belonging, and with all other and singular liberties, commodities, profits and easements and their just appurtenances whatsoever as well not named as named as well beneath the earth as above the earth far off and near belonging or which of right ought to belong in every manner whatsoever in future to the aforesaid Earldom Lordship and Regality, with the castles towers fortresses manors mills fisheries parts pendicles, farms of fee farms annexes connexes tenants tenandries services of free tenants advowsons donations

and right of patronage of Churches Chapes and Benefices of the same and their appurtenances freely quietly fully entirely honourably well and in peace without revocation or contradiction whatsoever. Our said Cousin his heirs and assigns rendering for the same yearly to Us and Our successors the rights and services to Us and Our Predecessors fit due and accustomed in respect of the aforesaid Earldom Lordship and Regality respectively.

In witness whereof we have caused Our great seal to be put to this Our present Charter. These being witnesses — John Archbishop of St Andrews and Our well beloved Cousin James Earl of Morton, Lord Dalkeith Our Chancellor, William Earl marischall, Lord Keith Our well beloved counsellor, Richard Maitland de Lethingtoun Knight under our seal in the custody of Master James Makgill de Rankelour nether Registrar of our Rolls and clerk of the Conneil and John Bellenden de Auchnoule knight our justiciary clerk.

At Perth, the 23rd day of June 1565.

(Note.) — This Charter in the original Latin will be found on pp. I to III of this Appendix, and on pp. 122 to 124 in "Minutes of Evidence, Mar Peerage Case," House of Lords, 1868-1875.



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