



1.3.249



Digitized by the Internet Archive
in 2012 with funding from
National Library of Scotland

with the authors
compliments.

X

THE PROCEEDINGS
IN THE
CASE OF
THE
EARLDOM OF MAR:
1867—1885.

A RÉSUMÉ BY R. B. SWINTON.

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

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

1889.

Price One Shilling.

THE PROCEEDINGS IN THE CASE OF THE EARLDOM OF MAR.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The King “founded upon,” in Scotch phrase, the

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

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

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

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

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

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

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

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

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

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

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

Earl of Kellie may afterwards well have exclaimed with Macbeth—

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

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

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

An attempt to cut the knot by altering the roll was

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

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

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

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

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

For a similar reason protested the Earls of Morton and

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ADDENDUM.—The question of this Peerage was again raised in the House of Lords on the 1st July, 1889, by the Earl of Galloway, who "begged leave to draw attention to a document bearing the signature of upwards of a hundred peers," and to move a resolution that an enquiry be made into its statements. The question the Earl wished to raise was that of last year—that the order of 1875, creating the new title, should be rescinded. The motion, after a little discussion, was rejected.

The Earl of Mar afterwards explained that he desired to make no claim to the estates of Mar in Aberdeenshire, confiscated in 1715; but to the estates of Alloa held by his late Uncle, and entailed in 1739 on the inheritors of the Earldom.

APPENDIX.

QUEEN MARY'S charter is “. . . . etiam eonseientia mote ut nobis deet legitimis heredes ad suas justas hereditates restituere”

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

Isabella's second charter of Deeember “. . . . tenenda et habenda predicto Alexandro et hæredibus inter ipsum et nos procreandis quibus forte defieientibus *hæredibus nostris legitimis ex utraque parte*”

Robert III, January, 1404, eonfirmed the second charter, omitting in its recital the words “ex utraque parte.” The first charter contained the words that Isabella had not been moved by fear or eompulsion, “vi aut metu dueta,” omitted in the second.

