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"OUT WITH IT BOLDLY, TRUTH LOVES OPEN DEALING."

—SHAKESPEARE.

ARE THERE TWO EARLS OF MAR?

BASIL MONTAGU PICKERING,
196, PICCADILLY, LONDON.
EDMONSTON & DOUGLAS,
88 PRINCES STREET, EDINBURGH.

1876.

Price One Shilling.




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(A DIALOGUE.)

Q. So there appear to be two Earls of Mar! What is the difference between them?

A. It is not difficult to ascertain—the matter has been made so public, and it is well it should be so.

In shewing the difference between the two Earls I should not venture to make assertions which at first may seem bold, if not incredible, without in every instance proving them, were it not that the facts of the case have already been widely published.

The “Judgment” in the Mar Peerage Case, given on February 25, 1875, by a Committee for Privileges, (consisting of Lords Chelmsford, Cairns, and Redesdale) together with reprints of the Royal Charters, Acts of Parliament, and other official documents relating to the case, with criticisms on the whole matter, have been put together in the form of a volume, called “Ancient and Modern,” which has been placed in the hands of every Peer, M.P., Q.C., and of most of the leading families in the kingdom.

This volume can also be seen at the principal circulating libraries in Edinburgh. Further, to verify the statements and authenticity of the Charters and various documents reprinted in it, it has been arranged that at 283 Regent Street, London, may be seen (gratis) the officially printed “Minutes of Evidence” before the House of Lords in the Mar Peerage Case with the whole of the “cases” and pleadings of counsel on both sides (in print), with the opinion (adverse to Lord Kellie) of the Law Officers representing the Crown, the Attorney-General for England, and the Solicitor-General for Scotland, delivered in the House of Lords, June 16, 1874.

Q. Surely this is an intricate legal subject few could understand?

A. On the contrary, the whole matter is wonderfully free from legal technical difficulties, and it can be understood almost by a child.

I will proceed to explain the difference between the two Earldoms of Mar, and at the outset I do not hesitate to describe Lord Kellie's new Mar title as an *official fiction*, and to say that the judgment of February 25, 1875 is *against Facts, Evidence, Law, and Justice*.

You may be shocked at the violence of these expressions, but I doubt not that you will, in common with thousands of others, pronounce the same opinion on reviewing the judgment of Lords Chelmsford and Redesdale when confronted with the evidence before them. (The very few observations made by Lord Cairns can scarcely be termed a judgment, for his Lordship left the matter virtually to the very matured wisdom of my Lord Chelmsford, and to the views and expressions of Lord Redesdale, who is not strictly a Law Lord, and whose prejudice against succession through ladies is so notorious that I believe he has never written a judgment in favour of female descent, though several decisions have been given of late years in favour of that line of succession.)

The position of the gentleman who has been distinguished as *the real* Earl of Mar, is the nephew and nearest heir, or *next of kin*, of the last Lord Mar, whom he succeeded on June 19, 1866.

For about a quarter of a century (since the death of his mother, Lady Frances, in 1842) he had been entered in all the "Peerages" as the heir to the Mar Earldom, and was acknowledged by all the family (including his uncle, Lord Mar) as the future successor to that ancient dignity.

On the death of his uncle he succeeded without dispute, and went through all the usual legal forms required by *Scotch* Peers, and, moreover, he and his wife have been repeatedly received by Her Majesty at Court as the Earl and Countess of Mar.

Q. May I ask, Was he recognised by the House of Lords?

A. No; simply because *Scotch* Peers are not required to seek the recognition of that House, which is only natural, as

they are debarred from an hereditary seat in the House of Lords.

Q. Was not the late Lord Mar, who died in 1866, Earl of Mar and Kellie?

A. Yes; he succeeded his father as Earl of Mar, and many years afterwards he claimed the Kellie title as a remote heir-male of a former Earl of Kellie, finding there was a small property attached to the Kellie title which would pay the law expenses incurred in the claim.*

The titles of Mar and Kellie had never before been united.

Q. Do I understand rightly that this Lord Mar, who died in June 1866, was succeeded in the Earldom of Mar by his nephew as his heir general, or *next of kin*, and in the Kellie Earldom by his cousin the heir-male?

A. Quite so.

At this time Lords Mar and Kellie were on extremely good terms, and I may add, that Lord and Lady Mar some months after this stayed on a visit to Lord and Lady Kellie at Tillicoultry; but this friendship proved afterwards anything but advantageous to Lord Mar.

Q. Why, how was that?

A. All the Mar deeds (contained in some half-dozen chests) were in Lord Kellie's hands. Lord Mar naturally did not trouble to investigate them at the time of his uncle's death, as there was no dispute raised, and thinking there would be no difficulty in seeing them at any time if he should wish it.

On Lord Kellie unexpectedly commencing in the following year a claim for an Earldom of Mar, Lord Mar, who naturally opposed his cousin's claim, but who *claimed nothing for himself* (being already in possession of the *ancient* Earldom of Mar—the *only Mar title on the Union Roll* of Scotch Peers), was astonished to find that Lord Kellie denied him all access to the Mar deeds, and even refused him an inventory of them.

Further, you will see that Lord Kellie and his son (holding exclusively all these Mar deeds), proceeded to repudiate and discredit what not only the Mar family but all Scotland had ever cherished and upheld.

* See "Minutes of Evidence," House of Lords, Kellie Peerage Case, pp. 69, 70.

Q. Has not the Earldom of Mar been universally regarded by Scotland as one of her oldest titles? .

A. Yes. All writers on Scotch Peerages and Scottish family history, among others "the great and accurate Lord Hailes," Douglas' "Peerage" (the standard work for Scotland), Tytler's "History of Scotland," and Riddell on "Scotch Peerage Law" (published in 1842), have upheld the Mar Earldom as the oldest in the Kingdom, as descendible to and through females, and as having been held by several countesses in their own right,* and thus it continues to be so descendible. It is simply a fact, which no one has attempted to dispute, that the title of Mar has *never* been held by an heir-male to the exclusion of the heir-general, and that Lord Kellie's opponent, Lord Mar, is heir-at-law and legal representative of his uncle, the last Lord Mar, and heir-of-line of the Earls restored in 1824 and 1565.

The Earls of Mar (including the last Lord who died in 1866) have naturally been ever proud of the great antiquity of their Earldom, and have asserted their right to be *premier Earl of Scotland* through female succession, to which position they of course could not have aspired as representatives of Lord Kellie's *new* title of Mar "*created in 1565*" and restricted to heirs-male (as adjudged by the Committee in 1875).

Q. Will you tell me as briefly as possible the history of the *ancient* Earldom of Mar?

A. It will suffice to begin with the history of of Isabella (or Isabel) Douglas, who succeeded *in her own right* to the Earldom of Mar and Lordship of Garioch through her mother, the Countess Margaret, who in 1377 succeeded her brother Thomas, son of Donald, son of Gratney, Earl of Mar, who married the sister of King Robert the Bruce.

This was regarded as beyond dispute by the Law Officers representing the "Crown" in 1874, who, in their decision *against Lord Kellie*, for the guidance of the Committee for privileges, expressed themselves on the rights of Isabella as follows: "This is important,—you have got the Earldom of Mar, to which Thomas, Earl of Mar, was entitled, assumed on

* In adjudging the Sutherland Case in 1771, the House of Lords ruled that an Earldom having even once only passed to a *female* heir, the succession must continue in the same line.

his death in 1377 by his *sister* Margaret, and the benefit of it also taken by the sister's husband through the courtesy. 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 described as the Countess. Therefore, you have the *title* of Mar capable of being held and enjoyed, and *actually held and enjoyed by FEMALES.*" (See "Speeches," House of Lords, June 16, 1874, p. 417.)

The Countess Isabella died without issue, and her next heir was Robert Erskine, who succeeded through his mother, Janet, the great-granddaughter (through her mother and grandmother), of the said Gratney, Earl of Mar.*

Q. Well! there was plenty of female succession there, for was not Isabella, through her mother, great-granddaughter of Gratney, Earl of Mar, and Janet the same relation as Isabella to the said Gratney through *her* mother and grandmother?

A. Exactly so.

Q. Then it was this Janet's son, Robert Erskine, who became through his mother, *heir of Isabella, Countess of Mar in her own right*, was it not?

A. Yes, and Janet married a Sir Thomas Erskine, who was in no other way connected with the Mar family, and the family name of the Mar Earldom continued to be Erskine for many years, simply because boys happened to be plentiful in the family. Of course, if Janet had married a Sir T. Smith, the Earls of Mar would have remained Smiths until another heiress of Mar had married (say) a Sir — or a Mr Jones.

Thus Robert, son of Janet, claimed the Earldom in right of his mother, the heiress of Mar, and succeeded in getting possession of the large estates of Mar and Garioch, and was formally styled Earl of Mar.

After Earl Robert's death, King James II, resolved to possess himself of this rich Earldom of Mar, to the exclusion of Robert's son. I will relate the pretext for this usurpation—as shallow as it was tyrannical.

Isabella, Countess of Mar, above mentioned, married Alexander Stewart, the illegitimate son of the man notorious as

* For proof of pedigree and heirship of said Robert and his descendants, see reprints of documents (from "Minutes of Evidence, House of Lords"), in "Ancient and Modern," pp. 6, 7, and 21.

the "Wolf of Badenoch." When a widow (having previously married Sir Malcolm Drummond, by whom she had no children), Alexander Stewart besieged her in her castle of Kildrummie, and, before his marriage with her, forced her to give up the title-deeds and to make a charter dated *August 12, 1404*, destining the Mar Earldom to *him* and his heirs, failing the heirs *of her body*.

This charter, however, was speedily *cancelled*, but if it had not been, it would have been really waste paper, for it was illegal to make over an Earldom to strangers to the prejudice of the heirs of blood, *without at least Royal assent*, which this charter of *12th August* never obtained.

But on the following September 9, immediately before the Countess Isabella's marriage with Alexander, he surrendered to the Countess the keys of the castle and *title-deeds* in the most formal manner before the Bishop of Ross and the vassals of the Earldom. (See Judgment, p. 3.)

On the 9th December in the same year (1404), the Countess Isabella made another charter settling the Mar Earldom on *her own heirs*, ("*ex utraque parte*," ruled in 1626 by the highest Court in Scotland, to convey to *heirs général*, and which interpretation Lord Chelmsford said is right).

Please note that this charter of December 9, rescinding the unconfirmed one of August 12, was confirmed by King Robert III.

Notwithstanding this, on the death of the Countess Isabella, without children, when her cousin Robert became (through his mother) her heir general and legal successor, Alexander Stewart, Isabella's husband, who enjoyed the Earldom, merely as liferenter, through the courtesy (as was then customary), and who was *no relation* to the Mar family, declared that the Earldom of Mar went to him and his heirs!

This declaration would have come to little had it not been for the rapacity of King James, who, in his desire to possess the rich Earldom, entered into an arrangement with Alexander in 1426, which was that he should resign the Earldom into the King's hands (the little fact that Alexander was *not entitled to resign what was not his own* being quietly ignored by these two!) the remainder of this bargain being that the King should re-grant the Mar Earldom to Alexander and his

son, whom failing, it was to revert to the King himself or his heirs!

Now Alexander died leaving only one son, Thomas, a bastard.

After this, in 1457, while the son of Robert, Earl of Mar (cousin and heir of the Countess Isabella), asserted his right to the Earldom, King James II. called together his chancellor and counsellors, and had it declared that he (the King) was entitled to the Earldom, on the pretence of the unconfirmed charter of August 12, 1404 (though it was *rescinded* by the charter of December 9 in the same year which was royally confirmed), and on the grounds of the illegitimacy of Alexander's son.

So, on these hollow grounds, King James seized the title and estates of Mar, and for no less than 130 years were the heirs of Isabella, Countess of Mar, in her own right, robbed of their hereditary rights, and the Mar Earldom was bandied about to relatives and protegés of the unprincipled monarchs.

During these 130 years of tyranny and oppression, the heirs of Mar in vain sought for justice (as Queen Mary, in 1565, in her charter of restoration and revival of their rights expressed it), "often and earnestly praying and soliciting their entry to the *hereditary* possession of the same."

At last the heirs of Mar were to have justice done to them. First, the descent and pedigree of the heir then living were formally proved (before a jury headed by the Earl of Crawford, Sir J. Douglas, Lord Lindsay, and others of position), tracing his heirship especially to his cousin Isabella, Countess of Mar in her own right, in 1404, through Robert, Earl of Mar (in 1438), and his mother Janet, and grandmother.

This done, and on the grounds of this heirship, and of the heirs having been unjustly deprived of their inheritance, Queen Mary made a charter, signed by herself, and witnessed by the highest men in the land, in which at last the cruel wrongs done to the old line of Mar, and the disreputable bargain between Alexander (husband of the Countess Isabella) and the King, were called by their right name, and the rights of the heirs of Isabella to the ancient Earldom of Mar were revived and admitted.

I quote from the charter itself, dated *Perth*, 23rd June 1565,

in which Queen Mary states that, "having understood that Isabella Douglas, Countess of Mar, was hereditary proprietor of the Earldom of Mar and Lordship of Garioch, she (the Queen) is *moved by conscience to restore Isabella's lawful heirs to their just inheritance*, their predecessors being kept out of possession of the same, partly by the quarrels of the time, and partly by the unjust hindrance made by *obstinate and partial rulers and governors* refusing their reasonable prayers soliciting their *hereditary* possession." Queen Mary then proceeds to enumerate the lands pertaining to the old Mar Earldom, Braemar, Cromar, etc., "with *all and singular* the other lands of old time pertaining;" and further on, Her Majesty states that the restoration is to be to "*heirs and assigns hereditarily*" (with *no limitation to heirs-male*, be it observed).

Q. Then do I understand that the right to this old Mar Earldom and Lordship of Garioch was not legally interrupted, but that the old titles and estates had been unjustly and illegally kept from the rightful heirs of Mar "by obstinate and partial rulers and governors."

A. Exactly so.

Please note that this charter was signed *at Perth* (on June 23, 1565), and the customary process of infeftment had to be gone through before the restored or revived Earl could be officially enrolled among the Peers *in Edinburgh*. It is curious that Lord Kellie (who has held exclusive possession of the Mar charter chests) has failed to produce the official return of this infeftment relating to Mar, though the corresponding document of the infeftment of Garioch (restored with Mar) was produced during the recent hearings of Lord Kellie's claim for a Mar title, and is dated July 24, 1565. A few days after this, on August 1, when these necessary formalities were completed, the Earl then fully restored to his rights (on the ground of his being the admitted heir of Isabella, Countess of Mar in her own right), took his seat in the Scottish Parliament.

Those who understand heraldry may be reminded that the Earls of Mar, from that time *up to the present day*, have always carried the *old Mar arms*, inherited through female succession in the *first or principal place* on their shield, but the Erskine arms merely quartered in the inferior place.

Q. Is not that in consequence of an Erskine having married

the heiress of Mar? But if the Mar Earldom were a new one in 1565, conferred on the Erskines and for them alone (as Lord Kellie pretends) the arms of Erskine (not Mar) would appear in the principal place?

A. That is very clear.

Q. You have told me the history of the ancient Mar Earldom up to its recognition and revival in 1565, after the palpable injustice done to it for 130 years before that. Now, will you tell me something about Lord Kellie's new title of Mar: is it not supposed to date from 1565?

A. Yes; but first let me observe that it had not entered into the heart of man to imagine the creation of a new Mar title in 1565, till it suited the present Lord Kellie to do so.

To shew that the late Lord Kellie himself, Lord Mar's former opponent, emphatically denied that there was any new creation by Queen Mary in 1565, I need only quote from Lord Kellie's printed "case" before the Committee for Privileges (p. 85) as follows:

"It appears certain that Queen Mary granted *no instrument relating to the dignity, it is quite impossible to suppose that it would not have been preserved, not a trace of such document has ever been discovered*, the Act of Parliament of 1587 and the Earl of Mar before the Commissioners on Precedence in 1606 are *wholly silent* as to it, and *the necessary and inevitable conclusion is, that no instrument was granted.*"

Q. You astonish me! Then what, may I ask, could Lord Kellie have gone on to support his claim to a Mar title?

A. The late Lord Kellie, in common with all writers on Scotch peerages and family history, maintained that Queen Mary's charter of 1565, while it enabled the heirs of old Mar to recover the Mar lands of which they had been unjustly deprived, recognised the right to the dignity,* and restored the dignity in the person of the heir of Isabella, Countess of Mar in her own right; but he first contended that the words "heirs and assignees" in the said charter *changed the old line of succession* (through females or heirs-general) to a *new line* restricted to heirs-male, and hence to him.

* It appears from the account in the Lords' Journal of the Moray Claim, June 16, 1793, the Lord Chancellor Loughborough (himself a Scotchman, afterwards Lord Rosslyn) ruled that the *comitatus*, or Earldom of Mar, restored by Queen Mary, embraced the *honours and dignity* of Mar.

Q. Then why was this contention of his not proceeded with?

A. The answer is simple. A year or so after Lord Kellie had started this idea, the Duke of Buckingham established his claim before the House of Lords in 1868, to an old Scotch title, Bruce of Kinloss, as descendible to *heirs-general*, or heirs of line, and hence capable of descending to his Grace's daughter eventually, on the grounds that these very words "heirs and assignees" convey the succession to *heirs-general*, with *no restriction to heirs-male*.

Q. After this why did not Lord Kellie abandon his claim?

A. Doubtless because he regarded the tenure of the Mar estates involved in the possession of a title of Mar, to which I shall again refer. However, he kept the claim dangling on, year after year, in spite of Lord Mar's vigorous and repeated efforts to get it heard and decided.

In 1871 Lord Kellie died, after which his son, the present Lord Kellie, shifted the ground his father had built on, and set up a claim to a new and "fancy" title of Mar, on the ground that it "*must have been*" created in 1565 by *some other instrument* than Queen Mary's charter, and that this new creation "*must have been*" limited to the heirs-male of the Erskine family alone, though it was (as he says) "created" for the benefit of the man whom Queen Mary, as I have shewn, immediately after she had satisfied herself of his hereditary right to be already Lord Mar, had just formally acknowledged to be the heir (through Robert, Earl of Mar), of Isabella, Countess of Mar in her own right, and (as the Queen expressed it in her charter), "whose predecessors were kept out of their *just inheritance* by obstinate and partial rulers and governors," and hence Her Majesty was "moved by conscience *not to create*, but to *restore to*" the heirs of the Countess Isabella their rights, and "to their heirs *hereditarily*."

Q. Then, may I ask, what did Lord Kellie produce to prove the existence of this new and imaginary "creation" which his father had *denied* could ever have existed, and had given such solid reasons for this conclusion?

A. You will, I fear, think me romancing, but it is a fact that he brought ABSOLUTELY NOTHING.

I will quote from their Lordships' "Judgment," (p. 7), and

by their own shewing you will see that there is *no proof* of any new "creation."

Lord Chelmsford says, "When and how did this creation take place? THERE IS NO WRITING OR EVIDENCE OF ANY KIND to assist us."

Q. What did Lord Redesdale say? for, of course, as there was "no writing or evidence of any kind to assist" Lord Chelmsford, there could have been none to help Lord Redesdale.

A. Lord Redesdale said (see "Judgment," p. 17): "Without accepting Randolph's letter as evidence, common sense tells us that he was *created* Earl of Mar in 1565."

Q. What was Randolph's letter?

A. It was a letter produced as evidence by Lord Kellie from a certain Randolph to the Earl of Leicester, in the postscript of which it was stated, that Lord Erskine* was made Earl of Mar (so he was by his *restoration* to his *hereditary* rights). This letter was *rejected* as evidence by the Committee, and Lord Chelmsford said, "it is a gossiping letter and nothing more, particularly the postscript."

Hence Lord Redesdale's "common sense" tells him that there was a "new creation," three hundred years ago, "without writing or evidence of any kind," and even "without the postscript of a gossiping letter," which was rejected as evidence.

Q. Actually then there is *positively no evidence* that there was any new Mar title created by Queen Mary?

A. Not one tittle. Its history is a complete blank, and there is ample evidence to shew that it never existed till two English Law Lords were pleased to give birth to it in 1875, by a "*must-have-been*" new "creation," to which their Lordships affix an imaginary date, 1565.

Q. Who was the individual, will you again tell me, who is presumed to have received this *now* officially recorded new "creation" in 1565?

A. The same person whom Queen Mary formally recognised as the heir (through Robert, Earl of Mar) to Isabella, Countess of Mar *in her own right*, and whom she was moved

* He was Lord Erskine alone through his father's family, and was in right of the Earldom of Mar, solely through his ancestor, Sir T. Erskine, having married the *heiress* of Mar.

in conscience to RESTORE (*restituere* is the word in the original Latin used by Queen Mary in her charter) to his “*hereditary rights*.”

Q. What could he have wanted then with a new “creation” when he was by birth and heirship Earl of Mar already?

A. He wanted nothing of the kind; it was not till Lord Kellie desired it that it was seriously held there ever was a new “creation” of a Mar title.

Q. But surely even if there is no evidence of the actual “creation” of this new title, is there not some collateral proof of its existence at some period?

A. I have related all that I, or any other mortal, can possibly know about it; its whole history is simply that Lord Kellie, after the grounds adopted by his father had failed, *presumed* its existence, and its exact nature of succession to suit himself (contrary to the admitted line of succession in the old Mar title), and the three Lords of the Committee were pleased to adopt his presumptions, and to say that it “*must have been created in some way or other, without writing or evidence of any kind to assist*” them (as they declare) to this truly wonderful fiction!

Having now exposed the baseless surmises and suggestions by which a new title of Mar, unknown to history, was bestowed on Lord Kellie in 1875, let us now continue the history of the *ancient* Mar family from 1565, when Queen Mary granted her charter of recognition of their heirship to Isabella, Countess of Mar in her own right in 1404, whereon they resumed the old titles of Mar and Garioch and the old Mar arms.

About 20 years after this an Act of Parliament was passed, dated 29th July 1587, to facilitate the recovery of the large estates of Mar, difficult to reacquire, being in the hands of different families to whom they had been granted by the unscrupulous kings, during the 130 years of usurpation previous to Queen Mary’s act of *restoration*.

The Act states that, “Whereas Isabel Douglas, Countess of Mar, was heritably infest at the time of her decease in all and whole the Earldom of Mar and Lordship of Garioch, and after her, Robert, *Earl of Mar*, was *lawfully* retoured heir to said Isabel of the said Earldom of Mar and Lordship of

Garioch, to which, John, Earl of Mar (restored in 1565), father to the complainer (John, the then Earl of Mar, 1587), was *lawfully* retoured *heir*, and so *heir by progress to said Isabel, Countess of Mar*; and, whereas, said John, Earl of Mar (in 1587), has the *undoubted heritable right* to the said Earldom of Mar and Lordship of Garioch, though his predecessors have been wrongfully debarred from the same *by the iniquitie of tyme*, and staying of the ordinary course of justice, our sovereign Lord's dearest mother (Queen Mary), was moved by conscience to *restore* the lawful heirs to their *just inheritance*, and considering *neither right of blood nor any heritable title falls under prescription, nor is taken away by length of time or lack of possession*, the which rights being tried by His Majesty and Estates of Parliament to be *lawful, valid, and sufficient*, the same be ratified and confirmed in this present Parliament, and declared to have as great strength, force, and effect in the said complainer's person as in the person of the said Isabel, or ROBERT, EARL OF MAR, HER HEIR; and the said complainer to have full right as *heir by progress* to his said predecessors, to *all and whole* the said lands wherein the said Isabel, Countess of Mar, or Robert, *Earl of Mar, her heir*, died vest, seized, and retoured, notwithstanding the length of time during which he and his predecessors, by the iniquity of the time, have been wrongfully debarred from the possession; and said complainer shall have as good right and title to the said Earldom, Lordship, and Regality as if the said Earl were *immediate heir to the said Isabel*, or to ROBERT, EARL OF MAR, HER HEIR, or had pursued for the same within a year and a day after their decease," and so on.

Q. Why, I see this Act of Parliament in 1587, far from regarding the old dignity of Mar extinct, calls Robert, over and over again, *Earl of Mar*, and heir to the Countess Isabel, and that the Earl of Mar then living (1587), enjoys his hereditary rights as if he had succeeded the Countess Isabel (who held the Earldom in 1400), in "a year and a day" after her death. Who then can doubt that it was this *old title* of Mar still existing in 1587, and which had formal Parliamentary recognition in that year?

A. None but the wilfully blind could or do doubt it.

Further, that it was no new Mar title, but the *old* Earldom of

Mar which was recognised as continuing to exist in 1565 and 1587, in the persons of the heirs of Isabella, Countess of Mar, in her own right, and of *Robert, Earl of Mar, her heir*, and by *virtue of that heirship*, (in spite of the 130 years of wrongs and usurpations during "the iniquitie of the tyme"), let me quote from a decision of the Court of Session in 1626, given in favour of Lord Mar, in actions he brought to recover the rest of the old Mar lands. Please observe that the contention of Lord Mar's opponents was that the tenure of the old Mar Earldom by the Crown and royal favourites, for the 130 years before Queen Mary's restoration to the rightful heirs, was no usurpation, but that the Earldom was *legally* in possession of the Crown, and that, therefore, the grants made by the Crown to them were valid. In support of this they relied on the *unconfirmed* charter of Isabella, 12th August 1404, which was *rescinded* four months afterwards, and on Alexander's resignation to King James in 1426, and on the seizure of the Earldom by James II. in 1457.

Q. I remember you alluded, did you not, to these in exposing the bargain or "job" between Alexander and the King?

A. Yes; and against these Lord Mar founded on the Countess Isabel's 9th December charter, confirmed by Robert III., which completely upset the one of the 12th August; also on Queen Mary's 1565 charter of restoration to Isabel's heirs; and on the 1587 Act of Parliament just quoted, shewing up the 130 years' usurpations, and confirming the rights of the heirs of Isabel, and proving the continued existence of the old Mar title.

The decision in this important suit, given by the highest court in Scotland, from which there was no appeal, July 1, 1626, in favour of the then holder of the *old* Mar title was as follows: "The Lords of Council *reduce and annul* the *pretended* charters, retours, &c., specially that granted to said Alexander and his son, and declare the same to have been from the beginning and to be now and in all time *null and of none effect*, and declare the *pretended* service *negative* whereby it was *alleged* to be found that *Robert Earl of Mar died not last vest* in the said Earldom of Mar and Lordship of Garioch, but that the same was lawfully in the hands of King James II. in 1457 and James I. his father, as having *no ground* but

the said *pretended infeftment* with the *pretended possession* by the said James I., and after him by James II., with the said *pretended Act of Parliament* (1457) made for continuation of his possession, TO BE NULL AND OF NONE AVAIL, *with all that has followed or may follow thereon*, and to FALL IN CONSEQUENCE."

There you see it was ruled that there *never was any legal possession of the Earldom by King James I.*, and his successors and favourites, *nor any legal interruption* in the line of succession to *the old Mar Earldom*.

In spite of this, Lord Chelmsford is pleased to call this illegal seizure of the old Mar Earldom in 1457 "*a solemn adjudication*," and to uphold as *valid* this *rescinded* charter of 12th August 1404 in favour of Alexander; and Lord Redesdale coolly describes this *attempted* extinction of the old Earldom by the Crown for 130 years before Queen Mary's restoration of the Earldom as "*a settlement of the question very dangerous to disturb*."

Further, their Lordships try to uphold what we have just seen condemned by a Court of Law as a "pretended Act of Parliament," and which was accordingly upset as "NULL AND VOID." (See "Judgment," pp. 8 and 16.)

Q. Surely Lords Chelmsford and Redesdale in thus attempting to overthrow a time-honoured institution—the ancient Earldom of Mar—are classing themselves with the "obstinate and partial rulers and governors" whom Queen Mary and the Act of Parliament in 1587 so strongly denounced, and reviving the iniquity of those times, are they not?

A. Certainly. However, any such observations on the part of these two noble Lords are irrelevant to the matter before them, which was simply whether or not Lord Kellie had established his claim to an Earldom of Mar which he presumed was "*created in 1565*;" and the formal "resolution" of the House of Lords, February 25, 1875, by which Lord Kellie is allowed to enjoy this new and hitherto unknown title called Mar, fails to touch his opponent's right to the *old* Mar Earldom, which *Lord Kellie could not*, and Lord Mar (being in possession of it) did not claim, as his counsel in 1874 insisted.

Q. Will you tell me how their Lordships got over the above

formal decision of the Supreme Court in 1626, which *upset* the 12th August charter, and declared the doings of 1426 and 1457 (on all of which Lord Kellie built) to be *usurpations*, *illegal*, "NULL AND VOID."

A. My reply is none the less true though startling! This decision of the highest legal tribunal (so crushing to Lord Kellie's pretensions) though fully in evidence before them (see "Minutes of Evidence," Mar Case, House of Lords, p. 453), and ably propounded by counsel, was completely ignored by these noble Lords; they are absolutely silent as to its very existence!

Q. I thought their Lordships form a Committee of Enquiry into evidence set before them. What authority have they for ignoring evidence, evading Acts of Parliament, bestowing peerages with purely imaginary creations (unrecorded because unknown), trying to over-ride the decisions of a supreme Court of Law, and attempting to extinguish an old title, admitted as continuing to exist by that Court and by parliamentary recognition?

A. The Committee has no such authority whatever, but in this instance they assume a power which would not be tolerated if it directly affected the rights of the multitude.

Q. I notice in this Act of Parliament of 1587 and in this Judgment of 1626 (evaded and ignored by the two noble Lords of the Committee in 1875) that Robert is called *Earl of Mar*, not only as claimant in 1438 of Mar lands, but that he is described formally as *the Earl of Mar*. Was he not the son of Janet, great granddaughter of Gratney, Earl of Mar, and the same Robert who claimed to succeed his cousin Isabella, Countess of Mar in her own right, and whose name became Erskine, simply because his mother (through whom he succeeded to Isabel) married a Sir T. Erskine?

A. The same man.

Q. I also note that in Queen Mary's charter, 1565, and the Act of Parliament, 1587, the grounds on which the then living heirs are restored to all their *hereditary* rights are that they are admitted to be the heirs of this Robert, Earl of Mar, and that Robert is the heir of Isabella, Countess of Mar in her own right. Now, will you tell me the exact relationship of the restored Earl of 1565 to this Earl Robert?

A. He was his great-great-great-grandson. One hundred and thirty years of injustice had been done, and four heirs after Earl Robert had lived and died in that comparatively short time.

Q. Then, if the hereditary rights of the heirs of an earl were interrupted, as we have seen, only "through the iniquity of the time," and "by obstinate and partial rulers and governors," why should it be for a moment supposed that the direct descendant of Robert, Earl of Mar should have required a new "creation" with a *new* line of succession, viz., a *limitation* to the heirs-male of his father's family through whom he claimed nothing?

A. Very true, he required nothing of the kind;* and no one ever imagined that he sought for or obtained any new "creation" till it suited Lord Kellie to presume it, and Lords Chelmsford and Redesdale were pleased to say there "must have been a new creation *in some way or other, though without writing or evidence of any kind, to assist them*" to that conclusion, as these noble Lords put it! (See "Judgment.")

Q. I am now beginning to understand your remark at the outset that the Judgment in 1875, bestowing on Lord Kellie a new title of Mar, is "*against Facts, Evidence, Law, and Justice.*" Have you anything further to tell me about this extraordinary case?

A. Yes. I will put before you an unanswered and unanswerable piece of evidence that the only real Earldom of Mar known to Scotland is the *old* one held by Isabel, Countess of Mar in her own right, which is confessedly *not* the one lately bestowed on Lord Kellie.

In 1606, *before which date the Scotch Peers had no defined precedence*, the Peers of Scotland were for the first time formally ranked. This was done by a Decree, of date

* In answer to the suggestion that it was the *territorial* Earldom alone (held by Isabella, Countess of Mar in 1404) which was restored in 1565, and recognised by the Act of Parliament in 1587, and by the judicial decision in 1626, it will be observed that in all the official recognitions of the Earldom the one individual in right of the lands of Mar is *always* styled Earl of Mar, or Countess of Mar in her own right. It can scarcely be seriously urged that the right to the dignity did not then pass to and merge in the same individual. As Lord Mansfield laid down, in adjudging the celebrated Sutherland case in 1771, "Another thing is clear, when Peerages were *territorial* the heir succeeded and took both estates AND HONOUR."

March 5, 1606, by order of the King, under the Great Seal, and the Peers were represented by their advocates, for there was much jealousy and dispute among them.

Each Peer was, by the terms of the Decree, ranked only "*according to the antiquity of the documents then produced*," but leave was given to obtain *higher rank* by the subsequent production of "more ancient documents."

The evidence produced by Lord Mar is still on record. It proves that he was the *heir of Isabel, Countess of Mar in her own right* in 1404, and holding the old Earldom held by her, and he was ranked accordingly.*

Q. I can well understand that; but will you tell me what rank was then assigned to Lord Kellie's new Mar title, supposed to have been "created in 1565," *only forty years before this decree?*

A. NO RANK AT ALL. I am rather surprised at your question, for if it had been ranked it would have afforded proof of its existence, though the exact mode of its "creation" might not have been explained. Again I tell you it is simply a *fiction founded on a phantom*.

Q. Is it not amazing that, in the face of this new Mar title of 1565 *having no place* in the ranking of the Peers in 1606, any one can assert (with the hope of being believed) that a certain event took place creating a new title 300 years ago, *without any evidence of any kind* to support it, as Lord Chelmsford admits, and when all the evidence points directly against it?

A. It is; and your amazement is shared by thousands. Why, I would undertake to prove myself Earl of anything, or say Emperor of China, if I might have the weight of law given to two unsupported "*must-have-beens*," and "*in some way or other*," by which Lord Kellie's imaginary title has suddenly appeared, to the confusion of the Scottish Peerage.

Q. Well, how do their Lordships account for the fact that Lord Kellie's new Mar title was *unknown* to the Commissioners of Ranking in 1606, while the *ancient* Mar Earldom was ranked by them as the old one held by the Countess Isabel in her own right in 1404?

A. Their Lordships completely fail to account for this,

* This was pointed out for the guidance of the Committee in 1874 by the Law Officers on behalf of Her Majesty, after the pleadings in the Mar case were ended.

except that Lord Redesdale resorts to yet another "*must have been*," and in a long and vague sentence (see "Judgment," p. 17) insinuates that this Lord Mar in 1606 *must have* basely destroyed the instrument of his *must-have-been* new "creation" of 1565. There is as much evidence that there was a new Earldom of Mar "created in 1565," or that the instrument of creation was destroyed, as there is evidence that you were created Earl of Mar by Queen Victoria, and that you had destroyed your instrument of creation to get older precedence under false pretences.

Q. Lord Redesdale's accusation appears to me very absurd, for if there had been an instrument of creation in 1565, and the Earl in 1606 had destroyed such instrument to get undue rank, such destruction would have been a fruitless piece of dishonesty, because surely there would have been plenty of witnesses living in 1606 who would have remembered well a "*new creation*" of only forty years previously?

A. Of course there would have been ample living testimony to a newly created title of only a few years' date.

To shew you the weight given to this Decreet of Ranking in 1606, when a "*must-have-been*" new "*creation*" was set up in other cases—notably by the heirs-male in the Sutherland and Herries Peerage cases, who both failed—I may mention that Lord Mansfield (in adjudging the former case) said: "When a commission was granted in 1606 for classifying the nobility according to their rights, Sutherland was ranked, and *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 shewn a new creation; but so little notion had they of a new creation that we see the family soon complaining that it was not carried to its original." *The same applies exactly to Mar.*

Further, in the judgment in the Herries case in 1858, against the heir-male, Lord Cranworth said: "The Decreet of Ranking in 1606 is a document of weight; and the then Lord Herries claimed and obtained a rank to which he was not entitled, if his honour dates from 1566." Again, Lord Brougham, in his judgment against a "*must-have-been*" new "*creation*," in this same case, observed: "The Decreet of Ranking in 1606 is very material; 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 according to the prior date of the earlier title."

The parallelism here is striking between a presumptive new creation of Herries in 1567 and the "must-have-been" new "creation" of Mar in 1565. Yet how differently has the corresponding evidence in the Mar case produced against Lord Kellie's presumptive new "creation" been treated!

Q. I quite see that this Earldom of Mar ranked in 1606, the right to which was admitted through female succession derived from Janet, the heiress of Mar, who married a Sir Thomas Erskine, and is hence totally independent of one drop of Erskine blood, can have no identity with a new Mar title created for an Erskine, and restricted to the heirs-male of the Erskines. Why, the two titles have nothing in common but the name?

A. That is all; and, of course, it follows that the old Mar title, the only one known and ranked by the Decree of 1606, is the only one that has been recognised by the sovereigns of Scotland and England ever since.

On perusal of the "Judgment" it will be noticed that the Committee, in their anxiety to extinguish the old Mar dignity,* try and treat the various Royal Charters, Acts of Parliament, etc., which for centuries have been regarded as showing the continued existence of the *ancient title* of Mar, as relating merely to the *lands*. But here is proof positive that the King and the Commissioners in 1606, who were *ranking not lands but titles*, and also Lord Mar's brother Peers (who would not have quietly suffered a new Earl of a creation of 1565, or *only forty years previously*, to have been put over their heads), all admitted the heir of the Countess Isabel of 1404 to be then (1606) in right of and in possession of the *ancient dignity* held by her, and he was ranked accordingly.

Yet, in face of this *fact*, Lord Chelmsford is pleased to assert that this old Mar dignity "had *in some way or other* come to an end more than a century before Queen Mary's time."

I must observe that neither Sutherland nor Mar get their

* It is generally considered that Peerages can become extinct solely through failure of heirs, or by the lawful resignation of the rightful heir, or by an attain unreversed, in *neither* of which positions the ancient Peerage of Mar stands.

full precedence in 1606, being ranked (as the Decreet enjoins) *only* "according to the antiquity of the documents then produced," no more.

However, shortly after this they each began to make formal protests for their higher precedency, and from 1639 there are seventeen recorded protests to be *premier* Earl of Scotland (through female succession) made by the Earls of Mar, including the last Peer, who died in 1866. Little could they have dreamt that, in 1875, one of their own kin, Lord Kellie, holding all the Mar deeds, and many proofs of the antiquity and continued existence of the old Mar title, would attempt to supplant it, and obtain for himself a new and unknown title of the same name!

To continue the history of the *ancient* Mar Earldom, to which Lord Kellie, being the heir-male, does and can lay *no claim*, we see it formally given by the Decreet in 1606, its old rank from 1404 (or more than a century before Lord Kellie's new Mar title, "created in 1565"), and this *ancient* Earldom was officially recognised as still existing, by the Parliament of the United Kingdom at the "Union" in 1707, and then placed on the "Union Roll" of Scotch Peers with its old precedence, as in the Decreet of Ranking.

I need scarcely add that Lord Kellie's new title of Mar is NOT ON THE "UNION ROLL."

The ancient title of Mar, accepted by Parliament in 1707 as the only one in existence, was attainted in 1715 by Act of Parliament, and the old Mar estates confiscated through Lord Mar's espousing the cause of the Stuarts.

In 1824 this old title was restored by Act of Parliament. As a preliminary to this restoration, the Law Officers of the Crown made formal inquiry into the pedigree, and their inquiry shews that the sole ground of Lord Mar's restoration was, that he was the legitimate son of his *mother*, Lady Frances, who was the only surviving child of the attainted Earl.

Now, this restored Earl's mother had married her cousin, who afterwards became the heir-male of the Erskine family; so now was the time if the title about to be restored were limited to heirs-male, as Lord Kellie pretends, to see the right admitted through male heirship, and of course the female heirship disregarded.

But no. The restored Earl's father, the heir-male, was entirely ignored, as not being in any way connected with the succession to the title,—he is simply mentioned in this official report made on behalf of the Crown, as a Mr Erskine, *legal husband of Lady Frances*, and their son is described as *her* legitimate heir.

Further, this Act of Parliament, dated June 17, 1824, states that "Whereas he is *grandson and lineal representative*" of the attainted Earl, (both of which he was *alone through his mother*), he is restored to his hereditary title. No mention is made of his heirship to his father, through whom alone he could have taken his title if it had been the restoration of a title of Mar restricted to heirs-male.

Q. I see then that the Earl was restored in 1824 as being *through his mother alone*, "grandson" of, and directly descended from, the attainted Peer of 1715, while he was grand-nephew and merely collaterally related through his father, was it not so?

A. Just so; and in order to shew that it was *not* the "*must-have-been*" new Mar title "*created in 1565*," as Lord Kellie would have it, which was restored in 1824, but the time-honoured dignity—"the most ancient Earldom of Mar," I will quote from Hansard's Reports (2nd series, Vol. II. p. 1318), a few remarks made at the second reading of the Bill in Parliament, June 14, 1824, called forth by the historical interest and *great antiquity* of the Earldom of Mar, just about to be restored. Lord Binning observed, "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 remarked 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 (afterwards Sir Robert) Peel said: "I beg to remark that the Earldom of Mar is one of the *most ancient* in the kingdom, and, according to Lord Hailes, existed before any records of Parliament."

Q. Well, what do the Committee for Privileges say to the fact that the Parliament in 1824, as well as the Act of Parliament of 1587, and the Commissioners of Ranking in 1606, and the Parliament at the Union in 1707, recognise the *ancient*

Mar title held through female descent as still existing, while the "must-have-been" new Mar title, "created in 1565," is *not on record?*

A. They say there was "*no enquiry made*" at the Restoration in 1824, and that the right of the Earl then restored "*must have been*" through his *father* (which is shewn above to be *contrary to fact*).

It is right that you should know that, on the contrary, *the enquiry made* took a substantial form, resulting in the "Report by the Law Officers of the Crown," the formal preliminary to the Act of Parliament by which the Restoration was effected. It was signed by J. S. Copley (then Attorney-General, afterwards Lord Chancellor Lyndhurst), and by the Lord Advocate, W. Rae. The said enquiry and report shewed plainly that the *female* descent (through Lady Frances, who was the mother of the restored Peer, and the only surviving child of the attainted Earl), was *alone* considered sufficient to establish the right of John Francis Erskine to be restored to the *ancient* title of Mar, as "*grandson and lineal representative*" (as the Act of Parliament puts it) of the attainted Peer, which position he held through his *mother* alone.

This official report of the said formal enquiry, duly lodged in the House of Lords, was produced as evidence before the Committee in 1868 by Lord Kellie's opponent, Lord Mar (John Francis Erskine), who, I may remind you is the *undisputed great grandson, and lineal representative, and eldest heir general* of the said restored Earl of 1824; but you would scarcely believe that the committee would not allow him even to lodge this official document as evidence (apparently because Lord Kellie's counsel opposed the admission of a proof so damaging to his client), and hence the counsel for Lord Mar were precluded from availing themselves of it.

This appears all the more extraordinary and unfair, for the exactly similar report of the Law Officers of the Crown, on the Restoration of the Nairn title, restored with Mar in 1824, was *received as evidence* by the noble Lords Chelmsford, Redesdale, and Cairns, in the Nairn Peerage case recently heard.

Q. Surely, do you not make some mistake with the rejection in 1868 of an *official* report made to Parliament in 1824?

A. I make no mistake; may I be prosecuted for libel if what I state be not true.

I cannot conclude without remarking upon the very few words uttered on the subject by Lord Cairns, who virtually left the judgment to Lords Chelmsford and Redesdale. Lord Cairns observed that, against Lord Kellie's claim, "the opposing petitioner (Lord Kellie's opponent) has been able to do nothing more than *make suggestions and put forward surmises.*"

I ask you, is it merely a *surmise or suggestion* that the succession to the ancient Earldom of Mar was *never* interrupted except "by obstinate and partial rulers and governors," and by a "*pretended Act of Parliament,*" formally condemned as such by the highest legal tribunal in 1626?

Is it but a *surmise or suggestion* that in 1587 an Act of Parliament was passed in which the hereditary rights of the heirs of Mar were admitted "as if they had succeeded the Countess Isabel in 1404 within a year and a day?"

Is it a "*surmise and suggestion*" that the right to the only Earldom of Mar, ranked by the Decree in 1606, was traced by the Commissioners, *through female succession*, to Isabel, Countess of Mar in her own right, in 1404? Was this Decree of 1606 treated as a "*surmise or suggestion,*" in adjudging the Sutherland and Herries Peerage cases?

Is it a mere "*surmise or suggestion*" that the only Earldom of Mar on the Union Roll of Scotch Peers, accepted by the British Parliament in 1707 as the rightful roll, according to the "Articles of Union," was and is the *ancient* Earldom of Mar of 1404 to which Lord Kellie lays no claim?

Is it a "*surmise and suggestion*" that the right of the Peer restored in 1824 was traced and derived solely through his mother, Lady Frances, the only surviving child of the attainted Peer?

Is it, again, a "*surmise and suggestion*" that the Mar family have handed down this old title as a restoration in 1565 of the *ancient dignity*, and that there are on record seventeen formal protests (during the last 200 years) made by the successive Lords of Mar to be premier Earl of Scotland, which is of course totally inconsistent with the position of Lord Kellie's comparatively modern title called Mar, restricted to heirs-male?

Is it not a fact that the evidence produced by Lord Kellie's opponent, the inheritor and holder of the *ancient* Earldom of Mar (which Lord Kellie did not and could not claim), and which evidence* is termed by Lord Cairns mere "*surmises and suggestions*," was sufficient to convince the Law Officers representing the Crown—the Attorney-General for England and the Solicitor-General for Scotland—after fully considering the whole case, and the pleadings on both sides, that, as stated by them for the guidance of the Committee, on June 16, 1874, "The Earldom of Mar is not limited to heirs-male, but is descendible to heirs-general, and hence that the heir-male, Lord Kellie, has *not* made out his claim to the dignity of Earl of Mar, in the Peerage of Scotland." (See "Minutes of Evidence," House of Lords, p. 421.)

It is clear that there is a vast difference between the two Earldoms of Mar,—the history of Lord Kellie's new Mar title is an *utter blank*,† while the old Mar Earldom held by his opponent is surrounded by every guarantee of Parliament and Royalty that a Scotch title can possess.

Q. Does it not seem strange that a gentleman holding already the Scotch Earldom of Kellie should have desired to possess a *new* Mar title giving him hardly any fresh precedence, unless he had some further object to gain.

A. True, but it is generally understood that he was anxious to obtain a title of Mar, though lacking the value and lustre of the ancient Earldom, its great antiquity, in order to render more secure his footing in the Mar estates at Alloa, by giving him the *appearance* of satisfying certain conditions in the entail deed of these estates (made in 1739) which, as Lord Kellie alone, he could not fulfil, and which his opponent, Lord Mar, could satisfy as the holder of the Mar Earldom attained in 1715. The entailers, after settling the estates on Lady Frances, the daughter of the attainted Peer, and *her* heirs, male and *female*, to the *exclusion of the heir male then living*

* It cost Lord Kellie's opponent many thousand pounds to put before the House of Lords this evidence.

† With regard to its very *creation*, I may repeat the words used by Lord Kellie's own father when he (at first) adopted other grounds: "Queen Mary granted *no instrument* in relation to the *dignity*; it is quite impossible to suppose it would not have been preserved; not a trace of it has been discovered, the Act of Parliament in 1587 and the Commissioners in 1606 are wholly silent as to it, and the necessary and inevitable conclusion is that *no instrument was granted*."

and his heirs, made the following provision: "That the whole heirs of taille, male and female, shall always use the surname of Erskine, and carry the arms worn before the attainder of John, late Earl of Mar, and in case the said attainder shall be reversed, the *title, dignity,* and honours of the family of Erskine of Mar, viz., the old Mar and Garioch titles (the Kellie title never having been held by an Earl of Mar till 1835).

These provisions would be clearly absurd if intended to apply to a new Mar title, *restricted to the heirs-male* of the Erskines (for how could heirs "*female*" hold a title *limited to males?*); and it is equally clear that the entailers had in view only one Mar title—the *old* Earldom, which they regarded as descendible to heirs "*male and female,*" or heirs general, and hence to Lord Kellie's opponent, and that they intended the estates to accompany this old title should "the attainder be reversed," (as it was by the restoration in 1824), in favour of "*the grandson and lineal representative,*" as the Act of Parliament expresses it, of the attainted Earl, which he was alone through his mother, the above Lady Frances.

That it was the conviction also of the late Lord Mar (John Thomas), who died in 1828, that these Mar estates were entailed for the benefit of the *old* Mar title, with the same succession, descendible through ladies, is obvious from the bond of provision he made (February 9, 1826), in favour of his daughter, "*including the eldest,*" (mother of Lord Kellie's opponent), "*in case of her being excluded* from succession to said estates by an heir-male of my body," as he expressed it.*

As it happened, his only son (the last Lord Mar) died in 1866 without issue, and so there is *no heir-male of his body living*; hence the succession to the estates, according to the above, would pass to Lord Mar, (Lord Kellie's opponent) the only son of Lady Frances, who died in 1842, the said "eldest daughter" of the above J. Thomas, Earl of Mar.

Reviewing all the circumstances bearing on this unprece-

* It must be noted that the Lord Mar of this date had free access to all the family papers shewing the nature of the succession to the Mar title and estates, and that, while Lord Kellie has held exclusive possession of all the Mar deeds, he has failed to produce a certain "Back Bond," quoted in the Deed of Entail, and which his opponent has asked for as important, but which Lord Kellie's agents state "*has gone amissing.*"

dented case, and remembering that the Committee for Privileges, unable to find Lord Kellie entitled to the Peerage of Mar on the "Union Roll," have adjudged to him a new Mar title "created in 1565," and "*without writing or evidence of any kind*" of this creation, as they admit and state, and again considering that the House of Lords have since further accommodated him by declaring him entitled to these Mar estates, you may draw your own conclusions on the subject of Lord Kellie's recent acquisition of a modern title of Mar *not* on the "Union Roll" of Scotch Peers, and the manner in which it has been effected, namely, by a Judgment which has been widely and severely censured, not only in society generally, but by the bar and the public press, and which has been delivered directly against the records of Scottish history, against the convictions of all Scotch genealogists and Peerage writers for centuries, against the advice of the Law Officers representing Her Majesty at the House of Lords in 1874, and against Acts of Parliament, Royal Charters, and the Articles of the "Union," accepted by the Parliament of Great Britain in 1707.

It must be kept in view that the formal "resolution" of Feb. 25, 1875, adopted by the House of Lords, which constitutes the Judgment, and is alone binding on those concerned, is simply and solely, "That *the claimant*, the Earl of Kellie, hath made out his claim to the honour and dignity of Earl of Mar in the Peerage of Scotland, CREATED IN 1565." Hence the House of Lords have *not* adjudicated on the *ancient* Earldom of Mar, and naturally so, as it was *not* the subject of Lord Kellie's claim.

However, it was remarked incidentally by Lord Chelmsford that the *old* Mar *dignity* (which by the Lords' own shewing is totally independent of Lord Kellie's new title of Mar) continued up to 1435, but his Lordship adds, it "had *in some way or other* come to an end more than a century before Queen Mary's time;" while Lord Redesdale observed that it "became extinct on the failure of heirs male," which failure (*as is not disputed*) occurred in 1377 on the death of Thomas, Earl of Mar.

Q. May I ask, are these observations of these two noble Lords alone (*not* in accordance with each other, as we see), to have the force of law, and thus extinguish from the records of

Scottish history and fame the time-honoured dignity of Mar; and are these remarks, discreetly omitted in the above "resolution" of the House of Lords, to have more weight than the *facts* that *since* Queen Mary's time the *ancient* Earldom of Mar (now sought to be extinguished) has been distinctly recognised as *continuing to exist* by Act of Parliament in 1587, by the Commissioners of Ranking and the Scottish Peers in 1606, and that it was this *ancient* Earldom which was ranked accordingly and placed on the Roll of Scotch Peers accepted by both Houses of Parliament at the "Union" in 1707, and restored by Act of Parliament in 1824?

A. It is to be hoped not, if only for the sake of truth and justice, and with respect for the integrity and dignity of the Scottish Peerage. But I do not suppose it has occurred before that the Committee have found themselves in such a dilemma, forcing them to try, *informally*, to extinguish an Earldom still existing and standing on the "Union Roll" of Peers, and to replace it by another not known to history, and *having no place on the "Union Roll."* However, the jurisdiction of the Committee does not affect a right which has not been claimed by either party, for Lord Mar appeared merely as objecting to a new title bearing the same name being given to Lord Kellie.†

Of course to those ignorant of the details of the case it may appear that there was a litigation about the only known Earldom of Mar, and hearing that one litigant had succeeded, they conclude that the other had failed.

This is not the case, and I will state the legal grounds on which the representative of the *ancient* Mar title still holds his hereditary right, in which position, as the facts of the case became more widely known, he is supported by Society and Public Opinion.*

On succeeding his uncle, the last Lord Mar, in 1866, to whom he is *next of kin*, he was formally recognised as fully as law and custom demand of Scotch Peers, and seeing the House of Lords have adopted *no "resolution"* with regard to his ancient Earldom, and *no claim* having been made to it either by Lord Mar† or Lord Kellie, and hence, naturally,

* This position has been clearly set forth in a letter recently sent to each Peer of Parliament.

† His counsel stated to the House of Lords, at the pleadings in 1874, "my

there being no adjudication by the House of Lords regarding it, its position remains untouched. In 1862 a resolution was passed by the House of Lords, that Scotch Peers are *not required* to obtain recognition from the House of Lords before voting at an election of Peers, and it is well known that Scotch Peers do not seek such recognition.

Q. Has not another resolution been lately passed to the effect that when the House of Lords have adjudged a Peerage to one party, no other party can vote at an election of a representative Peer *in right of that same title?*

A. Yes; but keep this distinctly in view—*It is not a case of two parties, each claiming to vote in right of one and the same title.*

There are two Earldoms of Mar.

One was admitted by Act of Parliament in 1587, and by the Commissioners of Ranking in 1606, to be *still in existence*, and to be the *same one held by the Countess Isabel in her own right in 1404*, the right to which they traced through *maternal* ancestors, *independently of one drop of Erskine blood*, and which old Earldom was put on the Roll of Scotch Peers by the British Parliament at the "Union" in 1707, with that *ancient* precedence.

The other the House of Lords have resolved was "*created in 1565*," having its origin in the Erskine family, and limited to their heirs-male. It was *not ranked by the Commissioners in 1606, and is NOT ON THE UNION ROLL.*

The representative of the *ancient* Earldom, the nephew and next of kin of the last Lord Mar, who died in 1866, does *not* claim or wish to vote in right of Lord Kellie's new title of Mar, "*created in 1565.*"

On the other hand, Lord Kellie, *holding this new title*, can have no right to vote in place of the old Earldom of Mar, which stands on the "Union Roll," admitted through a different line of succession, and with its ancient precedence of *more than a century earlier than a "creation of 1565."*

There is no clause in the "Articles of the Union," accepted

client, although he is a petitioner, *is not claiming anything before your Lordships*; he is opposing—he is undertaking to say 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." (See printed Speeches, p. 306.) Further, his "*Petition*," in opposition to Lord Kellie's claim, was *received by Her Majesty and the House of Lords as that of the Earl of Mar and Baron Garioch.*

by both Houses of Parliament in 1707, empowering the House of Lords to extinguish one Peerage on the Roll and supplant it by another of *totally different date, heirship, and line of succession*.

With these facts before us, I cannot see any legal bar to the vote of the representative of the ancient Mar title, standing on the Union Roll, being admitted, as it always has been received, if the ordinary rules and resolutions affecting the Scottish Peerage be strictly adhered to.

Surely the Scotch Peers will uphold the position of the ancient Earldom of Mar, and will regard it an insult to see the anomaly and injustice of an individual *holding one title voting in right of another*, especially when made fully aware of all the circumstances surrounding this most extraordinary case.

What inference is to be drawn from the refusal of the Lords' Committee for Privileges to admit rights clearly established by various Acts of Legislature, probably as conclusive, formal, and special, as were ever appealed to in support of a legal position?

The answer is difficult to find. Had there been even a legal quibble behind which their Lordships could have sheltered their "decision," they would at least have been safe from that inclemency of opinion which, whatever may be the ultimate effect of this extraordinary judgment, holds its authors up to public scrutiny.

Englishmen have ever been slow to believe in the possibility of those charged with the administration of the Law, and sworn to do justice, being influenced by anything except the evidence before them. But in this case they naturally ask, what rational explanation can be afforded of the process by which constitutional rights have been ignored to make way for a hypothetical dignity, founded upon a "*must-have-been creation*," conceded "*without evidence of any kind*," and in support of which their Lordships have been totally unable in their "Judgment" to allude to a single piece of documentary proof of it ever having existed.

Unless the grave charges set forth in this Pamphlet can be repelled, they will be held to remain established as proofs that Expediency, not Justice—Might rather than Right—obtained in this case the consideration of the Committee.

These charges may be thus summarised. In spite of two

Acts of Parliament, viz.: one of Scotland and one of the United Kingdom, in defiance of a Judgment of the Court of Session, from which (being before the "Union") there was no appeal, in contempt of the Decree of Ranking, and in direct contravention of the 20th clause of the Articles forming the basis of the Act of "Union," their Lordships, without delegated or prescriptive authority for such arbitrary exercise of power (and in a Court to which the public are not admitted), have invented an imaginary dignity for the especial benefit of the Earl of Kellie, and have proposed to foist this spurious offspring of their own conceptions on the Peerage of Scotland.

There is, it seems, but one issue from this unenviable position, and it is also that which will be most satisfactory to those (daily increasing in number), who regard with impatience an act of injustice to an individual involving an infringement of guaranteed constitutional rights.

Their Lordships should frankly confess that, as *English* Law Lords, their "Judgment" was rendered in ignorance of the position in which, at the "Union," the *ancient* Earldom of Mar continued to stand, *accepted* by the Law of Scotland and by the "Articles of the Union," with a date, precedence, and line of succession totally different from those affixed to the new Mar title conceded to the Earl of Kellie; and our most gracious Queen should be advised that the recognition which her Majesty has for many years been graciously pleased to grant to the representative of the *ancient* Earldom of Mar (the nephew and *undisputed* "next heir" of the last Lord Mar) should now be formally accorded to him.

If any other persons consider they have a better right to this *ancient* Earldom of Mar (which most certainly is *not* the Mar title adjudicated to Lord Kellie), let them establish their claim without delay.

As for the "Judgment" of the Committee and the new Mar title it bestows on the Earl of Kellie, the sooner they are consigned to oblivion the better; they will, if perpetuated, be remembered only as a parody on Justice, and a burlesque on History.

EDINBURGH :
H. & J. PILLANS, PRINTERS,
12 THISTLE STREET.

A P P E N D I X.

PROTEST * OF THE RIGHT HONOURABLE THE EARL OF CRAWFORD AND BALCARRES, ETC., AGAINST THE EARL OF KELLIE ANSWERING IN ANY CONCEIVABLE MANNER TO THE TITLE OF EARL OF MAR, AND ASSERTING THE RIGHT OF THE RIGHT HONOURABLE JOHN FRANCIS ERSKINE, EARL OF MAR, TO BE LEGALLY IN POSSESSION OF THE ONLY EARLDOM OF MAR IN THE PEERAGE OF SCOTLAND.

To the Right Honourable the Lord Clerk Register of Scotland, or The Clerks of Session officiating in his place at the next ensuing Election of Representative Peers of Scotland.

MY LORD,—

I, the Right Honourable ALEXANDER WILLIAM CRAWFORD, EARL of CRAWFORD and BALCARRES, LORD LINDSAY, etc., DO HEREBY PROTEST AGAINST THE RIGHT HONOURABLE WALTER HENRY, EARL OF KELLIE, ANSWERING TO THE TITLE OF EARL OF MAR, which stands on the Union Roll of Peers, or voting in right of that title, forasmuch AS HE HATH NO RIGHT THERETO: And should the vote of *the Right Honourable John Francis Erskine, Earl of Mar, hitherto received at the elections as that of the representative of the ancient Earldom of Mar on the Union Roll*, be tendered but *be not received* at the said election, I FURTHER PROTEST *against the rejection* of the said vote as being contrary to the usual regulations regarding the votes of the representatives of the Peerages which stand on the Union Roll; AS WELL AS BEING IN VIOLATION OF THE LEGAL RIGHT OF THE SAID RIGHT HONOURABLE JOHN FRANCIS ERSKINE, SO TO VOTE AS THE ACTUAL TENANT OF THE ANCIENT AND ONLY EARLDOM OF MAR IN THE PEERAGE OF SCOTLAND.

I GROUND and VINDICATE this PROTEST under seven articles, as follows:—Grieving much that it is impossible for me to do so except at considerable length; but trusting nevertheless to the indulgence of your Lordship and of my brethren, the peers of Scotland, in a matter wherein the rights of one of their number, and the security of the rights of all of them are deeply concerned at this moment.

I. Because the Resolution of the recent Committee of Privileges on the claim of the Earl of Kellie proceeds upon the assumed validity of certain charters and other documents upon which the Court of Session passed a solemn and final judgment in 1626, pronouncing them illegal and invalid, the Committee inferring from this assumed validity that the Earldom of Mar became extinct in the fifteenth century; and that, as an Earldom of Mar undoubtedly existed in 1565 and subse-

* Received, and entered in the minutes of proceedings at the election at Holyrood, Dec. 22, 1876.

quently, it must have so existed through a new creation in that year, probably by charter, and, in the absence of any charter or writ shewing the limitation, presumably destined to heirs-male, and thus vested in the Earl of Kellie; while the Resolution proceeds *pari passu* on the assumed invalidity of certain charters and documents which the Court of Session pronounced on the same solemn occasion to be legal and valid, affirming thereby the existence of the Earldom continuously, without legal break, from before 1404 to 1626, and in the succession of heirs-general, leaving no opening for the theory of a new creation in 1565. The Resolution of the Committee of Privileges and the Judgment of the Court of Session stand thus in absolute contradiction, each to the other. But, inasmuch as the Court of Session was, by statute and practice, the supreme tribunal in Scotland in all civil causes, including dignities, and its decreets were declared final, without appeal to King or Parliament, till a period subsequent to 1674, and in dignities absolutely till the Union; and all subsequent Courts of Law or Commissioners of Inquiry are bound to observe its Judgments, and regulate their decisions or opinions in conformity thereto; and the special question of the continuity and descendability of the Earldom of Mar to heirs-general, has been determined by the Decreet of the Court in 1626, and the Committee of Privileges has not reported in conformity thereto; *it follows necessarily that the Resolution of the Committee, which is a mere opinion tendered to the Crown, cannot weigh against the Judgment of the Court, and that THE EARL OF KELLIE HAS NO RIGHT TO VOTE UNDER THAT RESOLUTION AS EARL OF MAR.*

II. Because the Resolution of the Committee of Privileges—proceeding on the assumed invalidity (*ut supra*) of charters and documents which the Court of Session has pronounced legal and valid—*has disregarded the evidence of the Decreet of Ranking issued by the Royal Commissioners in 1606; which assigns precedency to the Earldom of Mar from 1404 in virtue of the charters and documents in question, in full recognition and affirmation of the continuous descent of the Earldom from that year, and in the succession of heirs-general established thereby—thus leaving (as before) no opening for the theory of a new creation in 1565. The Resolution of the Committee of Privileges and the award in the Decreet of Ranking in 1606 are thus, once more, in absolute contradiction. But inasmuch as the awards of the Royal Commissioners in 1606 are pronounced unalterable till reduced by legal process before the Court of Session; and those awards, and the judgments of the Court of Session in rectification of these awards, were observed and enforced by Parliament, as in duty bound; and the precedency of Mar, grounded *ut supra*, has never been reduced, and stands on the Union Roll—which Roll derives its warrant exclusively, not from Parliament, but from the Decreet of Ranking, of which, corrected by the judgments of the Court of Session, it is a transcript; and, thus sanctioned, cannot legally be ignored, or dealt with by any incompetent hand;—AND FURTHER, inasmuch as all subsequent Courts of Law and Commissions of Inquiry are bound to decide or report in conformity with the Decreet of Ranking and the Union Roll; and Lord Mansfield gave due weight to the Decreet in his address to the Committee of Privileges upon the Sutherland claim, which was a parallel case, in 1771,—and finally, the Committee of Privileges has not reported in such conformity in 1875—it follows necessarily that THE RESOLUTION OF THE COMMITTEE CANNOT WEIGH AGAINST THE RULING OF THE DECREET OF RANKING AND OF THE UNION ROLL as above set forth; and that THE EARL OF KELLIE HAS NO RIGHT TO VOTE UNDER THAT RESOLUTION AS EARL OF MAR.*

III. Because an acceptance of the vote of the Earl of Kellie, answering to the summons of Earl of Mar as on the Union Roll, or as claiming in any other way to be Earl of Mar in the Peerage of Scotland, would be incompatible with and to the prejudice of the right of the *heir-general*, John Francis Erskine, who, by the testimony and authority above established, is the lawful representative and tenant of the ancient and only Earldom of Mar, his said right standing thus:—I. As being SISTER'S SON AND IMMEDIATE HEIR OF JOHN FRANCIS MILLER, LATE EARL OF MAR, who died in 1866, in favour of whose grandfather, John Francis, the attainer of John Earl of Mar, forfeited in 1715, was reversed by the grace of the Crown and by Act of Parliament in 1824, on the ground, as expressed in the Act of Reversal, that the recipient of grace was "GRANDSON AND LINEAL REPRESENTATIVE" of the attained Earl—that is to say, *as previously verified and reported upon by the Attorney-General and the Lord Advocate, through his MOTHER Lady Frances Erskine, DAUGHTER of that Earl, from whom he was NOT DESCENDED IN THE MALE LINE.* It is to be observed that the reversals of attainder in 1824 were rigidly restricted

to the cases of such persons as were the direct heirs of the body of the attainted peers, and would have been in possession as such had the attainders not taken place. There can thus be no question as to the understanding upon which the inclusion of the Earldom of Mar among the restored dignities proceeded; whereas, upon the view taken by the recent Committee of Privileges, viz., that the Earldom of Mar is a dignity descending to heirs-male, the forfeited Earldom would have been excluded from the category. *The Act of Reversal* was thus in strict conformity with the standing judgment of the Court of Session in 1626, and with the precedency as from 1404 under the Decree of Ranking and on the Union Roll,—to say nothing of the weight attached to the Decree of Ranking by Lord Mansfield on the claim of the heir-general to the Earldom of Sutherland in 1771. 2. As being, through his said ancestor, John, Earl of Mar, attainted in 1715, the direct heir and representative of John, Lord Erskine, restored in 1565 *per modum justitiæ* as Earl of Mar, and of Robert, Earl of Mar, lawfully so designated, who flourished in 1438, and *nearest heir of Isabel, Countess of Mar, in her own right in 1404*, all as by the evidence affirmed as valid by the Court of Session in 1626, and previously effective in the restoration of the Earldom in 1565, and by the precedency assigned as from 1404 by the Decree of Ranking, and standing on the Union Roll as aforesaid; JOHN FRANCIS ERSKINE, SISTER'S SON AND HEIR-GENERAL of John Francis Miller, late Earl of Mar, the grandson and representative of John Francis, Earl of Mar, restored in 1824, HAVING LEGALLY QUALIFIED HIMSELF as successor to his uncle in the dignity according to the forms competent to the Peers of Scotland, and being THUS LEGALLY IN POSSESSION, AND BEING IN NO POSSIBLE WAY REQUIRED TO SUBMIT HIS RIGHTS TO THE CONSIDERATION OF A COMMITTEE OF PRIVILEGES under the circumstances above shewn, IS NOW *de jure* AND *de facto* EARL OF MAR BY THE LAWS OF SCOTLAND, RESERVED INVIOLEATE BY THE TREATY OF UNION, is, on the preceding grounds, ALONE ENTITLED TO VOTE, as he has voted on previous occasions, AS EARL OF MAR, ranking as from 1404 in the Decree of Ranking and on the Union Roll, and TO REJECT HIS VOTE TENDERED AS EARL OF MAR ON THE UNION ROLL, OR TO ACCEPT THE VOTE OF THE EARL OF KELLIE IN WHATEVER CONCEIVABLE MANNER AS EARL OF MAR, would be to DISREGARD LEGALLY ASCERTAINED RIGHTS, and inflict grievous injury on the representative of these rights—rights which may be said to be in the strictest sense under the view and protection of your Lordship and of the Peers of Scotland in convention at Holyrood on the present occasion.

IV. Because acceptance of the Earl of Kellie's vote as Earl of Mar under the alleged creation in 1565, in response to the summons of the Earl of Mar, ranking as from 1404 on the Union Roll would be incompatible with and to the prejudice of the rights of precedency of the Earls of Rothes, Morton, Buchan, Glencairn (a dignity dormant, but not extinct), Eglinton, Caithness, and Moray, all of them holding earldoms created between 1404 and 1565, their said precedencies being legally assured to them by the authority of the Decree of Ranking and of the Court of Session, and protected under the category of private rights dependent on the law of Scotland by the Treaty of Union, so that they may not now be disallowed or interfered with.

V. Because, inasmuch as *the Earldom of Mar, existing in 1606 and 1707, forfeited in 1715, and restored in 1824*, is, by the supreme authority of the Court of Session and by the Decree of Ranking (*the basis and warrant of the Union Roll*), THE IDENTICAL EARLDOM WHICH EXISTED IN 1404; and the suggestion of an Earldom of Mar, created in 1565, probably by charter, and presumably with a limitation to heirs-male, is thus inadmissible—it follows, as a necessary consequence, THAT NO SUCH ALLEGED EARLDOM OF MAR, CREATED IN 1565, IS NOW, CAN BE NOW, OR MAY AT ANY FUTURE TIME BE PLACED UPON THE UNION ROLL, or can be constructively included within its category. Even were the Crown to recognise in some formal manner the "Earldom of Mar in the Peerage of Scotland" alleged by the Committee of Privileges, such recognition could not constitute a Scottish Peerage, nor entitle it to be placed on the Roll even as the youngest of the Earldoms, inasmuch as such creation by recognition, even were it constitutional and practicable, would be *tantamount* under the circumstances to the creation of a new Scottish Peerage; whereas BY THE TREATY OF UNION NO MODERN ADDITION CAN BE MADE TO THE diminished but time-honoured ranks of the PEERS OF SCOTLAND. Much less could an Earldom of Mar as thus alleged, but disallowed by the earlier and dominant evidence above cited, be placed on the

Roll under the date of 1565 without infringement of the rights of precedence vested in the Earls created subsequently to 1565. IN NO POSSIBLE WAY, THEREFORE, CAN THE VOTE OF THE EARL OF KELLIE BE RECEIVED *as that of an "Earl of Mar in the Peerage of Scotland."*

VI. Because the vote of the Earl of Kellie, as Earl of Mar, is tendered in virtue of the Report of a Committee of Privileges which proceeds as its basis upon a principle of overruling the final judgments, and disallowing the paramount authority of the Court of Session, in dignities as it existed previously to, and at the date of the Treaty of Union; a principle which, originating in misapprehension and oversight, has been in operation from and since the Glencairn claim in 1797, was affirmed and systematised in the Montrose claim in 1853, and has found its most recent expression in the Report upon the claim of the Earl of Kellie to the Earldom of Mar in 1875,—the Reports in each of these claims affirming documents upon which the rights of the heir to these dignities depend, to be invalid, null and void, in the face of judgments of the Court of Session in the seventeenth century, standing and operative in the present day, which pronounced them valid, effective, and operative—the Committee of Privileges giving effect, on the other hand, to documents which the same Supreme Court had, in the same century, and in the same breath, pronounced invalid, non-effective, and inoperative,—thus inflicting cruel injury upon the heirs in each of these three cases; although the Noble and Learned Lords who advised these Committees would, there cannot be a doubt, have advised differently, especially in this last case of Mar, but for the controlling force of the system which has grown up in development of the principle in question:—Acceptance of the vote of the Earl of Kellie as Earl of Mar, in virtue of the Report, grounded as above, would, under these circumstances, amount to a sanction and homologation of the principle indicated; and such sanction and homologation must import very grave peril to the Peers of Scotland, and to heirs and claimants of Scottish dignities at a time when the above novel and revolutionary principle, adopted and enforced by Committees of Privileges, threatens, if acquiesced in, to deprive them of all security against their ancestral rights, as dependent on judgments of the Court of Session being overruled and set aside hereafter, as in the three cases above specified—the uncertainty and peril being now such that no man can say where the blow will next fall. In the two former of these three cases, those of Glencairn and Montrose, no counter claimant recognised as having a right to vote could possibly have appeared at the Election of a Scottish representative Peer; but, on this third occasion, the opportunity of protestation against the principle in question opens for the first time in the manner and form specially competent to a Scottish Peer; and *I protest against it accordingly under the present article, for remedy of justice in the two former cases, for removal of prejudice in that of Mar, and towards precluding similar miscarriage of right in the future.*

VI. Because, finally, *acceptance of the vote of the Earl of Kellie as Earl of Mar* upon the Report of the Committee of Privileges, founded on the principles above shewn, would be INCOMPATIBLE WITH RIGHTFUL OBEDIENCE TO THE LAW OF THE LAND, AND DUE REVERENCE FOR CONSTITUTED AUTHORITY; and would thus amount not merely to the sanction of private wrong, but to THE INFLICTION OF PUBLIC INJURY, STRIKING AT THE ROOTS OF JUSTICE.

In witness whereof, I have signed and sealed these presents, the 8th day of December 1876.

(Signed) CRAWFORD AND BALCARRES.

JOHN GRIFFIN, *Witness.*
ALFRED HILL, *Witness.*

PROTEST AGAINST THE EARL OF KELLIE, TENDERED AND
 LODGED AT HOLYROOD, AT SAME DATE, BY THE LORD
 NAPIER AND ETTRICK.

I, the Right Honourable FRANCIS, LORD NAPIER, do hereby object to the Right Honourable Walter Henry Erskine, Earl of Mar and Kellie, answering to the title of Earl of Mar on the Union Roll, which stands on the said roll with a precedence of more than a century earlier than the Earl of Mar assumed by the House of Lords to have been created in 1565, and adjudicated to the Earl of Kellie on February 25, 1875; and should the vote of the Right Honourable John Francis Erskine, Earl of Mar, hitherto received at the elections as that of the representative of the ancient Earldom of Mar on the Union Roll, be tendered and be not received, I further object to the rejection of said vote, and protest for the reasons set forth in the protest of the Earl of Crawford and Balcarres.

PROTEST* OF THE RIGHT HONOURABLE JOHN FRANCIS
 ERSKINE, EARL OF MAR AND BARON GARIOCH,
 ASSERTING HIS RIGHT TO APPEAR AND VOTE AT
 HOLYROOD, AS LEGALLY IN POSSESSION OF THE
 ANCIENT EARLDOM OF MAR, STANDING AS THE ONLY
 TITLE OF MAR ON THE UNION ROLL.

*To the Right Honourable the Lord Clerk Register of Scotland, or the Clerks of
 Session officiating in his place at the next ensuing Election of Representative
 Peers for Scotland.*

MY LORD,—

I, the Right Honourable JOHN FRANCIS ERSKINE, EARL OF MAR and BARON GARIOCH, being, as evidenced by the Sheriff of Chancery, February 14, 1867, the undisputed heir-at-law and legal representative of my uncle, the last holder of the ancient Earldom of Mar, which is the only title of Mar standing on the Union Roll, and being the undoubted great-grandson and heir of line of John Francis, the Earl of Mar who was restored to the said ancient Earldom by Act of Parliament, June 17, 1824—which Act stated that he was restored “*as grandson and lineal representative*” of the Earl who was attainted in 1715, which position he held alone through his mother, Lady Frances, as testified by the official report of the Law Officers of the Crown preliminary to the said restoration, showing the ground of his restoration to be through his heirship alone to his said mother—DO HEREBY ASSERT MY RIGHT TO BE, by the law of Scotland, *de jure sanguinis* and *de facto* through my mother, Lady Frances, in possession of the said ancient Earldom of Mar, the only title of that name on the “Union Roll.” Seeing that I have complied with the usual forms required of Scotch Peers, I do not need the formal recognition of the House of Lords, for by a “resolution” (his Grace the Duke of Buccleuch’s) passed by the House of Lords, July 25, 1862, it is not necessary for a Scotch Peer to seek or obtain the formal recognition of the House of Lords; and further, seeing that, by a late “resolution” of the House of Lords, it appears that no two votes in right of the same title can be accepted, I hereby protest that I do *not* claim or wish to vote or appear as in right of the title called Mar, supposed to have been “created in 1565,” and adjudicated by the House of Lords to the Earl of Kellie (as a purely imaginary “creation” of that year), which new title is not on the records of the Scottish nobility, and to support which new creation (as the Lords of the Committee state), “there is no writing or evidence of any kind,” and if this new title of Mar is to be recognised as a Scotch Peerage, I protest that it is totally inde-

* Presented to the Lord Clerk Register at the Election at Holyrood, December 22, 1876.

pendent of the old and only Earldom of Mar on the "Union Roll," in right of which old Earldom I have habitually voted; and if any other person can establish his or her right to the ancient Earldom of Mar on the Union Roll, which most certainly is *not* the Mar title conceded to Lord Kellie by the presumed new "creation of 1565," let that person prove his or her right to it forthwith.

I further maintain that, though for a considerable period the family name of the Earls of Mar continued to be Erskine, no claim to this ancient Earldom has ever been allowed to, or claimed by an Erskine in right of Erskine heirship, but solely through maternal ancestry, derived from Janet, the heiress of Mar, who married a Sir Thomas Erskine early in the fifteenth century.

Further, in 1606, when the Peers, by Royal command, were formally ranked according to the antiquity of the documents they then produced and no more, the then holder of the Mar title, in accordance with the documents he then produced, and which are still extant, claimed and obtained the recognition of the Commissioners and the Peers of Scotland, solely by virtue of the said maternal ancestry, and the said Earl was granted his rank and precedence as the heir of Isabella, Countess of Mar in her own right, in 1404, and as holding her Earldom of Mar, independently of Erskine heirship, while Lord Kellie's new Mar title, on the contrary, is said to have been created for an Erskine, and restricted to the heirs-male of the Erskines. Hence the difference between these two Mar titles is not merely in precedence, but in their origin and line of succession.

Further, my ancestors since 1606, not content with the precedence awarded to them, which was, by the terms of the said decret in 1606, only according to the antiquity of the documents then produced, have habitually protested their right to be premier Earl of Scotland, through female ancestry, and of these protests seventeen are recorded, including those of my uncle, the late holder of the ancient Earldom of Mar, whose representative I am, and that position to which I adhere is completely incompatible with the totally unfounded presumption that there was a new Mar Earldom created in 1565.

I protest that the aforesaid fact that the ancient Earldom of Mar was ranked in 1606, with precedence from the fifteenth century, and acknowledged by the Peers of Scotland and by the Commissioners to be still in existence, precludes the supposition that that same dignity "had come to an end in some way or other" about 170 years before the date of the said decret of ranking, as was observed by one of the Lords of the Committee, but to which no allusion was made in the "resolution" of the House of Lords.

Thus the ancient Earldom of Mar I inherit, being in existence in 1606, was acknowledged and ranked by the said Commissioners; while, on the other hand, Lord Kellie's new Mar title, though now supposed to have been *created in 1565, or only forty years before this Decret of Ranking*, was naturally not acknowledged and not ranked, as it was not called into existence till 1875.

Further, the *ancient* Earldom of Mar, thus ranked by the said Commissioners, was acknowledged by the Court of Session, notably in 1626, to be still in existence, held through *female* succession and by heirship to the said Isabella, Countess of Mar in her own right, in 1404.

Again, in 1707, according to the Articles of the Union, by which the rights of the Scottish Peerage remain "in the same manner" as they stood then "*according to the laws of Scotland*" this ancient Earldom of Mar, descendible through *female* succession to heirs-general or heirs of line (*with no restriction to heirs-male*), was as then recognised by the laws of Scotland thus accepted by the British Parliament, and, in accordance with the said Decret of Ranking, was placed on the roll of peers, admitted by the British Parliament as the authentic list of the Scottish Peerage, commonly called the "Union Roll," with its said ancient precedence involving female succession and descent to heirs-general or heir of line, which position I hold, and to which position Lord Kellie cannot pretend.

Further, this ancient Earldom of Mar was attained in 1715, and restored in 1824 by Act of Parliament, as already pointed out, in favour of the son of the *daughter* of the attained Earl, and on the grounds alone of *female* descent, as certified by the law officers of the Crown at that date, and no Act of Parliament having been passed to affect the position of this recently restored Earldom of Mar, its position and line of succession to heirs-general or heirs of line remain unaltered.

Finally, I protest that Lord Kellie's new title of Mar being *restricted to heirs-male*, by a presumed new "creation of 1565," but which is unrecorded and unknown in the history of the Scottish Peerage, is totally independent of my ancient

Earldom of Mar, whose continued existence has been admitted and confirmed by Royal Charters, by Acts of the Scottish Parliament, by the Commissioners of Ranking and the Peers of Scotland in 1606, by the decisions of the Court of Session, by the Articles of Union in 1707, and by the Parliament of the United Kingdom then, and again in 1824, descendible to heirs of line or heirs-general, with no restriction to heirs-male, I, as the undisputed heir of line and heir-general of the Earl of Mar, restored in 1824, am in possession of the said ancient Earldom of Mar; and seeing that there has been *no adjudication* against my right to this ancient Earldom by the House of Lords, nor by any other tribunal, I protest that should the right to this ancient Earldom of Mar, the only Mar title on the "Union Roll," be now or at any other time denied to me, or my heirs, such denial would be an infringement of the "Articles of the Union" accepted by the British nation as binding, and would be a direct violation of the laws of the land.

I therefore desire and require that the clerks of the present meeting do receive this my protest, and record the same in their minutes thereof.

Witness my hand and seal, this 22nd of December 1876.

(Signed)

MAR.

JAMES KEIR, Advocate, of 10 Albyn Place, Edinburgh, *Witness.*

LOCKHART THOMSON, Solicitor, of No. 114 George St., Edinburgh, *Witness.*

PROTESTS AGAINST THE EARL OF KELLIE, TENDERED
AND LODGED AT HOLYROOD, AT SAME DATE, BY THE
MARQUIS OF HUNTLY, THE MARQUIS OF AILSA (THE
EARL OF CASSILLIS), THE EARL OF MORTON, AND
THE EARL OF CAITHNESS.

I, the Right Honourable CHARLES GORDON, Marquis of Huntly, do hereby object to the Right Honourable Walter Henry Erskine, Earl of Mar and Kellie, answering to the title of Earl of Mar which stands on the Union Roll of Peers, as he has no right thereto, but only to a title of Earl of Mar recently found by the House of Lords to have been created in 1565; and if the said Walter Henry Erskine, Earl of Mar and Kellie, should, notwithstanding of the objection hereby made on my behalf, insist on answering to the said title of Earl of Mar so standing on the said Union Roll as aforesaid, I do hereby protest against his so doing, and for remeid of law at a fit and proper time.

I, the Right Honourable ARCHIBALD KENNEDY, Earl of Cassillis, do hereby object to the Right Honourable Walter Henry Erskine, Earl of Mar and Kellie, answering to the title of Earl of Mar which stands on the Union Roll of Peers, and voting before me, 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.

I, the Right Honourable SHOLTO JOHN WATSON DOUGLAS, Earl of Morton, do hereby object to the Right Honourable Walter Henry Erskine, Earl of Mar and Kellie, answering to the title of Earl of Mar which stands on the Union Roll of Peers, and voting before me, 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.

I, the Right Honourable JAMES SINCLAIR, Earl of Caithness, do hereby object to the Right Honourable Walter Henry Erskine, Earl of Mar and Kellie, answering to the title of Earl of Mar which stands on the Union Roll of Peers, and voting before me, as he has no right to the said title of Mar on the Union Roll, but only to a title of Earl of Mar recently found by the House of Lords to have been created in 1565, which creation gives his title of Earl of Mar rank below me; and if the said Earl of Mar and Kellie should, notwithstanding the objection hereby made on my behalf, insist on answering to the said title of Earl of Mar so standing on the said Union Roll as aforesaid, I do hereby protest against his so doing, and for remeid of law at a fit and proper time.

At the Election at Holyrood on December 22, 1876, the EARL OF MANSFIELD (Viscount Stormont), in reply to a remark that it was impossible that there could be two Earls of Mar at the same time, said—"It so happens that I am at this moment Earl of Mansfield, and Earl of Mansfield by two separate creations."

At the said Election the Earl of Mansfield voted for "*The Earl of Kellie*," and, in reply to a question, indicated that "he declined to accord the additional title," (of Mar). (See "*Scotsman*," "*Edinburgh Courant*," and "*Glasgow Herald*," Dec. 23, 1876.)

COPY, VOTING PAPER OF THE EARL OF MANSFIELD
(VISCOUNT STORMONT).

I, WILLIAM DAVID, Viscount Stormont, do vote for the Right Honourable Earl of Kellie and the Right Honourable Lord Balfour of Burleigh to be Representative Peers of Scotland.

(Signed) STORMONT.

HOLYROOD HOUSE, Dec. 22, 1876.

Excerpt from Proceedings of House of Lords as to Earl of Roseberry's Resolution, 13th May 1822.

Resolved, by the Lords Spiritual and Temporal in Parliament assembled, that no person upon the decease of any peer or peeress of Scotland, other than the son, grandson, or other lineal descendant or the brother of such peer, or the son, grandson, or other lineal descendant of such peeress, shall be admitted to vote at the election of the sixteen peers to be chosen to sit and vote in the House of Lords of the United Kingdom of Great Britain and Ireland as representatives of the Peerage of Scotland, or at the election of any one or more of such peers to supply any vacancy or vacancies by death or otherwise, until, on claim made on behalf of such person, his right of voting at such election or elections shall have been admitted by the House of Lords.

Resolved, by the Lords Spiritual and Temporal in Parliament assembled, that the right of every person voting or claiming to vote, or having voted or claimed to vote, at any election of the Peers of Scotland, shall be subject and liable to every objection to which the same would have been subject and liable had the foregoing resolution not been agreed to.

RESOLUTION OF THE HOUSE OF LORDS RESCINDING
THE ABOVE.

Election of Representative Peers for Scotland—*moved*, That the Resolutions of this House of 13th May 1822 relating to the election of the Scotch Representative Peers be rescinded.

Agreed to.

(The Earl of Doncaster).

—*Extract from Minutes of the House of Lords of 25th July 1862.*

Extract "ARTICLES of UNION," (agreed to 22nd July 1707).

Clause xx.—"That all heritable offices, heritable jurisdictions, be reserved to the owners thereof as rights of property *in the same manner* as they are now enjoyed by *the Laws of Scotland*, notwithstanding this treaty."

House of Lords ordered "Lord Clerk Register for Scotland do hereby lay before this House an authentic list of the Peerage of that part of Great Britain called Scotland (The 'Union Roll'), as it stood first day of May last."—December 22, 1707.

House of Lords ordered said Roll "*be received and entered.*"—February 12, 1708.

At Holyrood, Dec. 22, 1876, the Earl of Mar having stated that he had been in the habit of voting at the elections as a Peer, the Lord Clerk Register (Sir W. Gibson-Craig) replied “*no ! no ! certainly not.*” —(See “Scotsman,” Dec. 23, 1876.)

PROOF of the VALIDITY of the vote of the Right Honourable JOHN FRANCIS ERSKINE GOODEVE ERSKINE, EARL OF MAR, as a Peer of Scotland, in *contradiction* to the observation by the Lord Clerk Register (Sir W. Gibson-Craig), made at Holyrood on Dec. 22, 1876, to the contrary.

(See “Times,” “Scotsman,” etc., of Dec. 23, 1876.)

At General Election of 16 Representative Peers, at Holyrood, Dec. 3, 1868, the said John Francis Erskine, Earl of Mar, voted for (among other Peers) Lord Rollo, but *not* for the Earl of Kellie.

The vote of the *said Earl of Mar* was RECEIVED, COUNTED, AND INCLUDED in the votes which were given for Lord Rollo (22 in number, the Earl of Kellie receiving also 22 votes), and thus Lord Rollo and the Earl of Kellie immediately followed the first fifteen Peers, who had a greater number of votes.

“The Lord Clerk Register made return in favour of 15 Peers . . . (here follow names of said 15 Peers), and he returned the votes for the Earl of Kellie and the Lord Rollo as equal.”—(*Excerpt from Minutes of Election, 3rd Dec. 1868.*)

On and after 3d December 1868, up to July 7, 1869 (in the interval, Lord Rollo having been created a Peer of the United Kingdom), Scotland was represented by 15 instead of 16 Peers.

The Earl of Kellie lodged in the House of Lords, 19th Feb. 1869, Petition “to amend the return of the Lord Clerk Register (3rd Dec. 1868), by inserting Petitioner’s (Lord Kellie’s) name and title as one of the sixteen Peers duly elected.”

Petition of the said Right Honourable John Francis Erskine Goodeve Erskine, Earl of Mar, was lodged in the House of Lords, 7th May 1869, “praying the House of Lords *not* to amend the said Return.”

RESULT OF SAID PETITIONS.

“The Earl of Kellie having prayed leave to *withdraw* his said Petition, the Committee came to the following resolution, viz. : “Resolved that the Petitioner, the Earl of Kellie, having prayed leave to withdraw his Petition, the Committee do *not* think it expedient* to investigate the double return under the said certificate of the Lord Clerk Register with a view to its amendment.”—(*Excerpt from Proceedings, House of Lords, 11th May 1869.*)

In consequence of said “double return,” caused by the VALIDITY of the vote of the said John Francis Erskine Goodeve Erskine, Earl of Mar, and the said Petition of the said Earl of Kellie having been *thus withdrawn*, and the matter *not* further investigated, a *fresh Election* was rendered necessary.

FRESH ELECTION at Holyrood of a sixteenth Representative Peer, July 7, 1869.

The Earl of Kellie being the only candidate at said fresh Election (the Duke of Buccleuch and the Earl of Kellie were the only Peers present), the Earl of Kellie was declared duly elected.—(*See Minutes of said Election.*)

* Could the said vote causing said “double return” have been legally annulled?

EXTRACTS from the Volume "Ancient and Modern," privately printed and circulated in 1875.

[Page 9.] . . . We will now shew that Lord Kellie had in his possession many more *Mar Documents*, besides those produced at the funeral [of the late Earl of Mar, June 26, 1866.]

On being examined with regard to these, at the House of Lords on the 3rd May 1870, his lordship said :* "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."

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† & 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 recognised 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.

[Page 13.] . . . 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, & Brodies, W.S.,
Thistle Street.

* See Minutes of Evidence, page 414 (House of Lords).

† Brother of the said Lord Clerk Register.

‡ Considered by Lord Mar's legal advisers as most important as regards his right to the *Mar estates*.

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. The 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, & Cowan, W.S.

CORRESPONDENCE between Messrs Hunter, Blair, & Cowan, and
Messrs Gibson-Graig, Dalziel, & Brodies.

Messrs Gibson-Craig, Dalziel, & 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. . . .

We hope you will excuse this trouble, and we remain, dear Sirs, yours truly,
HUNTER, BLAIR, & COWAN.

Messrs Gibson-Craig, Dalziel, & Brodies, to Messrs Hunter, Blair, & 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, & Cowan, W.S.

—From Appendix to "Ancient and Modern," p. xxvii.





