The Genealogist.

THE EARLDOM OF MAR.

Genealogically speaking, one of the most notable events of the past year has been the removal by Act of Parliament of the doubts in which the Resolution of the House of Lords of 26th February, 1875, had involved the status of the holder of the ancient earldom of Mar. The general scope of this Act has already been concisely sketched in these pages (Vol. II, New Series, p. 308) by one eminently qualified to handle the subject, both from his familiarity with the questions involved, and from his having been counsel before the Select Committee of the Lords entrusted with the proof of the preamble. But a fuller *résumé* of the history of this remarkable dignity, and of the now terminated controversy of which it has been the subject, may not be unacceptable to some readers.

It is sufficient to allude here in general terms to a subject fully elucidated in Mr. Skene's "Celtic Scotland," vol. iii, the division of Scotland in the period immediately following the union of Picts and Scots into provinces, each ruled over by a Mormaer or Great Steward, whose office was hereditary, though not strictly according to the feudal laws of inheritance. The province called Mar corresponded to the larger half of the modern county of Aberdeen. The first authentic notice of an individual Mormaer of Mar comes from an Irish source, but rests on far higher testimony than the "Annals of Ulster," the authority quoted for it in the Mar Peerage case, namely, a nearly contemporary tract on the wars of the Gaedhel with the Gael, which has been edited by Dr. Todd as one of the "Chronicles and Memorials" issued under the direction of the Master of the Rolls. It is to the effect that in the struggle between the native races of Ireland and their Danish oppressors in the beginning of the 11th century, Brian Boroimhe, the leader of the Gaelic party, had the aid of an auxiliary force from Alban, under Domnall (Donald) son of Ermin, son of Cainnich, Mormaer of Mar, and that at the decisive battle of Cluantarbh, fought on Good Friday 1014, that Mormaer and Brian himself were both among the slain on the victorious side.

For the next mention of a Mormaer of Mar we are indebted to a MS.—which in old times belonged to the Monastery of Deer

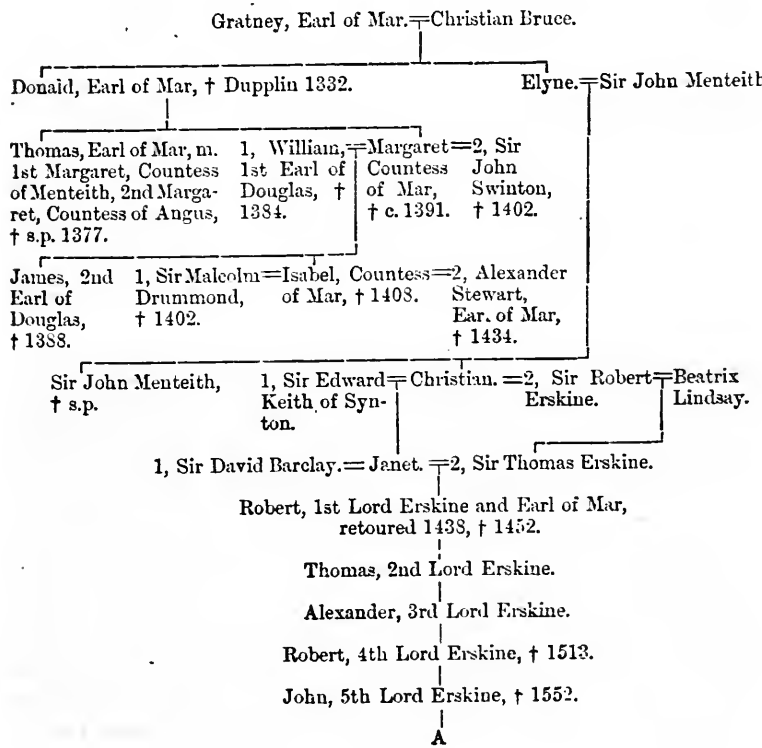
in Aberdeenshire, and is now in the University library of Cambridge—edited for the Spalding Club. Certain memoranda, in the Celtic language, in the blank leaves of this "Book of Deer," in a hand-writing of the beginning of the twelfth century, have preserved a full record of the succession of the Mormaers of Buchan, benefactors of the church of Deer; and though they do not impart the same amount of information about the contemporary Mormaers of Mar, they have at least left it on record that a grant by Gartnet, Mormaer of Buchan, to the clerics of Deer in 1132, was witnessed by Ruadri (Roderick), Mormaer of Mar. This Ruadri marks the epoch when the Mormaer passed into the Earl. As "Rothri Comes," one of the "Seven Earls of Scotland," he confirms the foundation charter of Scone (1120); and he figures similarly in the great charter of David I. to the monastery of Dunfermline (1124-7).

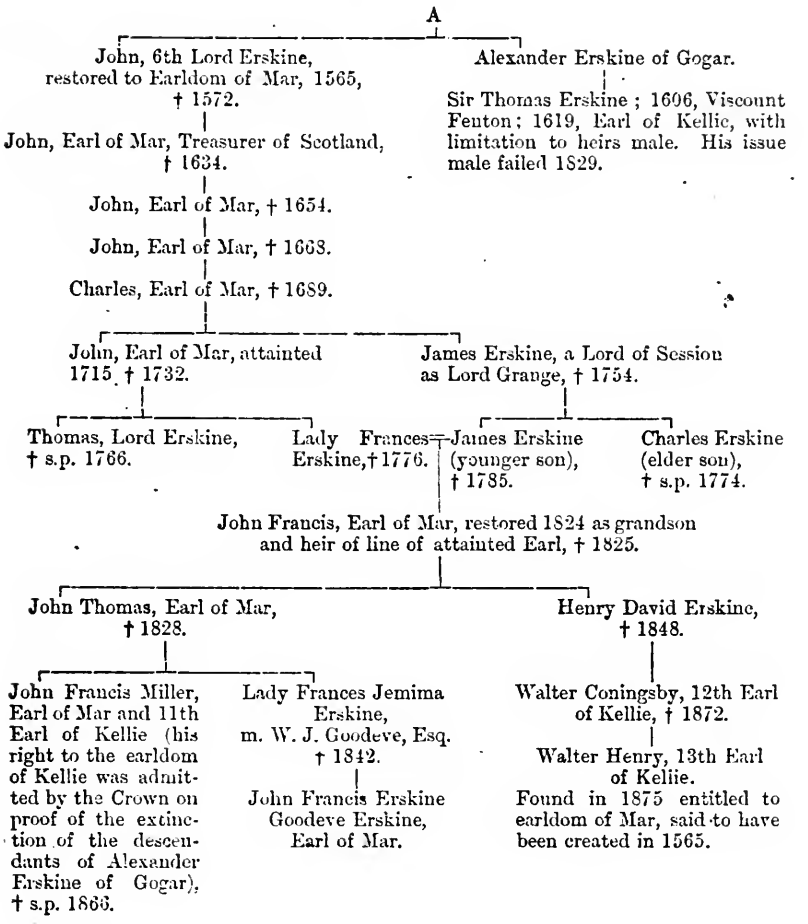
The succession of the earlier Earls of Mar, as deduced from record sources, can be but very briefly sketched consistently with the limits of this paper. The first progenitor, from whom the descent of later Earls can with legal certainty be traced, is Earl Morgund (*c.* 1152-79). He and his Countess Agnes are chiefly known through their donations to the Priory of S. Andrew's and other religious houses. A second wife of Morgund was mother by a second husband of the famous Seyer De Quinci, Earl of Winchester, who died in the Holy Land in 1219. But the lawfulness of Morgund's birth, and consequently his right to the Earldom, had been called in question by one Gilchrist, who, in the capacity of legitimate heir, established himself in possession on Morgund's death to the exclusion of the sons of the latter. What we know of Gilchrist, as of Morgund, is chiefly from ecclesiastical sources; he built a priory for the Culdees of Monymusk, and endowed them with various churches in Mar. On Gilchrist's death (after 1204) Morgund's line again resumed possession: and we have first Earl Duncan, son of Morgund; then William son of Duncan, one of the Council of Regency in the minority of Alexander III., and Great Chamberlain under that King, a prominent statesman on the patriotic as opposed to the English side. An attempt was made to disturb Earl William's possession by Alan the Doorward, one of the ambitious spirits of his time, who, through his grandmother, had inherited Gilchrist's claim, and obtained a commission from Pope Alexander IV. to have the question of Morgund's legitimacy tried. The dispute was probably one of many that arose out of the conflict between the old Celtic usage and the Canon law; but, as Earl William remained in possession, it is presumable that his grandfather's legitimacy had stood its ground.

Donald, Earl of Mar, son and successor of William, also played his part in contemporary history. He figured as one of the "Seven Earls" in 1291; actively supported the claims of the

competitor Bruce, whose grandson (the future King Robert) had married his daughter; fought against Edward I. at Berwick in 1296, but submitted and took the oaths of fealty; and Edward, in the autumn of the same year, spent a day at his Castle of Kildrummy. His wife (the widowed Countess of Fife) was a daughter of Prince Llewellyn of North Wales; one of his daughters was the first wife of King Robert Bruce, and ancestress of the Royal house; another was wife of the Earl of Athole who was put to death for his share in Bruce's coronation; and his son and successor, Earl Gartnet or Gratney, married Bruce's eldest sister Christian.

Of Gartnet or Gratney, who succeeded his father in 1297, and was but a few years Earl, we know little, except that in his father's lifetime he had earned thanks from Edward I. for his zeal in supporting his authority in the North. In the Mar genealogy he is of note as having been the common ancestor, through his son Donald and his daughter Ellen or Elyne, of all subsequent Earls. The subjoined pedigree will remove all difficulty in following the line of his successors in the Earldom.





Earl Gratney's widow, Christian Bruce, a lady of some mark, became wife of Sir Christopher Seton, who was put to death by the English in 1306; entered in 1326 into a third marriage with Sir Andrew Moray, much her junior, when she got in dower from her brother the King the *quondam* Earldom of Garioch as a lordship; and died at a great age in 1357.

Earl Donald, son of Gratney, taken to England as a captive in his boyhood, was brought up in the household of the English king; and it was only after the dethronement of Edward II., to whom he was personally attached, that his affections reverted towards his own country. On the sudden death of Thomas Randolph, Earl of Moray, in July 1332, just as an invading fleet was approaching the Scottish shores, a hastily assembled Parliament elected him Regent. But the choice was an unhappy one.

His rashness and inexperience brought on his country the disastrous defeat of Dupplin, where he was himself among the slain. There is a little difficulty in understanding the parentage of his wife, Isabel Stewart, who in her widowhood married Geoffrey of Moubray, then, divorcing Moubray, became (1339) wife of William of Careswell, and died about 1347. This lady had an acknowledged hereditary claim to the Sheriffdom of Roxburgh and keepership of Roxburgh Castle, and to lands in Scotland[1] of which Careswell got the ward till her son Earl Thomas should be of age.

Thomas, who was Earl of Mar from 1332 to 1377, was an infant when his father fell at Dupplin. His grandmother held the fortress of Kildrummy during the troubled period that followed; and, on her death in 1357, he had her lands and lordship (sometimes called Earldom) of Garioch confirmed to him. In 1358 he was Great Chamberlain of Scotland, and in 1360 he entered into an engagement to serve Edward III. in his French wars. He fell into disgrace for a time with David II, who besieged and took his Castle of Kildrummy, but on payment of a composition he was restored to his lands and to Royal favour. He was twice married: to Margaret, Countess of Menteith in her own right, whom he divorced ("instigante diabolo" as Fordun tells us); and to Margaret Stewart Countess of Angus; but he had no issue by either wife. The last-named lady, an intriguing and ambitious woman, had a natural son, born of an illicit connexion with her husband's brother-in-law the Earl of Douglas, who, through his mother's influence, became son-in-law of the King, and her successor in the Earldom of Angus, and was progenitor of all the Earls of Angus of the name of Douglas. The Countess of Angus and Mar also contrived a further scheme, which was frustrated, to obtain for her son the reversion of the Mar estates.

All the oldest Scottish dignities went to heirs of line, and the successor of Earl Thomas was his sister Margaret, Countess of Mar in her own right; she was married to William 1st Earl of Douglas, who, agreeably to the usual, though not universal, practice of the time, designed himself in her right Earl of Mar also, his ordinary style being Earl of Douglas and Mar. They had two children; a son James, who became son-in-law of Robert II, and succeeded his father in the Earldom of Douglas in 1384, but, falling at Otterburn (1388) in his mother's lifetime, never became Earl of Mar; and a daughter Isabel, who became Countess of Mar (her brother having left no lawful issue), but not of Douglas, inasmuch as the honours of Douglas were settled on a different line, from which females were excluded. Countess

[1] Sir Henry Baliol of Branxhame (? also of Cavers, which afterwards belonged to Isabel's son) who had been a comrade in arms of Sir James Douglas in 1316, was Sheriff of Roxburgh in 1329 (Exchequer Rolls of Scotland, I. p. 106.)

Margaret of Douglas and Mar had also a second husband, Sir John Swinton of Swinton, who fell at Homildon in 1402. She died between 1391 and 1395.

Countess Isabel, when she succeeded her mother, was wife of Sir Malcolm Drummond, brother of Robert III's Queen. Her *raptus* and second marriage form a well-known episode in Scottish history. In the year 1404 Alexander Stewart, illegitimate son of the King's youngest brother Alexander Earl of Buchan, and the contriver, according to universal belief, of a murderous attack on Drummond a few months previously, took forcible possession of the newly widowed Countess and her Castle of Kildrummy, and, on the 12th August of that year, extorted from her a charter which would, on the failure of his issue by Isabel, have substituted his heirs for hers in the succession to the Earldom. The royal confirmation, however, which was essential to give validity to this writ, was withheld; but a compromise was arranged, by which, after a formal renunciation by Stewart of the August charter, Isabel accepted him as her husband, and granted him, by a new charter of date 9th December, 1404, a liferent right only, with remainder to her own heirs in the Earldom, which charter Robert III confirmed on 21st January, 1404-5. She died in 1408, her husband surviving her.

Isabel's next heir, whose rights had thus been postponed till Alexander Stewart's death, was Robert Lord Erskine (see pedigree). But, in 1426, Stewart contrived by an arrangement with James I. to obtain a new grant of the Earldom proceeding on his resignation, with reversion, first to Sir Thomas Stewart, a natural son of his own (who predeceased him without issue), and then to the Crown. This transaction, though too much in accordance with the general policy of that King, was palpably illegal, inasmuch as the resigner was only a liferenter. The King, however, on the strength of it, took possession of the Earldom on Stewart's death, which occurred in 1434.

Two years later, the sceptre having on James' assassination passed into the hands of an infant Sovereign, Erskine thought the conjuncture an opportune one for vindicating his rights, and proceeded to take the usual steps to establish his succession. He was, according to the forms of the law of Scotland, retoured heir to the Countess Isabel by two services to separate halves of the Earldom on 22nd April and 16th October, 1438;[1] and he

[1] Why were there two services to two separate halves? The view taken in 1875 was that the services were to the same moiety of the earldom, that the second service was to correct the first, in which Garioch, then life-rented by Sir Thomas Stewart's widow, was wrongly included, and that Erskine throughout claimed only half the Earldom of Mar, Lord Lyle as junior co-heir claiming the other half. It would rather appear, however, that the Court of Session was right in 1626 in holding the services to have been to two separate halves. Lyle certainly asserted himself to be junior co-heir on grounds of which we know nothing, and which do not seem to have been admitted by Erskine; and the existence of such a contention

had that sasine on one at least of these retours which entitled him to design himself Earl of Mar. He granted charters as Earl of Mar, was made a burgess of Aberdeen as Earl of Mar, and even in the Crown accounts his eldest son is on one occasion designed *more Scotico* "Master of Mar." Yet he never had undisturbed possession of the Earldom. The King and his advisers, after temporizing during the whole life-time of Earl Robert, had the question of right tried at Aberdeen in 1457, when service was denied to his son, and the retours of 1438 were reduced, on the pretext that the Earldom had lapsed to the Crown by the bastardy of Alexander Stewart; and in order to put out of view Stewart's position as a life-renter, the renounced and unconfirmed charter of August 1404 was upheld against the confirmed charter of December following as the ruling investiture of the Earldom.

During the 108 years that followed, the Earldom of Mar was bestowed on three legitimate princes and one illegitimate member of the Royal house,[1] and from to time considerable portions of the lands were alienated by the Crown to Lord Elphinstone and others. In 1565, however, Queen Mary, apprized of the wrongs of the heirs of Mar, and feeling herself "moved by conscience" to make them the amplest reparation, obtained a resignation of the Earldom of Mar from her natural brother, on whom she had in ignorance bestowed it, and on the 23rd June of that year granted a charter to John Lord Erskine restoring to him and his heirs (*i.e.* heirs of line) the Earldom of Mar, to which (as there emphatically set forth) he was entitled as heir of Countess Isabel, and of which his predecessors had through usurpation and injustice been deprived. Down to 1875 this charter was universally understood, not only to have given Erskine a right to recover possession of the lands of Mar, but to have reponed him and his heirs general in the title of Earl, by which he began to be designed as soon after the charter as the indispensable formality of sasine could be gone through. The restored Earl, the heir of line as well as heir male of the Earl Robert of 1438, was afterwards Regent of Scotland; and his son and successor, who was Treasurer of Scotland, obtained in 1587 a parliamentary confirmation of the charter of 1565, declaring in the most explicit

suggests a plausible reason why Erskine's claim was sometimes for the whole lands, sometimes for half only. There are some indications of a compromise having been entered into, by which Lyle's claim was restricted to half of Garioch; and if so, we can see a possible motive for the exclusion of Garioch from the October retour. In any view, however, Erskine, as senior co-heir, was entitled by Scottish usage to the dignity of Mar and principal messuage.

[1] These were: (1) John, fourth son of James II., made Earl in his infancy in 1459, died 1479; (2) Alexander Duke of Albany, second son of James II., made Earl of Mar, 1483, forfeited the same year: (3) John, youngest son of James III., made Earl of Mar, 2 March, 1485-6, died 11 March, 1502-3: (4) James, natural son of James V. by Margaret, daughter of John Lord Erskine, afterwards the Regent Moray, who had the Earldom of Mar bestowed on him on 7 Feb. 1561-2.

language possible the hereditary right of Countess Isabel and of Earl Robert to dignity as well as lands.

In 1606, in the time of the Treasurer Earl, the precedence of the Scottish peers was regulated by the decree of a Royal Commission, composed of the highest officers of state and most eminent lawyers and legal antiquaries of the day. The nobility were enjoined to exhibit their writs, and the public records were ransacked for evidence. Except in the case of the five Earls at the head of the list, who owed their place to office or privilege, the precedence awarded was in strict correspondence with the antiquity of the writs produced. The Earl of Sutherland produced a charter of 1347, Mar of 1404 (Countess Isabel's December charter of that year), Rothes of 1459, etc.; and they were ranked accordingly. Had the Earl of Mar been able to lay his hands on the earliest writs of the family, he might have shewn good reason for his title preceding instead of following Sutherland[1]: but, by placing it where they did, the Commissioners assuredly indicated their belief that the Regent Mar was Earl, not by a new creation of Queen Mary, but in virtue of his representation of Countess Isabel.

It has to be further noted of the Treasurer Earl that he was successful in a series of actions at law against Lord Elphinstone and others to recover the alienated portions of the Mar estates, suits expressly founded on his heirship to Earl Robert and Countess Isabel, and in course of which the Court of Session affirmed in the most solemn manner the validity of the Charter of 9th December, 1404, and of the retours of 1438, and the invalidity of the Charter of 28th May, 1326, and of the proceedings of 1457.

Passing over the next three generations, as not involving matters of dispute, we come to the Earl fourth in descent from the Treasurer, who suffered attainder as the leader of the Jacobite rising of 1715. In 1824 the attainted Earl's heir of line, being his grandson through his daughter, was restored by Act of Parliament to the family honours. The restored Earl was no doubt (see pedigree) also heir male of the Erskine family; but he was expressly restored as "grandson and heir of line" of the attainted Earl; and in the official report and also throughout the parliamentary discussions on the subject, he was expressly stated to have been heir to the ancient Earldom, and that through his mother. The actings of the trustees who, in 1725, were allowed

[1] From 1649 down to our own time successive Earls of Mar have been in the practice of protesting for precedence before all other Earls, to which, were priority of creation the sole consideration, they were undoubtedly entitled. It is not clear but that a document of 1395 which the Treasurer Earl of Mar produced at the ranking, and which will be alluded to below, was in view of the Commissioners quite as much as the charter of December, 1404, when they placed him where they did. In either case his position would have been the same.

to repurchase the estates from the Crown, in order to entail them for behoof of the heirs of the house, shewed that they had not a doubt of the descendibility of the Earldom to heirs of line. The destination in the entail was to heirs general in preference to collateral heirs male; the heirs general who were strangers to the house of Erskine were bound to adopt the name and arms of the Erskines, Earl of Mar, and in event of the attainder being reversed they were to adopt the "title, dignity, and honours" of the family. The terms of this settlement derive additional weight from the consideration that one of the two trustees who made it was Lord Grange, not only an eminent lawyer and judge of the Court of Session, but at that time the nearest collateral heir male of the family, who had an overwhelmingly strong interest to maintain a contrary view.

From the days of the Earl of Mar and Lord Erskine of 1436 down to the year 1866 the successive Earls of Mar had, as has been explained, been all heirs male as well as heirs of line of their predecessors. But in 1866 the death of John Francis Miller Earl of Mar and Kellie[1] caused a separation of the two qualities of heir. John-Francis-Erskine Goodeve-Erskine, nephew, through his mother, of the deceased Earl, succeeded to the honours of Mar, was acknowledged as Earl of Mar by every one, was presented to Her Majesty as Earl, and voted as Earl at elections of Representative Peers. The heir male, however—Earl of Kellie by his cousin's death—who had at first joined in this general recognition, by and by put forth a claim, not to the well-known dignity held by Earl Gratney, by Countesses Margaret and Isabel, and by the Earl Robert of 1438, and illegally withheld for four generations, but to a till then unheard of Earldom of Mar, averred to have been created by Queen Mary, not by the Charter restoring, as an act of justice, his rights to Lord Erskine, but by a supposed patent a few weeks later in date, giving him a new titular dignity destined to heirs male of his body. The heir of line opposed this claim, not as himself having right to the dignity in question, whose existence he denied, but as interested that a second Earldom bearing the same title as his own should not be interpolated in the Roll of the Peers of Scotland. The opinion of the law officers of the Crown (Sir Richard Baggallay, Attorney-General, and Mr. Millar, Solicitor-General for Scotland, now Lord Craighill) delivered on 16th June, 1874, was wholly adverse to Lord Kellie. It was, therefore, a matter of no small wonder to all who were interested in the proceedings, when on 26th

[1] The Earldom of Kellie was a peerage bestowed in 1619 on a cadet of the Erskine family by a patent with remainder to heirs male bearing the name and arms of Erskine. The issue male of the patentee having failed in 1829, the honours were successfully claimed by the Earl of Mar as the nearest, though a very remote, collateral heir-male.

February, 1875, the House of Lords, in adoption of the report of the Committee of Privileges, found that the Earl of Kellie (the present Earl, who had recently succeeded his father the original petitioner) "had made out his claim to the honour and dignity of Earl of Mar in the peerage of Scotland, created in 1565." Simultaneously with the approval of the report, their Lordships' House ordered that their resolution should be reported not only to Her Majesty, but also to the Lord Clerk Register, the officer to whom the conduct of the election of representative Peers is entrusted; and also ordered that the Lord Clerk Register "do call the title of Earl of Mar according to its place on the Roll of Peers of Scotland called at such election, and do receive and count the vote of the Earl of Mar claiming to vote in right of the said Earldom."[1]

The grounds of judgment, as embodied in the speeches of Lords Chelmsford and Redesdale, were not calculated to dispel the surprise with which this decision was viewed by lawyers and historical scholars in Scotland. Even the original propounders of that presumption in favour of male succession, against which Scottish peerage lawyers have not without reason protested, admitted an exception to their principle in the case of the more ancient Earldoms of Scotland. It was virtually the *ratio decidendi* in the Sutherland case of 1771 that "no less than nine of the thirteen ancient Earldoms," of which nine Mar was one, "passed through females and came to females" (Maidment's Report, p. 25). Lord Redesdale, however, denied that Margaret or Isabel could have been Countesses in their own right; and to account for their being so called, he presumed with regard to the former that her husband must have been created Earl of Mar, and assumed with regard to the latter that she never (or at least never until the supposed grant of a titular earldom to her husband in 1426), had a right to be called what she is called both by herself and by the Sovereign in every existing document in which her name is to be found. Lord Chelmsford, unable to get over the evidence that these two ladies were *suo jure* Countesses, extinguished the old Earldom by upholding the validity of the renounced and uncomfirmed charter of 12 August, 1464, the charter to Earl Alexander of 1426, and the proceedings of 1457; all which, apart from their essential illegality, had been declared null, not only by Queen Mary's charter, but by the most solemn decrees of the

[1] The issuing this order in one breath with the order to report to Her Majesty, was surely a breach of constitutional principle, inasmuch as the House of Lords can only entertain peerage claims as a Commission of Inquiry and in virtue of a special remit from the Sovereign, with whom the ultimate judgment rests—and is not entitled to assume that the Sovereign will approve the result. The same irregularity was committed in the Southesk case in 1855: but it does not seem that there is any earlier precedent for it.

Supreme Court of Scotland. Both Lords being agreed—though on widely different grounds—that the old Earldom had, before Queen Mary's time, become extinct, declined to regard that Queen's charter of 23 June, 1565, as having any bearing on the dignity, and came to the conclusion that the dignity of Earl of Mar of which Lord Erskine was soon after its date found to be in possession, had been conferred by a separate patent a few weeks later than the charter, and with a different remainder; a document, it may be remarked, which had never before been heard of, for whose existence not a shred of evidence was produced, and which, had it ever existed, would have been unique in the history of Scottish dignities.[1] As conclusive proof that the charter of 23rd June, 1565, did not confer the dignity, Lord Redesdale pointed to the very undeniable fact that the restored Earl continued to be designed "Lord Erskine" (not Earl of Mar) for four weeks after its date. To any one conversant with Scottish records the inference would have been exactly the other way. The interval corresponded as nearly as might be to the time which would be required to effect that investiture by sasine on the ground of the lands which, as long as Earldoms and other titles of honour continued territorial, that is, till nearly the end of the sixteenth century, was considered a pre-requisite to their assumption.[2]

[1] Lord Chelmsford suggested that the title might perhaps have been conferred by "belting" without any writing. Lord Cairns' concurrence was expressed in general terms, leaving it uncertain which alternative view he adopted about the extinction of the old dignity.

[2] Down to a period considerably later than 1565, not only the retour of an Earl or Lord of Parliament, but the precept of sasine granted to him, designed him by his name and surname only, a fact familiar to every one conversant with Scottish charter chests. In the record called the "Libri Responsionum," containing the feudal payments made by Crown vassals on their succession, the same punctilio is noticeable. Thus, in 1514, after the battle of Flodden, so fatal to the principal nobility of Scotland, there is a large number of entries regarding the surviving heirs of these Lords, not, however, under the designation of Earls of Montrose, Argyle, Bothwell, or Lennox, Countess of Sutherland, or Lords Seton, Oliphant, Elphinstone, or Erskine, but simply, as William Graham, Colin Campbell, Patrick Hepburn, John Stewart, John Sinclair, Elizabeth Sutherland, George Seton, Alexander Elphinstone, John Erskine, and William Oliphant, they not having yet obtained sasine in the lands from which their titles were taken. Similarly, as late as 1561, the heir of the deceased Lord Hay of Yester is charged with relief duty as "William Hay."

The assertion here made regarding territorialism in Scotland is doubtless at variance with opinions expressed by Peers who have advised in other Scottish cases besides that of Mar. Lord Mansfield's assertion in the Sutherland case, that after 1214 territorial peerages had so completely gone that a charter of Earldom (*comitatus*) without separate specification of the dignity was a conveyance of the estate only without the honours, is utterly at variance with documentary evidence. The limits of this paper will not allow more than a general statement of the results of such evidence. Of the multitudes of existing charters of Earldom, original and on a resignation, from the earliest date down to 1578, only five can be pointed out in which the dignity of Earl is directly mentioned; and in four out of these five there is an obvious reason for its specification. In 1578 the practice began to vary, and from that date down to 1600 half the recorded charters of Earldom (they were ten in all) did, and half did not, specify the dignity. Yet in every case the grantee was recognised as Earl, and the line of heirs in the charters enjoyed the dignity as well as the lands. Moreover,

How, it may be asked, did the Committee of Privileges get over the obstacle to their theory presented by the already mentioned ascription to the Earl of Mar in 1606 of a precedence corresponding to 1404? By charging the Treasurer Earl with an act of wilful fraud, in deceiving the Commissioners, and withholding and destroying such charters as would have proved the new creation, the supposed patent among others.[1] To most people there will be a difficulty in apprehending how such a fraud could have been accomplished, as the public occurrences of 1565 must still have been fresh in the memory of such of the Commissioners as were past middle life.

It was at first, not unnaturally, taken for granted by the general public that the resolution of the House of Lords was two-edged, that it both affirmed the new Earldom of 1565 in the person of the Earl of Kellie, and disallowed the continued existence of the original Earldom in the person of the heir-general. But it soon became apparent to lawyers that such was not the case. The reasons contained in the speeches of the members of Committee were no part of the judgment, which fell to be interpreted independently of them by the most rigorous canons of law. A peerage of Scotland vests *ipso jure*; and the nephew of the late Earl of Mar, whose propinquity as heir in the quality specified in the restoration Act of 1824 was undis-

no one professes to have seen, in either record or charter-chest, a patent or charter of the title of Earl apart from lands earlier than 1600, although by Lord Mansfield's hypothesis they were multitudinous, as there must have been a resignation of the title and corresponding patent in every one of the numerous cases when the destination of the landed Earldom was altered on a resignation of the lands. The first actual instance of a creation by the English form of letters patent, was the case of Robert Earl of Winton in 1600. But the separation of personal honours from lands, was, like all changes of the kind, of gradual growth, and there are traces of the old ideas surviving almost down to that Act of 1617, which may be considered to have completed the change by establishing the forty years prescription in lands and other heritage carried by infeftment. The chief real difficulty arises in charters of Earldom between 1600 and 1617 not expressly conveying the dignity of Earl, in which it is not always easy to determine whether the honours are or are not included. King James' remonstrance against the assumption by Sir Alexander Seton of the dignity of Earl of Eglinton shews that even at that late date a charter of "comitatus" might in some circumstances be supposed to carry the dignity of Earl. Sir Alexander Seton had succeeded to the lands of Eglinton under a charter of resignation granted in 1611 to his maternal grandfather, conveying the "comitatus" of Eglinton without separate mention of the title. James remonstrated against his taking the title also; but the ground of his remonstrance was not, as might be imagined, that the charter and the resignation on which it proceeded bore reference to the lands only, but that the charter was granted under the cachet and without his knowledge, and *therefore* could not carry the honours.

[1] It ought to be added that Lord Redesdale has since propounded a different theory, that the Commissioners refused to give either Sutherland or Mar a precedence corresponding to the charters produced by them, and that the date which they wished to assign to Mar was 1457. Were there, however, any better foundation for 1457 than a very modern blunder in some almanacs and Peerages, whose history can readily be traced, it is as irreconcilable as 1404 with a creation by Queen Mary. A further disproof of the date 1457 is afforded by the rectification of the ranking of the Earl of Menteith on the strength of a charter of 1639 defining his precedence as of 1428. He was not placed before Mar, but between Mar and Rothes.

puted, had done all that either law or custom required on his succession. Acting under legal advice, he took up the position that a decision regarding an entirely different dignity, which he had never claimed, could not interrupt his lawful possession of the old Earldom; and he therefore refused to drop the title of Earl of Mar.

The first election of Representative Peers after the judgment of 1875 brought the two Earls of Mar into collision. The late Sir William Gibson-Craig, then Lord Clerk Register, interpreted the already quoted order of the House of Lords—agreeably, no doubt, to the intention of the framers of it—as entitling the Earl of Kellie to answer when the old Earldom of Mar was called; and he was supported in his views by the late Duke of Buccleuch and Lords Lothian, Elphinstone and Saltoun; in whose eyes the heir general was merely the unsuccessful claimant of a peerage which had been adjudged to another. The holder of the ancient Earldom maintained his ground, and explained his position, with a dignity and firmness that made a strong impression on all who were present: and six Peers lodged protests against Lord Kellie's vote, namely, the Marquess of Huntley, the Earls of Crawford, Morton, Caithness, and Cassillis (Marquess of Ailsa), and Lord Napier, the late Lord Crawford's protest having especial weight from its masterly grasp of the points at issue. Though the heir of line abstained from preferring his vote on subsequent occasions, yet every succeeding election of Peers showed an increase in the number of his sympathizers. There were six protesters against Lord Kellie's vote in 1876, seven in 1879, eleven in 1880, seventeen in 1882, and twenty-three in 1885.

The first result of the six protests of 1876 was a Petition presented to the House of Lords by Lord Mar and Kellie, on 5th June, 1877, that the title of Mar should be called at future elections with a precedence corresponding to 1565 instead of in its existing place; a resolution in accordance with which was moved by the Duke of Buccleuch. This proposal was tantamount to the excision of the old dignity from the Roll of Peers; and the House, on the report of a Select Committee, declined to interfere in the manner prayed for. The discussion on this resolution was chiefly valuable from the opinion which it elicited from the law lords that the continued existence of the ancient dignity must still be considered an open question.

Passing over other incidents in the controversy, on 1st June, 1880, Lord Galloway proposed and carried by a majority of eight in a House of ninety, a resolution to rescind the order to the Lord Clerk Register under which Lord Kellie had voted; but, a fortnight later, the question having to be re-opened on some technical ground, an opposite result was arrived at by a majority of twenty-eight in a House of 132. There was a long debate on

each occasion, in which the advocates of the ancient title made many important converts.

One effect of the Mar judgment of 1875 was greatly to intensify the objections which had long been entertained in Scotland to the tribunal to which peerage questions from that country were submitted. The opportune appearance of Lord Crawford's posthumous work on the Earldom of Mar, with its historical enquiry into the subject of jurisdiction in Scottish dignities, brought prominently to light the fact, nearly forgotten by all except legal archæologists, and coming even to many lawyers with the force of a new discovery, that the practice of Scottish claimants petitioning the Crown, and being remitted to the House of Lords, was founded, not on any provision of the Act of Union, but on a usage which had gradually sprung up subsequent to it. In 1882 a Select Committee of the House of Lords was appointed, on the motion of the Earl of Galloway, to suggest some improved method of dealing with questions involving the right to Scottish peerages; and its report contained some valuable suggestions, chiefly in the direction of restoring to the Court of Session a measure of the jurisdiction which it exercised before and even for some time after the Union. The following year the Lord Chancellor (Selborne) introduced in the House of Lords a Bill on the subject, which caused great disappointment from its being nearly on opposite lines from the views taken by the Committee, and which contained a particularly objectionable provision that the House of Lords should have the power of altering at pleasure the precedence of the Union Roll, a power which it was very generally believed might be used by the House to abrogate *proprio motu* the old dignity of Mar in the mode suggested in the Duke of Buccleuch's resolution of 1877. This measure, petitioned against by about a hundred of the chief lawyers and historical scholars in Scotland, condemned in the same country by a unanimous report of the Faculty of Advocates, and protested against by eighty-one Peers, was with difficulty carried through the Lords; and the opposition which it encountered in the Commons led to its withdrawal.

Meantime, it occurred to a number of friendly Peers that the most appropriate and effectual mode of putting an end to the Mar *contretemps* would be the direct intervention of the Sovereign. The Earl was, as has been stated, presented at Court with his Countess soon after his succession; and, although through influence used *ab extra* some difficulties had been thrown in the way of their continued reception at Court as Earl and Countess, the presentation had never been cancelled in the only way in which a presentation can be cancelled, namely, through the *Gazette*. One hundred and four Peers[1] joined in a Petition

[1] These were the Dukes of Abercorn, Beaufort, Leeds, Portland, Sutherland; Marquesses of Ailsa, Abergavenny, Bristol, Exeter, Huntly; Earls of Ashburnham,

that Her Majesty might again be pleased "to receive Lord Mar and his wife as hitherto at your Majesty's Court, on the ground that the decision of 1875 has not affected Lord Mar's status as the inheritor of the ancient dignity, as the holder of which he was formerly received by your Most Gracious Majesty." It is no secret that Her Majesty took a lively interest in the object of the Petition; but constitutional difficulties were considered to stand in the way of directly granting its prayer: and the Queen's advisers thought that the purpose in view would be better attained by a Bill, in the form of a restitution of the old Earldom from a hypothetical extinction, surrender, or attainder. The Bill, which was introduced in the House of Lords last May by Lord Rosebery (Lord Privy Seal), by command of Her Majesty, set forth in its preamble, that until the decision of 1875 the ancient honour inherited by the Countess Isabel of Mar was "commonly reputed to be still subsisting," but that in consequence of that decision "doubts may exist" whether it had not been previously to 1565 by some lawful means "forfeited or surrendered:"[1] and the chief operative clause restored "John Francis Erskine Goodeve-Erskine" and those entitled to succeed after him, to all the dignities held by Countess Isabel as effectually "as if the same had without any forfeiture or surrender descended to the said John Lord Erskine" (the Regent Earl) "or had been duly, expressly and effectually restored to the said John Lord Erskine and his lawful heirs general by the said charter of Mary Queen of Scotland or by other means effectual in law."

Having been read a second time, the bill was referred for proof of the preamble to a Select Committee. The Committee (appointed after the change of Government) comprised the Lords Chancellor (Lord Halsbury) and Privy Seal (Earl of Harrowby) the Duke of Bedford, Marquess of Bute, Earls Redesdale and Selborne, Lords Hopetoun (Earl of Hopetoun) Ker (Marquess of Lothian) Rosebery (Earl of Rosebery) Penzance, Moncreiff, Cole-

Bathurst, Carnwath, Carysfort, Clancarty, Clanwilliam, Clonmell, Crawford, Denbigh, Devon, Donoughmore, Eglinton, Erroll, Feversham, Galloway, Haddington, Hardwicke, Harewood, Howe, Kilmorey, Kinnoull, Kintore, Leitrim, Longford, Macclesfield, Manvers, Moray, Morton, Perth, Portarlington, Roden, Rosslyn, St. Germans, Seafield, Sondes, Stair, Stanhope, Strathmore, Wemyss, Westmoreland, Wharncliffe, Witton, Winchelsea; Viscounts Arbuthnott, Bury, Combermere, Hereford, Holmesdale, Hood, Midleton, Molesworth, Sidmouth, Strathallan, Templetown; Lords Abinger, Bateman, Beaumont, Blantyre, Brabourne, Calthorpe, Congleton, Conyers, De Lisle and Dudley, Denman, De Ros, Dunsany, Ellenborough, Forester, Headley, Howard de Walden, Houghton, Hylton, Lamington, Londesborough, Lovat, Mowbray and Stourton, North, Northwick. Ormathwaite, Poltimore, Raglan, Sherborne, Stanley of Alderley, Strathcden and Campbell, Strathnairn, Tollemache of Helmingham, Teignmouth, Tredegar, Wentworth, Westbury, Wynford, Windsor, Zouche.

[1] These words have been altered in the Act into "surrendered or merged in the Crown." For the *ipsissima verba* of the Preamble, see the Act of Restitution printed at the close of this paper.

ridge, Blackburn, Watson, Bramwell and Fitzgerald; a list strong in the legal element, which, while it included the sole survivor of the hostile Committee of Privileges of 1875, advisedly excluded all those Peers who had been active in Lord Mar's behalf. Of the Peers named, the Lords Chancellor and Privy Seal, Lords Bute, Redesdale, Selborne, Lothian, Blackburn, Watson, and Fitzgerald attended regularly, some others being occasionally present. Lord Selborne was chairman. The Earl of Mar and Kellie, at the outset, produced a printed statement challenging various assertions in the preamble, in particular, that Isabel was Countess by descent, that the valid charter to Alexander Stewart was that of 9th December, 1404, that John Lord Erskine was heir of Isabel, and that Queen Mary's charter of 23rd June, 1565, bore reference to the dignity.[1] The proving of the preamble mainly devolved on the counsel for the heir general, Mr. W. A. Lindsay (Portcullis Pursuivant), who opened the case with an explanation that while his client was deeply grateful to the promoters of the bill, it was impossible for him to consider the preamble, of which he was not the author, as an adequate statement of the facts from his point of view. The labours of the Committee were greatly lightened by Mr. Lindsay's thorough acquaintance with the points to be proved and the evidence on which they rested. Lyon King of Arms was present, on a summons from the Crown, to make what explanations were necessary regarding some of the documents produced. The three principal averments requiring proof in the preamble were: (1,). Isabel's status as Countess of Mar by inheritance, involving that of her mother, also Countess in her own right; (2,) The heirship of John Lord Erskine in 1565 to Countess Isabel, involving the validity of the charter of 9th December, 1404, the heirship under it of Robert Lord Erskine to both lands and title, and the adequacy, so far as pedigree was concerned, of the grounds of Queen Mary's restoration of the lands to warrant a restoration to the dignity also; and (3,) The universality of the belief, down to 1875, that both dignity and lands were restored by Queen Mary to John Lord Erskine by the charter of 23rd June, 1565. Each of these points was established beyond cavil, partly by the printed minutes in the Mar Peerage case, and partly by documents not made available in 1875. It is here only possible briefly to summarize the principal points brought out before the Committee.

I. As to the first subject of enquiry, Lord Redesdale's hypothesis that Margaret Countess of Douglas was Countess of Mar by marriage only and not by hereditary right was disposed of by direct proof that that lady continued as a widow to deal

[1] No distinct averment to this last effect occurs in the Act of Restitution, which regards the subject as one about which "doubts may exist."

with the Earldom as her own, and that during the four years when her son was Earl of Douglas he designed his mother Countess of Douglas and Mar, but adopted for himself the style of Earl of Douglas only.[1] Once only we find him using his father's style, in a grant made by him on 27 July, 1388, a few days before his death, of the church of Great Cavers to the Abbey of Melrose, where he designs himself "Earl of Douglas and Mar and Lord of the barony of Cavers."[2] This instance, standing quite alone, could, it was considered, only be explained as a loose mode of indicating that the Earl of Douglas was heir apparent to the Earldom of Mar, for which the clerk who drew the deed was rather to be held responsible than the granter of it, inasmuch as the designation adopted was at variance with the legend on the seal (as described in the transumpt of this charter produced in the Mar Minutes from the Douglas charter chest), which is "Sigillum Jacobi Comitis de Douglas." The first Earl of Douglas, on the other hand, in every one of the numerous charters granted to him and by him subsequently to 1377, is designed Earl of Douglas and Mar, and his seal bears the legend "Sigillum Willelmi Comitis de Douglas et Mar." An equal amount of direct evidence was adduced to prove Isabel to have been Countess in her own right from the time of her mother's death and before she was wife of Alexander Stewart, including an obligation by Robert III. of date 22 November, 1395, not to accept any resignation which Isabel Countess of Mar and Garioch may make in prejudice of the Erskines as heirs of these Earldoms;[3] Crown charters of 1397 (*Mar Minutes*, p. 406) and 1402 (Lord Hailes's *Sutherland*

[1] In proof of this assertion the following charters may be referred to, most of which were adduced in evidence. 1. A charter of 15 Aug., 1384, granted by Margaret Countess of Douglas and lady of Mar and Garioch of certain lands to the chapel of St. Mary in Garioch, for the soul of.....her son James Earl of Douglas (*Mar Minutes*, p. 383). 2, 3. Two charters, of 1384 and 1387, witnessed by James Earl of Douglas (*Reg. Mag. Sig.* p. 169. Nos. 2 and 3). 4. Precept granted by James Earl of Douglas and Lord of Liddesdale at the instance of his mother Margaret Countess of Douglas and Mar (Lord Hailes' *Sutherland case*, V. S. 9, pp 36, 37. *Antiquities of Aberdeen and Banff*, Spalding club, IV. p. 727). 5. Crown Precept by Robert II. to bailies of Selkirk in favour of Isabel widow of James Earl of Douglas (*Chartulary of Kelso*, II. p. 408). 6. Charter by Robert II. of 8 Nov., 1388, to Sir James Douglas of Dalkeith of certain wards and reliefs falling to the crown by the death of our beloved son James Earl of Douglas (*Registrum Honoris de Morton*, Bannatyne club, II. 161). 7. Charter of Drumlanrig by James Earl of Douglas and Lord of Liddesdale to his (natural) son William (*Mar Minutes*, p. 721). 8. Obligation dated 5 Dec., 1389, by John Swinton Lord of Mar and Margaret his wife Countess of Douglas and Mar to William son of the late James Earl of Douglas and Lord of Liddesdale in reference to the barony of Drumlanrig. (*Mar Minutes*, p. 724).

[2] *Chartulary of Melrose*, ii. pp. 465, 616; *Minutes in Mar Case*, p. 721.

[3] This otherwise important document was among the productions at the ranking of 1606; and though not in the Mar minutes of evidence, was allowed to be quoted, from the print in Lord Hailes' Sutherland case, taken from the original in the Mar charter chest.

Case, p. 44) similarly describing her; and a confirmation by herself as Countess of Mar and Lady of Garioch of a grant by David Earl of Huntingdon and Earl of Garioch to the Abbey of Arbroath, of date 7 May, 1403 (*Chartulary of Arbroath*, p. 46).

II. In regard to the second subject of enquiry, the consideration that the earlier of the two Charters of 1404 to Alexander Stewart was unconfirmed and had been renounced, and that the later Charter had been duly confirmed by the King, as also the solemn decision of this question in the suit with the Elphinstones, was held to put Lord Chelmsford's view of these Charters out of Court. The heirship of the Erskines through Gratney's daughter, Ellen of Mar, was established in the most convincing manner. It had been strongly urged in the pleadings for the late Earl of Kellie, that the descent of the Erskines from Gratney had been asserted for the first time in general terms in a retour of 1588, that the details of it rested on no better authority than the *ipse dixit* of one George Erskine, bailie of Alloa, compiler in 1701 of a Genealogy in the Mar charter-chest, and that Janet, mother of Robert, Lord Erskine, was paternally not a Keith, but a Barclay. In connexion with this matter, Mr. Lindsay directed attention to an older pedigree, also printed in the Minutes of Evidence (p. 577) from the Mar charter-chest, belonging to the period of the Treasurer Earl's litigation and proceeding from a hostile quarter, but giving the steps of descent exactly as in the 1701 pedigree, as the contention of the Earl of Mar. The documentary evidence by which this part of the case was established, (to understand whose bearing the reader is requested to refer to the pedigree on p. 3,) included: (1) A grant of Strathgartney, of date 1359, to Sir John Menteith, called son of Ellen of Mar, Ellen herself being styled niece of King Robert (*Acts of Parliament of Scotland*, I., p. 524); (2) A Crown Charter, of 1368, to Sir Robert Erskine and Christian Keith his wife, the King's cousin, of Alloa in exchange for Strathgartney (*Ibid.* p. 531, *Mar Minutes*, p. 381); (3) A deliverance by King Robert III. on a petition by Sir Thomas Erskine of date 18th March, 1390-1, praying that the King would abstain from giving his sanction to a certain transaction regarding the Earldom of Mar and lordship of Garioch, of which Isabel wife of Sir Malcolm Drummond is next heir, and failing her, half of the said Earldom and lordship belongs to his (Erskine's) wife by right of inheritance; (4) The already-mentioned obligation by the same King, of date 22nd November, 1395, not to sanction any alienation by Isabel Douglas, Countess of Mar and Garioch, in prejudice of the heirs of Sir Thomas Erskine as "veri hæredes" of these Earldoms; (5) A series of entries in the Exchequer Rolls (*Scottish Record Series*) regarding a certain annuity from the fishings of Aberdeen, taken in connexion with the proof, by means of a Charter of 1357 (*Reg.*

Mag. Sig. p. 33, No. 86), that the island of Arran then belonged to Sir John Menteith. From 1387 onwards, during the life of Sir Thomas Erskine, that annuity is paid him in right of his wife. After his death his widow Janet Barclay is the recipient of it, as due to her in her own right. In 1428, Janet being dead, her son Lord Erskine receives the pension, and in the entries of that date it is said to have been granted by a Charter of Robert II. "in excambium terrarum de Arane."[1] The chain of proof was completed by the retours of 1438, the Charters granted by Robert Lord Erskine as Earl of Mar, the service of John Lord Erskine in 1565, the Charter of 23rd June, 1565 with its ratification, and the Act of 1587.

III. The universality of the belief that the Charter of 23rd June, 1565, had restored the old title, was proved by the ranking of Mar in 1606, the continued protests of the Earls of Mar for higher precedence than was then awarded them, the entail of 1725, the discussions at the introduction of the Restitution Act of 1824, (particularly the speeches of Sir Robert Peel and Mr. Bruce) the wording of that Act, and the opinions of the different historical antiquaries who have discussed the subject. Nay, the grantee of the Charter of 23rd June, 1565, was proved to have himself shared the same belief, as he granted an obligation of date 6th July, 1565, three weeks before his supposed new creation, on the narration that the Queen had given him the "earldom of Mar and lands pertaining thereto." (*Mar Minutes*, p. 61).

Four days' prolonged sittings of the Committee worked conviction on the Law Lords without exception and the Lay Lords with the sole exception of Lord Redesdale, that every statement in the preamble was proved: and the Bill was read a third time in the House of Lords on the 31st of July. The sole opposition which it encountered in the Commons, was an expression of opinion from Sir George Campbell, which, when placed on the Select Committee of the House, he had to retract: and the Royal Assent was given on the 6th August.

There is a clause in the Act providing that the rehabilitated Earldom of Mar shall be called at elections "next after the Earldom of Sutherland," a provision identifying the dignity held by the Peer in whose behalf this Act was passed with the Earldom of Isabel Douglas, the Earldom which the Regent and Treasurer Earls possessed (or should we say, "believed themselves to possess"?); while the Earldom to which the judgment

[1] As further evidence that Sir Thomas Erskine's wife was widow of Sir David Barclay of Brechin, it was proposed to produce an attestation of 1437 by one Thomas Bisset, who had in his youth been "servitor" to Sir Thomas, as printed from the original in the "Registrum de Panmure," a collection of original documents at Panmure House, edited by the late Dr. John Stuart. But Lord Selborne, considering a book of this kind inadmissible by the strict rules of evidence, and expressing his opinion that the evidence on this head was otherwise sufficient, the admission of the document in question was not pressed.

of 1875 found the Earl of Kellie entitled is to be "called in the place and order properly belonging to an Earldom created in the year 1565."[1]

[1] At the election of Scottish Representative Peers on the 10th of December last, the former of these two provisions was given effect to, by receiving the vote of the heir general as that of the Earl in the Union Roll. But the position assigned to the title for which the Committee of Privileges of 1875 stands sponsor, namely, immediately before the Earl of Moray, called forth a protest from the last-named Peer, on the ground that his honours are more ancient "than those of the Earl of Mar created, or alleged to be created, in 1565." The Lord Clerk Register (if the account of the election in the *Scotsman* and other local newspapers be correct) received and recorded Lord Moray's protest, but refused to give effect to it "because it seemed to him that he was precluded from so doing by the judgment of Lord Loughborough in the House of Lords in the year 1793, which decided that 1581 was the date of that Earl of Moray from whom the present Earl was descended."

The question involved may not be one of much moment; but the writer of this paper cannot help thinking that had the noble Earl who discharges with such tact, ability, and assiduity the duties of Lord Clerk Register, had the opportunity of consulting the official record of what took place in 1793, he would hardly have attached the interpretation here given to it; and that had the question arisen less abruptly, his Lordship's two very competent statutory legal advisers, the Principal Clerks of Session, might have been able to shew reasons for viewing the matter differently. Neither the status nor the precedence of any Earl of Moray was ever before the House of Lords on a remit from the Crown. About the end of the last century the keen competition that prevailed at the election of Representative Peers led to a fertile crop of objections to individual votes; and, in 1790, the vote of the Earl of Moray was one of those protested against. The House of Lords having, in connexion with the election return, to decide whether to receive or reject the votes excepted to, sustained, among others, that of the Earl of Moray, on 6th June, 1793. This is absolutely all that we learn on the subject from the proper official source—the House of Lords' Journals. But the late Mr. Riddell had at one time access to some manuscript notes of a speech delivered on that occasion by Lord Loughborough; and, in the course of some remarks on it (with which the present writer can only partially agree), he animadverts, not without reason, on that learned lord having ignored the fact, vouched for by the clearest record evidence, that, on her father's death, Elizabeth, daughter of the Regent Moray, became Countess of Moray in her own right, and that, when she married, her husband (the "Bonny Earl" of history and song) was Earl only in his wife's right and by courtesy. As far as can be gathered from Mr. Riddell's citations (through which alone we know anything about this speech) the ascription of a precedence corresponding to 1581 is only a remote inference from the Chancellor's remarks, or, more properly, from his remarks amended by the records of Parliament; for, while Lord Loughborough would rather appear to have considered 1584 as the earliest date at which Elizabeth's husband is called Earl of Moray in the Acts of Parliament, he is actually so styled in 1581 also. But during the whole discussion, the bearing of the question on precedency seems never to have been thought of: and, if we suppose with Lord Loughborough that the "Bonny Earl" had in 1584, or at any other date, a new charter with remainder to heirs male, we now know that that charter could only have proceeded on his wife's resignation, and must, therefore, have left untouched the original precedence; for there is no more firmly established principle in Scottish Peerage Law than that a charter of Resignation bringing in new heirs (nay, even strangers in blood) did not derogate from the precedence of the resigner.

Surely, if Lord Redesdale's opinion that Isabel Douglas was not Countess of Mar, and Lord Chelmsford's opinion that the charter to Alexander Stewart of 12th August, 1404, was valid, (being the respective *rationes decidendi* of these two Lords) were in July last unceremoniously rejected, as being no part of the "judgment" in a Peerage Claim which proceeded on a reference from the Queen, it is impossible to attach the character of an authoritative judgment to a very doubtful inference from some alleged remarks by Lord Loughborough which are avowedly founded on error, and were made in reference to a question which was only before the House incidentally in connexion with an election return.

The relation of the Act and the judgment of 1875 to each other suggests some curious considerations. While the preamble of the Act assumes that the judgment of 1875 must be upheld as giving Lord Kellie an earldom of 1565, it also unequivocally affirms that the *rationes decidendi* of the Lords who pronounced it were wrong. It affirms, in opposition to Lord Redesdale, that the old earldom had been inherited by Countess Isabel, and had therefore not been extinguished in 1377; and it affirms, in opposition to Lord Chelmsford, that the regulating charter was not that of 12th August, 1404, which diverted the succession to Alexander Stewart's heirs, but that of 9th December, 1404, which brought in Isabel's heirs. If then the grounds of the decision are abandoned, and the decision only acquiesced in "out of respect for the House of Lords and regard for constitutional law" (as Mr. Lindsay puts it in his recent paper on the subject,) why, it may be asked, should doubts that are but inferences from these discarded reasons be recognized even as doubts? Because the existence of these doubts had helped to work the injustice that called for redress. And to preserve a measure of consistency in the redress it was found necessary to presuppose as a basis for restitution, a rationale for the judgment of 1875 differing alike from Lord Redesdale's theory of extinction in 1377, and Lord Chelmsford's theory of extinction in 1434. So far as can be gathered from the Blue Book, the hypothesis in the view of the Select Committee seems to have been that something had been

The following appears to be the position of the Moray titles. A charter of the earldom of Moray was granted on 30th January, 1561-2 in favour of the future Regent and the heirs male of his body; but, as Huntly, who was then in disgrace, though not yet attainted, had had a prior grant of the same subject, the writ was for a time kept *in retentis*; and the "belting" of Stewart as Earl of Moray only took place on 10th February, 1562-3. Then, lest exception should be taken to the date of the charter as being before Huntly's forfeiture, the Earl deemed it expedient to have a second and corroborative charter with the same limitation, which bore date 22nd January, 1563-4, and was confirmed in Paliament in 1567. A third charter was granted him on his resignation on 1st June, 1566, bringing in heirs female. The Regent was assassinated in 1569-70, leaving no male issue; his daughter Countess Elizabeth died in 1591; and her husband met soon afterwards his well-known tragic fate. The 3rd Earl (grandson of the Regent and son of the "Bonny Earl") had, in 1592, a Parliamentary ratification of the charter of 1st June, 1566, and all other charters granted to the Regent; and in 1611 a new charter of the Earldom of Moray on his resignation with an altered limitation to heirs male. The circumstances connected with this last-named charter shew that it included dignity as well as lands; and it was so construed on Earl Alexander's death in 1700 (when that Earl's second but eldest surviving son succeeded in preference to the daughter of his eldest son) and also ever since, if we except the little episode of 1790-3, where the point was raised, not on a petition to the sovereign by the heir of line, who never dreamed of claiming the earldom, but by a political opponent, and as an election question.

It seems, therefore, to follow that the Earl of Moray's creation must date, either from 30th January, 1561-2, or (if the charter bearing that date be liable to exception) from 22nd January, 1563-4; in either case, prior to 1565, a date in exact correspondence with the place of Moray in the Decreet of Ranking; namely, immediately before the Earl of Orkney (Stewart), who was certainly Earl on 28th October, 1581, and almost certainly so before 7th July, 1576.

done by the proceedings at Aberdeen in 1457, which required to be formally undone by statute before the rights that had then been taken away from Lord Erskine could be restored, a hypothesis—it may in passing be remarked—which can with difficulty be apprehended—even as a legal fiction—by a Scottish historical antiquary, cognizant of the fact that restorations of attainder before the Union were effected, not by Act of the Scottish Parliament but by Royal Charter.

The position of the representative of the old earldom is to some extent analogous to that of a man who, convicted by a criminal tribunal of an offence which he has not committed, is discovered to be innocent while undergoing his sentence, and receives a pardon. This shade of difference, however, exists between the two cases, that, unlike the pardon granted to the man known to be innocent, but still feigned to be guilty, the restitution effected by this Act is hypothetical, contingent on there being a sufficient foundation in law for the "doubts" expressed in the preamble.[1] The continued existence of the old dignity is left an open question. On the alternative of the doubts being well founded, the effect of the Act is to restore the representative of the earldom of Mar to the rights of which the proceedings of 1875 had (technically) deprived him. If, again, the doubts are not well founded—and this is the view of most Scottish lawyers, and probably that of the noble Earl who benefits by the Act—what the Act has done is to place the right of that Earl, which was previously good in law, wholly beyond challenge. In either view it is satisfactory that such a remedy has been found possible for the error of 1875, though in this case, as in that of the unjustly condemned man who has been pardoned, it is hardly in the nature of things that the redress should be complete.

EARLDOM OF MAR RESTITUTION ACT.

48 and 49 Vict., Chapter 48. A.D. 1885.

An Act for restitution of the ancient dignity and title of Earl of Mar, 6th August, 1885.

Whereas Isabella Countess of Mar in the peerage of Scotland, being by lawful descent from her ancestors entitled to the ancient territorial earldom of Mar, did, on the ninth day of December, one thousand four hundred and four, intermarry with Alexander Stewart, and by a Charter of the same date (which was afterwards confirmed by a Charter of Robert the Third, King of the Scots), granted to the said Alexander Stewart the earldom of Mar and the lands therein mentioned, to hold to him and the heirs between him and herself begotten, whom failing, to her lawful heirs on either side :

And whereas the said Isabella Countess of Mar died in or soon after the year one thousand four hundred and seven without having had any issue ; and during the

[1] In the words of Lord Selborne, the chairman of the Select Committee, the Act "is an Act of grace to relieve you from the surrender *if there was one*." "It is intended to relieve against forfeiture or surrender if there was one. Without absolutely deciding that there was, there is so much *prima facie* ground for apprehending it, that it is right to relieve against it." (Minutes of Evidence, pp. 16, 24.)

interval between her death and the year one thousand five hundred and sixty-five the succession and inheritance to the said earldom which she had so inherited as aforesaid was treated by successive Kings of the Scots as if the same had been lawfully surrendered or merged in the Crown :

And whereas in the year one thousand five hundred and sixty-five, John, then Lord Erskine, was the lawful heir general of the said Countess Isabella who, if the said ancient territorial earldom of Mar, and the dignity of Earl of Mar in the peerage of Scotland, had not been by any lawful means extinguished, was then entitled thereto :

And whereas by a Charter bearing date the twenty-third day of June one thousand five hundred and sixty-five, after reciting that Isabella Countess of Mar was the hereditary proprietor of the earldom of Mar and of the lordship and regality of Garioch, and that the said John Lord Erskine had then the undoubted hereditary right of the said earldom, lordship and regality, notwithstanding that his predecessors were kept out of the same partly by reason of the quarrels occurring at the time, and partly by the unjust refutations and hindrances made by obstinate and partial rulers and officers, refusing the reasonable prayers and petitions made by the predecessors of the said John Lord Erskine often and earnestly praying and soliciting their entry to the hereditary possession of the same, Mary, Queen of the Scots, did, for those and other considerations therein mentioned, and also as being moved by conscience to restore the lawful heirs to their just inheritances, give and grant to the said John Lord Erskine, his heirs and assigns hereditarily, all and whole the said earldom of Mar containing the lands therein mentioned, and all and singular the lands of the said lordship and regality of Garioch.

And whereas on and after the first day of August one thousand five hundred and sixty-five the said John Lord Erskine sat as Earl of Mar in the Privy Council of Scotland, and between that date and the time of the union between the Crowns of England and Scotland he and his successors in the direct male line sat as Earls of Mar in the Parliament of Scotland :

And whereas from the time of the said union till the nineteenth day of January one thousand seven hundred and fifteen the descendants of the said John Lord Erskine in the direct male line continued to hold and to enjoy the title and dignity of Earls of Mar in the peerage of Scotland :

And whereas by an Act passed in the first year of King George the First, John, then Earl of Mar, was, as from the nineteenth day of January one thousand seven hundred and fifteen, attainted of high treason :

And whereas by another Act passed in the fifth year of King George the Fourth, after reciting that John Francis Erskine, Esquire, of Mar, was the grandson and lineal representative of the said John Earl of Mar, it was enacted that the said John Francis Erskine, and all other persons who would be entitled after him to succeed to the honours, dignities, and titles of Earl of Mar, in case the said Act of the first year of King George the First had not been made, should be and they were thereby restored to the honours, dignities, and titles of Earl of Mar, with all rights, privileges, and pre-eminences thereunto belonging, as fully, amply, and honourably as if the said Act had never been made, notwithstanding the said Act, or corruption of blood thereupon ensuing :

And whereas after the passing of the said last-mentioned Act the earldom of Mar thereby restored, descended successively to the son and grandson of the said John Francis Erskine; and, upon the death of his grandson John Francis Miller, Earl of Mar, without issue in the year one thousand eight hundred and sixty-six, the right of succession to the ancient honour and dignity of Earl of Mar was claimed by his nephew and heir general, John Francis Erskine Goodeve Erskine (who is now the lawful heir general of the said Isabella Countess of Mar and of the said John Lord Erskine respectively) :

And whereas in the year one thousand eight hundred and sixty-seven Walter Coningsby Earl of Kellie, a grandson and then heir of the aforesaid John Francis, Earl of Mar, the grandfather of the said John Francis Miller Earl of Mar (who was himself heir in the direct male line of the said John Lord Erskine), presented his petition to Her Majesty, claiming to be entitled to the honour and dignity of Earl of Mar, which petition was in the usual manner referred to the House of Lords, and was considered and heard by the Committee of Privileges of the House of Lords :

And whereas on such hearing and consideration the said Committee of Privileges was of opinion that the said Charter of restitution of Mary Queen of the Scots did not operate or extend to restore to John, then Lord Erskine, the ancient honour, dignity, and title of peerage of Earl of Mar, but only to restore to and re-vest in

him the lands belonging to the said ancient territorial earldom; and that in the year one thousand five hundred and sixty-five a new honour, dignity, and title of peerage as Earl of Mar, descendible to the heirs male of his body, was created by Mary Queen of the Scots in favour of the said John Lord Erskine:

And whereas upon the twenty-sixth day of February one thousand eight hundred and seventy-five the House of Lords, upon the report of the said Committee of Privileges, resolved that Walter Henry Earl of Kellie (to whom, by the death of his father the said Walter Coningsby Earl of Kellie, the right and title of his said father had then descended) had made out his claim to the honour and dignity of Earl of Mar in the peerage of Scotland created in one thousand five hundred and sixty-five, and the right of the said Walter Henry Earl of Kellie to such last-mentioned honour and dignity was thereby established:

And whereas doubts may exist whether the said ancient honour, dignity, and title of peerage of Earl of Mar, which so descended to the said Isabella Countess of Mar as aforesaid, was or was not, previously to the said year one thousand five hundred and sixty-five, by any lawful means surrendered or merged in the Crown:

And whereas until the decision of the House of Lords upon the claim of the said Earl of Kellie the said ancient honour, dignity, and title of peerage of Earl of Mar was commonly reputed to be still subsisting, and to have been enjoyed and possessed by the said John Lord Erskine, his heirs and successors:

And whereas the said John Francis Erskine Goodeve Erskine hath upon all occasions conducted himself loyally and dutifully towards Your Majesty, and it is expedient that he should be placed by the authority of Parliament in the same position as if the honours, dignities, and titles of peerage which anciently belonged to the said territorial earldom of Mar had not been treated as if they had been surrendered or merged in the Crown, or had been by the said Charter of restitution of Mary Queen of the Scots expressly and effectually restored to the said John Lord Erskine:

May it therefore please Your Majesty that it may be enacted; and be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same as follows:

Restitution of ancient honours, dignities, and titles of Mar.

1. The said John Francis Erskine Goodeve Erskine, and all other persons who would be entitled after him to succeed to the honours, dignities, and titles of peerage anciently belonging to or enjoyed and held with the territorial earldom of Mar, which so descended to Isabella Countess of Mar as aforesaid, in case the said honours, dignities, and titles had never been by any lawful means forfeited or surrendered, or in case (being so forfeited or surrendered) they had been expressly and effectually restored to the said John Lord Erskine and his lawful heirs general by the herein-before recited Charter of Mary Queen of the Scots, shall be, and they are hereby restored to the said ancient honours, dignities, and titles of peerage, as fully and effectually to all intents and purposes as if the same had, without any impediment, descended to the said John Lord Erskine, or had been duly expressly and effectually restored to the said John Lord Erskine and his lawful heirs general by the said Charter of Mary Queen of the Scots, or by other means effectual in law.

Saving rights of Walter Henry Earl of Mar and Kellie.

2. Nothing herein contained shall affect or in any manner prejudice the right or title of Walter Henry now Earl of Mar and Kellie, his heirs and successors, or other the heirs for the time being in the direct male line of the said John Lord Erskine, to the honour and dignity of Earl of Mar in the peerage of Scotland, created in one thousand five hundred and sixty-five, or the right or title of the said Walter Henry Earl of Mar and Kellie or any other person to any lands or heritage in Scotland or elsewhere.

Order and precedence.

3 From and after the passing of this Act the earldom of Mar hereby restored shall be called at all elections of representative Peers for Scotland next after the Earldom of Sutherland; and the earldom of Mar now vested in the said Walter Henry Earl of Mar and Kellie shall be called at all such elections in the place and order properly belonging to an earldom created in the year one thousand five hundred and sixty-five; anything in the Decreet of Ranking made on the fifth day of March one thousand six hundred and six, under the Commission issued by James the Sixth, then King of the Scots, to the contrary thereof notwithstanding.