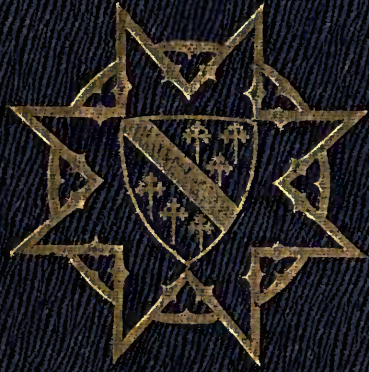


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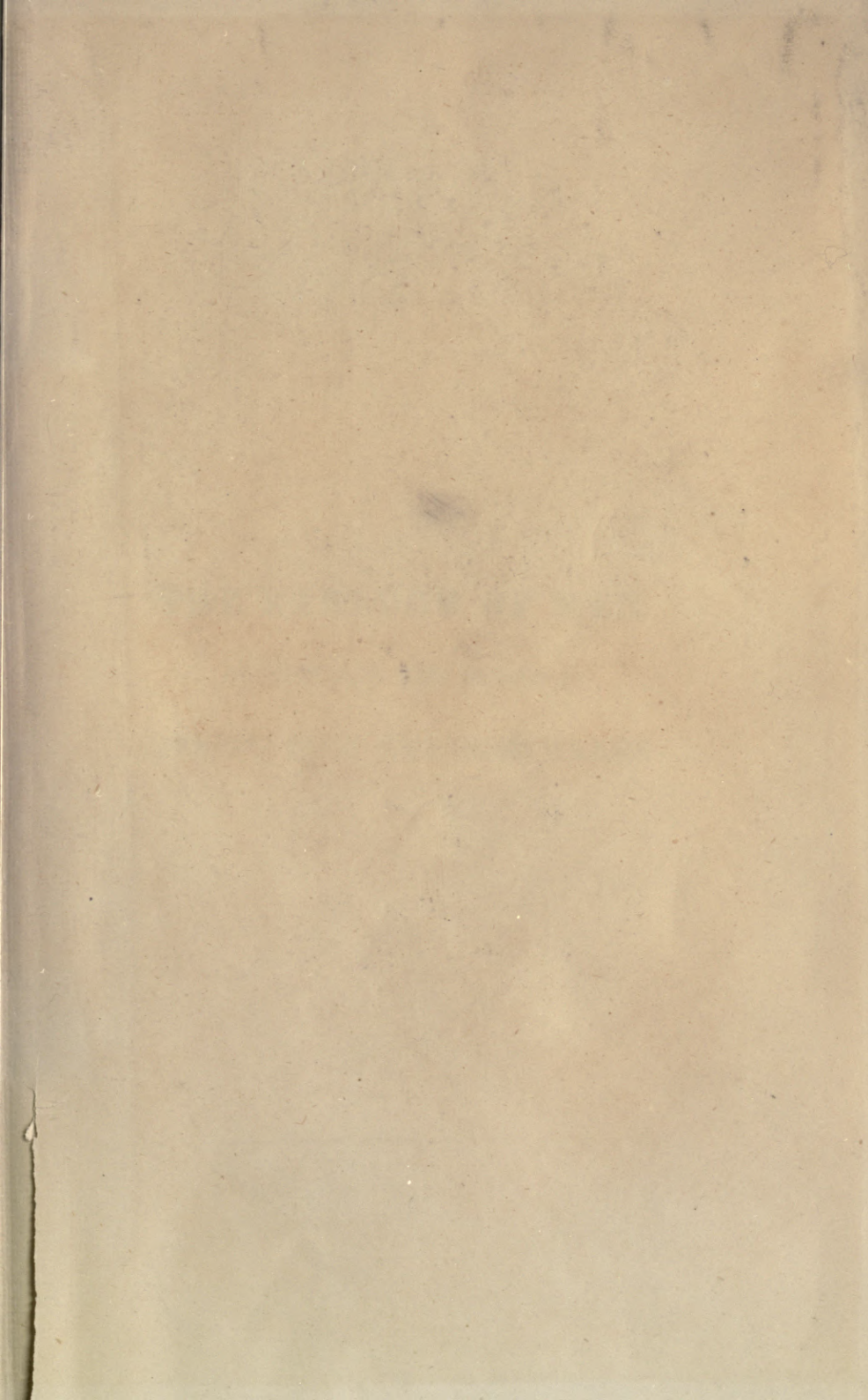
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THE EARLDOM OF MAR

IN SUNSHINE AND IN SHADE

DURING FIVE HUNDRED YEARS.

THE HAZARD OF WAR

IN EUROPE AND IN RUSSIA

DURING FIVE HUNDRED YEARS



42904



THE EARLDOM OF MAR

IN SUNSHINE AND IN SHADE

Scotland
Crawford

DURING FIVE HUNDRED YEARS.

WITH INCIDENTAL NOTICES
OF THE LEADING CASES OF SCOTTISH DIGNITIES FROM THE
REIGN OF KING CHARLES I. TILL NOW, *etc.*

IN REPLY TO AN ADDRESS TO THE PEERS OF SCOTLAND BY
WALTER HENRY EARL OF KELLIE, MAY 1879.

LETTERS

TO

THE LORD CLERK REGISTER OF SCOTLAND
(GEORGE FREDERICK EARL OF GLASGOW, LORD BOYLE, ETC.)

BY THE LATE

ALEXANDER EARL OF CRAWFORD AND BALCARRES,
LORD LINDSAY, ETC.

IN TWO VOLUMES.
VOL. I.

'Thrice is he armed that hath his quarrel just.'

EDINBURGH: DAVID DOUGLAS

1882.



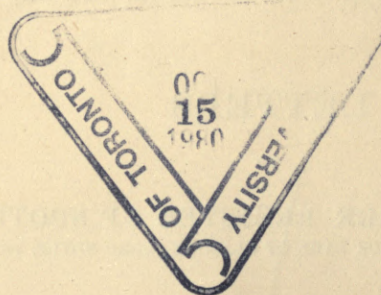
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P R E F A C E.

IN presenting the present work to the public, I have endeavoured to carry out the intention of my late husband, Lord Crawford, who was very anxious to have brought it to a termination as early as possible last year. For this purpose he had worked unremittingly for many months,—the subject of which these Letters treat requiring not only great research into the history of past times, but also great accuracy and exactness of detail.

Before the commencement of his illness in August last year, he had to a great extent completed his work; and he laid it aside for a week or two, pending our proposed journey to England, before revising what remained to be done, and preparing it finally for the press. Instead of this it pleased God to call him to his rest; and at the end of the year his active and laborious life was brought to a close, leaving, alas! this and others of his works unfinished.

I have placed the manuscript in the hands of a gentleman in all respects thoroughly competent to

carry out the necessary revisions and verifications, and through whose kindness the work has been prepared for publication ; and I take this opportunity of thanking him most warmly for the care, ability, and appreciative pains which he has bestowed in editing and carrying out to the utmost all the intentions of Lord Crawford, whose notes for the finishing of those parts not completed and revised by himself have been closely and faithfully followed. The first, second, and seventh Letters seem to have had most, and the concluding Letters least, of the author's final revision.

The subject is one which will not, I fear, prove of very general interest ; but Lord Crawford always had the strongest veneration for and pride in the great historical dignities of his own country ; and this, coupled with the keen sense of justice which was one of his principal characteristics, induced him to devote much time and labour to the researches requisite for the vindication of his warm and constant advocacy of the claims of the ancient Earldom of Mar. I trust that the work, though perhaps wanting in the last and final touches that the pen of the author could alone have supplied, will (to quote his own words) "justify the course adopted . . . in the endeavour to place the questions affecting the

succession to the Earldom of Mar before the public in such a manner as to enable the least learned reader to understand the principles I have appealed to, and to judge with an intelligent interest as between the voice of antiquity and prescription sounding from past centuries, and that of 1875 contradicting its testimony.”

MARGARET CRAWFORD AND BALCARRES.

VILLA PALMIERI, FLORENCE,
December 1881.

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and that of 1877 containing the
testimony
MARTIN BENTON AND REMAINS

NEW YORK: PUBLISHED BY
1877

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<i>Answer</i> —1. By modern usage the lay peers are practically silenced, Lord Redesdale's case being exceptional. 2. I have not hitherto excepted to competency of tribunal. 3. I protested, when proper time arrived, in regular form. A protest against	

a report of the House of Lords acting as a mere commission of inquiry tendering advice to the Sovereign, who may or may not act on it, falls to be made to the Sovereign, and in the Mar case was precluded, as the House, in supersession of the Sovereign's judicial action, sent an order to the Lord Clerk Register in same breath with their approval of the report of the Committee; an illegal act, which, if repeated, will deprive aggrieved parties of access to the ultimate judicature. I protested to the Sovereign in the Montrose case, and nothing was done on the Report, 41, 42

2. My Protests are a *rechauffé* of arguments of counsel, with a few "startling" assertions which no counsel would have ventured to make, and I have suppressed all the evidence and argument on the other side. A Chancellor, an ex-Chancellor, and a Chairman of Committees are at least as competent to arrive at a correct decision as those whose opinions are formed from *ex parte* statements, 42

Answer.—My Protests are an appeal to the law of Scotland, in vindication of Lord Mar's arguments against traditions of House, and overruling of final judgment of Court of Session of 1626. That I should expect the House to report in accordance with Scottish law may be "startling," but is true. Word "suppress" offensive. A Protest against speeches echoing the argument of a successful claimant presumes that the authority appealed to is aware of that argument. My first Protest was indeed against the documents and arguments that I am accused of suppressing, they having been disallowed by Court of Session in 1626, 43, 44

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Answer.—The report, tested by the law of Scotland, was wrong, and the heir-general the true Earl of Mar. Had I acted in concert with other peers I should only be doing what Lord Kellie's ancestor and nineteen other peers did in 1711, in protesting against an incompetent resolution regarding the Dukes of Hamilton and Queensberry, which was afterwards rescinded. But my Protest was spontaneous; and that other peers should have done as I did forms no ground for charging me with organising a conspiracy to defeat the ends of justice, 45, 46

2. I am an "amateur lawyer."

Answer.—To know, assert, and defend the great principles of law

forming the foundation of society is the duty of every man. If an uncle appropriates his niece's property after her father's death without any entail to cut her out, a lawyer's wig not required to judge of the matter. A legislator blameworthy, if unacquainted with the principles of national obligation and constitutional right, *e.g.* the powers of the Court of Session, the inviolability of her judgments, and the protective provisions of the Treaty of Union. These are questions of difficulty and obscurity where the intervention of an amateur lawyer would be presumptuous; but my Protests do not relate to such, the points in debate having been *res judicata* since the judgment of 1626; and I have only insisted on that judgment point by point as decisive for Lord Mar. Lord Redesdale's guidance equally censurable on the same ground. I had a special training in Scottish peerage law under one of its greatest masters,

46-48

3. "Contempt" of decisions of the House of Lords.

Answer.—Denied, both as to reports in peerage cases and genuine decisions. But the two must not be confounded. In the latter the House of Lords is a tribunal, in the former only a commission of inquiry advising the Sovereign. My expostulation is the old contention whether the orthodox doctrine or law of Scotland protected by Treaty of Union is to stand, or the heterodox, void of legislative authority. My quarrel is with a system, which, like the car of Juggernaut, once set in motion, may crush even those who have given it impulse. I disclaim disrespect to individual Lords who have advised in Committee. "Contempt" involves moral turpitude, not error or prejudice. I regard opinions proceeding on supersession of law and of final judgments as tested by that law and those judgments. I am entitled to credit when insisting that my remonstrance is in behalf of the peerage and people of Scotland and the maintenance of the national law inviolate. Notice Lord Kellie's triumphal assertion that the Lords can overrule final decisions of the Court of Session pronounced before the Union,

48-51

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LETTER II.

ESTABLISHMENT OF GENERAL PRINCIPLES.

LORD KELLIE'S assertion that the subject-matter of the Protests is settled for ever, by a decision of the proper tribunal, the House of Lords, in accordance with the <i>dicta</i> of Lord Mansfield, raises three issues, in answer to which it will be demonstrated that the principles of my Protests are the law of the land ; that the House has not observed them in advising the Sovereign, and therefore that my Protests are justified. The principles appealed to, and their proofs, will emerge in answer to six questions to be considered in separate sections, which I preface by Stair's maxim that rights are to be determined by the laws standing when those rights originated ; a maxim of peculiar weight as to dignities created before the Union, and reposing on the moral law of priority of obligation, . . .	58-61
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By Treaty of Union, law of Scotland declared inviolable unless modified by Parliament within conditions of the Treaty. This includes statutory and customary law, and expositions in final decreets of Supreme Court. By Article 18 of Treaty, Parliament may assimilate the laws regarding public right, policy, and civil government throughout the United Kingdom ; but can alter laws concerning private rights only for the evident utility of the subjects. General sanction of expositions of law in final decreets, and rights founded on them, expressed in Articles 18 and 19. Court of Session is to continue with same " authority and privileges " as before the Union, subject	
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- to regulations for the better administration of justice made by Parliament. The "authority and privileges" in question have not been the subject of any such regulations. By Article 19 no causes in Scotland are to be cognoscible by any Courts in Westminster, which shall have no power to review the acts or sentences of Scottish judicatories or stop their execution. Object was to preserve justice inviolate from review by a judicature necessarily unfamiliar with Scottish law. The assumption of jurisdiction by the House of Lords did not then occur as possible, 63-65
- What were the "authority and privileges" of the Court of Session alluded to? The Court of Session was constituted in 1532 for the administration of justice in civil actions (including dignities): its decreets were to have the same force as those of the Lords of Session formerly, *i.e.* to be without appeal to King or Parliament. Down to 1685 the privileges of the Court were confirmed by all subsequent Kings, who thus divested themselves of the prerogative of administering justice. All the departments of law were consolidated in one Court. Conditions of final judgment—*litiscontestatio* and decret extracted, 65, 66
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- An intervention at the Revolution has been represented as the origin of Appeals to the House of Lords after the Union. By the Claim of Right in 1689, the banishment of the advocates was declared a grievance, and the Convention affirmed the right of protest to King and Parliament against sentences of Court, such appeal not stopping execution of sentence. But nothing was done to define the mode and occasion of protest; and it was not to One Estate but to the Three, who sat and voted together, a fact overlooked by those who connect this protestation with appeals to the House of Lords. The Union Commissioners might have provided for transfer of the right of Protest—not indeed to the new Parliament, but to the House of Lords: but this was not done, and not intended: and the Court re-entered into its full powers, which have never been abridged by Parliament. The House of Lords assumed the office of a Court of Appeal without legislative warrant by an order of 1709 stopping execution of sentences. The assumption has worked well, but its unconstitutional origin transfers the presumption of justice in argument to the credit of the Court of Session on every point on which its authority and judgments have been set aside by the House of Lords in reports on Peerage claims. The authority and

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- While this jurisdiction was thus recognised, the House adopted a policy of engrossing cognisance of Scottish dignities as much as possible, and controlling elections at Holyrood. I notice the latter first. The statutory provisions for elections gave no power of interference. The Peers were to elect "freely" and return the list. The proper tribunal for questions regarding process of election or right to vote was necessarily still the Court of Session; but the neglect to specify in whom jurisdiction resided left it open for the House to step in. On a petition in 1708 by those Peers who conceived that they, and not the Peers returned, had been duly elected, the Lords summoned the parties to London, and passed general Resolutions on the controverted points. Contradictory character of Resolutions of 1708 and 1711. Both *ultra vires* and futile. While the laws of Scotland were appealed to by remonstrant peers of 1708, the Court of Session, which alone could apply them, was ignored, and every subsequent intervention was by the House of Lords. The chief of these have been for preventing pretenders to peerages from voting, where the old formula about establishing pre-

tensions "in due course of law" (*i.e.* according to Treaty of Union before Court of Session) was still retained, and construed as inferring jurisdiction in the House. Lord Rosebery's resolution of 1822 requiring Peers on their succession to submit their claim to vote to the House (afterwards rescinded in 1862) was *ultra vires*, and found inoperative. On suggestion of a Select Committee of the House, Acts were passed in 1847 and 1851 to deal with pretenders. It has been recently admitted by the House that no intervention is competent by it in matters affecting the Union Roll except under these Acts. Hence all *interventus* since 1708 has been *ultra vires*, the proper forum for such questions being the Court of Session. Scores of protests have been addressed to the Court of Session, on rights to dignities and form of election, and in vindication of freedom of election. Elections at one time, instead of being free, were controlled by the Ministry in London. In 1734 troops were sent to Holyrood to overawe the Peers,

76-80

The assumption by the House of authority in appeals in Holyrood elections paved the way for engrossing the jurisdiction in peerage claims. In 1711-14 the House originated and decided *proprio motu* a claim to the title of Lord Dingwall, without a reference from the Crown, a proceeding not repeated. But pretenders to dignities, and even acknowledged Peers, were, in contested elections, summoned to prove their rights. The practice of claimants petitioning the Sovereign according to English usage began in 1723. A vote tendered for the title of Lord Somerville, which was neither on the Union Roll nor in the Decree of Ranking, was protested against by Lord Tweeddale, with the suggestion that the case should be tried by the House of Lords after the Dingwall precedent. The claimant, however, petitioned the King, and his petition was referred to the House after the English practice, and the precedent was followed in the cases of Colville of Culross and Duffus, all being a private unauthorised arrangement between claimants and the Sovereign, and the Court of Session having no occasion to make her voice heard; but the result was that the right to resort to the Court of Session was almost forgotten,

80-82

Meantime the Court of Session had sustained its supreme and exclusive competency, first in the case of Lovat, 1730, when the right was questioned by the eventually successful claimant (the case being judged without appeal, and with subsequent recognition by House of Lords), who, however, abstained from urging the same plea in 1745 to save his life. Also afterwards in a claim to the Viscounty of Oxenford, 1733, where the heir of line, defender, pleaded that it was a privilege of the Peers of Great Britain to have their rights tried by the House of Peers, which he wrongly assumed was the English practice.

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In Report by Court of Session to House of Lords in 1740, the Court inform the House that if claims to peerages come before them they must give a decision,	86
Further engrossment of the functions of the Court of Session, and premonitory sign—in connection with the transference of the Oxenford case to the House of Lords by petition to the Sovereign—of a policy of dealing with them on considerations of expediency. Tendency to rule by English law developed in 1748 in the Stair case, in refusal to acknowledge the exercise by the second Earl of a power conferred on him by charter to nominate as his successor any one of his grandfather's descendants,	86, 87
Wild assertion by Lord Kames, in his "Historical and Legal Tracts," that to determine a right to peerage is the exclusive privilege of the House of Lords, and belonged in Scotland to Lyon before the Union. Wallace's remark relative to it in 1783, "that it was only lately that Scotch lawyers were taught to number among the privileges acquired to the Peers of Scotland by the Union, that of subjecting their legal pretensions to the arbitrary authority of the Crown,"	87, 88
Lord Mansfield recognised the competency of the Court of Session up to the Union, but not in the Lovat case. Lord Loughborough founded on the authority of the Lovat case. The subordination to which the Court had been illegally reduced induced the idea that it must always have acted under revision of some higher authority. It could only have been under some such idea that the Committee for Privileges of 1875 disregarded the decret of 1626. Lord St. Leonards's reasoning on this subject analysed,	88-90
Such being the sanctions of the law of Scotland under the Treaty of Union, they involved the following obligations on Lords, Parliament, and Sovereign:—1. The Sovereign cannot resume any jurisdiction delegated to a court of law, <i>e.g.</i> that conferred on Court of Session in 1532. The practice of preferring Scottish peerage claims to the Crown, is by allowance and irregular. 2. Parliament cannot alter laws of Scotland affecting private rights except for "evident utility of the subjects within Scotland." 3. The House of Lords having (alone) no legislative power, cannot supersede the laws of Scotland or set aside final decreets of Court of Session by private rules or tacit understandings. 4. No alteration of laws or diminution of authority of the Court of Session, competently made by Legislature, can apply to rights to dignities originating before the Union. 5. Claimants to Scottish peerages are warranted in resorting to	

the Court of Session, and Court warranted and under obligation to adjudicate on them. 6. Protests on questions affecting dignities, whether before or after Union, are addressed to the Court of Session, as basis for subsequent processes, . . . 90-92

SECTION III.—*Under what authority and limitation does House of Lords intervene in claims to Scottish dignities ?*

- According to English usage, claims are made by petition to the Sovereign, craving a writ of summons, such being petitions of right. Sovereign determines, after reference to Attorney-General and House of Lords to report. Scottish claimants ask simply for recognition of their right to the dignity. But the supreme jurisdiction being in the Court of Session, in virtue of the surrender of the Sovereign's prerogative, it is only by allowance of the claimant and consent of the Sovereign to act as arbiter that their claims can come before the Sovereign: hence limitations and protective sanctions develop themselves beyond those of English dignities, 92, 93
- Theory and practice of intervention in English cases, given in Lord Chelmsford's words, in accordance with precedents given in "Cruise on Dignities," 93, 94
- Lay Lords formerly took part in consideration of claims; now reduced to dummies—perhaps not an unmixed advantage. The Cassillis Resolution was determined by lay Peers on grounds which the law Lords repudiated. Lord Redesdale's position is exceptional, 94, 95
- Restrictions on intervention of House in English claims. The House has no prescriptive right to be consulted. Earldom of Huntingdon was decided on report to Attorney-General alone in 1819. In earlier times references were made to Chief-Justice, Court of Chivalry, etc.' House of Lords can take cognisance of no right unless brought before it *ab externo*: and in honours, except on a reference from Sovereign as supreme judge. Its Resolution of 1692, that Charles Knollys was not a peer, was disregarded by the courts of law, the question not having not been competently brought before the House. The Resolution of 1853, and Order of 1875, equally *ultra vires* for same reason. Nor has the House alone any legislative power. Such power virtually assumed by general Resolutions affecting dignities, Scottish as well as English, and private rules have been recently disclaimed. The House when consulted on a question of dignity, is bound to advise according to the law of the land. In cases of difficulty judges are consulted, 95-97
- Resolutions are not judgments, much less the *dicta* in speeches in Committee, which have of late years been printed as "judgments." Lord Mansfield's presumption in favour of heirs-male

only a *dictum*. House has lately affirmed that speeches are not judgments, and cannot be imported into the Resolution ; but have held Resolution itself irreversible. This is in contradiction to precedents. But speeches are valuable as a means of estimating the value of the Resolutions. They are privative to the House, not reported to the Sovereign unless asked for. Resolutions should not introduce reasons or rules for future guidance, or observations on any right or claim not referred to the House. These views have been substantially recognised by Lords since 1875, 97-100

The House is *functus officio* after tendering its advice ; and any action taken on that advice before such confirmation is null and void. The Sovereign is not presumed blindly to accept a Resolution, *a fortiori*, when unfavourable or compromising the rights of others, and cannot shut his ear to the remonstrance of an aggrieved party, 100, 101

Chief-Justice Holt says that an English peerage may be claimed before the courts of law ; and that if a claimant is dissatisfied with the King's determination, the King should send his petition to Chancery, 101

These limitations have been often opposed by the House ; and but lately the authority of the House to the supersession of the Sovereign was affirmed in the Report of the Select Committee of 1877, and by Lord Selborne, 101, 102

Restrictions in Scottish cases, arising from the different capacity in which the Sovereign intervenes :—*a*. The understood compact being that the award is to be by Scottish law ; on breach of compact the claimant re-enters into his original right to apply to Court of Session. The award is not binding on heirs or successors. *b*. No claimant of a dignity, still less peer in possession of a dignity claimed by another, can be subjected by such competition to the jurisdiction of the Crown or intervention of the House, except by acquiescence, *i.e.* himself petitioning. *c*. The recently asserted supreme jurisdiction of the House in dignities cannot apply to Scottish dignities ; it could not have been acquired from Scottish Kings or Parliament, or in any way but by an Act of Parliament, which would have been a violation of the Treaty of Union. *d*. The House of Lords advising the Crown ought to consult Scottish judges, 101-104

These restrictions, English and Scottish, are of paramount importance. Lord Kellie's theory of absolute jurisdiction in the House of Lords incompatible with evidence here given in its disproof, 104, 105

Results.—*a*. The House, reporting on an English claim, is not a legal tribunal but a consultative body, with no judicial power, and *functus* after rendering its advice. *b*. The Resolutions reported to the Sovereign are not judgments, the actual judgment being with the Sovereign. *c*. The authority of the House is thus

derivative, and not of standing continuance. It cannot originate, much less act on an opinion. *c.* General Resolutions and rules affecting dignities *en masse* are *ultra vires*. *d.* In Scottish cases there can be still less any question of jurisdiction, as that resides in the Court of Session; hence the petition to the Crown, etc., being irregular, neither Sovereign nor House can acquire any jurisdiction at the expense of the Court, which has never flinched from sustaining its competence, and is protected by Treaty of Union. *e.* In Scottish dignities important limitations arise out of the understood compact between the claimant and the Sovereign that the decision will be according to Scottish law. On breach of that compact, recourse is still open to the Court of Session, 105, 106

SECTION IV.—*What is the Scottish law of dignities where no charter or patent is extant?*

As already said, the presumption is for heirs-general, and the *onus* on heirs-male. Dignities are a heritage; the words of constitution and transmission are the same in them as in lands, and when the grant is missing the presumption is the same, 106, 107

That law of succession proved:—

1. By universal custom from earliest times to fourteenth century. Charter proof in Lord Hailes's Sutherland Case alluded to, and circumstances in which that Case was written. Heads of argument proving that nine out of the thirteen old earldoms descended to heirs-female, a tenth being forfeited and its constitution unascertainable. This proof was accepted by Lords Mansfield and Camden, 108-110
2. By the expressions used in acts of revocation by Scottish Kings, 110, 111
3. By Oliphant decision in 1633 and 1640, 111-113
4. By testimony of institutional writers—Balfour, Skene, Craig (who has been misapprehended from not observing his distinction between the Lombard—or what he calls “feudal”—law, and the law “*apud nos*”), Stair, Bankton; opinion of Craige of Glendoick, and words of Earl of Marchmont, 113-119
5. By exhibiting the connection between the Scottish law of succession and the system of feudal tenure. Kingdom concentrated in capital, and in like manner fief in chief messuage, which was identified with the possession of the whole. Right only inchoate till King, baron, and earl inducted into corporal possession. Connection between the superiority of the whole fief and the chief messuage. Alienations of portions of the *dominium utile* permitted, but not of chief messuage without King's consent; the only voluntary alienation of the fief being by resignation and regrant. Sometimes the fief was alienated involuntarily by compulsion or coercion. The dignity ceased with alienation of the chief messuage. A territorial dignity

- survives in the lordship of Torphichen. Indefeasibility of dignities in English sense unknown. *Jus sanguinis* in dignities recognised in time of Mary and James VI. The great fiefs, including all the old earldoms, descended to heirs-general. In case of coheirs, the eldest get the chief message, carrying superiority of whole and dignity, though territory divided. This continued after peerage titles became hereditary. This succession by the eldest daughter contrasts with English principle of abeyance. During minority, fief was in Sovereign's hands. Ward and marriage of heir or heiress. *Custos comitatus*. On marriage of heiress, husband bore the title of dignity by courtesy; and if she alienated the fief to him is principal in all transactions. It followed from the identification of the title with the chief message and the impartibility of the fief, that the original charters do not as a rule allude to titles of dignity or "peerage" (a thing unheard of till 1587). The chief message carried the dignity as its shadow. This continued till 1600. On a few exceptions in peculiar circumstances was founded Lord Camden's rule (that no charter of comitatus conveys the title of honour unless specified) so disastrously applied in 1875. "Peerage-earldoms" had no existence. Limitation "*hæredibus suis*" proved by Lord Hailes not to mean male heirs:—has to be read in light of investitures. The law and principle of succession is thus the outcome of the feudal system, by which the fief is the dominant consideration, and the continuity of the male succession of the original grantee secondary, the services to the Crown being secured by wardship and marriage of heiress, while it was in the interest of the Crown that the *dominium utile* should be divided. In the fourteenth century some leading families began to protect themselves by entails to heirs-male, which were exceptional, and only tolerated. These entails, instead of being a relic of feudalism, were intended to obviate the tendency of that system to break up the great families. All this is familiar to historical students, . . . 119-131
6. By responses by the eighty Scottish Commissioners to Edward I. on the claim of Lord Hastings (as third coheir) for division of kingdom—reserving title and office of King to Baliol. They declared that earldoms were not partible, as adjudged in the case of the Earldom of Athole; but assignment should be made, of grace not right, to younger sister. Details of Athole case. Apparent incongruity between this impartibility and alienation to younger coheir disappears when it is considered that that alienation is of the *dominium utile* only. Lord Kellie's misapprehension and Lord Chelmsford's misdirection originated in the erroneous *dictum* of Lord Mansfield in the Cassillis case, that territorial dignities could not continue after the fee was dismembered. The insistence by Lords Chelmsford and Redesdale that

- the Erskines only claimed half the comitatus is based on the same misapprehension. The responses of the eighty Commissioners were founded on by Lord Camden for female succession in the Sutherland case, 131-134
- The law of succession *ut supra* is in daily recognition in Scotland, never questioned except in dignities, and no countenance has ever been given by the Court of Session to counter-heresy. Torch of orthodoxy handed down by Riddell and Maidment, 134, 135

SECTION V.—*What is the doctrine and rule upon which the House of Lords is in the habit of advising the Crown in Scottish dignities? When, how, and on what authority was that doctrine and rule first laid down?*

According to Lord Kellie, "since the Union the succession to peerages where no patent exists has been conclusively established by the House of Lords in favour of heirs-male. In cases of Cassillis (1762) and Glencairn (1798) this presumption has been ever since acted on, and is not to be upset by protests by an amateur lawyer." But Lord Kellie does not exhibit the full bearing of the doctrine introduced in 1762 and subsequently. In the Cassillis claim, the Resolution (expressly drawn up for future guidance) proceeded on principle that where no written limitation exists, descent to heirs-male of the body is to be presumed. But in Sutherland claim this presumption was modified if an exception could be proved in favour of the heir-general on whom the *onus* lay. On these two rules conjointly, the Spynie, Glencairn, and Mar claims were reported on. The question is not between the authority of Lords Mansfield, etc., and mine, but between these Lords and the witnesses to the law of Scotland above given. Since 1771 these *dicta*, though opposed point-blank to the law of Scotland, have been simply reiterated, without the slightest answer to the increasing remonstrance against them, 135-149

If it be asked how the House has been committed to such grave error, the answer is to be found in the circumstances which preceded and attended the Cassillis and Sutherland claims. The counsel for Crawford in the Court of Session in 1706 had founded on the Lombard law, misquoting Craig; as did the counsel for Simon Fraser in the Lovat case, though alternatively pleading the genuine Scottish law, on which the decision actually proceeded, to the effect that an exception to the general presumption could be proved from the investitures. The same problem recurred in the Cassillis claim, the heir-general founding on the ordinary Scottish presumption, and the heir-male alternatively—1. On the same misreading of Craig, viz. an assumption that the Lombard law described by him was also

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the law of Scotland ; and, 2. On an exception to the common presumption for heirs-general derived from the investitures,	137-139
The motive that induced Lords Hardwicke and Mansfield to enforce the heterodox doctrine are explained by them with great <i>naïveté</i> , viz. the advantage (in the absence of abeyance in Scotland) of such a principle in putting a bar on claims by eldest heirs-general ; query, Because the Scottish Peerage was viewed with jealousy as being Jacobitically inclined ?	139
The process of reasoning seems to have been : "No law of succession to dignities is discoverable before Union. The only exception is the Oliphant case, which at the same time rules a question regarding resignation contrary to common sense. Since the Union the Crawford and Lovat cases were both ruled by Court of Session in favour of heirs-male, neutralising the Oliphant judgment. It is thus open to us to fix a permanent rule for future cases on grounds of expediency, viz. a principle in favour of heirs-male, which no argument from the investitures can remove,"	140, 141
This was done in face of the authority of Stair and his predecessors, Craig included. Their not consulting the Scottish judges implies latent distrust as to the answer. Lord Mansfield, leaving out of view the special interlocutor testifying to the existing law of succession, qualified the entire Oliphant judgment as erroneous, in consequence of a separate utterance, which he misunderstood, but which was correct, and acted on by Charles I.,	141, 142
The support given by the peers present to the Cassillis report went, according to Lord Hailes, on the exception to the Scottish principle founded on the investitures, and not on Lord Mansfield's law. Lord Mansfield however tells that he "settled with Lord Hardwicke the penning of the judgment as a rule for the future." The rule as laid down in 1762 left no room for proof of an exception in favour of heir-general,	142, 143
Lord Mansfield's indication of the advantages accruing, and statement that "questions regarding peerages should be settled on principles of expediency as well as law." Same doctrine vindicated by Lord Brougham. Avowed object of "rule" was the suppression of claims to Scottish peerages by heirs-general,	144
The danger of deserting the path of legal right was shown in 1771 when three claimants appeared for the Earldom of Sutherland. The Cassillis Resolution, which had no apparent opening for heirs-general, brought two heirs-male into the field ; yet grievous hardship would have ensued had the right of the heir-general not been recognised. By Scottish law, when the direct male line ended in Earl John in 1514, his sister Elizabeth had succeeded, and her husband Sir Alexander Gordon became Earl by courtesy. On the death of Earl William in 1766, his only	

- child, a daughter, succeeded in like manner. But her right was questioned by Sir Robert Gordon, heir-male of the second, and Sutherland of Forse, heir-male of the first line, and their petitions to the Sovereign, and Lady Elizabeth's counter-petition, were referred to the House of Lords, 145
- Lady Elizabeth's claim rested on general Scottish principles. Sir Robert Gordon's rested on the Cassillis Resolution, as heir-male of Adam Gordon, husband of the Lady Elizabeth of 1514, by a presumed creation to him by a lost patent to heirs-male—a status identical with that of Lord Kellie in the Mar claim. Sutherland claimed also agreeably to the Cassillis Resolution, as heir-male of the old line flourishing in 1367. It was difficult to see how the pretence of the two heirs-male to two distinct earldoms could be resisted if the doctrine of 1762 were correct, 146, 147
- But the estates as well as title were involved, as they had been settled on the heirs succeeding to the Earldom. A report in favour of either or both heirs-male would beggar Earl William's daughter, and cut off his sister Lady Elizabeth Wemyss, the next heir of line. The last-named lady petitioned that if the House could not find for heirs-general they would extinguish the dignity, so that the estates should not pass to distant collateral heir. The "Additional Sutherland Case" came opportunely as a means of extrication from the consequences of the Resolution of 1762. Emerging from the broad ground of the presumption in favour of heirs-general, Lord Hailes pointed out that if the presumption for heirs-male were correct, more than one of the old Celtic earldoms in the same position with Sutherland devolved on heirs-female, when they ought to have passed to heirs-male, the husbands of the Countesses becoming Earls by courtesy. The importation was thus suggested of an exception into the iron rule of 1762. The right of the Sutherland heiress was saved, not by a frank recognition of the Scottish rule of succession, but by a compromise, by which the presumption of male succession introduced by the Cassillis Resolution was declared open to contradiction by the heir-female. Lords Mansfield and Camden stumbled on justice by a path full of difficulties and errors. Lord Camden, though admitting that Lord Hailes had proved the descent of nine earldoms, Mar being one of them, to heirs-general, and that there was no distinction between the descent of dignities and lands, went out of his way to assert that the grant of a comitatus did not carry the dignity. The result of the combination of his speech and Lord Mansfield's was a network of bewilderment and confusion, 147-152
- Citation of words of Lord Mansfield in Spynie claim (1784), of Lord Loughborough in Glencairn claim (1797), with misrepresenta-

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tion of ground of Lovat decision. Lord Loughborough's subsequent dissent from the doctrines then laid down, as expressed to Sir Adam Fergusson, and his admiration for Lord Hailes's Sutherland Case,	82-84
Since Lord Hailes blew the supposed authority of Craig to atoms, no one has ever advanced an argument in support of Lord Mansfield's law; yet the House has continued to report according to its tradition, and it has at last been possible for Lord Kellie's counsel to elevate it to the rule of "the law of Scotland, finally settled by the House of Lords,"	155
Yet all the cases decided under the influence of this principle have not miscarried, <i>e.g.</i> Cassillis, Sutherland, and Glencairn. In Mar claim, Lord Mansfield's and Lord Camden's rule combined by a curious infelicity to crush down the law of Scotland, and work an unparalleled complication of error and injury,	156, 157
 SECTION VI.— <i>If the law of Scotland and private rules of House come into collision, which is binding on Sovereign and subject, and which is to prevail?</i>	
The law of the land is to be obeyed against private rules. The private rule of 1762-71 is especially stamped with invalidity from its disregard of the final judgments of the Court of Session,	157
Recapitulation of answers to the six questions taken up in the six sections,	158-160

LETTER III.

THE EARLDOM DOWN TO 1435.

I HAVE now to show that the principles proved in last Letter to be obligatory have not been observed by the House of Lords in advising Lord Kellie's claim. To do so I have to trace the history of the Earldom of Mar, indicating at the proper points the divergence of the views of the Lords from these principles. Charge of "suppression,"	161-163
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SECTION I.—*The Earldom previous to 1404.*

The history of the Earldom divides into five periods:—1. To the death of Alexander Stewart. 2. The <i>interregnum</i> during which the lawful heirs are illegally kept out of possession. 3. From the restoration of 1565 to the attainder of 1714, and the restoration of 1824. 4. The current period,	163
The fourteenth century would be a sufficient starting-point, but Lord Kellie's scepticism regarding the earlier evidence of the existence of the Earldom leads me to specify the evidence of it. Celtic evidence regarding remote <i>origines</i> : Earl Donald	

in 1014. The succession must have been in the tribe of the land. Two rival series of Earls. Introduction of feudal system, based on succession to heirs-general. Question of Earl Morgund's legitimacy. Charter of 1171, and questions regarding its genuineness. A papal rescript of 1257 affords convincing evidence of the descendibility of the Earldom to heirs-general,	163-172
Earl William, 1244-1273. Earl Donald II., 1290. Earl Gratney, husband of Christiana Bruce. Earl Donald III. and his sister the ancestress of the Erskines. Earl Thomas last Earl of the Celtic stock,	172-174
Earl Thomas succeeded by Countess Margaret his sister (Countess of Douglas by marriage), James Earl of Douglas and Mar her son, and Isabel Countess of Mar her daughter. Janet Keith, wife of Sir Thomas Erskine, next heir to the Earldom in 1404. Genealogy. Riddell on the antiquity of the Earldom of Mar,	174-176

SECTION II.—*The Earldom not extinguished in 1377 or 1435.*

The conclusions of Lords Chelmsford and Redesdale that the Earldom was extinct are founded on reasons mutually destructive of each other. The problem proposed by Lord Chelmsford was—By what right Margaret and Isabel possessed the Earldom and assumed the title. Lord Redesdale asks: By what title was Margaret's husband called William Earl of Douglas and Mar? He begins by laying down—1st, That, while the ancient Earldom was probably held by tenure of the <i>comitatus</i> , what is now in question is something independent of it, a "peerage-earldom" (associated by him with a seat in Parliament, as if attendance in Parliament was not obligatory on every baron). 2d, There being no record regarding the ancient Earldom, it must on Lord Mansfield's <i>dictum</i> be presumed to have gone to heirs-male of the body. Hence he concludes that the Countesses Margaret and Isabel did not hold the dignity in their own right, and the peerage-earldom became extinct on the death of Earl Thomas in 1377. Lord Chelmsford, more guarded as to the presumption in favour of male heirs, shrank from denying that Margaret and Isabel were Countesses by inheritance,	176, 180
Both agree in supposing that the following difficulties stand in the way of recognising Margaret and Isabel as Countesses in their own right:—1. William Earl of Douglas and Mar deals in charters with Mar as his own property. If, according to Lord Chelmsford, he had held in Margaret's right, his warranty would have been invalid without her concurrence. Lord Redesdale suggests three alternative explanations, rejects the first and second, and will not commit himself to the third. 2. James, son of Countess Margaret, called himself Earl of Douglas	

and Mar while his mother was alive; the same plea urged by Sir Robert Gordon in the Sutherland case, and assumed by Lord Hailes. 3. Sir John Swinton, second husband of Margaret, and Sir Malcolm Drummond, first husband of Isabel, were designed "Lords," not Earls of Mar. 4. Isabel (according to Lord Chelmsford) sometimes styled herself "Lady of Mar and Garioch" before her marriage: and Garioch being assumed to be only a Lordship, it is inferred that Mar is in the same case, and she is not Countess by hereditary descent. Reference by Lord Redesdale in connection with this objection to two charters of Earldom of Carrick, as evidence that charters of comitatus did not carry the title of earl unless specified. This refuted. Question, Whether Earl of Mar is not still *de jure* Earl of Garioch also? 180-183

All these difficulties disappear on acknowledgment of the Scottish presumption in favour of heirs-general, as the phantoms of night and error with the rising of the sun of daylight and truth. The objections are based on two unwarrantable assumptions:—1. That the tenure of an earldom by the husband of a countess in which she was moving agent, and he only concurred, was the only one in feudal times. 2. That no one who had a right to a higher title was ever designed by a lower one. As to the first assumption, a resignation for a new investiture, or a confirmation of a grant by a countess to her husband, might entitle him to perform ordinary acts of ownership independently of her. The memorandum produced from the Douglas charter-chest favours the probability that William Earl of Douglas and Margaret obtained a new investiture of both Earldoms, which would account for the Douglas Earldom going on the death of Earl James to the illegitimate male line. The assumption that one possessing a higher title was never designed by a lower is untenable. What difficulty could arise from it is put out of court by the qualification of the Erskines as *veri hæredes* of Isabel through common descent from Earl Gratney. But an earl and countess are often designed "dominus" and "domina," more especially in dealing with the lands of which he or she was feudal lord, 183, 191

While Lord Redesdale concludes that the ancient Earldom became extinct by failure of heirs-male on the death of Earl Thomas in 1377, Lord Chelmsford, unable to resist the evidence for female succession, holds that it passed to Margaret and Isabel, and to the husband of the latter, Alexander Stewart, when it ceased to exist from being broken up beyond possibility of resuscitation, 191

The inquiry unimportant, inasmuch as the successor of Margaret and Isabel is recognised in the final judgment of the Supreme Court in 1726, to say nothing of the Act of 1687. The reports

on the Sutherland claim proceeded on the argument that nine of the thirteen ancient earldoms, Mar being one, were indisputably proved to be descendible to heirs-general, 192

Ingenious multiplication of presumptions by the Sutherland heir-male to account for Isabel being designed Countess of Mar. Result, that agreeably to usual Scottish rule, though contrary to Lord Mansfield's *dictum*, Margaret and Isabel were successively Countesses of Mar as heirs-general, 193

SECTION III.—*The Countess Isabel: her raptus and her two charters.*

Countess Isabel the subject of a network of intrigue. First, as regards her Douglas inheritance; Margaret Stewart, Countess of Angus, widow of her uncle Thomas Earl of Mar, the motive agent: her object the aggrandisement of George Douglas, her natural son by an incestuous intercourse with Isabel's father. She gets a regnant in his favour of the Earldom of Angus, and endeavours to obtain for him both the untailed Douglas estates, to the prejudice of the Sandilands family, and also the Mar estates on Isabel's death. Robert III. lends himself to the transaction, Angus marrying one of his daughters, 194-197

Renunciations obtained from Sandilands of his rights, and Isabel's charter of Cavers to Archibald Earl of Douglas, and consequent recognition, 197, 198

Steps taken by the Erskines to protect their interests. Application to Robert III. in 1390-1. The King's pledge in 1395 to sanction no alienations in prejudice of the Erskines as *veri hæredes*: and his breach of faith in 1397, 198-201

Friendship of Erskines and Earls of Crawford, 201

Alexander Stewart's bold stroke for a wife. A murderous attack on Sir Malcolm Drummond followed by forcible wooing of his widow the Countess Isabel, from whom he extorts the charter of 12th August 1404, settling her whole lands (Earldom of Mar and untailed Douglas estates), not on her but on his heirs, *i.e.*—failing his issue on the King, inasmuch as Alexander was a bastard, 201-203

This charter, however, was worthless unless confirmed by the King: and the King refused to confirm it. Its existence is known by an irregular record of it entered seventy-two years later in the Great Seal Register, 203, 204

A compromise arranged, by which Isabel, condoning her wooer's violence, granted him the Earldom of Mar, etc., with liferent to the longer liver, and destination to her heirs "ex utraque parte," *i.e.* her maternal inheritance to the Erskines, and paternal to the Douglasses, as under then existing investitures, except as regards Alexander's liferent. A remarkable scene first took place at Kildrummie described in a notarial instrument

- of 9th September 1404, when the subjects conveyed by charter of 12th August were solemnly renounced in terms of intended charter. This charter followed on 9th December 1404; and, after sasine, was confirmed by the King, 21st January 1404-5. Two charters printed in parallel columns with confirmation below them, 204-207
- Confirmation differs from charter of December in disallowing the grant of Cavers; and the fact that Cavers did not devolve on Alexander is in itself proof that the charter of August was not, as Lord Chelmsford held, the dominant investiture. Fate of Cavers viewed with anxious eyes. Recognosed by Isabel from alienation without leave to Archibald Earl of Douglas, and granted to Sir David Fleming, who was slain by the Douglasses. Probable reasons why charter of 12th August was not visited with a similar penalty, 207-209
- The two charters of August and December are respectively the foundations of all that has followed, just and unjust, legal and illegal. The extorted, renounced, unconfirmed, and rejected August charter ruled from 1457 to 1565, but was finally condemned by the Court of Session in 1626, who set up that of December. The House of Lords has again set up the rejected charter, and on the strength of it attempted to intrude the newly-discovered Earldom of 1565 into the place of the ancient Earldom. After Countess Isabel's death, Alexander was a mere liferenter, and there was no legal power in him or in the Crown to divert the succession from Isabel's heirs, 209, 21
- However creditable Alexander's subsequent public career may have been, his private activity was unscrupulous to the last. In the interest of his natural son Thomas he plotted to acquire the Earldom of Mar in perpetuity by a quasi-legal title, to the exclusion of the Erskines. The circumstances of the Albany regency seemed favourable for his purpose. His policy illustrated by three pieces of evidence:—1. The stipulations in an indenture between Earl Alexander and Murdoch Duke of Albany that the latter is to confirm a conveyance of the Earldom in favour of Thomas, natural son of the former, and a projected marriage between the son of the latter and a daughter of Sir Robert Erskine (Question whether that marriage took place). 2. Account of Chamberlain of Mar 1445-6 referring to a resignation to Albany in favour of Sir Thomas Stewart, and containing the expression "assertus comes de Mar." 3. Resignation by Alexander Stewart of Earldom to James I., and regrant to himself and Sir Thomas and heirs-male of body of latter, with final remainder to King—a transaction *ex facie* illegal, 210-216
- Thomas having previously died childless, James I. seized the Earldoms on death of Alexander under charter of 1426. Death and character of Earl Alexander, 216, 217

SECTION IV.—*Opinions of Lords Chelmsford, Redesdale, and Cairns, and discrepancy in their views.*

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Opinion of Lord Chelmsford,	217-233
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Discrepancy 1: Lord Chelmsford adheres to charter of 12th August 1404, thus recognising the competency of Alexander's resignation of 1426; and acknowledges the continuous succession of fief and title down to 1535. Lord Redesdale adheres to charter of 9th December 1404 and its confirmation, but holds it to be a charter of lands only, not conveying the "peerage-earldom," Alexander bearing the title by usurpation until 1426, when he was probably rewarded by a "peerage-earldom."	
2. Lord Chelmsford regards the charter of 1426 as the pivot of subsequent dealings with the Earldom; Lord Redesdale, aware of the King's defective title, holds his possession as an act of injustice sanctified by power and time, and thus not to be disturbed,	246-248
Lord Hailes's description of these events,	249

LETTER IV.

ROBERT EARL OF MAR AND THE INTERREGNUM,
1435—1565.SECTION I.—*Policy of James I. and his successors.*

The policy of James I. and his successors, except James IV., was to break up the great earldoms. The power of some of them was excessive, and too often abused, particularly during the long minoritics. Yet the scene contrasted favourably with the state of England during the corresponding period. The nobles did not as a rule oppress their vassals, nor was justice banished from their courts. While there was a struggle for power on both sides, the love and respect of the nobles for their Sovereign was never extinguished. The Earldoms of Strathearn, March, Lennox, and Mar, were crushed out by James I.: and resentment in the case of Strathearn brought about that King's murder. The league between Douglas, Ross, and Crawford was broken up by James II. Under James IV. alone King and nobles lived in harmony. James V. put down the Red Douglas, and struck at Crawford, Argyle, and Morton. The general character of the policy of Kings towards nobles was too often one of violence, fraud, and injustice, 250-256

The strength of the great Scottish families rested on the attachment of their kinsmen and feudal dependants, 256, 257

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SECTION III.—*Struggle with Crown and Service Negative of 1457.*

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Grant of Earldom of Garioch to the Queen, 26th August 1452,	275

Thomas Lord Erskine, his father being dead, a suppliant in his own name, 20th March 1452-3, for justice as to both Earldoms. The judicial inquiry which had been promised limited, first to an inquiry by the Secret Council, and now to an assurance that justice would be done by the King, sitting in his own cause,	275, 276
<i>Summary of results.</i> —(1.) <i>Legal.</i> —1. It was recognised by the Crown from 1438 to 1457 that the right was not absolutely in the Crown, but debateable and in suspense; and the determining question was, Whether was the charter of August 1404 or of December 1404 to be the governing instrument? 2. The claim was to the entire Earldoms not half of them. (2.) <i>Historical.</i> —1. The indentures were entered into to amuse and disarm Earl Robert, but in bad faith on the side of the Crown. 2. As years rolled on, the Crown gradually receded from its engagements that justice should be done,	276-279
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What had become of the Lyles? They never protested against Earl Robert or his son claiming the whole inheritance. Lord Chelmsford's assertion baseless, that Sir Robert Erskine claimed in 1438 as coheir with Lord Lyle. Indenture between Lyle and Sir Alexander Forbes of 26th March 1444, stipulating for exchange of lands. Charter of 25th September 1452 by Lyle to Abbey of Paisley, acknowledging loan to promote his right to Garioch,	281, 282

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Promised inquest held five years after the King's majority, on 15th May 1457, at justice-ayre at Aberdeen, the King sitting in judgment in his own cause,	282
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This grant of Strathdee was a transaction of excambion, and not by Erskine, but by Lyle, as would have been proved by Erskine had he been allowed to be present,	286, 287
These proceedings were private; the rest were public. Lord Erskine was summoned, and briefes granted him. An inquest was empannelled, including the "penitents" of 1438. To Lord Erskine's claim the Chancellor replied that the King was in	

possession of the lands at the time of the death of Lord Erskine, and had had investiture of them at his coronation ; that Lord Erskine stood in no relationship to Countess Isabel ; that after Isabel's death Thomas Stewart held them, whose widow now enjoyed her terce ; that the retour of 1438 was invalid, from the absence of forty days' notice, from the deputy-sheriff having refused to defer to the King's letters, and also, inasmuch as it had been enacted that the King in his minority should remain in possession of all the lands in which his father died seised,	287-291
Lord Erskine produced in support of his right the charter of 9th December 1404, with its confirmation. The Chancellor produced against it the unconfirmed charter of 12th August 1404, in virtue of which he alleged that the Earldom had devolved on the King by the bastardy of Alexander Stewart. The jurors found for the King,	292, 293
Criticism of proceedings. First is to be noted the breach of faith ; the inquiry was based on a personal suit of the King at a justice-ayre, and not held before Parliament, or even an assize of error ; while the grand inquest contained five men who had just thrown themselves on the mercy of the Crown as guilty of perjury. The King sat in his own cause, and Scroggs, etc., were examined apart from Erskine. The Chancellor took part in a suit that ought to have been intrusted to the usual advocates of the Crown. The allegations of the Chancellor are susceptible of easy answer. He amplified Scroggs's statement into an absolute denial of relationship to Isabel. The argument from the terce of Thomas's widow only proved the fact of possession. The forty days were a period unheard of. The conduct of Sir Alexander Forbes in disregarding the letters was praiseworthy. The enactment about the King's lands was passed seven years after the service, and had no retrospective clause. But these <i>gravamina</i> are insignificant compared with the effrontery of founding on the charter of August 1404,	293-296
Might thus prevailed, and the Erskines maintained a dignified silence, serving the princes who enjoyed their inheritance with devotion. Effect of this confiscation on the vassals of the Earldom,	296-298
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Independent testimony to rights of the Erskines by Sir David Lindsay, the Lyon, in his official Armorial,	300
Queen Mary, in ignorance, granted the Earldom of Mar to her illegitimate brother, James Stewart ; but, on discovering the truth,	

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undid her work, and gave him the Earldom of Moray in compensation,	301

SECTION V.—*The above narrative confronted with the opinions of the Lords in Committee.*

Lord Redesdale founds chiefly on traditional doctrine of House ; Lord Chelmsford on the retour of 1457 being founded on strict justice. Lord Redesdale holds the territorial earldom as extinct on the death of Earl Thomas in 1377. Any one bearing the title since must have done so by some <i>interventus</i> . According to Lord Chelmsford, it was perpetuated through heirs-female to Isabel, but she dispossessed herself and her heirs by charter of 12th August 1404,	301, 302
Speeches of these two Lords quoted,	303-308
I deal first with general observations, chiefly Lord Redesdale's, then with special, chiefly Lord Chelmsford's; but first premising that the crucial point is whether the unconfirmed charter of August or the confirmed of December 1404 is to stand. Lord Chelmsford stands wrongly by the former, Lord Redesdale rightly by the latter; but considers the illegal possession of the Crown with the acquiescence of the Erskines as a settlement dangerous to disturb,	308-311
Against this conclusion I remark :—1. The admission of the Crown had no effect for or against the existence of a dignity in Scotland; and the success of the policy of James I. and his successors to absorb the great Earldoms <i>per fas et nefas</i> cannot be founded on against the rights trampled on. 2. Admission by the Lords Erskine that they had no right would have had no weight. 3. A dignity cannot be established by prescription. 4. The Erskines could not have acquiesced to their own injury, except by formal resignation. The later Erskines did not assume the title, because not infeft. It is inconsistent to argue against their rights to the higher title because they did not assume it, and blame the present Earl for assuming it. 5. The "settlement" was effectually disturbed in 1565 and 1626, a new settlement fixing for ever the relative claims of the two charters,	311-313
Lord Chelmsford's special objections to the retours :—1. That they were obtained through fraud. Accusation against Sir Alexander Forbes refuted at length,	313-316
2. That the retours assert what was false. The lands were not in the hands of the King on the death of Alexander Stewart, but were claimed by the Crown by the reversion in the charter of 1426. The October retour was obtained to correct the former one which had erroneously found that Robert had right to half the Lordship of Garioch. But there was neither false	

- assertion in the first retour, nor discrepancy with the second ; the second reasserts Alexander's life tenancy, and incompetency to resign what was not his. Judgment of 1626 on this point, 316, 317
3. That the retour of April was vitiated by an intervening delay of six months in acting on it. There was no such rule in Scottish law, 318
4. That the retours were both (as Lord Redesdale also held) to the same half of the comitatus. But Lord Chelmsford's eye is shut to half the evidence. It is the whole comitatus which is the subject of his claim and of Robert III.'s engagement in 1395 ; nor is there any limitation to half in the indenture between Sir Thomas Erskine and David Earl of Crawford in 1400. The fact that the Chancellor in 1457 refused to grant precept of seisin on the October retour, while Earl Robert had seisin of Kildrummie, is clear proof that he claimed both halves. Subsequently to 1565, Robert Lord Erskine was fully recognised by the Court of Session as having been legally Earl. Discussion on this subject is superfluous after the judgment of 1626. Any rights possessed by the Lyles would not be affected by a retour which touched only on the superiority. Where a comitatus was parted between coheirs, the eldest took the chief message, 318-322
5. That, the comitatus being broken up by partition, the dignity annexed to it must necessarily have ceased to exist ; an assertion of the counsel for Lord Kellie, arising from inadvertence of the rule that the chief message carried the dignity. Lord Chelmsford predisposed to this blunder by the English doctrine of abeyance, 322, 323
6. That the retour of 1438 was annulled in 1457. But the proceedings of 1457 were illegal, and annulled by the Court of Session in 1626. Comments on Lord Chelmsford's remarks on the ignoring of the charter of 1426, 323, 324
- Lord Redesdale's special objections. His expression "got himself served heir" incorrect. Regency after death of James I. utterly misunderstood. The party in power had no sympathy with Sir Robert Erskine, 324-326
- Tytler's account of the episode of 1457, 326, 327
- Observations on Lord Redesdale's two remarks:—1. That every peer had an interest in Erskine's succession. 2. That nothing done by the Crown could have affected the title of honour, if an exception could be established against Lord Mansfield's presumption, 327-329
- Arriving by distinct roads at the same door of 1565, Lords Redesdale and Chelmsford pause, shake hands, and enter together ; and Lord Cairns, giving no clue to his own opinion, lifts the latch and follows. Scotch law paralysed in debate by consciousness that its genuine doctrines would not be listened to, 329, 330

LETTER V.

RESTITUTION AND PARLIAMENTARY RATIFICATION.

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130 years having passed away, the hour of restitution arrived. Effected by Queen Mary in 1565, but not completed till seventy years later as regards the fiefs,	331, 332

SECTION I.—*Retour and Charter of 1565.*

As a preliminary step, Lord Erskine's status had to be re-established by a general retour to the last legitimate tenant of the Earldom, establishing his <i>jus sanguinis</i> , perhaps preceded by an assize of error,	332-334
The charter an act of restitution <i>per modum justitiæ</i> , placing Lord Erskine absolutely "in Isabel's shoes,"	334
Words of the charter,	335-337
The question whether the wording of the charter conveyed the dignity was at once decided, or rather taken for granted in Committee in the negative. Agreeably to Lord Camden's law, "a peerage" by separate patent was assumed, and the new dignity pronounced, unlike the lands, to have been granted to heirs-male of the body. Old Arabic tale. Similar hypothesis rejected in Sutherland case,	337, 338
Infertment, with its difficulties and delays, after which Lord Erskine took the style of Earl of Mar,	338, 339

SECTION II.—*Objections raised to the Charter as conveying the dignity, and conveying it to heirs-general.*

The Lords in accordance as to these objections, which are to be met separately,	339, 340
They are—(1.) That the ancient feudal Earldom having been broken up, the original dignity had ceased to exist, and could not be set up again. Other dignities descended in line of eldest coheir, independent of any amount of disintegration of the fiefs. But, had it been otherwise, all these disintegrations were by those <i>non habentes potestatem</i> , and were illegal,	341
(2.) The retour of 1565, on which the charter proceeded, had been obtained by undue influence and misrepresentation to Queen Mary. Negated by whole circumstances. Not an Act of Mary's reign evoked such universal approval; and if she had been deceived, so was Parliament in 1587, and the Court of Session in 1626, which vindicated Mary's expression of vicarious contrition,	341, 342
(3.) That the charter asserted what was false. 1st alleged false recital. John Lord Erskine is said to have been retoured heir of Robert Lord Erskine in <i>the lands</i> , whereas his service is a	

- general service. This is a simple oversight of Lord Chelmsford, who misread the charter. 2d alleged false recital. John Lord Erskine said to have had the undoubted hereditary right to the Earldom, whereas his claim was only to half of it; and if either the charters of 12th August 1404 or 28th May 1426 were valid, the possession of the Crown was by right, not usurpation. "Much virtue in *if*." Charter speaks the truth as to both matters. Charter also said to betray a latent doubt of its premises; hence the double grant, as the first was challengeable. Lord Chelmsford quotes an argument of Lord Kellie's counsel on this subject, founded on a *dictum* of Lord Mansfield in the Cassillis case, which has reference to a signature of an Exchequer charter—a kind of document which had no existence till after the union of the Crowns. True explanation of so-called double grant, 342-347
- (4.) That the charter exhibits discrepancy with the retour of service in the designation of Robert Lord Erskine. In the service John Lord Erskine is retoured to Robert Earl of Mar; in the charter Robert is called Lord Erskine, implying a refusal to recognise his right to the higher authority. Answer: Independently of the judgment of 1626, such refusal would have been to stultify herself; and the recital commented on is formally correct, 347
- (5.) An objection of both Lords, that the charter was a mere conveyance of the landed estate, valueless as to the dignity, agreeably to Lord Camden's rule, as it contains no special words conferring it. Reference in reply to proof in Letter II. that a charter of comitatus conferred the title of honour without special grant. Examples of this in cases of Crawford and Moray. History of modern Earldom of Moray. Lord Rosslyn's recognition in his speech on the Moray case of the charter of 1565 as conveying the dignity, 347-351
- (6.) That the dignity was therefore created by an independent charter or instrument which is lost. Lord Chelmsford admits that there is no writing or evidence to assist us—and makes a suggestion of "belting;" but it is thought conclusive by both Lords that till 1st August following he is still designed Lord Erskine. Lord Redesdale's suggestion that the patent was fraudulently destroyed by the Treasurer Earl in 1606, to obtain an undue precedency, to be dealt with afterwards.—Answer: That titles of honour were then habitually not assumed till after infeftment. Instance of this in addition to those given by Lord Hailes. Lord Chelmsford's suggestion of "belting" disposed of—a mere ceremonial subordinate to a formal writ. Lord Redesdale's supposed charter: disposed of by its non-existence, and the non-existence of writs of the kind in Scotland, 351-356
- (7.) (Induction.) That the presumption by private rule of House of Lords is in favour of a limitation of this writ to heirs-male.

Views of the three Lords as to the descendibility of supposed charter quoted,	356-360
A presumption in opposition to the law of Scotland, and a private rule of the House, impotent as against the heir-general, when no exception can be adduced in favour of heir-male : nor can Lord Camden's rule counteract the law and practice of Scotland that grants of comitatus carried the dignity,	361-363
On the plain testimony of the charter, Lord Erskine was to be replaced in his whole rights, as immediate heir of the Countess Isabel. In restoring the comitatus, Mary could not, had she wished it, but have restored the title,	364
Lord Chelmsford's objection that there was no necessity that Queen Mary should make the limitation in the patent correspond with that in the charter, in respect that the grantee could have diverted the succession of the lands, is unworthy of its author. He could not have done this without sanction of the Crown, which it was not always possible to obtain,	364, 365
Lord Chelmsford's argument from another dignity of Mar having been granted to Queen Mary's brother and his heirs-male, proceeds on two untenable assumptions,—that the dignity was conferred under parallel conditions, and that it was optional to the Queen to affix what limitation she liked to the charter of 1565,	364-367
Lord Redesdale's argument from the supposed descendibility of the title of Lord Erskine. The Erskine title, if limited to heirs-male, is so by special entail, and it is impossible to argue from it to the Earldom of Mar, which is not so limited,	367, 368
The presumption of a lost patent not only unsupported by but contradictory to Scottish law ; it presumes the existence of dignities apart from territory ; whereas patents of honours apart from lands were first introduced much later,	368-370
Exposure of the untenableness of the argument for the heir-male in the Report of the Officers of the Crown,	370, 371
That the charter of 1565 was a restoration was accepted as indubitable down to 1875, as in the report in the Sutherland case, the report of the officers of the Crown as to the reversal of attainders, etc.,	371-373
Necessity for criticising <i>obiter dicta</i> to prevent perpetuation of error,	373
Too much weight is not to be attached to the charter of 25th June 1565. It removed the impediment that had stood in the way of Lord Erskine's enjoyment of his just rights ; but the Crown could not have altered the destination of the charter of December 1404 except on Lord Erskine's resignation,	373-375

SECTION III.—*Parliamentary ratification of 1567.*

Charter of 23d June 1565 ratified in Parliament on 19th April 1567.

This ratification unnoticed by Lord Redesdale ; and confounded by Lord Chelmsford with the Act of 1587,

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LETTER VI.

PROCESS FOR THE RECOVERY OF THE INHERITANCE.

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Character of John Earl of Mar. Recovery of the Mar heritage the work of his life—and the object of this Letter. Take note of what the charter 23d June 1565 could, and what it could not do. It restored at once what lands were in the hands of the Crown <i>per modum justitiæ</i> , and replaced Earl John in the superiority of the whole ; but could not take effect on portions alienated till the infeftments were reduced by legal process, and the right declared to be in Isabel's heirs, Earls of Mar. The Elphinstones, Earl of Huntly, etc., arrayed against Earl of Mar in this forensic warfare. The Decreet of Ranking, which was pronounced during his life, reserved for a special Letter, . . .	378-380

SECTION I.—*Act of 1587 and Retours of 1588.*

On 3d March 1572-3 John Earl of Mar was served to his father in Earldom of Mar, containing the lands specifically conveyed by charter. On 13th July 1577 Robert Lord Elphinstone was infeft on retour to Kildrummie. He died in 1602, and it was with his son that the great process for the recovery of Kildrummie was pursued in 1624-6, . . .	380
First step taken by Earl John in 1587, to the significance of which the Elphinstones were fully alive. The Act 29th July 1587, protecting Earl John's regress against prescription, on a narrative of the rights recognised in 1565. Though a private act, it was not passed without opposition. It proceeds on the narrative of a supplication to the King and Estates, supported by evidence ; and declares their deliverance on the merits. It sets forth the unjust exclusion of the late Earl John from inheritance of Countess Isabel and Earl Robert, in remedy for which Queen Mary, after careful inquiry, granted the charter 1565. Wherefore, as John now Earl of Mar must be served heir, and have sufficient right established in his person for the recovery of the lands, notwithstanding diuturnity of time, and as the right of blood and heritable titles do not fall under prescription, the petitioner prays the King and Estates to examine the evidence under which Countess Isabel, Earl Robert, and his father hold the Earldoms, and that he should have as good right to recover the same as if he were immediate heir of Isabel or Robert, etc., without prejudice of the defences of others. The Act then says that the King and Estates, having examined the infeftments of Isabel and retours of Earls Robert and John, find the same valid and sufficient, <i>i. e.</i>	

- the charter 9th December 1404 and its confirmation, the retour of Earl Robert 1438 ; and the retour and charter of 1565, 380-383
- Lord Elphinstone, the Earl of Huntly, and others, understood the drift of this, and protested in Parliament for their respective interests ;—Elphinstone, that the Act should not prejudice his right to Kildrummie ; Huntly, do. for himself and his friends, ament their lands ; and Wishart of Pitarrow, whose right had flowed from the Earl of Moray during his brief tenure of the Earldom of Mar. Last protest important, as showing that the Act of 1587 was duly considered in Parliament. In the process of 1622-6 Lord Elphinstone's protest was founded on ; but the Court decided that it derogated nothing from the weight of the Act. This Act is not noticed in the speeches of 1875, except by Lord Chelmsford, who mistook it for the ratification of 1567, 384, 385
- Earl John's next step was to vindicate his propinquity to Countess Isabel, with the ulterior view of establishing the right of heirship in terms of the charter 9th December 1404 and its confirmation ; and this by general service to Isabel, 20th March 1588-9. The report was that the Countess Isabel had died in faith and peace, etc., and that Earl John was her heir, the line of descent being set forth in detail. Earl John was served in special to Isabel in Strathdee and Braemar on the same day ; and was infet on a Chancery precept or retour on 7th November 1589 ; the necessary preliminaries for legal action. The general retour establishing his right of blood was a basis for any number of processes. Its importance was appreciated by Lord Elphinstone, and an unsuccessful attempt was made to reduce it in 1622, 385-387
- I pause to remark on these retours, and especially the general retour, which has been misapprehended by Lord Chelmsford. Among the documents produced at the ranking of 1606 were extracts of this general (not the special) retour. Lord Chelmsford attributes to the Commissioners of 1606 what can only apply to the jurors of 1588-9 ; and adds some observations on general retours. He says that the finding that Earl John was heir to Isabel through Helen of Mar was erroneous, as there is no succession upwards through females, 387, 388
- "In 1622," he says, "an action of reduction of the retour of 1588 is brought by the six Earls ranked below Mar" (a misapprehension—there was no such process of reduction), "and this stimulated him to obtain further support to his claim of precedence. He procured four retours to remote ancestors, which only show how easily retours could be got, and have no effect on the question of succession to the dignity." All this is argued on erroneous grounds. The retours had nothing to do with any precedence claim. The retours of 1589 and 1628

were alike the necessary basis of processes for recovery of the lands. The general retour is here confused with the special, and the act of the Commissioners of 1606 with that of the jurors of 1588-9. The retour of 1588-9 established consanguinity and still stands. Lord Chelmsford's strictures on general retours are founded on the assumptions that evidence would not be forthcoming *in re tam antiqua*, that the jurors were incompetent to estimate its value, being only capable of judging of what they personally knew, and that retours are generally unworthy of credit, and determine nothing but relationship. But as they were judgments on which rights depended, and apart from which no process could go on, the presumption must be in favour of their accuracy. They cannot be disregarded without superseding the law of the land: and great territorial rights depended on their accuracy. They were necessary for royal recognitions of dignities; and at the time we have to do with necessarily carried the dignities inherent in the fief, 388-392

We learn from Craig that in this special case the evidence was thoroughly sifted and propinquity proved. The documents then produced must have been familiar to the Commissioners of 1606, 392, 393

SECTION II.—*Process against Forbes of Corse, etc.*

Earl John began proceedings in 1593 against Forbes of Corse to reduce a charter of Oneil, etc., granted in 1482. He pursued as heir of Isabel in Strathdon and Braemar. The Court disallowed Corse's defences, and admitted Earl John's reasons; but action slept till 1620, 393, 394

Alexander Master of Elphinstone joint defender with his father, 395

Enumeration of documents produced before Commissioners of Ranking in 1606. With the exception of the retour of 1588-9 no document was produced which did not refer to the territorial comitatus. It stands to reason that, had the fief not carried the dignity, the document granting the dignity would have been produced and not the others. Lord Redesdale's theory of Earl John having wilfully destroyed the patent impossible. Queen Mary's charter 23d June 1565, the retour 5th May 1565, and Earl Robert's retour 1438 were not produced, showing how completely these transactions were regarded as mere connecting links, transmitting the feudal heritages, fief, and dignity, from Isabel to the tenant *pro tempore*, 395, 396

Probable reasons why Earl John paused from 1593 to 1620. Altered conditions of Scotland between these dates. Sympathy with Elphinstone, 396-398

Between beginning and end of struggle almost all Earl John's original opponents had died. The Corse process was revived

against Patrick Bishop of Aberdeen in 1620. Earl John's plea was that Isabel having been lawfully infeft, and neither she nor her heirs being forfeited or having resigned the fee, James III. had no power to grant Corse to defender's ancestor; but it remained the property of Isabel's heirs, and therefore now pertained to Earl John. Corse founded on the unconfirmed charter of 12th August 1404, to which Earl John opposed the renunciation of September 1404, and the confirmed charter of 9th December 1404 as the dominant deed, showing that the continuity of right had never been interrupted; and on that basis Earl Robert was served in 1438, and Earl John in 1565. It was the old battle of the charters, as in 1457, 1622, and 1875. Final judgment against Corse pronounced 23d June 1621,

388-401

SECTION III.—*Preparations for recovery of Kildrummie.*

The judgment in the case of Corse was final; but the *crux* had to be applied to each similar case. To recover Kildrummie, Earl John proceeded by summons against the Elphinstones in 1620 or 1621. Series of interlocutors till final judgment in 1626, .

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Some subsidiary matters call for notice. While the alarm was general, apprehensions arose that Earl John's retour to Isabel in 1587 might be made the basis of proceedings to recover the Douglas succession also, to which Isabel was heir through her father, unless the provisions of the charter 9th December 1404 restricted the succession of the Erskines to the Mar estates. Hence the Marquess of Hamilton, and the Earls of Angus, Nithsdale, and Annandale, applied to the King for protection by obtaining a renunciation from Earl John of any such claim. Letters of James VI. and Charles I. to Lords of Session. Earl John satisfied them; and the King also required a declaration that no interlocutor should prejudice his "revocation." This settled, Charles I. wrote to the judges to proceed,

401, 402

Letter showing Earl John's personal feelings,

403, 404

The Elphinstones, taking the "first word in flyting," brought an action to reduce the retour of 20th March 1588-9, and thus subvert the basis of Earl John's action. All parties primarily interested associated themselves with the Elphinstones. King in the van, Lord Elphinstone, six Earls prejudiced in their precedence by the general retour, Huntly, Erroll, etc. etc., as holding baronies which belonged to Isabel. Brunt of action directed against—not Earl John, but—Wood of Largo, the survivor of the assize of 1588-9. Nothing more was heard of this counterblast, and the services stood unimpeached,

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SECTION IV.—*Process against the Elphinstones. Earl John's First Reason.*

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Summons against Lord Elphinstone as successor <i>in rem</i> and by progress to Alexander Stewart, Earl of Mar, and Sir Thomas Stewart, and officers of Crown. King's interest alleged on five points. Summons called for production of charter 12th August 1404, any alleged confirmation of it (thus striking at the root of the matter)—charter of 1457, and all grants to the Elphinstones—to be reduced, etc. Process lasted four years. Counsel employed,	406-408
Reasons in support of Earl John's claim:—1. That James iv. had no power to grant Kildrummy, the Kings of Scotland having been denuded of all property in the Earldom by confirmation of 21st January 1404-5. 2. That the charter 12th August 1404, being unconfirmed, was no warrant for the resignation of the Earldom and regrant of 1426, the right being in Earl Robert, as lawfully retoured, notwithstanding decret of 1457 proceeding on the basis of the charter of 12th August 1404. That charter being invalid, the charter 1426 and the service negative of 1457 fall with it. 3. That the retours of 1438 are valid, because by Act of 1587 it was found that Countess Isabel was lawfully infert in Mar, Earl Robert was retoured to her, and John, now Earl, is heir to Isabel, notwithstanding decret and service negative of 1457. The retour of 1438 is therefore valid,	408, 409
The question was: Is a charter by a vassal valid without authority of the superior? Such was the charter of 12th August 1404. Earl John opposed to it the charter of 9th December 1404, and its confirmation, founding on the confirmation throughout. When a vassal resigned his fief, it became the property of the Crown <i>pro tempore</i> , the denudation being complete though momentary. This was <i>a fortiori</i> the case when a vassal alienated without the superior's warrant; this was an act of dereliction, only to be salved by confirmation. But when the superior had confirmed he became <i>functus</i> ; the fief had passed from him,	409, 410
Twenty-three evidents were relied on by Earl John, based on the letters-patent of Robert III., acknowledging the right of the Erskines. Lord Elphinstone produced the charter 12th August 1404 and 18th May 1426, the Act regarding the Crown lands, the service negative of 1457, and the charter of Kildrummy of 1507,	410, 411
Every qualification present to render a trial fair and a judgment final—best counsel employed. All the documents read and considered (they were the same, except the imaginary patent of 1565, as are supposed to have been destroyed after 1606). Decret embodies the arguments,	412, 413

Form of pleadings. Reasons of Earl John, pursuer, divided into members. Met by defences by Lord Elphinstone, defender—answers, duplies, triplies, quadruplies. Logic mixed with law. To be remembered that the question was the right to a great fief which carried the dignity of Earl,	413, 414
First Reason against the validity of the grant of Kildrummie sustained as sound. Members:—1. The King and his predecessors had been denuded in favour of Isabel and her heirs by confirmation 21st January 1404. 2. Robert Earl of Mar had been retoured to Isabel, who died last vested and seised. 3. The special Act 1587 declared that Isabel was lawfully infeft, Earl Robert lawfully retoured her heir, and Earl John heir of blood to Isabel. 4. Present Earl of Mar retoured to Isabel,	413-415
The various questions under this Reason were determined by four interlocutors, of 23d July 1624, 26th July 1625, and 23d March 1626,	415
Lord Elphinstone contended that in terms of the <i>tenendas</i> of charter 9th December 1404, the Earldom of Mar would go to Isabel's heirs on the father's side, as the rule <i>paterna paternis</i> , etc., was not recognised in Scotland. This was dangerous ground; if sustained, the succession would vest in Lord Torphichen,	415, 416
Explanation of rule <i>paterna paternis</i> . Case of Gilbert, as reported by Craig—doubts on the law. Words of Isabel's charter quoted,	416-418
Debate on this point—interlocutor,	418-420
Lord Kellie urged Lord Elphinstone's contention as to words "ex utraque parte." Lord Chelmsford's remark in reply the only allusion in the opinions of 1875 to the proceedings of 1624-6,	420
Lord Elphinstone then attacked the assertion that James iv. had no right to grant Kildrummie, and the efficacy of the Act 1587. He argued that Earl John's acceptance of Queen Mary's charter was an acknowledgment that she had power to dispose of the Earldom, and therefore precluded him from denying the right of James iv. to grant Kildrummie. Reply,	420, 421
Main point of attack the statute of 1587. Debate on it,	421-423
Sentence of Court by three interlocutors on First Reason,	423, 424

SECTION V.—*Process against the Elphinstones. Final decret.*

Earl John's Second and Third Reasons. His general proposition that the charters 12th August 1404 and 28th May 1426 and service negative of 1457 were null, vindicated on following grounds: As regards charter 12th August 1404, because—1. It was never confirmed, and could therefore be discharged by the grantee without resignation or new infeftment in Isabel's favour. 2. It was so renounced when Alexander accepted a new right. 3. Robert III. confirmed the new right with ultimate remainder to Isabel's heirs. As regards the charter 28th May 1426,

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because—1. Earl Alexander had no power to resign. 2. The statute in James's minority could not salve his defective right. As regards the service negative, because proceeding on charter of 12th August 1404 : and conversely (Third Reason) the retour of 1438 is good,	424-427
Lord Elphinstone's defence ; battle of the two charters, which is to prevail,	427-439
Pleadings brought to a close ; interesting picture of the Court of Session when possessing supreme jurisdiction. Tendency to intermix logic and law. Ability and acuteness. Disdain of petty quirks. Hope's argument more weighty ; Stewart's more ingenious. Judges clear-headed and honest,	439-441
Judgment on First Reason already given ; on Second and Third, pronounced on 1st July 1626, wound up the process. Given in the original words as to charter 28th May 1426 ; alleged possession of the Crown before 1438 ; and service negative,	441-444
Results—1. Charter of 12th August 1404 invalid ; 2. Charter confirmed 21st January 1404 rules, thus denuding James iv. ; 3. Sir Robert Erskine lawfully retoured to Isabel in 1438 ; 4. Resignation of Alexander Stewart and charter of 1426 invalid ; 5. Possession by James i. and subsequent Kings a usurpation ; 6. Service negative of 1457 null, and retour of 1438 stands ; 7. Grant of Kildrummie without warrant. Everything based on charter of 12th August null, including charter of 1507 ; everything based on charter of 9th December valid ; right in Earl of Mar by lawful inheritance,	444, 445
Decree of 1624-6 took immediate effect, and stands unchallenged, its influence permeating all the channels of succession,	445
This decree final. No subsequent Court can impugn it or advise otherwise than in accordance with its views of fact and law. The rights vindicated by it for Earl John and his descendants, including the tenure of the dignity of Earl <i>de jure sanguinis</i> as heir of Isabel through Earl Robert, protected by Treaty of Union,	445
The Elphinstones behaved with dignity, and Earl John met them in conciliation. The settlement of various matters emerging was referred to arbiters,	445-447

SECTION VI.—*Process against vassals of Earldom.*

Many less important rights of property and superiority, alienated by former Kings and by Crown vassals, were now claimed by Earl John. To establish his status on the broadest basis he procured five retours to remote ancestors. Most of the evidence in proof of these had been already adduced in 1587 ; the remaining links could easily be supplied. The retours were obtained for this practical object, and not for any claim for precedence, 447, 448

The process, determined by final decret on 26th March 1635, called on more than 150 proprietors in the north to produce their charters as from the Erskines or earlier Earls of Mar, or from the line of Kings up to Robert III., and called specially for the charter of James I. in 1426 to Alexander Earl of Mar. All to be reduced. Stirring up of rights and claims. Though justice was with Earl John, it was impossible not to sympathise with expressions in a document on the other side, which however also showed that numbers of vassals of the Earldom had rushed into Chancery after 1457 to obtain Crown charters. Those who held exclusively under writs founded on the charter 1426 were unsuccessful in their defence; but many proved a right which could not be questioned. In most cases the superiority was found to be in Earl John; in some he withdrew his claim. Earl John was checked by the obligation to warrant the acts of his predecessors. Pleadings essentially the same as in 1622-6; interest of the judgment consists in the application of the law of feudal tenures to the several cases. Note recognition of charters of Robert Earl of Mar as valid in character of heir of Isabel, in virtue of retours of 1435 and seisins, in refutation of criticisms of Lords Chelmsford and Redesdale that they were private documents unworthy of regard. Coping-stone laid on Queen Mary's restoration, 448-450

SECTION VII.—*Bearing of Decreet of 1626 on present question.*

Except a reference by Lord Chelmsford to the words "ex utraque parte," it is unnoticed in speeches in Committee. This only to be accounted for by the belief that the restored comitatus was merely the landed property. But, as the grant of the comitatus in 1565 carried the title, the enormous importance of the decret is apparent; and, apart from this, the fact that the charters 12th August 1404 and 1426, on which Lord Kellie's claim rests, were "disturbed" and declared null in 1626, with counter-affirmation of the confirmed charter, shows that the Resolution of 1875 proceeds on a vicious basis. But when we perceive that the judgment of 1626 is directed specially to instruments affecting the right to a fief which carried the dignity, it stands out that the judgment is on the right to the dignity concurrently with the fief, the two being inseparable; and that the right to the fief being in the heirs-general, that to the dignity was equally so. Hence the grievous error in 1875 in ignoring the decret of 1626. Lord Kellie's claim being essentially identical with that of Lord Elphinstone in 1626, the Lords have overruled the solemn decision of the Supreme Court, 451, 462

The decret set forth—1. The continuity of the descent of the

comitatus. 2. That the comitatus carried the dignity. 3. All that it affirms of fief it affirms of title also. 4. That the dignity, descending with the comitatus to heirs-general, must stand so, unless there be a resignation and regnant in favour of heirs-male, on whom <i>onus</i> of proof rests. 5. The impossibility of the theory of a lost charter of the dignity in 1565,	452, 453
The House was thus in the position of one <i>non habens potestatem</i> , the question having been fully determined by a tribunal without appeal. The opinions of the Lords are not judicial, and as the House could not express an opinion of a dignity not claimed of Sovereign or referred to it, still less consideration is due to opinions not embodied in a Resolution. These opinions count for nothing as against the heir-general, Lord Mar. Lord Mar needs no recognition. The Order to Lord Clerk Register, as impeding the free exercise of his vote, should be rescinded, and is void in itself under decret of 1626,	453-454
Further observations:—1. The decret recognises Earl John as heir of Gratney <i>jure sanguinis</i> ; the present Lord Mar is therefore Earl independently of transaction of 1404. 2. The decret proves retrospectively that the ranking in 1606 is as holding the ancient Earldom. 3. The decreets of 1626 and 1635 show the whole comitatus reunited in Earl John's favour; disposing of Lord Chelmsford's objection from disintegration. Earl John became, and his present representative is, Earl of Mar by tenure of the comitatus. 4. As the decret 1626 qualifies Earl John as Earl of Mar and Lord Garioch, Lord Redesdale's statement that the title Garioch was never recognised as a peerage-barony is contradicted. The present Earl of Mar seems also to be <i>de jure</i> Earl of Garioch,	454-456
Quotation from my first Protest,	456, 457

THE EARLDOM OF MAR.

THE RANDOM OF WAR

THE EARLDOM OF MAR.

LETTER I.

INTRODUCTORY.

MY DEAR LORD GLASGOW,—

I venture to address the present and the ensuing Letters to you in your official character as Lord Clerk Register of Scotland, an office which places you in a position of independent superiority to any controversy which may rage around the lower steps of your presidential chair at Holyrood.

It is within your knowledge that the Earl of Kellie has recently addressed a letter to the Peers of Scotland under the signature "Mar and Kellie," in which he takes exception to two Protests which I lodged at the election of Scottish Representative Peers at Holyrood in 1876 and 1879, against the reception of his vote as representing the Earldom of Mar standing on the Union Roll, and in assertion of the exclusive right of the heir-general to vote as actual tenant in possession of that ancient dignity. This letter, which I shall speak of as his "Address" for the sake of distinction, was transmitted to the several peers, and was made public simultaneously in the *Edinburgh Courant* of the 2d May 1879. The publication imposes upon me an obligation which I propose to meet in the following pages.

Lord Kellie's Address is grounded upon the facts that the House of Lords reported to Her Majesty in 1875 that he was entitled "to the honour and dignity of Earl of Mar in the Peerage of Scotland, created in 1565," and that the House directed your Lordship's predecessor in the office of Lord Clerk

Register—the late regretted Sir William Gibson-Craig—to receive and count his vote in place of the Earldom of Mar standing on the Union Roll of the Peers of Scotland. It is clear that the *prima facie* presumption of right is, so far, with Lord Kellie; while I stand in a position of disadvantage in contravening the Report in his favour. My first object, therefore, must be to remove this prejudice and place the question on its right footing, by stating the circumstances of fact and law which underlie the controversy, and upon which my remonstrance takes its stand. I shall then lay before you my two Protests and Lord Kellie's Address *verbatim*, and notify the conditions under which I consent to meet his challenge. All this will be comprised within the present introductory Letter. My contention will, in a word, be found to be for observance, first, of the law of Scotland; secondly, of the judgment of the Supreme Civil Court of Scotland, the Court of Session, pronounced before the Union *in foro contradictorio, partibus comparentibus*, and therefore final and irreversible; and, thirdly, of the provisions of the Treaty and Act of Union, which protect that law, those judgments, and the rights of Scottish subjects under both. For such, I say, I contend, against certain private rules and assumptions, subversive of that law, those judgments, and that Treaty, which the House of Lords originated *proprio motu* in former times. I protest, finally, in the interest, not only of him whom I am bound by law to style exclusively Earl of Mar, but of the whole Scottish Peerage.

My statements of fact and law in the present Letter will be substantiated hereafter by proof, which would be out of place in what is a simple preliminary programme.

SECTION I.

Circumstances under which my two Protests took place.

It is admitted, or not disputed, on all sides—1. That Mary Queen of Scots conferred the "Comitatus" of Mar and Lordship of Garioch by charter, 23d June 1565, on John Lord Erskine and his heirs, the grant being *ex terminis* a restitution *per modum justitiæ*, whether the Queen was rightly advised as to the acknowledgment of previous injustice on the part of the Crown or not. 2. That all the subsequent Lords Erskine have

been Earls of Mar, except during an interval of attainder, from 1715 to 1824. 3. That there is no vestige of any patent or writ conferring the Earldom of Mar as a personal title of honour, if it be held that the charter of the comitatus in 1565 did not carry the dignity. And, 4. That the one and only Earldom of Mar standing on the official Roll regulating the precedence of the Peers of Scotland is ranked at a very long interval above the precedence which would have been appropriate to a dignity created in 1565. But beyond this common ground all else has become matter of contradiction and controversy.

On the death of the late Earl of Mar in 1866 without issue, and leaving no brother or brother's issue, the dignity was assumed by Mr. Goodeve Erskine, sister's son and next of kin, or heir-at-law, to the deceased Earl. It has been held by the House of Lords, and they have acted on the view, that this assumption was without warrant, Lord Mar having been, not brother's, but sister's son of his predecessor. But this censure proceeds upon English, not Scottish principle, which latter rules exclusively in Scottish questions. The assumption of this dignity by Lord Mar was in regular course, according to Scottish law and precedent, as the necessary consequence of hereditary devolution. It had been matter of universal recognition up to 1866, and even in the House of Lords itself, that the Earldom of Mar was descendible to heirs-general, and had repeatedly been transmitted through such heirs during and since the fourteenth century, that it was held proximately under the limitation to heirs in the charter of 1565, and by remote right by the Lords Erskine *de jure sanguinis* as heirs and representatives of the ancient Earls, under the original constitution of the dignity, at a date beyond record and lost in the mists of antiquity; while further, the law of Scotland, in distinct opposition to the private rule of the House of Lords, presumes in favour of such succession, and no evidence was known to exist, or, indeed, has ever been produced, in proof of an exception to that presumption in the case of Mar, in favour of heirs-male collateral.

Lord Mar thus—I will not say henceforward “assumed,” but—succeeded to and became invested with the dignity as a matter of course, *nolens volens*, on his uncle's death and he

then and thenceforward became entitled to act in every respect as a Scottish peer, in accordance with the standing law and usage of Scotland, and thus to vote at the elections of Scottish Representative Peers at Holyrood. All this I have asserted in my Protests, in conformity, as I maintain, with truth, law, and justice. Lord Kellie denies all this. Meanwhile Lord Mar voted on more than one occasion at Holyrood, and his vote was received and counted, and on one occasion caused "a tie" (although protested against by Lord Kellie), which occasioned a fresh election.

No doubt was raised for a considerable time as to Lord Mar's right under the ancient Earldom. Whether or not Lord Kellie acquiesced at first in Lord Mar's right, is a matter of dispute between the noble Lords, into which I cannot enter. Such acquiescence, if established, could be of no legal prejudice to Lord Kellie in a question of hereditary Peerage. Lord Kellie's scepticism as to Lord Mar's right was publicly announced at the first election at Holyrood after the death of Lord Mar, by a Protest against Mr. Goodeve Erskine's vote being received as Earl of Mar on the 21st March 1867; and the Protest was repeated on subsequent occasions till the Report in Lord Kellie's favour in 1875. It is stated that at this time, in the first blush of inquiry, Lord Kellie's claim was to the original Earldom of Mar, and that it was only on discovering that that pretension was untenable, that resort was had to the theory of a new creation in 1565—which had, in fact, been originally started in the Sutherland claim in 1771 by the unsuccessful candidate, and was then rejected. No reproach can attach to Lord Kellie on this score. The question of the dignity has also been mixed up, to a certain degree, with the question of the right to the family estates, which was decided in the House of Lords, on appeal from the Court of Session, to be vested in Lord Kellie under a settlement of 1739. This latter question is, in its main point, disconnected with the former; and although it will be necessary to touch upon the settlement of 1739 as evidence in regard to the descent of the dignity, I shall keep the two questions wholly distinct in their essence in these pages.

Meanwhile Lord Mar's armorial bearings as Earl of Mar were matriculated anew in the Lyon Register, on his petition

and by virtue of an interlocutor of the Lord Lyon King of Arms, on the 13th October 1866: and on the 14th February 1867 he was served "as one and the elder of the two nearest and lawful heirs-portioners in general to the said late John Francis Miller Erskine, Earl of Mar, Lord Garioch, etc., his uncle." According to English usage, a dignity descending to heirs-portioners or co-heirs, falls into abeyance: but by Scottish law it vests in the eldest heir-female; and thus the Earldom became vested in Mr. Goodeve Erskine, the eldest co-heir, as Earl of Mar. Nothing more was requisite to the full and legal establishment of his status and right. The Earl and Countess of Mar were presented at Court in 1868, after their full recognition in the dignity (as aforesaid), in usual form, like any other peers or peeresses of the realm. Everything went in the natural course as if Lord Mar had been brother's instead of sister's son of the deceased Earl of Mar.

All this is well known to your Lordship and to Scotland. And it is no less matter of notoriety that the dignity of Earl of Mar was claimed by the late Earl of Kellie, the heir-male collateral of the deceased Earl, by petition to the Crown, on the allegation, *ut supra*, that the Earldom of Mar on the Union Roll was not the ancient dignity it had till then been supposed to be, but a new creation by Mary Queen of Scots in 1565, the original Earldom being extinct; and that, the charter of the comitatus not conveying the dignity, and the patent not being known to exist either in the original parchment in the family archives, or as recorded in the public Register, this comparatively modern dignity was descendible, according to the private rule of interpretation observed by the House of Lords in similar circumstances, to heirs-male of the body of the patentee, and consequently to Lord Kellie himself. Lord Kellie's petition having been referred by Her Majesty to the House of Lords for their advice in usual form, the House referred it to the Lords' Committee for Privileges, who on the 25th February 1875 came to a Resolution in favour of Lord Kellie—the present Earl, his father's successor,—based on recognition of the preceding plea, in the following terms:—"That it is the opinion of this Committee that the claimant, Walter Henry, Earl of Kellie, Viscount Fenton, Lord Erskine and Lord Dirleton in the peerage of Scotland, hath made out his claim

to the honour and dignity of Earl of Mar in the peerage of Scotland created in 1565." This Resolution was reported to the House on the following day, the 26th February, and ordered to be laid before Her Majesty; while an Order (already spoken of) was issued in the same breath, directing your predecessor, the late Lord Clerk Register, not to place the newly-discovered Earldom on the Roll with precedence as from 1565, but to receive Lord Kellie's vote as Earl of Mar in response to the summons of the ancient Earldom, thus placing Lord Kellie in the seat, place, and precedence of his cousin, the heir-general, excluding the latter, and giving Lord Kellie precedence over eight Earldoms created previously to 1565. I state this as the general effect, not the precise words, of the Order—these will appear presently.

It was taken for granted at the time, and the impression was acted upon without question by the House of Lords, that the Resolution just recited was double-edged, that it not only affirmed the new Earldom of 1565 in the person of Lord Kellie, but disallowed the continued existence of the original Earldom in the person of the heir-general. The Order to the Lord Clerk Register of the 26th February proceeded upon that supposition. It is beyond question that the award for Lord Kellie, as expressed in the Resolution, was based exclusively on the view that the ancient dignity had ceased to exist; the speeches delivered by the noble and learned Lords (Lord Chelmsford and Earl Cairns, the Lord Chancellor), and by the noble Lord the Chairman of Committees (the Earl of Redesdale)—speeches in which that view was distinctly laid down—were assumed to constitute the "judgment," and to be included (so to speak) in the Resolution reported to the Queen: and the speeches, with the Resolution, were printed by the House under the title of "Judgment." The House has since recognised and disavowed this error, in a spirit which does it the highest honour: but the effects of the error at the time were disastrous, and those effects are still bearing fruit.

That this Resolution of the House of Lords, and the speeches upon which it proceeded, took the Scottish world by surprise, is well known; and the sympathy felt for the heir-general was shared by every generous heart. Nor were the surprise and the sympathy confined to Scotland. In the debate on the

9th July 1877 upon a Resolution moved by the Duke of Buccleuch in consequence of proceedings at the first election of Scottish Representative Peers which took place after the Report, Lord Selborne betrayed somewhat of the former sentiment when he described the Resolution of the 25th February as affirming "that the ancient earldom had not been restored by the means which, down to the date of that decision, had always been supposed to have had the effect of restoring it," viz., by Queen Mary's intervention in 1565. And Lord Chancellor Cairns echoed the latter sentiment in the same debate in very feeling words:—"I do not remember any case which ever occasioned me more anxiety, or in which one's sympathy was more enlisted on behalf of the claimant"—a term which I shall show hereafter to be inaccurate—"who did not succeed before your Lordships' Committee. That gentleman had been supposed to be the person entitled to the Peerage of Mar. He had been accepted as such, I believe, by all who were related to the family, and, amongst the rest, by that particular family who afterwards became his antagonists for the title. They had received him as the proper heir to the older title, and it was in that position that, after holding it for some years, he found himself opposed by those who had in the first instance admitted his claim." It was not, as Lord Cairns proceeds to state (with perfect accuracy), till "after the most careful and patient investigation" that the Committee came to their Resolution in favour of Lord Kellie; but the Resolution—or, as Lord Selborne and Lord Cairns term it, the "decision"—having been pronounced, both the noble and learned Lords affirmed that it must be upheld as final and irreversible, irrespectively, as they all but explicitly avowed, and as Lord Redesdale did not scruple to enforce, of the question of its accuracy and justice. It startles the non-legal mind to be told that a resolution based upon error in law, and conferring the inheritance of one man upon another without warrant, is beyond the possibility of reversal: but the position is untenable when the fact is appreciated that the "decision" has been pronounced by a mere commission of inquiry, not a tribunal, in a legal sense, even of the first instance, and far less a court of first and last instance, without appeal, as Lord Cairns, and more particularly Lord Selborne, have recently represented the House of Lords

to be, in claims to Scottish dignities. But, passing from this for the present, it is no disrespect to those noble and learned Lords, or to the House, to suggest that the wisest heads may err; and it will be seen that there were sufficient causes, unsuspected by themselves, to betray them into error in the proceedings of 1875.

But the surprise felt in Scotland, and which Lord Selborne almost involuntarily indicates, was speedily associated with scepticism as to the soundness of the (so-termed) decision. In what I now say, I am chronicling the development of popular opinion; for I myself, viewing the question from the beginning with Scottish eyes, lamented the "decision" from the moment it was uttered. The reflection naturally presented itself,—How very singular, how unprecedented it would be, if the universal judgment of the greatest lawyers of Scotland before the Union, and testimony higher than that of any lawyer, that of the Kings, the Parliament, and the Supreme Civil Court of Scotland, which had exclusive jurisdiction in dignities—for nothing short of all this accumulative testimony is in question,—should turn out to have been erroneous for centuries; while correction of what thus assumed the proportions of the error of a whole nation, on a point of feudal succession in feudal times, and in the case of one of its own dignities, had been reserved for the superior insight of two law Lords and of the Chairman of Committees of the House of Lords—most able men, but all of them Englishmen—advising the Crown in 1875; and who must, on this hypothesis, be presumed to be more competent than were their Scottish predecessors to form a sound opinion upon a matter in which the difficulties raised and the question at issue turned upon points of feudal and Scottish law, and upon the interpretation of Scottish documents, with which those predecessors were familiar as living and native realities, while the noble and learned Lords in question were only acquainted with them at second hand, as subjects of recondite and foreign legal antiquity. The chances were in fact so strong in favour of the Scottish authorities as against the English in such a controversy, that these chances might of themselves have suggested an apology, were such needed, for a reluctance on the part of Scotsmen to acquiesce in the conclusion arrived at by the Committee for

Privileges, and adopted and acted upon by the House of Lords in 1875.

But this scepticism deepened into incredulity on the part of those who, preoccupied by the law and practice of Scotland in the matter of dignities, examined more narrowly the process by which the Committee for Privileges reached the conclusion in question. That conclusion proceeded upon two private rules of the House of Lords; the first laid down in the Sutherland case in 1771 at the instance of Lord Camden, affirming that no charter of a "comitatus," or comital fief, which does not specify the title of honour, shall be understood to convey it; and the second, frequently called "Lord Mansfield's law," although ultimately attributable to Lord Hardwicke, and laid down in the Cassillis case in 1762, affirming that, when the limitation of a title of honour does not appear from charter or patent, the presumption shall be held to be in favour of heirs-male of the body of the grantee. The charter of the Comitatus of Mar in 1565 does not specify the title of honour—the inference was therefore that the title must have been conferred as a personal honour by a distinct patent or grant; and, as no trace of such patent or grant exists, the further inference arose that the limitation must have been to the heir-male of the body of the grantee, John Lord Erskine, and the dignity must therefore be vested in Lord Kellie, in terms of his petition and claim above stated. It was perfectly well known to Scottish lawyers conversant with antiquity, and it had been amply proved by the celebrated Scottish Judge, Lord Hailes, in his "Additional Sutherland Case" in 1771, that charters of a "comitatus" conveyed the title annexed to the fief, as a general rule, without specific words, till a period considerably later than 1565, patents of simple dignity apart from land being absolutely unknown at that date in Scotland, while the presumption of the law of Scotland is in absolute contradiction to Lord Mansfield's "law," the private rule of the House of Lords in favour of heirs-male. It was equally well known that the House of Lords has no legislative power apart from the other House of Parliament, and that to lay down and enforce a private rule subversive of the law of Scotland, such as those initiated by Lord Mansfield and Lord Camden, was *ultra vires* of the House, which cannot legally overrule the law of the land—as indeed has been

recently admitted by the House in the debate upon the Duke of Buccleuch's Resolution in 1877, and subsequently. It was impossible upon these considerations to escape the conviction that a great wrong had been committed by the Resolution of the House of Lords in favour of Lord Kellie. It did not escape observation, moreover, on the part of those who viewed the "decision" of 1875 from the standpoint of Scottish legal antiquity, that the point upon which the controversy turned had been already the subject of a formal and final judgment by the Supreme Court, the Court of Session, in 1626, in distinct preclusion of any claim or right under a new creation in 1565, and that this judgment, although binding on all subsequent tribunals or commissions of inquiry, had been overlooked and set aside as regarded these important points by the Committee for Privileges and the House of Lords in 1875.

In the presence of these conflicts between the private rules of the House of Lords and the law of Scotland, it appears but a trifling matter—yet one which might of itself have afforded grounds for hesitation and distrust—that the opinions and advice tendered by Lords Chelmsford, Redesdale, and Cairns, in their addresses to the Committee for Privileges, on the subject of the descendibility and continued existence of the ancient Earldom of Mar, were in point-blank repudiation of the opinions and advice which their predecessors had expressed and offered on the identical question in the Sutherland claim in 1771. Lords Mansfield and Camden, when advising the Committee of that year upon the competing claims to the Earldom of Sutherland, founded upon the descendibility of nine out of the thirteen ancient Celtic earldoms of Scotland, existing at the close of the thirteenth century, to heirs-general, as proved by what Lord Camden described as "indisputable evidence"—Mar being one of the nine,—and made this descendibility a foundation-stone for their advice to the Committee, and, through the Report of the House, to the Crown, in favour of the heir-general of Sutherland as against the collateral heir-male; the late Elizabeth Countess of Sutherland (in her own right) occupying the position of Lord Mar, and Sir Robert Gordon, the collateral heir-male, that of Lord Kellie in the present case. It would require a nice discrimination to prove that if the decision in

favour of Lord Kellie in 1875 be correct, that in favour of the Countess Elizabeth in 1771 was not wrong: but all I am concerned to show here is, that the self-contradiction they exhibited by the House in relation to one and the same dignity at the interval of a century, affords a further justification for adherence to the view taken by the House at a time when the testimony of the great Scottish jurists and other authorities was brought more forcibly before it through the "Additional Case" of Lord Hailes, than has been the case at any more recent period. Personally speaking, I may thus aver that, if I have protested against the decision of 1875, it has been in vindication of the soundness of that of 1771; and I have defended Lords Mansfield and Camden in the particular point at issue against Lords Cairns, Chelmsford, and Redesdale. The two decisions are, so far as the point I dwell upon extends, at daggers-drawn with each other. I have seen no reason, through allusion or otherwise, to believe that the noble and learned Lords who advised the Committee in 1875 were aware how thoroughly they were overruling the previous ruling of their predecessors in 1771, striking, in fact, at the root of the Report then made in favour of the Sutherland heir-general. It cannot be urged that the Committee possessed any information in 1875 which it did not possess in 1771 towards guiding them to a correct decision; for not only were two charters, which form the foundations respectively of Lord Mar's and Lord Kellie's positions, under the view of the House, but the very arguments of Lord Kellie in support of a new creation in 1565 were urged by Sir Robert Gordon and disallowed, in recognition of Lord Hailes's disproof of their validity; while the descendibility of the Earldom of Mar to heirs-general was accepted and founded upon as part of the "indisputable evidence" upon which the Resolution and Report in favour of the Countess of Sutherland proceeded.

While the House of Lords in Committee for Privileges thus ruled in favour of Lord Kellie, they acted with a severity against Lord Mar, the natural and direct result of their hereditary but unwarranted presumption against heirs-general. By the law of Scotland (as above shown), the heir-general enters at once *de jure sanguinis*, and without the necessity of any formal recognition, into possession of a dignity in every case where no legal proof can be established of a provision in favour of heirs-

male collateral in exception to the standing law and presumption of descent; the *onus probandi*, or burden of proving such exception, resting with the heir-male. This present Letter, it will be remembered, is not one of probation; but assuming it to be the fact, the House—acting on the traditions handed down from 1762 and 1771, but which possess (as I have also asserted) no legal validity—refused from the first to recognise Lord Mar (even provisionally) as Earl in possession—assumed that the question of his right to the ancient Earldom was brought before them for adjudication by the claim of Lord Kellie to the supposed modern dignity—compelled him when he appeared before them, not as a claimant but in opposition, to expunge his title from his case and plead as a commoner—and transferred the *onus probandi* from Lord Kellie, the heir-male, to his, the heir-general's, shoulders—treating him throughout persistently, in spite of his repeated remonstrance, as a claimant—not of the new dignity, the exclusive subject of Lord Kellie's pretension, but of the ancient, of which, as stated, he was actually in possession by law, and for which he had not petitioned the Sovereign—a reference from whom could alone have empowered them to adopt such conduct. In a word, they presumed throughout in favour of Lord Kellie and against Lord Mar: and this displacement of the Scottish by the English presumption of 1762 led, as might have been expected, to unfortunate consequences. The Order above mentioned, sent down to the Lord Clerk Register in the same breath with the Order that the Resolution should be laid before the Queen, took effect at the first election of a Scottish Representative Peer at Holyrood, on the 22d December 1876, when Lord Kellie's vote was received by your Lordship's predecessor as Earl of Mar, standing in the place of the ancient Earls, and Lord Mar's was rejected, and his protest as "Earl of Mar" refused, under circumstances of practical expulsion from the Peers' table at the meeting, all which I shall have to detail in due time.

Among the immediate effects of this repudiation of Lord Mar's title by the House of Lords during the proceedings before the Committee for Privileges, and of the Resolution of the 26th February 1875, were certain matters, in themselves of comparatively small moment, but which we shall

find have been exalted into importance, and urged seriously and strongly against him—not merely in the moderate terms of allusion adopted in Lord Kellie's Address to the Peers, and through the Peers to the public,—but, according to the representation of a noble Lord at a recent election at Holyrood, as official disallowances of his right to the dignity, proceeding from two independent authorities of a judicial character, acting distinct from the House of Lords. Shortly after Lord Mar's accession, and before the shadow of a question had arisen as to his right to the dignity, Lord Mar applied by petition to Her Majesty, praying that the precedence of earls' daughters might be granted to his sisters—a matter of favour, not of right—but was (so far as I am aware) refused. The request being submitted to the late Garter King of Arms, Sir Charles Young, who was then in failing health both in mind and body, Sir Charles applied to the Lord Lyon of Scotland, in accordance with his duty on such occasions, for his opinion whether the right of Lord Mar was beyond doubt; to which the Scottish King of Arms replied that no possible doubt existed, Lord Mar being heir-of-line to the late Earl. This opinion ought, I conceive, to have been acted upon forthwith, but Sir Charles was induced to defer acting in the matter: and it was not till after the Report of 1875 that the Lord Chamberlain informed Lord Kellie by letter, dated the 24th August 1876, that Lord Mar's (that is, "Mr. Goodeve Erskine's") application had been refused. Nor was the presentation of Lord and Lady Mar at Court allowed to remain unchallenged. Lord Kellie applied to the Lord Chamberlain, who consulted Garter on the subject—the present King of Arms for England, Sir Albert Woods—inquiring whether the decision of the House in favour of Lord Kellie deprived the heir-of-line of his status as Earl of Mar. The reply was unhesitatingly in the affirmative: and a letter was in consequence written to Lord Kellie, in which, while the Lord Chamberlain refused to cancel the presentation through the *Gazette* as requested, it was added that, as Mr. Goodeve Erskine had been decided by the House of Lords not to be Earl of Mar, his presentation as such was inept. I need scarcely observe that the application at the Lord Chamberlain's instance ought to have been made to the Lord Lyon of Scotland, and not to the English Garter, whose opinion could be of no official

authority in regard to a Scottish peerage; while, if custom authorises such application to Garter in the first instance, that officer ought to have taken the advice of the Lord Lyon and followed it in his reply to the Lord Chamberlain. This took place in 1875.

It is manifest that the subsequent disavowal by the House of its original error in imagining the Resolution of 1875 to have extinguished the ancient Earldom, stamps the measures I have just narrated with precipitance, harshness, and injustice. For Lord Mar is by the law of Scotland Earl of Mar until a better right has been proved through special probation in favour of the heir-male, Lord Kellie, whose pretensions—at least since he appeared before the House of Lords as a petitioner to the Sovereign—have never soared beyond the comparatively modern Earldom of 1565.

It was in view of these circumstances, and with especial reference to the question of Lord Mar's right to vote at Holyrood, as exclusive tenant of the Earldom of Mar on the Union Roll, that I entered the first of the two Protests which Lord Kellie now comments upon. I give it here as a necessary preliminary to the appreciation of Lord Kellie's remonstrance. It was based mainly, as will be seen, on the ground that the entire question at issue having become *res judicata* through the final judgment of the Court of Session in the case of the Earl of Mar *contra* Lord Elphinstone in 1626, the question could not be reopened by the House of Lords and redecided in terms of the claim of Lord Kellie as against the legal right and actual possession of Lord Mar.

“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 BALCARES, 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 subsequently, it must have so existed through a new creation in that year, probably by charter, and, in the absence of any charter or writ showing 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 descendibility of the Earldom of Mar to heirs-general has been determined by the decret 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 ranked 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:—

“1. 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

attainted 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 shown, is now *de jure* and *de facto* Earl of Mar by the laws of Scotland, reserved inviolate 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 precedence 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 Decreet 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 Decreet 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 the 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 principles 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.

“VII. Because, finally, acceptance of the vote of the Earl of Kellie as Earl of Mar upon the Report of the Committee of Privileges, founded upon the principle above shown, 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 Eighth day of December, Eighteen hundred and seventy-six.

“CRAWFORD & BALCARRES.

“JOHN GRIFFIN, *Witness.*

“ALFRED HILL, *Witness.*”

I have already intimated that whereas the Order of the House of Lords now in question proceeded upon the view that the Resolution affirmed or implied the extinction of the original Earldom and the exclusion of any right on the part of the heir-general either to the older or the younger dignity, a change exhibited itself in this respect, subsequently to the election of 1876, in the opinions of those in high places. It was admitted by Lord Cairns and Lord Redesdale in the House, in the debate upon the Duke of Buccleuch's Resolution, and the admission was sanctioned by the Report of the Select Committee on the question of the Earldom of Mar, and by the practical adoption of that Report by the House, that Lord Kellie's successful claim to an Earldom of 1565 did not necessarily exclude the possible existence of the earlier and ancient Earldom, and that the heir-general might still make his pretension good to that older honour. This admission was based upon a distinction then drawn between the speeches of noble and learned Lords in Committee for Privileges and the Resolution adopted by the House and reported to the Sovereign, to which latter alone the character of "judgments," under which such speeches have recently been printed and spoken of, can, in accordance with this distinction, be attributed. The present view of the House is thus that two Earldoms of Mar may co-exist,—a view, however, I must remark, incompatible with recognition of the final judgment of the Supreme Civil Court in 1626. A great step was thus far gained. But the House still maintains its determination not to recognise Lord Mar as such, unless upon his previous submission of his right by way of claim—not to the Queen, but to their own adjudication, in terms of an Act of Parliament of 1847, which I shall have occasion to remark upon in its proper place, but which I may say here is in no way applicable to Lord Mar's case. This I contend to be in disregard of Scottish law and of the provisions of the Treaty of Union; while other novel views were thrown out in the debate and assumed in the Report of the Select Committee which appeared to me to run to excess in the contrary and unconstitutional direction. Against these, therefore, as well as in continued defence of Lord Mar's exclusive right to vote as Earl of Mar, I entered a Second or "Additional" Protest at the ensuing election, on the 11th March 1879. I

prefaced it by a brief historical statement of the devolution of the Earldom of Mar, which I thought it desirable to put upon record in the archives of Holyrood, and which I do not insert here, inasmuch as the reader will find the facts detailed at greater length in the ensuing letters, and Lord Kellie has not taken any special exception to this part of the Protest in his address to the Peers, with which I have here primarily to do. It is not so however with the *rationes*, which have been the subject of severe animadversion, not only by Lord Kellie himself but by some of his supporters at Holyrood, as will appear in due time. These *rationes* are as follows:—

“I. By the Treaty of Union between England and Scotland it was covenanted that the laws, customs, and usages of the latter kingdom should be held sacred, and in no manner of way violated; and that the inhabitants thereof should not be judged by any other law than their own.

“II. The Earldom of Mar, in like manner with that of Sutherland, being territorial, was in its original constitution inheritable by females, and was consequently possessed by two Countesses in their own right, Lady Margaret de Mar, Countess of Douglas and Mar, and Lady Isabella Douglas, Countess of Mar. Upon extinction of the descendants of Donald Earl of Mar, son of Earl Gratney, that Earldom passed through females to Sir Robert Erskine, as heir-of-line of the Lady Elyne de Mar, daughter of Earl Gratney by his wife, Christian de Bruce, sister of Robert the First.

“III. The right to the Earldom of Mar and Lordship of Garioch being, by the restoring Act of Queen Mary and the ratification of her Parliament, and the Act of Parliament, 29th July 1587, declared to be in the heir-general of the Lady Isabella Douglas, Countess of Mar, cannot now be questioned.

“IV. James the Sixth having appointed Commissioners to settle the precedency of the Peers, subject to correction upon challenge and proof by the Court of Session, the Court of final appeal in all such causes; and the Commissioners having issued the Decree of Ranking in March 1606; and the Court having corrected it from time to time in the cases of Buchan, Glencairn, and others, as shown in the Rolls of Parliament, and in the last Roll, styled the Union Roll; and having passed its solemn and final judgment upon the charters 12th August and 9th December 1404,—the ranking of the Earldom of Mar in the Decree of Ranking from 1404, thus sanctioned, cannot under the attendant circumstances be now challenged in any Court of the United Kingdom.

“V. By the Treaty of Union no power is given to the Crown,

Parliament, or Courts of Law in England, to challenge the rights of any Scottish subject to his estates or dignities. Where such is intended it must be done in the Supreme Court of Scotland, and decided, not by the law of England, but by that of Scotland only.

“VI. There being no Peerage of Mar on the Union Roll other than that which is referred to the ancient territorial Earls, and was afterwards in possession of John, subsequently attainted for high treason, and no claim for any new Earldom having been advanced in the Ranking and Decreet pronounced in March 1606, it follows as a necessary consequence that no new creation was made, and that the assertion that there was such is unfounded. The allegation to that effect maintained by the Earl of Kellie is therefore not grounded on fact, and must be rejected.

“VII. A Committee of Privileges has no power to create a Scottish Peer, or, indeed, any other Peerage : and in the present instance, where there is not the slightest evidence, by writ or other competent proof, that a new Peerage of Mar was ever created, their Resolution, although confirmed by the Peers and approved of by the Sovereign, is inoperative, and must be held null and void.

“VIII. There not having been, moreover, any authority to assign a place in the Union Roll to the Earl of Kellie by the Committee, the Lord Clerk Register cannot, in the discharge of his ministerial duty, give him one. Lastly,

“IX. As, after the Union, the Crown had no longer the power to create a Scottish Peer, the instrumentality of a Report of the Committee of Privileges, approved of by the House of Peers, cannot enable Her Majesty to do that which she has no constitutional power to do.”

In this Additional Protest, besides repeating my remonstrance against the acceptance of Lord Kellie's vote as Earl of Mar on the Union Roll in prejudice of Lord Mar's right, I protested likewise as follows :—

“It is important, in fine, to observe that the present Earl of Mar does not stand in the position of an unsuccessful claimant of a dormant dignity. When the Earl of Kellie petitioned the Sovereign for recognition of his right to an Earldom of Mar, assumed to have been created in 1565, and the Sovereign referred his petition to the House of Lords for their opinion and advice, Lord Mar appeared in opposition to a claim which, although the dignity claimed was one of which he denies the existence, trencched nevertheless upon his rights as tenant of the original and only Earldom of Mar. But he never claimed, nor was under any necessity to claim, a dignity of which he is in actual possession by the law of the land. The rule and presumption of succession in Scottish law is in favour of the heir-general, alike in lands and

dignities, where no counter right can be shown by legal evidence in favour of the heir-male, the *onus* resting on the heir-male to prove such counter right. Lord Mar would be entitled therefore, as heir-of-line, to the Earldom of 1565, were such a dignity in existence, no less than he is to the ancient and existing Earldom, holding its precedency from 1404. In no possible way, therefore, can there be any one entitled to vote in right of the one and only Earldom, standing on the Union Roll and the Decreet of Ranking, except the heir-general."

Your Lordship will perceive how impossible it is for me to recognise the existence of two Earls of Mar, an heir-general and an heir-male, succeeding to distinct inheritances, when the law is clear that the heir-male is excluded from the one as much as the other.

I may take this opportunity of stating that, except these two Protests and two papers, the one entitled "The Ancient Earldom of Mar, and the Resolution to be read in the House of Lords on Monday next," and the other "Memorandum with reference to the proposed Resolution of the Duke of Buccleuch to remove the ancient Earldom of Mar from the Union Roll of Scottish Peers,"—both of them written with immediate reference to, and in anticipation of, a debate on the 9th July 1877—both papers signed by my name, both printed and circulated during my absence from England, and the latter printed in the *Times* of the 2d July 1877; with the exception of those two, I have written and circulated no papers on the subject of the present controversy. I state this, because Lord Kellie, referring to one of the papers just spoken of, speaks of "the numerous prints by the present Earl of Crawford,"—an expression which may have the effect of crediting me with writings not my own, unless I disclaim such vague responsibility.

SECTION II.

Lord Kellie's Challenge.

What I have written thus far has been but a bare outline of a sequence of events which occasioned my two Protests, and the special details of which will be exhibited in the following letters. It was necessary to sketch the background in order to exhibit, in salient relief, the Address which Lord Kellie has issued to the Scottish Peers and the public in remonstrance against my Protests. I now insert that Address



as it appeared in the *Edinburgh Courant* of the 2d May 1879.

“*The Mar Peerage. Letter to the Peers of Scotland by the Earl of Mar and Kellie.*”

“MY LORDS,—It is now upwards of four years since it was decided by the House of Lords that I had made out my claim to the Earldom of Mar in the Peerage of Scotland.

“Although very confident from the first as to what the result would be, I was aware that a decision in my favour was not calculated to give satisfaction in some quarters, as my contention was contrary to the preconceived notions of those who desired the continuance of the original dignity of Mar, and its inheritance by heirs-female. I was not, therefore, surprised at the remarks made on the judgment of the House of Lords by the disappointed claimant and his friends, but I declined to notice the anonymous, and for the most part inaccurate and offensive, statements which have appeared on the subject, or to be drawn into a newspaper controversy on a matter already decided by the only competent tribunal. As, however, Lord Crawford has thought it consistent with his position as a Peer of Scotland, not only twice to protest against my right to vote as Earl of Mar, and to ascribe that title to the defeated claimant, but has taken the unprecedented course, in concert with that defeated claimant, of endeavouring to induce other Peers to follow his example; and as, from his high character as an antiquarian and a scholar, his authority must carry considerable weight, I feel compelled, in my own defence, and in vindication of the memory of my father, by whom the claim to the Mar Peerage was commenced, to address your Lordships on the subject, and endeavour to correct some of the misapprehensions which exist. I wish, in the first place, to make a short statement of the circumstances under which the claim was originally made, after which I will deal with Lord Crawford’s Protests.

“On the 19th of June 1866, John Francis Miller Erskine, Earl of Mar and Kellie, died, leaving as his heir-general the Rev. John Francis Erskine Goodeve, his sister’s son, and as his heir-male, his first cousin, Colonel Walter Coningsby Erskine (my father). The Earldom of Kellie, which was limited by patent to heirs-male, was inherited by my father without dispute. For the Earldom of Mar, however, no patent is known to exist. It was supposed by many that this dignity was descendible to females, but doubt had often been expressed on the subject. More than a year before Lord Mar’s death, and with his full sanction and approval, my father consulted Mr. William Fraser, a gentleman well versed in Peerage lore, and asked him to investigate thoroughly the constitution and history of the Mar Peerage. These investigations were not concluded when Lord Mar died, on the 19th

of June 1866. Mr. Goodeve came to Alloa to attend the funeral of his uncle, and announced his intention of at once assuming the Mar title. He was informed of the investigations which were in progress, and was warned that if these proved that the dignity of Mar was limited to heirs-male, my father would certainly claim it. On Mr. Goodeve still persisting in assuming the title, my father said, that as he was not himself prepared to do so until he was assured of his right to it, he would address Mr. Goodeve by the title he had assumed, on the distinct understanding that this act of courtesy was not to prejudice his own right if the pending investigations turned out to be in his favour. These, then, were the circumstances under which Mr. Goodeve assumed the Mar title. He did so at his own risk, and, as I have shown, my father's recognition was both qualified and provisional. Mr. Goodeve's assumption of the title was irregular from the first, and his continuance of it in defiance of the judgment of the House of Lords is illegal.

“The investigations to which I have referred resulted, in a few months, in my father's being convinced that the Mar dignity, as at present existing, was limited to heirs-male. A memorial of his right to the dignity, embodying the result of exhaustive investigations, both in the Mar and other private charter-chests, as well as in the public records, was submitted to Mr. Fleming, Q.C., the most eminent Peerage lawyer at the English bar, and his opinion was entirely favourable to my father's claim. That claim was very carefully considered by those most competent to advise him, and the successful result of a unanimous judgment proved that he had been well and safely advised from the first. Mr. Goodeve, who, in addition to assuming the title, had also added the name of Erskine to his patronymic, was duly informed of the claim; and on the 21st of March 1867, at the first election of a Representative Peer which took place after Lord Mar's death, my father protested against Mr. Goodeve Erskine's vote being received as that of the Earl of Mar, and this protest was repeated by him, and after his death by me, at every Peers' election, till the case was decided.

“The Home Secretary, in the meantime, acting on the advice of the late learned Garter King of Arms, to whom such matters were referred, refused Mr. Goodeve Erskine's application for rank for his sisters; and the subsequent presentations at Court of himself and his wife as Earl and Countess of Mar were cancelled, after the decision of 1875, as having been made under a mistake.

“My father lost no time in presenting a petition to the Queen, claiming the title of Earl of Mar, on the grounds that the ancient Earldom came to an end in 1435, on the death of Alexander Stewart, Earl of Mar, without issue, and that the existing Earldom was created by Queen Mary in the person of John, sixth Lord Erskine, in 1565,

and was limited to heirs-male. That petition was referred by Her Majesty to the House of Lords on the 23d of May 1867, within a year of the late Lord Mar's death, and was in the ordinary course referred by the House to the Committee for Privileges.

“Mr. Goodeve Erskine obtained leave to appear in opposition, and in his petition, and also in his printed case, styled himself Earl of Mar; but on this fact being brought to the notice of the Committee, he and his counsel were told that it was an improper assumption; and on his subsequently lodging an additional case, in which he was styled Earl of Mar, he was ordered to amend the style by inserting the words ‘claiming to be’ before the ‘Earl of Mar.’ On one occasion he personally appeared at the bar of the House of Lords without counsel or agents, when he persisted in styling himself ‘thirty-fifth Earl of Mar.’ But Lord Chancellor Hatherley informed him that he must see the extreme absurdity of admitting him as Earl of Mar, which was a fact to be proved. On Mr. Goodeve Erskine's still persisting that he was Earl of Mar, the Lord Chancellor said:—‘You are under a foolish mistake; that is one of the misfortunes of your not being advised. You may watch the case as a claimant.’ On several subsequent occasions when Mr. Goodeve Erskine's counsel ventured to allude to him as Earl of Mar, they were interrupted by several law Lords, and informed that that style could not be allowed. At one stage of the proceedings, when a question was raised as to the proper mode of correcting the headings of the printed cases for Mr. Goodeve Erskine, in which he was styled Earl of Mar, Lord Colonsay suggested that he must interline the words ‘claiming to be’ before ‘Earl of Mar.’

“The case then proceeded with Mr. Goodeve Erskine as a mere claimant, and from first to last it occupied the Committee for upwards of eight years, and during that time more than five hundred charters and other documents were produced in evidence. The case was argued at the bar of the House at great length and with great ability by eminent counsel on both sides, the pleadings of counsel alone occupying eleven days. In 1872, during the progress of the case, my father died, but I, having fully concurred with him in the action he had taken, continued the case without the delay of a single session. After the pleadings of counsel were finished, the Committee took several months to consider their judgment. The noble Lords who gave judgment had sat on the case from the commencement to the end of it; and when, on the 25th of February 1875, they delivered their decision, not only was their Resolution unanimous, but the grounds of judgment, as given in the speeches of the three noble Lords, were identical—namely, that the ancient title of Mar was extinct, and the existing title was created by Queen Mary, and limited to heirs-male. A short extract from each of the speeches will show this:—

“LORD CHELMSFORD.—‘Whether the original dignity was territorial

or not, or was or was not descendible to females, is wholly immaterial, inasmuch as it had come to an end more than a century before Queen Mary's time.'

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

"LORD CHANCELLOR CAIRNS.—'I am of opinion that it is clearly proved that the Earldom of Mar which now exists was created by Queen Mary between the 28th of July and the 1st of August 1565. It appears to me perfectly obvious, from every part of the evidence, that in the greater part of the month of July 1565, and before that creation, there was no Earldom of Mar properly in existence.'

"The Resolution of the Committee was as follows :—'Resolved—That the petitioner, Walter Henry 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.' This Resolution was reported to the House and approved of on the 26th of February 1875, and the following orders of the House were passed upon it :—

"Ordered, 1. That said Resolution and judgment be reported to Her Majesty by the Lords with white staves.

"Ordered, 2. That the Clerk of the Parliament do transmit the said resolution and judgment to the Lord Clerk Register of Scotland.

"Ordered, 3. That at the future meetings of the Peers of Scotland assembled under any Royal Proclamation for the election of a Peer or Peers to represent the Peerage of Scotland in Parliament, the Lord Clerk Register, or the Clerks of Session officiating thereat in his name, 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, and do permit him to take part in the proceedings of such election.

"As the returning officer appointed by Statute to act at the election of Peers, the Lord Clerk Register by himself, or by two Clerks of Session having commission from him, is bound by the Statute passed in 1847, under these orders of the House of Lords, to receive my vote and to refuse that of any one else attempting to vote as Earl of Mar ; so that the protests of Lord Crawford and other Peers are not of the slightest value, and only serve to interrupt that harmony which has hitherto prevailed at the election of Peers.

"And now, my Lords, I come to deal with Lord Crawford's second or Additional Protest, as he is pleased to term it. Like the first Protest which Lord Crawford made at the election of Peers in 1876, this

Additional Protest is a mere repetition of the arguments in the printed cases of Mr. Goodeve Erskine and in the speeches of his counsel, with the addition of a few startling assertions of Lord Crawford's own, which no counsel would have ventured to make at the bar of the House of Lords. Lord Crawford has not stated a single new argument nor adduced any evidence which was not before the House. He has, besides, entirely suppressed all the evidence and arguments which were brought forward in support of my claim, and which were sufficient to convince the House of Lords of its truth and justice. During the dependence of that claim Lord Crawford frequently attended in his place in the House of Lords. He never indicated any exception which he may have entertained to the competency of the tribunal for adjudicating on the claims. Neither did he enter any dissent or protest against the unanimous judgment of the Committee when it was pronounced, on the 25th of February 1875. The first indication of his dissent was shown at the election of Representative Peers in December 1876, when, in the absence of Lord Crawford, a Protest was lodged for him against the reception of my vote as Earl of Mar, and against the rejection of the vote of Mr. Goodeve Erskine. That Protest was addressed to the Lord Clerk Register as the presiding and returning officer at the election. But neither the returning officer as an official, nor the Peers assembled for the special purpose of election, could constitute themselves a judicial tribunal for rehearing or rejudging the merits of the Mar case after it had been finally decided by the House of Lords.

“Although now, after a second Protest by Lord Crawford, I am induced to notice his proceedings, I will not allow myself to be drawn into any discussion on the merits of the case. The questions which the Committee were asked to decide were two in number. 1. Was the Earldom of Mar, which now exists on the roll of Scotch Peers, and was held by the Earl of Mar and Kellie, who died in 1866, a new grant by Queen Mary, or a restoration by her of an ancient dignity? 2. Was the dignity descendible to heirs-general, or was it limited to heirs-male? These questions were fully discussed by the only competent tribunal, and a unanimous judgment pronounced upon them, which is final and irreversible. It would therefore be a work of supererogation to say anything in support of a judgment which requires no defence.

“Lord Crawford, and those who think with him, are of course entitled to their own opinions as to the soundness of the judgment; but I venture to think, and I believe that the majority of your Lordships will agree with me, that a Committee composed of the Lord Chancellor, an ex-Lord Chancellor, and the Chairman of Committees of the House of Lords, having had the whole evidence before them for so many years, and assisted as they were by the arguments of counsel, is,

at least, as competent to arrive at a correct decision as those who have not had the same advantages, and whose opinions are formed from *ex parte* statements and preconceived notions.

“ Besides, I venture to doubt whether Lord Crawford can be considered an impartial judge in such matters, seeing that it is not the first time that he has thought proper to impugn a judgment of the House of Lords. In 1850 the late Earl of Crawford claimed a Dukedom of Montrose. His claim, however, was unanimously rejected by a Committee for Privileges, including Lords Lyndhurst, Brougham, St. Leonards, Cranworth, and Redesdale. Lord Crawford, then Lord Lindsay, was disappointed with this judgment, and wrote an address to the Queen, in which he used the following language :—‘ Fact has been misapprehended, evidence misrepresented, law misunderstood and misapplied, precedent disregarded, and unjust and inconsistent measure liberally dealt out by the Committee to which my father’s claim has been submitted by your Majesty—every point in his argument being either misconstrued, treated with contempt, or overlooked. Speaking generally, this claim has been throughout thought lightly of, vilipended, and held cheap.’

“ This, my Lords, being Lord Crawford’s opinion in a former case, it is not so surprising that he should again repudiate the authority of that tribunal, and declare that ‘ their Resolution, although confirmed by the Peers and approved of by the Sovereign, is inoperative, and must be held null and void.’

“ Since the final judgment was pronounced, a discussion has been raised in reference to the proper ranking of the Mar title in the roll of Peers which is called at elections. This is, indeed, a very secondary and subordinate question, and does not bear upon the merits of the case. But an importance has been attempted to be attached to it, as if it had been a vital turning-point overlooked in the judgment of the House of Lords. On this special point of ranking and precedence I am willing to join issue with Lord Crawford, and to notice the portions of his Protest which bear upon it. A full explanation will easily clear up any misunderstanding which may have arisen on this point.

“ In the year 1605, King James VI. appointed a Commission to inquire into and regulate the precedence of the peers of Scotland. The proceedings of the Commissioners are little known, and it is necessary to explain them in some detail. The object of the Commission was to put an end to the contentions for priority among peers which took place at the meetings of Parliament, during the processions to Parliament, and after the Peers had entered the House. Such contentions frequently arose, and led to serious consequences.

“ The Commissioners were occupied from October 1605 to the 5th of March 1606, on which last date they pronounced the Decree of Ranking of the peers that has given rise to so much discussion. The

six months which were occupied by the Commissioners was a brief period for inquiring into the history of the whole Peerages of Scotland, many of which were created at early dates. Instead of only six months being bestowed on an inquiry into the creation of all the Peerages of Scotland, more than that number of years have sometimes been required to investigate the descent of a single Peerage.

“The Commissioners summoned to their presence all the Peers. The Decreet of Ranking narrates that they were charged to compare before the Commissioners, and produce their evidence to show their ranks and places of precedence. The Decreet shows that the charge was given to the peers according to their graduation, and nearly in the order of their respective rank in each class.

“The first is the Duke of Lennox, next the Marquis of Hamilton, then the Earls, and lastly the Barons. It is remarkable that John, second Earl of Mar, is the twenty-first earl named in the list of earls summoned, and only fifth from the lowest or latest-created earl—the Earl of Home, whose title was created in 1605.

“The Commissioners must have been aware that the father of the Earl of Mar had been created by Queen Mary, and they in the charge to appear called him according to the new creation. Had the Commissioners supposed that he had been restored to the ancient dignity of Mar, he would certainly have been summoned as the first of the Earls. In the Decreet itself, however, following on the inquiry, he succeeded in obtaining rank as the seventh earl, the six having precedence of him holding dignities created long after the original Peerage of Mar. In one of the numerous prints by the present Earl of Crawford, he maintains that there was a Donald Earl of Mar in 1014. Lord Crawford’s title was created in 1398, upwards of three centuries after 1014; but his ancestor was ranked before the Earl of Mar, and his descendants have ever since retained that precedence.

“John Earl of Mar compared before the Commissioners of Ranking, and produced a charter, purporting to bear that Isabella Douglas was Countess of Mar in 1404; but that charter was not acknowledged by the Commissioners, who only ranked him below the Earl of Marischall, whose title was created between 1455 and 1458.

“It is possible that this precedence was granted to Mar by a special warrant from the King, but the original dignity of Mar was certainly not ranked by the Commissioners. Out of place as the title of Mar is in the Decreet of Ranking, judged either by the original or new creation, it is much nearer the creation by Queen Mary in 1565 than to the ancient creation of which Lord Crawford speaks. According to him this old title is post-ranked 444 years, while the new title is pre-ranked only 107 years, thus making a difference in favour of the new creation of 337 years.

“The position of Mar, however, is by no means singular. The

Earldom of Sutherland was created before 1275; and yet that Peerage was placed in the Decree of Ranking after those of Angus, Argyll, Crawford, Erroll, and Marischall, the first of which was created about 1389, and the last about 1458. The Commissioners may have ranked Sutherland according to a supposed new creation which has since been decided not to have taken place; but if so, according to Lord Crawford's argument as to Mar, it is not the Earldom of Sutherland, proved by a decision of the House of Lords to have been created in 1275, but a more recent one which, if his contention is logically carried out, could still be claimed by the heir-male. Other Earldoms are also out of their places on the roll, and the precedency granted to several of the Barons is even more erroneous.

"The Decree of Ranking of 1606 contained only the names of the Peers then existing. Between 1606 and the Union of the kingdoms in 1707, a number of Peers were created, whose names were entered in the roll which was called in Parliament up to the time of the Union, and is commonly known as the Union Roll. This Roll of Scotch Peers was transmitted to the House of Lords in 1708, and was ordered to be received and entered in the Roll of Peers, with a saving as to protests which had been made for precedency before the Union. Between the years 1708 and 1739 the imperfections of the Union Roll appear to have been discovered by the House of Lords, who took steps for obtaining a more accurate list of Peers, by issuing an order, on the 12th of June 1739, that the Lords of Session should make up a roll of the Peers of Scotland at the time of the Union whose Peerages were still subsisting. The Lords of Session made their return in the following year. They reported that, 'After the most careful search and examination, they have not hitherto found among the records any roll or list of the Peers of Scotland at the time of the Union, authenticated by the subscription of the Lord Register, or by any other person or officer whatsoever. All they have been able to meet with to give satisfaction in this particular is an unsigned writing on a sheet of paper, entitled "Roll of Parliament 1706," bearing a list of the Peers according to their ranks.'

"The lists or Rolls which were furnished by the Lord Clerk Register to the House of Lords in 1708, and by the Lords of Session in 1740, continued to be the Rolls of the Scotch Peers till the year 1847, when, under a special Act of Parliament for correcting abuses at the election of Scotch Peers, owing to the imperfection of that Roll, the present one was made up by the then Lord Clerk Register; and it is still the regulating Roll called at the election of Peers, with such additions and corrections as have been made by order of the House of Lords.

"The unsatisfactory and imperfect nature of the Decree of Ranking in 1606, and the subsequent Roll of Peers from that date to the Union, and from 1740 to 1847, will be apparent from the history now given.

“The errors of the Decreet and subsequent Rolls have often been the subject of comment by Peerage writers. Mr. Riddell, whom Lord Crawford styles his ‘friend and father in genealogy and Peerage law,’ thus refers to the subject in his *Law and Practice of Peerages*, published in 1842 :—‘The Union Roll, if truth and accuracy are to be respected, and Peerage rights possess a title of that value and importance which they seem anciently to have done, calls loudly for correction and amendment. It has been transmitted to us in no solemn form, owing to the well-known hurry and distraction of the moment, when lesser interests were sacrificed to greater, adopting the gross errors in the Decreet of Ranking in 1606, while it is otherwise faulty and exceptionable. It has been remarked that the Scottish Peers at elections are the only Court that cannot purge their own Roll, retaining as it does a copious list of nonentities through the insertion of extinct peerages. Previous to the Revolution, on a Peerage ceasing to exist, or merging in another, an order was issued for its being expunged from the Roll: but this obvious and salutary step, which might exclude the pretensions of impostors at elections of the sixteen Peers, who have not been wanting on such occasions, and the reception of undue votes, with the attendant trouble and perplexity, has latterly been omitted.’

“The errors in the Decreet of Ranking have frequently been remarked upon in the trial of Scotch peerage cases. It was much founded on by one of the claimants in the Herries case, which was decided by the House of Lords in 1858. In moving judgment, one of the law Lords, referring to it, said—‘It cannot by any means be taken as conclusively establishing the relative rank of the different peers.’ And another of the Lords said, ‘The incorrectness of this Decreet is so clearly proved that no reliance can be placed upon it unless otherwise supported. It is disputed constantly at the election of the Scotch Peers to this day. It was made up in some cases from evidence produced by the peers themselves, several of whom did not appear before the Commission.

“The Decreet was also founded upon by Mr. Goodeve Erskine in the claim to the Mar Peerage in the House of Lords. It was very fully discussed at the hearing of the case, and very little attention was paid to it, owing to what Mr. Riddell calls its gross errors and glaring inaccuracies. It is absurd now to attempt to uphold such an imperfect document, as if it were equal to a final and irreversible judgment on each particular case of peerage mentioned in the Decreet. It was liable to reduction by any peer having an interest, and it was reduced by the Court of Session at the instance of the Earl and Countess of Buchan, and more than once altered in the case of Glencairn. The mere superficial inquiry by the Commissioners in the course of a few months in the year 1606, regarding the whole Peerage of Scotland, cannot for a moment be put in competition, in so far as the Mar Peer-

age is concerned, with the exhaustive inquiry which was made during several years for the special purpose of adjudicating upon the constitution and descent of that dignity.

“Lord Crawford states that no peer of an earlier creation than 1565 protested against the precedence given to Mar in the Decree of Ranking. This is a mistake. In the minutes of evidence in the Mar case, it is proved that the Earls of Menteith, Morton, Montrose, Eglinton, Glencairn, and Cassillis not only protested but instituted proceedings for the reduction of that precedence. Although Lord Crawford has overlooked the evidence of that action, it did not escape the attention of Lord Chelmsford, who alludes to it in his judgment.

“An action was brought in 1706 by the Earl of Sutherland to reduce the precedence given to the Earl of Crawford over his dignity : and in defending that action Lord Crawford’s ancestor argued strongly in favour of the presumption of male descent in the Peerages ; and the judgment of the Court of Session was in favour of his argument, and in direct contradiction to the present Lord Crawford’s contention, that the rule and presumption is in favour of heirs-general. He in his own person furnishes a proof of his inconsistency. In theory he is in favour of female succession, but in practice he excludes them for males in his own Earldom and barony, and in the Montrose case he wishes to construe a remainder ‘heredibus suis’ as in favour of heirs-male.

“Since the Union the succession to peerages, where no patent exists, has been conclusively established by repeated judgments of the House of Lords to be in favour of heirs-male. In the Cassillis case, decided in 1762, the doctrine was so laid down. The heir-female in that case was William Earl of March, who, like Mr. Goodeve Erskine, had assumed the title. The heir-male was successful, and the Earl of March, unlike Mr. Goodeve Erskine, acquiesced in the judgment, and dropped the title, which has ever since been borne by the heir-male, now the Marquis of Ailsa, solely in virtue of the decision of the House of Lords.

“The later case of Glencairn was decided on the same grounds by Lord Loughborough, and the presumption in favour of heirs-male has ever since been acted upon, and is so firmly established that it cannot now be upset by irrelevant Protests, which attempt to set up a crude code of Peerage law by the most unsafe of all legal guides, an amateur lawyer.

“Lord Crawford’s startling statement in his Additional Protest, that ‘a Resolution of the Committee for Privileges, although confirmed by the House of Lords, and approved of by Her Majesty, is inoperative, and must be held null and void,’ together with the general contempt with which he treats decisions of the House, would naturally lead to the supposition that his own dignity depended on the authority of some much higher tribunal. It is, however, a fact that he holds his

Peerage of Crawford in virtue of a decision of that House, and in virtue of that alone ; and that the judgment in the Crawford case in 1848 was in direct opposition to the law as laid down by the Court of Session in the Oliphant case, part of the judgment in which case Lord Crawford has quoted for another purpose. There is no patent of the ancient Peerage of Crawford in existence, and that dignity was held to the exclusion of heirs-female from its creation in 1398, till it was inherited by Ludovic Earl of Crawford in the reign of King Charles I.

“ It is not my intention to controvert Lord Crawford’s right to his dignity, or to criticise the decision of the House of Lords in that case when his father claimed it after it had been dormant for forty years. It is, however, fortunate for Lord Crawford that a tribunal exists which has authority to decide Peerage cases, and which does not consider the law laid down by the Court of Session infallible.

“ Lord Crawford maintains that Mr. Goodeve Erskine is in possession of the Earldom of Mar, and cannot be dispossessed of it. I have shown that he merely assumed the title without any authority, and continues to make use of it in defiance of the judgment of the House of Lords.

“ It may be true that, in an undisputed case of succession to a Scotch Peerage, no formal claim to the House of Lords is necessary ; but it is absurd to argue that this applies in a disputed case. The result of such an argument would be that, in every case of a Scotch Peerage, no patent for which existed, in the event of the holder dying, and his heir-male and heir-general being different persons, each of these persons might assume the title on different grounds, and no authority could dispossess either of them. Such is Lord Crawford’s contention, carried to its logical conclusion ; and, I confess, I cannot conceive anything more likely to cast ridicule on the Peerage of Scotland.

“ My Lords, it is with the greatest regret that I find myself compelled in self-defence to take up my pen in answer to Lord Crawford, for whose high character and amiable disposition I entertain the utmost respect. I have declined to notice the statements of anonymous writers, but I cannot submit without protest to repeated attacks coming from one in Lord Crawford’s position.

“ I feel I owe your Lordships an apology for intruding on your notice at such length. I trust, however, that some excuse may be found for me in the fact that my legal right to the dignity which I have the honour to hold has been assailed in a manner unprecedented, and that persistent attempts have been made to transfer that title to a person who had ample opportunity of vindicating his claim to it in the proper Court, and who failed to do so.

“ I have the honour to be, my Lords, your Lordships’ most obedient servant,

“ MAR AND KELLIE.

“ ALLOA PARK, ALLOA, 30th April 1879.”

I must confess that, although I am no Elijah, and although no possible resemblance can be suggested between Omri and Ahab and the late estimable Earl of Kellie and his present representative, I felt when I received Lord Kellie's letter as if I had been addressed in the words of the Israelitish potentate, "Art thou he that troubleth Israel?" that disturbeth the harmony that hath hitherto prevailed at the elections at Samaria? And I was almost tempted to reply in the words of the Tishbite, "I have not troubled Israel, but thou and thy father's house," in that ye have forsaken the laws and practice of our forefathers, and followed new doctrines and sacrificed to Baalim in the land of the Southron. I say this in all good humour, but with a somewhat grim smile. I have somewhat to pardon in respect of personal allusions in many parts of Lord Kellie's Address, but he has paid me a graceful compliment at the beginning and at the end of it, and I shall take no further notice of the intermediate references except in necessary self-exculpation.

Lord Kellie's letter is divisible into two portions, the first dealing with the general question of my two Protests, the second with the views expressed in those Protests upon the special question of the ranking of the Earldom of Mar on the Union Roll, and the authority upon which the Union Roll itself reposes. The references to myself are scattered, as may have been perceived, throughout the letter.

Under the first of these heads Lord Kellie—declining to enter into any controversy—opposes to my Protests what he describes as the unanimous, final, and irreversible "judgment" of the House of Lords, which renders them futile and unavailing; while he qualifies my dissent from this alleged judgment by the serious reproach of "contempt" for a competent tribunal. The practical effect and presumable object of Lord Kellie's pleading under this first head is to crush what I have said—in other words, the principles and laws I have appealed to as of binding obligation—under the mountain of superior and autocratic authority, as cities were crushed, for example, under the adamant island of Laputa.

Under the second head Lord Kellie expresses his willingness to join issue with me on the question of the Union Roll, an exception to the reserve which he maintains as to the merits

of my two Protests. The practical effect of the narrative and argument under this head is to depreciate the authority of the Roll and of its basis, the Decreet of Ranking; and its object, as I infer, is to prepare the way for some alteration of the Roll by legislative authority, so as to remove the existing difficulty which stands in the way of the reception of Lord Kellie's vote as Earl of Mar in virtue of a dignity which was admittedly not known to exist previously to 1875.

The references to myself represent my interference as uncalled for and unbecoming my position as a Peer of Scotland (as to which there may be different opinions), and the arguments I have used as unworthy of consideration as being those of an "amateur lawyer" (which may be perfectly true, so far as those arguments rest on my sole responsibility). I am also charged with treating the "decisions" of the House of Lords, alike on former occasions and on that of the recent Mar claim, with systematic "contempt"—a word calculated to prejudice all I have written, and against which I shall remonstrate. But these references assume a graver character when they charge me with indifference to consistency in argument when it suits my purpose, and suggests that my advocacy is suspicious, inasmuch as I stand in the position of a "disappointed" claimant (as my father's representative) before the House of Lords, in regard to the ancient Lindsay Dukedom of Montrose; and, having impugned the "judgment" reported in that case in very strong terms, my repudiation of the recent Report in favour of Lord Kellie and vindication of Lord Mar's right, cannot create surprise. I need scarcely say that I credit Lord Kellie with believing that such imputations are allowable in a forensic argument; but, even granting this, the charges are far too strongly urged to admit of my passing them over as such. Their practical effect is to discredit whatever I may have said in my Protests, by the suggestion of partial and interested motives; while they are injurious to my reputation as an honest man and a gentleman. I shall say a few words with reference to the former class of those references before closing this letter; but shall postpone dealing with the latter till my vindication of the matter of my Protest and of Lord Mar's right shall have enabled me to deal with them from the vantage-ground of proof, which will by that time have

become available for my defence. In the meanwhile, I must trust to a character for honesty and fair dealing, which has never been impugned hitherto.

I cannot but express my regret that Lord Kellie should not have met the appeal in my Protests to principles and law by a disproof of the relevancy and accuracy of that appeal, or by a frank statement—in development of his assertion of the powers of the House in such respect, in the fifth paragraph from the conclusion of his Address—that the House of Lords had of its superior authority overruled the principles and law in question, and that the time for founding upon them was gone by. The course he has adopted evades the issue I have raised, and preoccupies the public ear under cover of a respect for the authority of the House, so profound as to render any discussion of what it has decided upon unnecessary and out of place. As I have said, he declines controversy on the broad merits of the question, while permitting himself to challenge it on details, which he acknowledges to be of secondary importance, arising out of the original question of debate, and which cannot be fully understood apart from due appreciation of that question. Meanwhile, the interspersion of the personal and disparaging references above noticed, among innumerable (but wholly unintentional) misrepresentations of fact and law—proceeding throughout on the assumption that the House of Lords must necessarily be right and I wrong, and that I plead for a hopelessly lost cause—is calculated to render the task of disentangling the truth from the meshes of error, and of reducing the question to its due proportion and simplicity, almost hopeless.

I never felt more puzzled than how to reply to this letter of Lord Kellie, alike with justice to myself and respect to its author and those who support him, not to say to the Peers of Scotland in general, to whom the remonstrance is addressed. A short answer, summarily asserting my own and denying Lord Kellie's position, would have been inadequate to the occasion. It appeared to me necessary alike to vindicate my Protests in the interests of truth and of the Scottish Peerage, and to vindicate myself also on the personal points objected against me. The question was whether this should be done in a dry exposition of legal proofs, applied in a process of rigid reasoning—which no one probably of those addressed by Lord Kellie would

be likely to read ; or in a more familiar and, so to speak, friendly way, as precise in point of illustration as the other, but with as little of legal technicality as was possible in a matter of antiquarian law. My choice between these alternatives was determined by the consideration that the publication of Lord Kellie's letter had brought the points at issue before a more extensive audience than that addressed in my Protests. In those Protests I simply appealed to principles, laws, and obligations which I was entitled to assume to be familiar to the tribunal they are addressed to (an exclusively legal tribunal) without adding any proof of their existence : but the public at large know nothing of the sanctions upon which those principles, laws, and obligations repose ; and appealed to as they have been by Lord Kellie, they have a right to be made acquainted with them, and with my reasons for asserting that they have been disregarded and set aside by the House of Lords in Lord Kellie's claim. Such proof I felt I ought to give ; but it was impossible to do so within the space of a letter such as Lord Kellie's, and within the columns of a newspaper ; while it must be recollected that a single line, a single word of erroneous statement or imputation, affirmative and unsupported, or vague and unsubstantial, not unfrequently demands a dozen—I had almost said pages—for disproof. I found myself, therefore, committed to a volume in reply to a letter, and to all its attendant disadvantages ; but for this I cannot hold myself responsible. It remains for me to justify the course I have adopted by doing the work thoroughly : and in so performing an unsought-for task, it shall be my endeavour to place the questions affecting the succession to the Earldom of Mar before the public in such a manner as to enable the least learned reader to understand the principles I have appealed to, and to judge with an intelligent interest as between the voice of antiquity and prescription, sounding from past centuries, and that of 1875, contradicting its testimony. Lord Redesdale said with great truth in a recent debate that "none but those who have gone into this question of the Mar Peerage are really competent to form an opinion upon it." Opinions may differ as to the result of the investigation by the House of Lords ; but these words may be my justification for going, as I intend to do, into the very depths of the matter.

I do not despair of success in what I have undertaken ; but I must bespeak the indulgence of the reader. I cannot forego the necessity of proceeding, by strict proof of fact and law, and of scrutinising the deliverances of noble and learned Lords and the value of Lord Kellie's dependence on them by the proof thus established. I must be pardoned frequent repetitions of fact and argument where such demand enforcement and reinforcement in a legal as distinguished from a logical argument. But if the reader find the process at first somewhat irksome, he will soon lose the sense of fatigue in the animating consciousness of apprehensive vigour with which, like one ascending a mountain, he will grapple with and subdue difficulties, and gain an ever-widening view of the prospect below him : in other words, his grasp of the legal and constitutional principles which lie at the base of the argument, will find agreeable and intelligent exercise in their application to facts and incidents as they come one after another into view ; while he will feel that they are of that broad and universal character which will enable him to understand history the better, in its overt facts and its legal and constitutional development, in consequence of having mastered them. Thus much apologised for, as rather of preliminary discipline, the fortunes of the Mar Earldom and of those who have been its servants will be found in themselves, in their external aspect and in their accessories, as varied and picturesque as any romance, so that the barest narrative cannot but be interesting. They are mixed up with the great struggle between the Scottish Kings and the feudal aristocracy in the fifteenth and sixteenth centuries—a struggle which might form the subject of a history in itself. They exhibit right trodden under foot for more than a century—restitution made by Mary Queen of Scots after her wonted sense of justice—and the restored rights enjoyed for more than two hundred years ; and lastly, those rights once more crushed down in the present day, on precisely the same grounds and allegations which were condemned by the Scottish Parliament and the highest tribunal of Scottish law as illegal and iniquitous, in the reigns of James VI. and Charles I., although there are already symptoms, I confess with pleasure, of a turn in the tide. The drama I have to exhibit is at once legal and historical—a page of history interpreted by law ; and I venture to

think that all Scotsmen who are not (in the old phrase) "Scoti Anglicati" will view it with alternate pity, exultation, and indignation. I trust, in fine, to develop the vague apprehension generally existing that a great wrong has been perpetrated, into a clear comprehension of the nature and (let me add) excuse for that wrong—to exhort public opinion on the right side, and not merely in point of sympathy, but with a view to practical results.

It has been urged against me, almost as a charge, that I wish to preserve this ancient Earldom of Mar. I avow that I do so, but only because it exists; because I am proud of it; because it is the only survivor of the ancient, I may say prehistoric, Celtic mormaerships of Scotland; because its extinction would be tantamount to the loss of one of the brightest jewels which enrich the British Crown, and I cannot consent to see it crushed down unjustly.

I may notice one or two minor points of exception taken by Lord Kellie, which may leave an unfavourable impression on the mind of the readers of Lord Kellie's letter unless explained. I have been unwilling, in justice to Lord Kellie, to abridge his letter; but this very deference to his presumable wishes imposes on me the necessity of leaving nothing unanswered which he has thought right and fair to urge against me.

I. Lord Kellie objects that "during the dependence" of his claim before the House of Lords, "Lord Crawford frequently attended in his place in the House of Lords. He never indicated any exception which he may have entertained to the competency of the tribunal for adjudicating on the claims. Neither did he enter any dissent or protest against the unanimous judgment of the Committee when it was pronounced, on the 25th February 1875. The first indication of his dissent was shown at the election of Representative Peers in December 1876, when, in the absence of Lord Crawford, a Protest was lodged for him against the reception of my vote as Earl of Mar, and against the rejection of the vote of Mr. Goodeve Erskine. The Protest was addressed to the Lord Clerk Register as the presiding and returning officer at the election. But neither the returning officer as an official, nor the Peers assembled for the special purpose of the election, could constitute themselves a political tribunal for rehearing or rejudging the merits of the

case, after it had been finally decided by the House of Lords." My reply to this is:—

1. By the modern usage of the House, sitting in Committee for Privileges, the lips of the lay Peers are practically sealed; and the whole question is disposed of by the law Lords,—the part taken by the present Chairman of Committees in advising the Crown, or, as in Lord Redesdale's own words, delivering a "judgment," being as exceptional as his experience in the special business of the House, which constitutes the vindication of that intervention. Lord Redesdale delivered no such "judgment" in the Montrose claim, although holding the same office. I wish he had.

2. I have taken no exception hitherto against the competency of the House of Lords to report to the Crown on a claim to a Scottish Peerage submitted to it by the Sovereign on petition from a claimant. "Adjudicate" upon such claims the House does not; nor is this an insignificant distinction, as shown by the construction placed upon their advice by Lord Kellie in the present instance.

3. I protested in the proper form and in the proper place, when the proper time for protesting had arrived. The House of Lords, reporting upon a peerage claim, is not a "court" or "tribunal," nor its report a "judgment:" it is merely a commission of inquiry tendering advice to the Sovereign, in reply solely to a question from the Sovereign, that question being its sole authority for interference, and upon which answer and advice the Sovereign is free to act as he thinks fit, while he is presumed to deliberate before he acts. Any Protest lodged before such action has been taken falls therefore to be addressed to the Sovereign for such previous consideration. Protests have been recorded in the House of Lords on occasions when it had exceeded its powers by acting upon Peerage matter *proprio motu* without authority from the Crown; but I am not aware of any having been lodged in a case such as the present. In the Mar case the possibility of any Protest to the Sovereign on the part of Lord Mar or his friends, had such resort to the Royal footstool appeared to them expedient, was practically precluded by the fact that the House, taking the assent and approval of the Sovereign for granted, and superseding her judicial action altogether, issued

the Order to the Lord Clerk Register on the same day, the 26th February 1875; and in the same heat with their approval of the Report of the Committee for Privileges directed the Lord Clerk Register to receive the vote of the Earl of Kellie as Earl of Mar, in the place on the Union Roll where the title appears, more than a century earlier than 1565. This precipitate and illegal act, if repeated and formalised, will deprive aggrieved parties of their sole chance of remonstrance before the seat of what is supposed to be the ultimate judicature in Peerage claims. On the Report of the House of Lords in the Montrose claim in 1853, I protested directly and publicly to the Sovereign as to the ultimate judge, according to the English usage; and as the Report was adverse, nothing has been done during the interval, and the matter so rests.

Such then being the position of things, I have followed the regular form of Protests for "remeid of law at fitting time and place" before the Lord Clerk Register at elections at Holyrood. Such Protests imply no power of reason or judgment on the part of that officer; his province is to receive and record protests; as he has done from time immemorial in the acclamation for justice. The circumstances of the present case may be unprecedented, but my course has not been unprecedented.

Whether my protest and those of other Peers will be ultimately found to be "not of the slightest value" is a question for time to decide.

II. According to Lord Kellie, my two Protests are "a mere repetition of the arguments in the printed cases of Mr. Goodeve Erskine and in the speeches of his counsel, with the addition of a few startling assertions of Lord Crawford's own, which no counsel would have ventured to make at the bar of the House of Lords. Lord Crawford has not stated a single new argument, nor adduced any evidence which was not before the House. He has, besides, entirely suppressed all the evidence and arguments which were brought forward in support of my claim, and which were sufficient to convince the House of Lords of its truth and justice." He adds, "Lord Crawford and those who think with him are of course entitled to their own opinion as to the soundness of the judgment: but I venture to think, and I believe that the majority of your Lordships will agree with me, that a Committee composed of the Lord Chancellor,

an ex-Lord Chancellor, and the Chairman of Committees of the House of Lords, having had the whole evidence before them for so many years, and assisted as they were by the arguments of counsel, is, at least, as competent to arrive at a correct decision as those who have not had the same advantage, and whose opinions are formed from *ex parte* statements and preconceived notions."

I do not feel quite sure whether Lord Kellie includes myself within the category of opponents whose opinions have been thus formed. I can hardly think so; for I believe he is aware, that when his late father did me the honour to consult me as to his claim before it was brought before the House, I advised him most strongly against attempting it, on the ground that the dignity had always been and is still descendible to heirs-general. My opinion was thus formed independently altogether of the cases and arguments of counsel as before the House of Lords. My answer to the remarks above quoted is:—

The express object of my Protests was to appeal to the law of Scotland in vindication of the justice of Lord Mar's arguments, as against the overruling of that law and those arguments by the House of Lords, proceeding on the direction laid down in the Cassillis case in 1762, and the traditional rule grounded thereupon, and as against the overruling of the final judgment of the Court of Session in 1626. That I should expect that the House is bound to report in accordance with Scottish law, and not according to its traditional private rules, may be "startling," and I freely admit that a counsel, even of the first experience, might be indisposed to argue thus in the fear of irritating the law Lords; but the question, I repeat, is "What do truth and justice say on the subject?" In charging me with having "entirely suppressed all the evidence and arguments which were brought forward in support of his claim," etc., I take it for granted that Lord Kellie's complaint has nothing of the character of the "*suppressio veri, suggestio falsi*," of ancient law pleadings. The word is one better replaced by "omitted" or "passed over;" and in that light I shall read it. My first impression had been to include it among the more serious charges reserved for future refutation. I must again repeat that a Protest, appealing against a Report grounded on speeches which echo the argument of a successful

claimant, proceeds on the presumption that the authority appealed to is fully aware of the argument in question. But it so happens that in my first Protest I appealed to prove that the entire series of the writings and documents upon which the success of Lord Kellie's claim depended, and which the House of Lords have ruled to be valid, and everything following upon these documents, including the entire superstructure of argument that Lord Kellie accuses me of having "suppressed," were disallowed as of legal weight, and decreed to be null, void, and of none effect in all times to come, by the final judgment of the Court of Session above mentioned, in the great litigation between the Earl of Mar and Lord Elphinstone, the result of which depended entirely on those documents—in 1626. My words in the Protest were as follows:—

“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 subsequently, it must have so existed through a new creation in that year, probably by charter, and, in the absence of any charter or writ showing 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 descendibility 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."

The judgment is conclusive as to the fact that Mary Queen of Scots restored the Earldom of Mar, fief and dignity, to John Lord Erskine in 1565, the dignity being that and no other which was enjoyed *de jure* by Robert Earl of Mar in 1438, in right of representative of Isabel Countess of Mar in 1404, as her heir-general. The noble Lords who advised the Committee for Privileges paid even less attention to this solemn Decree than to the Decree of Ranking.

SECTION III.

References to myself.

I would now say a few words on the question of Lord Kellie's references to myself in deprecation of my interference in this Mar matter, and in disparagement of my competency to do so; with which I may include his representation that I have treated the decisions of the House of Lords—including that upon Lord Kellie's recent claim—with contempt. These charges are not the most serious that he has brought against me; and yet it is impossible for me to proceed further in this controversy, I should be overweighted in the saddle, and the public, to whom Lord Kellie has appealed, would be unduly prejudiced against me so far, if I did not clear them away at the very threshold of this reply.

1. The first of the charges embodies the allegation that I have acted inconsistently with my position as a peer of Scotland in that I have protested, and twice protested, against Lord Kellie's right to vote as Earl of Mar, and have ascribed that title to "the defeated claimant," and that I have taken the unprecedented course of endeavouring, in concert with the late "defeated claimant," to induce other Peers to follow my example. Lord Kellie's legal right has, he states, been assailed in a manner unprecedented; and persistent attempts have been made to transfer the title to a person who had (it is affirmed) ample opportunity of vindicating his claim to it in the proper Court, and who failed to do so.

It is not unnatural that Lord Kellie should look upon the question from his own point of view in this manner. But the

question is (passing over minor matters), "Was the Report (or, as Lord Kellie terms it, the "decision") of the House of Lords right or wrong?" No human tribunal is infallible. The Report must be tested by the law of Scotland, and I shall show that by that standard it was wrong. If wrong, as I pledge myself to prove it, the heir-general of Mar is the true and only Earl, and not the heir-male. It follows that I designate him accordingly. In protesting for remeid of justice, even had I acted in concert with other Peers, I should have done nothing but what, for example, Lord Kellie's own ancestor, John Earl of Mar, did in 1711, when he protested, along with nineteen other Peers, eight Scottish and eleven English, acting in concert, against the general Resolution of the House of Lords, which excluded Scottish Peers who had been created Peers of Great Britain—and specially the Dukes of Hamilton and Queensberry as Dukes of Brandon and Dover—from their seats in Parliament for seventy years, till it was rescinded in 1782 under the ruling of the judges of England. That men who believe that injury has been done should seek to obtain redress by remonstrance in the proper quarter and by endeavouring to induce others to do so likewise, appears to me to require no justification; but, as matter of fact affecting myself, my first intervention by Protest was purely spontaneous and unsolicited; and, while making my opinion freely known, I have never solicited the suffrages of any one on behalf of Lord Mar's right: and that other peers should have done as I have done, can furnish no ground for a representation by Lord Kellie amounting to little short of the charge that I have endeavoured to organise a conspiracy in order to defeat the ends of justice.

2. To Lord Kellie's disparagement of my competency to interfere on the ground of my being the "most unsafe of all guides, an amateur lawyer," I have nothing to offer but a word, not of exculpation, but of explanation; inasmuch as the charge, or let me say in my own case, the three last words of the charge, are perfectly true. It is true that I have had the misfortune never to have become a member of the noble profession of the law, inclusion within which, under the most ordinary sanctions, would have qualified me to speak without reproach or reproof on the present subject. But Lord Kellie's views appear to me susceptible of expansion on the present point.

Every one is presumed to be familiar with the great principles of law, the foundation of society, apart entirely from special legal education; no excuse for ignorance of such principles is admissible; it is every man's duty to assert and defend these principles when in jeopardy. "The laws of his country," says Gibbon, "are the first science of an Englishman of rank and fortune, who is called to be a magistrate, and may hope to be a legislator." Of such is the principle and law of succession in Scotland, which lies at the foundation of the present Mar question. What would be thought of a paternal uncle who should occupy his niece's house, drive her out, and appropriate her goods, her heritage after her father's death, when no entail was known to be extant in his own favour, cutting her off, and any conceived right on his part had to be made good in the courts of law against the presumption in her favour? It would not require a lawyer's wig to enable a man to judge rightly in such a case. Yet this is the case which Lord Kellie assumes to be beyond the comprehension of any one not dubbed an attorney. There is an intermediate and higher stage, where large and broad principles of national obligation are concerned, the foundations of constitutional right; and every one holding a position in the legislature, lay or cleric, is presumed to be acquainted with such, and is blameworthy if he is not. Of such are the powers of the Court of Session, the inviolability of her final judgments pronounced before the Union, and the provisions of the Treaty of Union protective of those powers, those judgments, and the rights of the people of Scotland under both. What would become of the liberties of any nation were the perception of their safeguards held to be inappreciable by laymen unless invested with the robes of the law? Thus far, too, I submit, I have not transgressed the tether. It is only when questions arise involving difficulties of conciliation between conflicting laws, or of interpretation through the obscurity of particular laws, that the intervention of an "amateur lawyer" would be indeed as unsafe as it would be presumptuous. But there has been no opening for such hazardous intervention in my two Protests, inasmuch as the particular points in debate between Lord Mar and Lord Kellie have been already fully and finally decided (as I have affirmed) by the Court of Session in 1626, the entire question having been

res judicata since that date ; and all I have done has been to cite and insist upon that judgment, point by point, as decisive in favour of Lord Mar, without a word of original suggestion obtruded on my part. I am perfectly willing that my "guidance," if it be so termed, through the present pages, shall be rigidly but fairly tested by these conditions : and if I should unfortunately either say too little or too much on any point, be it remembered that the cause I advocate cannot be prejudiced thereby when in abler and more legitimate hands, on the very consideration which Lord Kellie arrays against me, and which may be my consolation if found at fault under such disadvantages. Lord Kellie forgets, indeed, that by the theory of the intervention of the House of Lords, under reference from the Crown in peerage claims—although the practice has recently been modified, and the lay voice silenced in Committee—every peer, lay as well as cleric, is understood to deliberate and advise as well as vote ; and that the speech of Lord Redesdale, for example, on which he lays stress as in his behalf, would be equally amenable to the censure of amateur guidance, were it not for the noble Lord's long experience in such matters as Chairman of Committees in the House of Lords. But I have said enough on this subject ; although (I may still urge) more than one of the elder generation, learned in the law and high in judicial rank, may recollect that I had from circumstances a special training in Scottish peerage law under one of its greatest masters in my earlier days, which might be my apology for any presumption that could be imputed to me for entertaining an independent opinion in the present case.

3. I cannot, however, condone so easily Lord Kellie's charge of "general contempt" with which I treated decisions of the House of Lords. I deny that I have expressed or felt any "contempt" either for the Reports of the House of Lords on peerage claims or for the jurisdiction of the House when passing genuine "decisions" or "judgments" in cases of appeal to which they are competent. The two classes of "decisions" must not be confounded. The House of Lords is a tribunal, and has jurisdiction when sitting as a Court of Appeal ; but it is only a commission of inquiry, not a Court of Law, not possessing any jurisdiction, when advising the Sovereign on the claim to a peerage—the Sovereign, according to the English

usage, being the supreme judge. This will appear by full proof in due time. Lord Kellie alleges my strong expostulation against the report on the Montrose claim in 1853 as proof of my "contempt" for the House in former times, and my action in the present Mar case as similar proof at present. I reserve the former instance for a later letter; but with respect to the Mar case, the question raised by Lord Kellie's claim is one of old contention, debated even before the Union, between the adherents of two schools, the orthodox and what I must be pardoned for styling the heterodox in Scottish law, and which, when brought before the House of Lords in the Cassillis and Sutherland claims of last century, became complicated (as I may remind the reader) by the adoption by the House of the heterodox doctrine, and its formulation into a code as a rule for their guidance in all cases where the contending principles should come into competition. I merely ask once more the question (and it is not the last time I shall have to ask it), Which doctrine, the heterodox or private rule, handed down by tradition in the House of Lords, but which has no legislative authority, or the orthodox doctrine and standing law of Scotland, protected as it is by the provisions of the Treaty of Union, is to prevail? My quarrel, therefore, using the word in its old sense, is not with the House of Lords as a body, or with this or that Committee for Privileges, nor with the noble and learned Lords who have advised the House on the present or on former occasions, but with a tradition, a system, which rolls on like the car of Juggernaut, and once set in motion may crush others besides Lord Mar, and even those who have given it impulse, under its remorseless wheels. Specially, then, I disclaim any disrespect either to the House of Lords, or to the noble and learned Lords, Lord Chelmsford and Lord Cairns, and the noble Chairman of Committees, the Earl of Redesdale, who advised the Committee for Privileges on Lord Kellie's claim. In the matter of the Montrose claim referred to by Lord Kellie, I acknowledged in the most explicit terms, in the Address to Her Majesty from which he quotes, my confidence in the personal integrity of the noble and learned Lords who advised the Committee on that occasion. In fine, I deprecate the word "contempt." It is impossible to entertain contempt for anything or any one where the imputation of baseness or

moral turpitude does not apply; and I do not reckon error, into which any one may fall, or prejudice, to which the noblest intellects and purest hearts may be liable, under that term. For "contempt" I would suggest the substitution of "disregard" or "dissent," but in this sense only, that I regard opinions of noble and learned Lords which proceed on manifest supersession of law and overruling of the final judgments of a sovereign tribunal, as tested not by the traditional doctrines of the House of Lords, but by the law of Scotland, by the extent to which the noble and learned Lords together have regarded that law and those judgments,—and this is not through any blind confidence in my own judgment, but in deference to that law of the land to which I am bound, as a loyal subject and good citizen, to yield paramount obedience.

I shall now, I think, be readily understood when I repeat in public what I have invariably maintained in private, that I consider all who have pronounced or protested against Lord Mar in this unfortunate business to have been actuated throughout, as might be expected from their known character, by perfect honesty and good faith, believing, on grounds which must to themselves have appeared satisfactory, that they have been working justice, while they have been, in fact, reimposing and vindicating injustice and oppression. The proverb is true in this as in many other cases, "The fathers have eaten sour grapes, and the children's teeth are set on edge." This acknowledgment excludes *per se* any possible opening for the imputation of personal disrespect on my own part; and I am entitled, in a spirit of reciprocal candour, to credit, when I insist that, in protesting on behalf of Lord Mar, and vindicating that Protest in these present pages, my remonstrance is on behalf of the entire body of the Scottish Peerage, of which I have the honour to be a member, and of the people of Scotland generally, as each and all interested in the maintenance of their national law inviolate. For the danger is great that, if the Resolution of the House of Lords in affirmation of Lord Kellie's right be upheld—and it has recently been affirmed in the House of Lords that it must be upheld, as being irreversible, whether right or wrong,—the rule of 1762 and 1771, subversive of the Scottish law of succession, will be tied round the neck of the peers of Scotland with tenfold compression;

and no one can tell how far the innovation may be extended. The reader may perhaps have noticed Lord Kellie's triumphal assertion that the House of Lords has power to overrule the final decisions of the Court of Session, pronounced before the Union—that very power, or rather assumption of power, which I denounced in my first Protest. “Proximus ardet Ucalegon,”—our whole legal polity may soon be in a blaze. I should have contended, let me conclude, for Lord Kellie's interest, had he been the aggrieved party, with as much earnestness as I now do for Lord Mar,—but this on a principle very different from partisanship.

Such being my sentiments, I need not say that I shall utter no word that can aggravate misunderstanding or unreasonably irritate: my wish is to conciliate, to convince by dispassionate proof and expostulation. I have not hitherto uttered one word calculated to degrade the question from the abstract and serene atmosphere of legal and constitutional discussion.

SECTION IV.

Conditions of my Reply.

It remains for me, as the party challenged, to notify the conditions under which I consent to meet Lord Kellie in this public manner.

1. In the first place, I can admit of no derogation from the sacred privilege of protest. Lord Kellie appears to me to under-estimate its nature and importance when he treats my Protests as if they were a pleading before the assembled Peers, or before the Lord Clerk Register, and thus before an incompetent tribunal, of not the slightest value, futile and unavailing. A Protest at a Scotch election at Holyrood is a solemn appeal to standing law on behalf of right, against action taken by an authority in possession of power, but in violation (as asserted) of law and right, “for remeid of law,” as the formula runs, “at fitting time and place.” The right to a peerage is the right to an inheritance, and the remedy sought is not through any intervention of the peers of Scotland or of the Lord Clerk Register, nor from any action on the part of the House of Lords, which possesses no jurisdiction in such matters and becomes *functus* after tendering its “opinion” to the Crown—and an appeal to

which (were this not the case) would be to the very body which has committed itself to the opinion remonstrated against: nor does the remonstrant even look to the Sovereign for redress, the Sovereign being constitutionally precluded from resuming and exercising any jurisdiction which the Crown has, with consent of the Estates, delegated to another tribunal. On the contrary, a Protest tendered at Holyrood is addressed to the highest judicial authority of Scotland, as limited and defined by the Treaty and Act of Union, the Court of Session; and it looks forward to and provides a constitutional basis for remedial intervention from that quarter, either in the present or future generations. It is to this that my two Protests point; and the character of futility attributed to them by Lord Kellie is thus unwarranted by law or precedent. There is, in a word, no other resource than Protest when the authority appealed against is autocratic.

It will now, I think, be clear that the regular course for Lord Kellie to have adopted, would have been to lodge a Counter-protest, more or less categorical, against my own; and that the Address he has circulated among the Peers and published to the world is irregular—although I take no other than this formal exception to it, looking upon it in the same light, so far, as upon the verbal criticisms upon my Protests indulged in by certain noble Lords—with much zeal at least—at recent elections at Holyrood. Lord Saltoun protested, at the election of the 11th March 1879, against the second of my Protests in proper form, and in respect of a particular section of that Protest; and that is the regular and legal course for objection. Thus, then, the matter stands; neither Lord Kellie's Address to the Peers nor this present reply having any weight or authority in themselves, but standing as mere unauthorised glosses upon my two Protests—a text of primary importance, and inscribed *in perpetuum* on the records of the Scottish elections at Holyrood.

I submit, in fine, that my Protests have not been futile nor irrelevantly misplaced or mistimed, or a contravention of order and due respect to constituted authority; and the day will come, is already dawning, when they will bear fruit.

2. I make it, further, a condition of this my reply, that I write neither in the spirit of partisanship on behalf of

Lord Mar nor of hostility to Lord Kellie. I contemplate the questions between them from a point of view elevated above that of personal controversy. It is true that I defend Lord Mar's and deny Lord Kellie's asserted right, and that on the proximate grounds of pending justice: but my ultimate and dominant motive is, that the sanctity of the laws of Scotland and the inviolability of the Treaty of Union are bound up with the vindication of the former against the latter. All my personal and family prepossessions and prejudices go in favour of the male succession, which has been a tradition and almost a law in my house since the fourteenth century; but I cannot shut my eyes to the supremacy of the law, which determines that in the case of Mar, as of very many others, the succession is to heirs-general. If, therefore, as I gather from Lord Kellie's letter, he looks upon my Protests as somewhat "north of friendship" towards himself, I can but urge that I question his right most unwillingly, and only in deference to that rule of priority of obligation which prescribes obedience to the law of the land as the first duty of a good citizen. In a word, all I have uttered in my Protests, all that I shall plead in these letters in reply to Lord Kellie, has been, and will still be, "In Defence"—my shield the law, and my sword the passionless word of truth.

3. Lastly, as the question between Lord Kellie and myself is not waged in any court of law, but stands on the footing rather of a tournament of chivalry between honourable men, I may point out that my acceptance of the combat imposes something like a corresponding obligation on my challenger; to wit, that if the verdict of the public he has appealed to be pronounced against him, he shall accept the issue of the field by admitting the right of the heir-general to the original and only Earldom of Mar, and shall do his utmost, along with his friends, to remove any impediment to the full recognition of that right. I do not submit this as a condition, but as a suggestion which Astræa might voice from those skies to which the collapse of the Golden Age of unclouded justice induced her retreat. There is a heroism of self-abnegation in the interest of right to which no human law obliges us, and for resilience from which no human tongue can blame us, but which in its exercise equals man with the immortals. And I pay no mean

compliment to Lord Kellie, when I add that such action as I have indicated would not be much to expect from the chief of the loyal and chivalrous house of Erskine.

This first and introductory letter ended, I propose, in the first instance, in the ensuing series, to establish by proof the principles appealed to in my Protests, and which lie at the root of my whole argument and contention—principles to which, it will appear, the House of Lords and all others concerned are bound to pay implicit deference. I shall then take up the history of the Earldom of Mar, and show how those principles illustrate and explain every successive incident—unintelligible otherwise—in the devolution of the Earldom from the fourteenth century to the present day; and how the views advanced, point after point, by Lord Kellie, and the noble and learned Lords who advised the Committee for Privileges in 1875 in interpreting these incidents, are irreconcilable with the principles in question. It will appear in the progress of the narrative that the fundamental point under discussion betwixt the respective parties has been the subject (as already insisted upon) of full investigation and final and irreversible judgment by the Supreme Civil Court of Scotland, to the effect of precluding the House of Lords from advising the Sovereign upon any other lines, and towards any other conclusion, than that in favour of Lord Mar and against Lord Kellie. The effect of this probation will be to vindicate my two Protests as accurate in point of fact, and well-grounded in point of law, while valid in every respect as a legal and constitutional remonstrance formally executed, and available—in association with the numerous independent protests by other Scottish Peers—towards “remeid of law” in future times, should right still remain unrecognised and wrong unredressed during the interim. Condescending (in Scottish phrase) on more minute particulars, the second letter of the series will be devoted to the establishment of the principles referred to, the backbone of my argument; the third will deal with the history of the Earldom till the year 1435, when the right of the Erskines emerged and became established (legally, according to the judgment of

1626) in the person of Sir Robert Erskine, Earl of Mar and Garioch; the fourth, with the *interregnum* from 1435-1457 to 1565, during which that right was at first denied, and ultimately and illegally crushed down; the fifth, from the restoration by Queen Mary, *per modum justitiæ*—partially, so far as it was in the Queen's power, of the fiefs, but wholly of the earldom,—in 1565, unto its subsequent ratification by Parliament; and the sixth, with the processes before the Court of Session, beginning in 1593 and terminating in 1635, by which the Earls of Mar recovered the remainder of their inheritance. I shall then, in the seventh letter, take up Lord Kellie's special challenge on the subject of the Decreet of Ranking and the Union Roll, and in which the Earldom of Mar holds a precedence irreconcilable with the theory of a new creation in 1565; and, after disposing of that interesting question, branching out as it does far beyond the interests of an individual dignity, my eighth letter will trace the fortunes of the House of Mar through a period of attainder, yet not devoid of evidence bearing on the legal question of the succession to the dignity, lasting from 1715 to 1824, when that attainder was reversed, and the dignity restored *per modum gratiæ* in the person of the lineal descendant and representative of the attainted Earl through his daughter, in which character (*pace* the noble and learned advisers of the Committee for Privileges of 1875) the restoration took place. The question having been started as to the right of succession after the death of the late Earl of Mar in 1866, I shall review in letter ninth the Resolution and Report arrived at by the House of Lords in 1875, in favour of Lord Kellie's right to an Earldom of Mar, not the ancient Earldom, but one inferred, apart from any charter or direct evidence, to have been created in 1565, and this in connection with the views of noble and learned Lords upon which that Resolution and Report proceeded: and letter tenth will determine the questions, by what right did the heir-general assume the title of Earl of Mar, and whether he was or was not a claimant of the original Earldom at the bar of the House of Lords while opposing Lord Kellie's claim to the Earldom of 1565. The eleventh letter will bring us to the Order issued by the House of Lords in the same breath with their approval of the Resolution of the Committee for Privileges, directing the Lord Clerk Register of Scotland to

receive Lord Kellie's vote as Earl of Mar in the place of the ancient Earldom as standing in the Union Roll, and will exhibit the consequences of that Order in the rejection of Lord Mar's vote at the election of a Scottish Representative Peer in 1876, in violation of his rightful privilege as a Peer of Scotland, the refusal of his Protest on behalf of his right, and the acceptance of the vote of Lord Kellie as Earl of Mar in his place. Two subsequent letters, the twelfth and thirteenth in the series, will exhibit a remarkable change of views which passed over the House of Lords subsequently to the election of 1876, as illustrated by the debate on a Resolution moved by the Duke of Buccleuch for the purpose of amending the Order above referred to by an alteration upon the Union Roll, and by the report of a Select Committee appointed to consider and report upon the question; while letter fourteenth will be devoted to an Act of Parliament passed in 1847, recourse to which was recommended by the Select Committee as a means by which "Mr. Goodeve Erskine" may obtain a consideration of his asserted rights by the House of Lords. All these discussions have a scope far wider than that of the Earldom of Mar in particular; and I shall endeavour to estimate the results of the debate and the report of 1877, some as favourable, and others as unfavourable to Lord Mar and the interests of the Scottish Peerage generally, in my fifteenth letter; while the latest incidents in the controversy, including the rescission of the obnoxious Order of 1875 by the House of Lords in 1880, will be the subject of the sixteenth. I shall deal in the seventeenth with the more serious charges of a personal nature against myself, already noticed as in Lord Kellie's Address; and shall conclude the series by an inquiry what remedy should be resorted to, for the removal of the impediments at present debarring Lord Mar from the exercise of his right of suffrage at Holyrood, and for the more satisfactory determination of claims to Scottish dignities in the future, vindicating the necessity of such a resort by an exhibition of the perils to which the peers of Scotland, and indeed Her Majesty's Scottish subjects generally, are exposed by the present style of dealing with claims to Scottish dignities in the House of Lords.

I shall subjoin in an Appendix, among other *pièces justificatives*, a series of reports of the leading cases bearing upon the

law of succession to Scottish dignities, which have been prosecuted in Scotland and England since the middle of the seventeenth century. It is impossible fully to appreciate the innovations upon Scottish law adopted by the House of Lords in 1762 and 1771, without a summary and critical survey of these cases, which could not however be exhibited, consistently with due proportion, within the limits of these letters.¹

I do not think, my dear Lord Glasgow, that you will require an apology from me for addressing these letters to you. I am not upon my defence before the peers of Scotland; but in addressing yourself in your official capacity, I can plead for law and justice on behalf of a brother Peer without derogation.

I am the rather inclined to address these letters to you as the nephew of our late venerable and learned friend Mr. Alexander Sinclair, who took so deep an interest in the vindication of the rights of the heir-general of Mar; and from whose brief but pregnant memoranda, circulated among his friends from time to time, up to the date of his death in 1877, I have myself repeatedly profited. The successive deaths of Mr. Sinclair and Mr. Maidment, each at a period of life prolonged, although with the enjoyment of unclouded memory and intellect, beyond the ordinary term of mortality, have deprived Lord Mar of assistance and support for which nothing can now compensate.

I shall drop the personal address in the letters that follow the present, but shall probably resume it when taking leave at the conclusion.

¹ [This summary of cases regarding Scottish dignities has not been discovered, at least in the form intended for this Appendix, among the author's papers.]

LETTER II.

ESTABLISHMENT OF GENERAL PRINCIPLES.

THE field being thus far cleared, the first thing to be done is to ascertain the weapons by which the controversy between Lord Kellie and myself is to be decided. I have appealed to certain principles, directly or indirectly, in my two Protests, as the ground of remonstrance. Lord Kellie meets this appeal and my entire remonstrance by the assertion that the subject-matter of the Protests has been settled for ever by the final and irreversible decision of a supreme tribunal, the House of Lords, in accordance with the rule laid down in the Cassillis case in 1762, and "conclusively established by repeated judgments of the House" since, affirming the presumption in favour of heirs-male as against heirs-general. There is nothing novel in this assertion, nothing surprising; it will appear convincing to ninety-nine men out of a hundred; it is the expression of a popular delusion, in which the House of Lords shares as much as any. But the assertion raises at once a direct issue under the three following heads:—1. Are the principles I appeal to, the law of the land, and thus of dominant authority and binding on the House of Lords, or not? 2. If they are, has the House observed them in advising the Sovereign in favour of Lord Kellie's claim to an Earldom of Mar created in 1565? 3. If the House has not observed them, but advised the Queen on totally different principles, or, strictly speaking, on a mere theory, in contradiction to them, are not my Protests justified? And what, in such case, becomes of the Resolution in favour of Lord Kellie, of the order to the Lord Clerk Register, and of all that has since taken place in disallowance of Lord Mar's right? The determination upon the first of these three heads must determine that upon the two latter. It will be demonstrated, if I may thus far anticipate, that the principles which underlie my Protests are part and parcel of the law of the land and of

dominant authority; that the private rules of the House of Lords, and the rule of 1762 in particular, are found, when tested by those principles, wanting in the balance; and, such being the case, that my Protests are justified, and Lord Mar is now, as I have affirmed, legally in possession of the one and only Earldom of Mar on the Union Roll, and alone entitled to vote and act otherwise as Earl of Mar—the resolution of the House of Lords in favour of Lord Kellie, and the order to the Lord Clerk Register founded upon it, notwithstanding.

What then are the principles which I have appealed to or taken for granted throughout my Protests, and by which this important issue must be determined? They will emerge, with their attendant proofs, in the form of answers to the following questions:—

I. By what law is the House of Lords bound (even by its own reiterated acknowledgments, independently of remoter obligation) to regulate its Reports to the Crown on claims to Scottish dignities?

II. What are the general and constitutional sanctions of the law of Scotland as binding on the House of Lords, on the Imperial Parliament, and on the Sovereign?

III. Under what authority and by what allowance does the House of Lords intervene in claims to Scottish, as distinguished from English dignities; and what are the limitations on that intervention?

IV. What, in particular, is the law and presumption of Scotland which governs the succession to dignities, where no charter, or patent, or other indication exists to testify to the limitations in the original ruling grant?

V. What, in particular, is the doctrine and rule upon which the House of Lords is in the habit of advising the Crown upon claims to Scottish dignities under the conditions aforesaid? And when, and how, and by what authority was that doctrine and rule first laid down? And lastly,

VI. If the law of Scotland, sanctioned as aforesaid, and the private rules or doctrine of the House of Lords, come into collision, either on the question of succession or any other controverted point, which is binding on the recognition alike of Sovereign and subject; and, in the result, which is to prevail?

I shall give the answers to these questions, establishing the principles appealed to, as far as possible in the *ipsissima verba* of recognised authorities; while I shall refer the reader to such sources of information as may enable him to go deeper into the matter at any point if he shall wish to do so. The principles themselves are by no means difficult of apprehension, and, once mastered, the reader will find himself on firm ground, and with an intelligent grasp of the subject, when point after point of controversy emerges in the history of the vicissitudes of the Earldom of Mar, which I shall lay before him in the ensuing Letter.

I must preface this exposition by laying stress on a maxim of primary importance and universal application, and which I cannot express more forcibly than in the words of our greatest Scottish constitutional authority, Lord Stair. It is, he says,¹ a "great and common interest that men's rights ought to be determined, not alone by the laws standing when the determination is, but by the laws that were standing when the rights were acquired or the deeds done, although thereafter these laws were abrogated." This maxim has peculiar weight in its application to cases of Scottish dignities, all of which were created before the Union, and which are governed in their descent and other incidents by the laws then existing, laws which are protected by the Treaty of Union, laws which cannot be modified or superseded even by the authority of Parliament in such manner as to effect such vested rights retrospectively, laws which indeed, as matter of fact, subsist unmodified and in full force at the present day, although the private and unauthorised rules of the House of Lords have tended to obscure our perception of them. It has been made a subject, half of reproach, half of merriment, against me by a brother Peer at Holyrood, that I must, judging by the terms of my protestation, have existed two centuries ago, before the Union—an anachronism in the present century of (if I understand my noble critic's view correctly) abject submission of the Scottish Peerage to the autocracy of the House of Lords. I take this as a compliment. Clio sitting as assessor with Themis does not thus testify; and it will be a sad day for humanity when men, whose privilege is to look before and after, abjure their birthright and concen-

¹ Stair's Institutions, iv. i. 61.

trate their gaze and action solely on the present. Lord Stair's maxim is broader-based: it reposes on what I am accustomed to style the great moral law of priority of obligation. The advantage of looking down the stream instead of up, and the duty of doing so, is great, is imperative in all matters of historical and legal criticism; that duty is especially imperative in dealing with the present subject of Scottish dignities. It is only thus that, standing on an elevation in the background of time, we can escape from the bewildering distraction of familiar prejudice and modern pseudo-precedent, and take note of the conditions of law and jurisdiction as evolved and binding at each successive epoch of history. It is only thus that a Committee for Privileges, or a more legitimate tribunal, can become qualified to apply, in Lord Stair's words, "the laws that were standing when the rights were acquired or the deeds done," to the determination of questions of supposed difficulty, such as have been started in opposition to the right of the heir-general in the present case of Mar.

SECTION I.

By what law is the House of Lords bound (even by its own reiterated acknowledgments, independently of remoter obligation) to regulate its Reports to the Crown on claims to Scottish dignities?

The leading authorities in the House of Lords have repeatedly acknowledged that the House is bound to report on claims to Scottish dignities in accordance with the law of Scotland. In an opinion given by Lord Mansfield (when Attorney-General, and known as the Hon. William Murray) on a claim to the barony of Ross of Halkhead, 31st March 1755, he writes, "I am clear that in the case of a Scotch Peerage the House of Lords ought and will judge by the rules of the laws of Scotland, if they can be discovered." "This case," said Lord Marchmont, in his speech on the Cassillis claim, 22d January 1762, "must certainly be determined upon the general principles of the law of the country where the case itself took its rise," viz. Scotland. Lord Mansfield's opinion *ut supra* was given as a counsel, and Lord Marchmont warned the House in the Cassillis claim

against the overruling of the law and presumption of Scotland which was then introduced. But Lord Mansfield testified to the same effect when, in the *Cassillis* case, he said, in advising the Committee for Privileges, "I speak with great diffidence, but I can see no argument that can be urged from the law of Scotland to oppose the construction of the charter"—one under discussion—"in the way I have laid down." And Lord Loughborough (otherwise spoken of as Earl of Rosslyn) similarly said on the *Moray* case, 29th April 1793, "This case may be said to resolve itself into a question of prescription, a doctrine of great weight in the law of Scotland, by which law our decisions should be regulated."¹ It is clear from these citations that the noble and learned Lords who advised the House of Lords, and under whose influence the innovations upon Scottish law which I have specified in the preceding letter were either initiated or established, fully recognised the abstract principle that the law of Scotland is the authority dominant on the House in Scottish questions. The same principle has been repeatedly acknowledged in Committees for Privileges during the present century. I found here on the personal acknowledgments of noble Lords who have advised the House of Lords in Committees for Privilege, as unexceptionable testimony. That the law of Scotland is binding on the House as matter of constitutional obligation, independently of any acknowledgment to that effect on their part, will appear through what will follow.

I may here observe, that errors have been committed through a hasty assumption that the laws and usages of Scotland and those of England in regard to dignities were originally identical. General analogy and points of correspondence undoubtedly existed; but the feudal system in England was founded upon conquest, and bore the stamp of it in the law of dignities; whereas in Scotland it was introduced in the process of peaceful civilisation, and underwent material modification from the pre-existing Celtic customs and polity, submitting itself moreover from the first to the supremacy of law, however imperfectly developed or enforced, in repudiation of the central

¹ For further proofs see my Report of *Montrose Claim*, p. 340, note (a), and p. LXXI for the remarkable words of the late Lord Chancellor Eldon on the great principle here inculcated, alike applicable to advice tendered to the Committee for Privileges and to jurisdiction exercised by the House of Lords in Appeals from the Court of Session.

absolutism of the Crown. The common law held its ground in Scotland from first to last as against the feudal polity.

SECTION II.

What are the general and constitutional sanctions of the law of Scotland as binding on the House of Lords, on the Imperial Parliament, and on the Sovereign?

These sanctions are found in the Treaty and Act of Union, and stamp the law of Scotland with inviolability, unless in so far as that law has been modified by the authority of Parliament within the conditions of the Treaty.

The law of Scotland includes the statutory and customary laws of the ancient Kingdom, distinguished in the Treaty and Act of Union as North Britain, and the expositions of that law laid down in the final decreets or judgments of the Lords of Council and Session, the Senators of the College of Justice, commonly called the Court of Session, or the Supreme Civil Court.

The general sanctions of the Scottish law as at present binding, and of the constitutional rights of Scottish subjects, are expressed in the Eighteenth Article of the Treaty of Union, by which it is provided "that all other laws" (*i.e.* other than laws concerning regulations of trade, commerce, etc.) "in use within the Kingdom of Scotland do, after the Union, and notwithstanding thereof, remain in the same force as before (except such as are contrary to or inconsistent with this Treaty), but alterable by the Parliament of Great Britain, with this difference betwixt the laws concerning public right, policy, and civil government, and those that concern private right, that the laws which concern public right, policy, and civil government may be made the same throughout the whole United Kingdom, but that no alteration be made in the laws which concern private right, except for evident utility of the subjects within Scotland." The exception does not, of course, apply retrospectively to the laws and rights affecting Scottish dignities as originating before the Union, and which fall to be governed by the laws as existing at the time when the Union between the two kingdoms was completed.

In accordance with the general sanctions in question, Sir

William Blackstone affirms¹ "that the municipal" or civil "laws of Scotland are ordained," *i.e.* by the Articles and Act of Union, "to be still observed in that part of the island, unless altered by Parliament; and as the Parliament has not thought proper, except in a few instances, to alter them, they still, with regard to the particulars unaltered, continue in full force." These words are still applicable.

The general sanction of the expositions of the law laid down in the final decreets of the Court of Session, and of the particular rights grounded upon such expositions, is expressed, partly in the preceding or Eighteenth, partly in the Nineteenth Article of the Treaty of Union, by which it is stipulated "that the Court of Session, or College of Justice, do after the Union, and notwithstanding thereof, remain in all time coming within Scotland, as it is now constituted by the laws of that kingdom, and with the same authority and privileges as before the Union, subject nevertheless," it is added, "to such regulations for the better administration of justice as shall be made by the Parliament of Great Britain," but with no other limitation upon the original authority.

I may state at once here that the "authority and privileges" in question of the Court of Session have never been the subject of any such "regulations" as these here spoken of. Particular laws have been abrogated or modified; but the "authority and privileges" of the Court as existing at the time of the Union have never been annulled or abridged in the only manner competent under the solemn Treaty in question, that is, by the Parliament of Great Britain.

It is further expressly provided by the Nineteenth Article of the Treaty "that no causes in Scotland be cognoscible by the Court of Chancery, Queen's Bench, Common Pleas, or any other Courts in Westminster Hall; and that the said Court, or any other of the like nature after the Union, shall have no power to cognosce, review, or alter the acts or sentences of the judicatures within Scotland, or stop the execution of the same." I shall revert to this last clause presently. The letter and spirit of this provision was to preserve the administration of justice inviolate from any influence arising from review by a foreign judicature, necessarily unfamiliar, except at second-

¹ Blackstone's Commentaries, vol. ii. p. 88.

hand, with Scottish law. Any assumption of such jurisdiction by the House of Lords, such as actually took place, never occurred as possible to the Commissioners who carried through the Treaty of Union, or to the Parliament of the respective kingdoms which acquiesced in it.

The effect of the Eighteenth Article of the Treaty, protective of the laws of Scotland affecting private right, can need no elucidation ; but it may be asked what was that "authority," and what were those "privileges" which the Court of Session possessed as "constituted by the law" of Scotland before the Union, and which, by the Nineteenth Article, the Court is to retain "in all time coming," till otherwise determined by legislation of the Imperial Parliament under the form prescribed. The weight and binding character of the expositions of law laid down in the final decreets or judgments of the Court of Session, and the inviolability of the rights created by them at the present day, depend on a due appreciation of the "authority and privileges" of the Court as existing when the Union took place, and this necessitates a brief historical statement, which will not, I hope, prove uninteresting. It will rectify many misapprehensions current in high places at the present day.

The Court of Session was constituted by statute of James v. and his Parliament, 17th May 1532, "for the doing and administracioun of justice in all civile actions," under which, as I shall presently show, dignities were included; and it was decreed by this Act that their "processes, sentences, and decretis sall have the samin (same) strenth, force, and effect as the decretis of the Lordis of Sessioun had in all tymes bigane," that is, as by the previous Act of James II., 6th March 1457-8, that such causes as came before them "sal be utterly decidyt and determyt be (by) thaim but (without) ony remeide of appellatione to the King or to the Parliament."¹ This and the other privileges of the Court of Session were confirmed by all the subsequent Kings and Queens of Scotland till the accession of James VII. in 1685. The Scottish Kings, by the constitution of the Court of Session, absolutely divested themselves, without reservation, of the prerogative of administering justice in all civil causes. This privilege of "final" judgment without appeal must not, I need hardly add, be looked upon with English, but

¹ Acts of the Parliaments of Scotland, Record Edition, ii. pp. 335, 48.

with Scottish and European eyes. The various departments of law were consolidated in one Court in Scotland, differently from England, where they were apportioned out to different ones. The Court of Session, in particular, had what was called its "nobile officium," or cognisance superior to and above its ordinary jurisdiction, derived from the Roman law. "Every sovereign court," observes Lord Stair,¹ "must have this power," the *nobile officium*, "unless there be a distinct court for equity from that for law, as it is in England. . . . Other nations do not divide the jurisdiction of their courts, but supply the cases of equity and conscience by the noble office of their supreme ordinary courts, as we do."

The conditions of a final decret or judgment were, and are, that the parties to a cause shall be present and meet in "litis-contestatio," or legal conflict, or, in other words, *in foro contradictorio* or *contentioso*, and that the decret or judgment should be what is technically called "extracted." Such decreets could not, as above shown, be appealed from to King or Parliament.

The supreme authority and final jurisdiction were exercised by the Court of Session without curtailment or modification from 1532 till the Revolution in 1688. An appeal to Parliament against a final decret was made for the first time under the rebel government of 1649, after the execution of Charles I., and a similar appeal was attempted by certain advocates of Edinburgh in 1674. In speaking of this latter appeal, Lord Stair states that "the Parliament never sustained an appeal from the Lords" of Session, "neither was there ever any reduction of their decreets, except as to the title of honour betwixt Glencairn and Eglinton, which, with the Parliament"—*i.e.* the Parliament which reduced or annulled the decret of the Court during the usurpation, as aforesaid—"is" (as Lord Stair continues) "simply annulled and rescinded," *i.e.* subsequently to the Restoration, "without any reservation;" while I may add that Parliament, subsequently to the Restoration, sustained and enforced the decret of the Court, which had been in favour of Glencairn, on protestation by that Earl, 9th January 1667. The appeal in 1674 was unavailing, and the advocates were punished by banishment from Edinburgh. There can be no

¹ Stair's Institutions, iv. iii. 1.

doubt that the appeal was constitutionally incompetent, and the punishment just. The advocates, who were men of the younger generation, ultimately made their submission.

Matters remained in this state, the Court sustaining and sustained in its final authority, till the Revolution, when an intervention took place which I must notice, inasmuch as it has been represented as the origin and sanction, or, at least, pretext, for the practice of appeals from the decisions of the Court of Session to the House of Lords as a Court of Review, subsequently to the Union—a representation wholly untenable, inasmuch as the intervention in question ceased to operate at the Union, and nothing was substituted in its place.

By the statute entitled the Claim of Right passed by the Convention of Estates in 1689, the banishment of the advocates in 1674 was declared to have been “a grievance,” and the Convention affirmed it to be “the right and privilege of the subject to protest for remeid of law to the King and Parliament against sentences pronounced by the Lords of Session, provided the samin do not stop execution of the sentences.” But the statute determined nothing as to the time and occasion of protest, and all that Lord Stair can say, commenting on the enactment, is that “no doubt the King and Estates will in due time determine.” Nothing, however, was done; the statute remained, so far, a mere inchoate and barren provision for subsequent legislation, never followed up. The right of protestation affirmed was, moreover, not to one, but to the Three Estates of Parliament, which all sat and voted in one chamber, neither of the three Estates having any jurisdiction apart from the other two—the Scottish being thus totally different in constitution and form from the English and British Parliament, so that no argument can be inferred from the one to the other assembly—a fact little known or constantly overlooked by those who have endeavoured to connect the protestation for remeid of law under the Claim of Right with the jurisdiction assumed by the House of Lords as a Court of Appeal from the Court of Session after the Union. The truth is, that when the Scottish Parliament, a triple-headed Geryon, and the only tribunal to which appeals were declared to be competent under the Claim of Right, ceased to exist, and was replaced, as that of England was, by the new Parliament of

Great Britain, the right of protestation expired *ex necessitate* along with it. It would have been competent for the Commissioners for carrying through the Union, to provide for a transfer of the system of protestation and relative judicature under the Claim of Right—not, indeed, to the new Parliament, for that would have been impossible, but to the House of Lords, or to appoint a special appellate court under powers to be defined by the Treaty; but nothing of the sort was done; and it must be presumed that nothing was intended to be done; while, if aught was intended and not provided for and done, the answer is manifest, “*Quod solverunt non fecerunt.*” Such being the case, the Court of Session re-entered *de jure* and *de facto*, on the 1st May 1707, into full possession of all its powers, authority, and privileges, as enjoyed since 1532, and before the Claim of Right in 1689; and these, as I stated at the beginning, have never been annulled or abridged by lawful authority since the signature of the Treaty, except in so far as such “regulations for the better administration of justice” as are provided for in the Nineteenth Article of the Treaty of Union, have been effected from time to time by Act of the Parliament of Great Britain.

It is unnecessary to my purpose to extend this statement beyond the consummation of the Union. I have exhibited in detail, in a special paper, in my Report of the Montrose claim, the full proof of the preceding historical sketch; and it may there be seen how the House of Lords assumed the office of a Court of Appeal from the decisions of the Court of Session without any legislative warrant, and, in fact, by an act of usurpation, in direct contravention of the Treaty of Union, almost its first act being to stop the execution of the sentences of the Court of Session in cases of appeal, by an Order, 19th April 1709, equally *ultra vires* with its main act of aggression, that “the sentence or decret so appealed against from such time ought not to be carried into execution by any process whatever;” an excess of *outrévidence* which contrasts unfavourably with the modesty and reserve of the Claim of Right, although a statute of Parliament in the full flush of triumph and power. The assumption in question of the office of an Appeal Court, however irregular, has, upon the whole, given satisfaction to Scotland; but I am bound to point out—and I

must call upon my readers to take notice—that the fact of its questionable and unconstitutional origin transfers the *prima facie* presumption of justice in argument to the credit of the Supreme Court of Scottish law upon every point on which the authority of the Court and the finality of its judgment have been impugned or tacitly set aside by the legal advisers of the House of Lords when reporting to the Sovereign on Scottish Peerage claims. I may add here, in order to preclude Lord Kellie's objection of amateurship, that the paper referred to *supra* was written, as was indeed my entire Report of the Montrose claim, under the correction of my late friend Mr. Riddell, so that I may allege his high authority for what I have stated.

It is thus clear that, in strict constitutional obligation, the original jurisdiction of the Court of Session, its "authority and privileges," remain legally and constitutionally undiminished as at the first, at the present day, notwithstanding the assumption and usurpation in question in cases of appeal since the Union. It will be important to keep this in mind, on distinct grounds, in the development of the ensuing narrative.

While the jurisdiction of the Court of Session, its "authority and privileges," are thus protected by the Treaty of Union against undue interference by Parliament—and *à fortiori* from that of the House of Lords, a mere moiety of that Parliament—it is further to be noticed that its jurisdiction and independence are equally protected by statute from any usurpation on the part of the Sovereign. As already stated, the Scottish kings renounced all judicial authority in civil causes (including dignities) in favour of the Session. The only attempt made by any king of Scotland to infringe upon the privileges of the Court was by Charles II., who attempted to resume the original judicial authority of the Crown by an Act of Parliament passed on the 16th Sept. 1681, enacting that, notwithstanding former legislation, "His Sacred Majesty may by himself, or any commissioned by him, take cognizance and decision of any cases or causes he pleases." But this Act was formally repealed after the Revolution (by the Convention of Estates, 1689, c. 13), in consequence of which things returned to their original state; and, in the words of an approved author on the subject of the Courts of Scottish law, "it is now unques-

tionable law, not only that the King cannot personally exercise the judicial power in the proper courts of law, but that he cannot, without the consent of the Estates in Parliament, delegate a jurisdiction to any courts different from those which have been used and established.”¹ I shall have to revert to this hereafter in special regard to dignities.

Such, then, being the original constitution and the protective sanctions of the “authority and privileges” of the Court of Session, the fact stands out beyond all controversy that the final decreets of this Court, pronounced before the Union, or, to take the most rigid view, before the Claim of Right in 1689, were pronounced when the Court was in full enjoyment of its supreme jurisdiction, without appeal; and are thus binding upon all subsequent tribunals or commissions of inquiry as *res judicata*, fixing the law and the value of evidence upon the points determined, and securing the rights of individuals established by those judgments, beyond cavil and irreversibly. Of this character, therefore, I may remark in anticipation, are the decret in the case of Mar *contra* Elphinstone, in 1626, upon which I have founded in my first Protest; the decret in the Oliphant claim, in 1633, on which I founded specially in my second or additional Protest; and the decret in the Glencairn and Eglinton process for precedency, in 1648, referred to by Lord Stair in the passage above quoted, likewise founded upon in my first Protest, and which Lord Kellie’s reference to it in his letter will necessitate my entering into in a later page.

It stands thus established: First, That the laws of Scotland affecting private rights, and the final decreets of the Court of Session pronounced before the Union, in all civil causes, are binding, unalterable, and irreversible, except in so far as the laws referred to may have been modified by the Legislature, under the conditions prescribed in the Treaty of Union; and, secondly, That the “authority and privileges” of the Court of Session stand now as they did at the time of the Union, subject only to such “regulations for the better administration of justice” as may have been made by the Legislature; while there is no opening in the Treaty for the transference of causes from Scotland for review by any jurisdiction south of the

¹ Glassford’s Constitution and Proceedings or Scottish Courts of Law, p. 93.



Tweed. Without challenging the influence of time and circumstance on everything of human origin, the *onus* rests on any one who may presume upon the vantage-ground which the changes of time have produced to vindicate the constitutional validity of those changes, before they can base argument or take action to the detriment of those—as for example of Lord Mar—whose rights date from a period before the earliest of those changes took place, *i.e.* before the Union. Lord Stair's maxim above enforced applies here. All rights connected with the descent of Scottish dignities date from days when Scotland was still an independent kingdom, and fall to be regulated by the laws existing before Scotland ceased to be such.

I have now to touch upon a point which has been very much misunderstood by our southern neighbours.

It was questioned by Lord St. Leonards, in his speech on the Montrose claim, whether rights to dignities or precedence could possibly be included under those "civil causes" which were confided to the jurisdiction of the Court of Session, and whether such rights must not, in the nature of things, have been subject to that of the Scottish Parliament, or rather of what he and other noble and learned Lords supposed to have been the Scottish House of Lords, in ignorance that there was no House of Lords in Scotland, the peers or barons sitting as one only of the three Estates assembled in one House of Parliament. It may be necessary, perhaps, even now, to repeat that while there is no distinction in the law of Scotland between rights to dignities and rights to any other description of heritage, an imaginary distinction upon which Lord St. Leonards's scepticism based itself and which is still prevalent, the fact that dignities were included under civil causes, and thus within the cognisance, the exclusive cognisance, of the Session, is proved, not only by the simple fact that the final judgments in all such questions proceeded from the Court in question, but that when the Decreet of Ranking, determinative of the precedence of the nobility, was passed by Royal Commissioners in 1606, reservation was specially made, that any parties aggrieved as to the rank assigned to them, should "have recourse to the ordinary remeid of law be (by) reduction before the Lords of Council and Session of this present Decreet, for recovery of their own due place and rank be (by) production of mair



ancient and authentic rights nor (than) has been used in the contrair of this process;”—the Decreet nevertheless to stand “ay and while (until) the party interest and prejudgit obtain lawfully a Decreet before the said Lords of Council and Session, as said is.” In the very case of Glencairn *contra* Eglinton, Parliament itself referred one of the parties who prayed for its intervention to the Session as the competent Court, which it (Parliament) was not, this being in 1641. Practically, in a word, from the first institution of the Court of Session till the Revolution and the Union, the Court of Session figures in all cases of honours as the legal and correct tribunal; and the decisions of the Court, when pronounced, were obeyed throughout the land as final and conclusive, with not a single instance of the decision of Parliament of a Peerage claim or question of precedency. The cases of the Earldom of Morton in 1542, of the Earldom of Arran (as granted to Sir James Stewart) in 1586, of the Earldom of Angus in 1588 (as prosecuted by the King himself as claimant before the Court of Session, which decided against him), of the Earldom of Eglinton in 1613, of the Earldom of Lothian in 1631, of the Earldom of Strathearn in 1632-3, of the Lordship of Oliphant in 1633, of the Earldom of Home in 1633-6, of the Glencairn and Eglinton precedency (involving the question of the true creation of the Glencairn dignity) in 1610, 1617, and 1637-48, of the Sutherland and Erroll precedency in 1661 and 1671, of the Lordship of Coupar in 1671, of the Lothian and Roxburgh precedency in 1679, of the Earldom of Caithness in 1681, of the Lordship of Lindores in 1685, of the Lordship of Lovat in 1702, of the Crawford and Sutherland precedency in 1706, and of the Earldom of Kincardine in 1706-7, all of them decided or discussed by the Court of Session as the exclusive, ultimate, and ruling judicature in honours, amply justify the above proposition. No appeal to Parliament against the final sentences of the Court of Session was ever ventured upon in any of these cases, or indeed spoken of except in idle talk; except, as already stated, in the Eglinton and Glencairn case during the Great Rebellion in 1649. All this renders it unnecessary for me to insist on the fact that Scottish dignities were defended by no special privilege from the ordinary provisions of the common law; on the contrary, they were protected by the law from the

uncertainties and perils which so constantly beset the dignities of the sister kingdom from the intervention of the Sovereign or of Parliament in such matters, on the ground that rights to dignities were matter of privilege as distinguished from rights to other descriptions of heritage. Still less need I refute what has been occasionally advanced, that the Scottish peers having been promoted to all the privileges of the English or British peers under the Twenty-third Article of the Treaty of Union, with the exception of that of sitting in Parliament except by deputation, and of sitting on the trials of Peers, they have acquired thereby the privilege of having their right to their Peerages discussed and decided upon by the House of Lords. This would be, indeed, a very questionable privilege; but the theory is modern; it is negatived by the proofs already given; and I shall show it to be utterly fallacious by testimony which is yet to come.

Another error that I must now notice is this, and it was likewise urged by Lord St. Leonards against the Montrose claim, that if the Court of Session ever possessed jurisdiction in dignities, it lost it, and the House of Lords succeeded to it, and has exercised it as of right since the Union. This would, of course, have been in violation of the Treaty of Union: and if the maxim be sound, that "no custom can prevail against an express Act of Parliament," much less could such stand against an Act such as that based on the Treaty of Union. But the hypothesis and the assumption based upon it are absolutely without foundation.

The fact is, that the Court of Session retained and exercised its jurisdiction in dignities, under the sanction of the Treaty and Act of Union, subsequently to as before the Union. And this was recognised and acted upon by the House of Lords, both directly and indirectly, down at least to 1771.

When the Union Roll was received by the House of Lords from Scotland, and inserted in the Roll of Peers, 12th February 1708, the order for its insertion directed that it should be entered "with the salvo following, that whereas there are several Protests entered on the records of the Parliament of the part of Great Britain called Scotland, in relation to the precedency of the Peers, the said Protests shall be, and are of the same force with relation to their claim of precedency as if they

had been entered in the Roll of Peers or in the Journals of the House of Lords." All these Protests were for remeid of law through process before the Court of Session under the provisions of the Decreet of Ranking of 1606; and their insertion on the Roll of the Peers of the United Kingdom was in clear recognition by the House of Lords of the jurisdiction of the Court, alike under its statutory constitution and under the reference in the Decree of Ranking—a recognition prescribed, in fact, by the treaty just concluded. Nothing was ever more clearly avowed and acted upon than this recognition. One long series of these Protests stood on behalf of the Earls of Sutherland, claiming precedence over the Earls of Crawford and all the Earls of Scotland; the cause had been before the Court of Session in 1706, and determined provisionally in favour of Crawford, the Earl actually in possession of the precedence under the Decreet of Ranking; after which the process slept till 1746, when it was resuscitated by what was called a "Summons of Wakening" issued by Sutherland, the Court acting without hesitation on its ancient jurisdiction. Sutherland did not follow up the process; but when the claim to the Earldom of Sutherland was brought before the House of Lords in 1771, the House ordered that due notice should be given to the two Earls as interested in opposition, viz., through the Protests for remeid of law, and the pending but slumbering process in the Court of Session, the validity of which and the competency of the Court being thus fully recognised by the House. Lord Mansfield, indeed, in 1762 and 1771, while affirming the competency of the Court of Session in dignities before the Union (which Lord St. Leonards might have remarked in 1853), asserted that the House possessed the jurisdiction subsequently thereto; but this, a purely gratuitous and utterly inaccurate assertion, vindicable neither on Scottish nor English principles, as I shall hereafter show, was merely in his speeches, advising the respective Committees, which speeches have no claim to be considered judgments or as expressing more than his personal opinions. Other noble and learned Lords since Lord Mansfield have repeatedly held the same language, but under the same merely personal responsibility. Such *dicta* fall to be tested by the *origines* of truth, and stand or fall by that criterion. The House of Lords, it may be said,

as has often been said of Parliament collectively, is wiser and more just than the wisest and most just of its individual members; and the recognitions in 1708 and 1771, as well as another marked recognition immediately to be mentioned, counter-balance such rash utterances as those referred to. The House of Lords, as I shall show in due time, has exhibited recently the same superior wisdom and justice on a point of vital importance as affecting Peerage claims generally and the case of Mar in particular, although it has emphasised the error with respect to jurisdiction which I am here dealing with.

But the most direct proof of the independent jurisdiction of the Court of Session in dignities, and of the recognition of the competency of that Court by the House of Lords, is afforded by the final judgment of the Court, in the case of the competing claim to the Lordship of Lovat as between the heir-general, Hugh Mackenzie Fraser, and the heir-male collateral, Simon Fraser, in 1730. Simon Lord Lovat, the successful competitor, was arraigned, tried by the House of Lords, condemned, attainted, and executed as a Peer, in virtue exclusively of this judgment of the Court of Session. No appeal to the superior authority or judgment of the House of Lords was even spoken of by the unsuccessful competitor, who had been in legal possession of the title and honour since 1702, in virtue of a decret of the Court, proceeding on the legal presumption at common law, but in absence of the heir-male, and which thus was not final, although valid during the interim. The doctrine of the indefeasibility of peerage, peculiar to England and laid down by Lord Erskine in modern times, was, I repeat, and is unknown in Scotland. The restoration of the Lordship of Lovat against attainder in 1854 equally proceeded upon the solidity of the judgment of the Court of Session in favour of Simon Fraser, Lord Lovat, in 1730.

The preceding instances show that the jurisdiction of the Court of Session in dignities, alike through its original constitution as in the case of Lovat, or proximately through the provisions of the Decreet of Ranking, as in the case of the Sutherland and Crawford precedency, has been exercised in the ordinary course of law subsequently to the Union, and in virtue of the protective sanctions of the Treaty of Union, and subsists at the present day precisely as it existed before the

Union, independently altogether of any necessity for recourse to the Sovereign, and *à fortiori* to the House of Lords, as arbiter in honours.

All this had apparently faded from the recollection of the House of Lords when Lord St. Leonards delivered his memorable speech upon the Montrose claim in 1853.

But while the House of Lords recognised the jurisdiction of the Court of Session in dignities both directly and indirectly on the occasions specified, and never in so many words asserted a jurisdiction of its own in opposition to it, the House adopted, almost from the hour of the Union, a policy of engrossing the jurisdiction over Scottish dignities as much as possible into its own body, and assumed a control over the elections of the Representative Peers at Holyrood, for which, as far as I see, there was no sufficient warrant. I shall notice the result of this interference with the elections first, and then the development of the doctrine that the House of Lords is the proper Court for the decision of Scottish Peerage claims, and the resistance offered in Scotland to that doctrine.

The provisions of the Treaty of Union, that the Scottish Peers shall be represented in the Parliament of the United Kingdom, or of Britain, by sixteen delegates, are familiar to every one. In the two Acts prescribing the mode and form of the elections, there is not the slightest power given to the House of Lords to interfere in the matter of those elections. The peers of Scotland are to elect their representatives "freely," and the Lord Clerk Register, or the two principal Clerks of Session in his absence, are to exact the prescribed oaths, receive the votes, and return the list of the sixteen elected Peers, duly attested, to the Clerk of the Privy Council of Scotland, or by the later Act, to the Court of Chancery, for transmission to the House of Lords.

Under these circumstances, if questions arose upon the elections, whether as regarded the process of election or the rights under which individuals claimed to vote, the legal tribunal for reference and decision was necessarily the Court of Session, more especially upon the second and more important class of questions likely to arise on such occasions—the question of the right to sit as a peer in Parliament having invariably been subject to the judgment of the Session, and the Session

being secured by the Treaty of Union in its own authority and privilege, subsequently to the Union, which it had possessed before the Union. Many matters of detail were left unsettled; many severed arteries were left untied up and bleeding, at the the time of the Union, as, for instance, in the question of the provision for appeals under the Claim of Right; and the neglect to specify in whom the jurisdiction in case of disputed elections should reside, left it open for the House of Lords to step in and appropriate it to itself. The opportunity soon occurred. After the first election, held at Holyrood on the 17th January 1708, the Marquis of Annandale, the Earls of Sutherland and Marischal, and Lord Ross, conceiving themselves entitled to election in the stead of five peers who had been preferred to them, petitioned the House of Lords for redress, appealing in the same breath "to the known laws and usages of all the Courts and public assemblies in Scotland, which laws are by the Treaty of Union reserved," and remonstrating against the conduct of the Clerks of Session and the Lord Clerk Register in refusing them "extracts," or official copies, of the Minutes of the Proceedings, and the lists, proxies, etc., received on the occasion. The House of Lords at once assumed (not to say grasped at) the office of judges, summoned the parties to London, and passed a series of general resolutions determining the controverted points, for the most part very judiciously, but not so in every instance. The most important of these general resolutions was this, "that a peer of Scotland, claiming to sit in the House of Peers by virtue of a patent passed under the Great Seal of Great Britain after the Union, and who now sits in the Parliament of Great Britain, had no right to vote in the election of the sixteen Peers who are to represent the Peers of Scotland in Parliament." This was aimed at the Duke of Queensberry, who had been created Duke of Dover by Queen Anne, and his vote was in consequence disallowed. The reader will recollect the similar general resolution passed by the House in 1711, by which the Dukes of Queensberry and Hamilton, as Dukes of Dover and Brandon, created since the Union, were declared to be not competent, having been Scottish peers before the Union, to sit in the House of Lords at all in that capacity. So that by the Resolution of 1708, the Duke of Queensberry was

precluded from voting at the election of Scottish Representative Peers because he had been created Duke of Dover and sat in Parliament as such; and by that of 1711, it was declared that the Duke of Queensberry (that is to say, the second Duke, his son), being a Scottish peer, had no right to sit there as Duke of Dover, or otherwise than as a representative Peer. Both resolutions were equally *ultra vires*, both ultimately futile and of no avail. Thus, while the laws and usages of Scotland were frankly appealed to by the five remonstrant peers in 1708, the Court of Session, which could alone interpret and apply those laws and usages, was ignored and set aside; and every subsequent intervention down to 1847 has been by the House of Lords. The usurpation was as complete, although, perhaps, with more plausibility on its side, in the case of the elections at Holyrood, as in the case of appeals from the Court of Session. Truth, nevertheless, usually makes her voice heard under whatever superincumbent pressure. The most important interventions of the House of Lords have been for the purpose of preventing the undue assumption of titles of dignity by pretenders, only distantly connected with dormant or extinct peerages, and the tendering and acceptance of their votes; but even in the Resolutions and Orders, of which a great number were passed and issued, especially in 1761-62, the formula of the Resolution is invariably that the pretender ought not to be recognised or (inferentially) his vote be accepted, till his pretensions shall have been established "in legal course of determination," and that of the Order sent to the Lord Clerk Register, "in due course of law;" necessarily, that is to say, before the Court of Session, the House having no original jurisdiction, no question of petition to the Crown being suggested, nor of matter of privilege—the "due course," the "legal course of determination" being undeniably, under the terms of the Treaty of Union, in the Court of Session. There can be no doubt that this was the view when the formula was originated, and it will be remembered that the rights of the Court were familiar to and recognised by the House as late as 1771. But the House ere long construed the formula in the sense of a jurisdiction inherent in itself; and in a contested election in 1790, it went so far as to summon peers of Scotland actually in full possession of duly transmitted dignities to the bar of the House, for investigation of their right to vote. The House

went so far as to pass a general Resolution, on the motion of the Earl of Rosebery, 13th May 1822, providing "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," etc. etc., "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"—a resolution which, like all such general resolutions, was *ultra vires*, which was found to be inoperative, and which was rescinded *simpliciter* by another general Resolution passed at the instance of the Duke of Buccleuch, 25th July 1862. All this was irregular and illegal, the only "source" of legal determination on such matters of right and privilege being the Supreme Civil Court of Scotland. In 1847 the House appointed a Select Committee, at whose instance an Act was introduced and passed through Parliament, making special provision for dealing with the case of the pretenders above spoken of, with which I shall have to deal hereafter; and a subsequent Act was passed in 1851. It has been since very recently admitted by the noble and learned Lords who at present advise the House of Lords, that the House having no legislative power, has no authority to intervene in matters affecting the Scottish Peers as standing on the Union Roll called at the election at Holyrood, except in so far as has been delegated to it by the Legislature, and specially by the Acts of 1847 and 1851; and it thus stands out that the interventions above noticed have all been in excess of the power of the House from 1708 till now, leaving the ground open to the conclusion that the Court of Session only has been the proper Court for deciding all questions arising on the elections at Holyrood during the interval. I ought to have mentioned that the scores of Protests lodged at Holyrood during the period covered by these observations, have all been, as I have already shown, addressed to the Court of Session for that "remeid of law" which that Court only can supply. These Protests have been of two descriptions—those on the questions of right to dignities and of the formalities of election, and those in vindication of the freedom of election; for it must be added that the lion's share in the control assumed by the House over the Scottish elections

in 1708 was almost immediately appropriated by the Government. So far from being "free," the elections were controlled by the Ministry in London; every form of undue influence was resorted to; and on one occasion, at the election of the 4th June 1734, a battalion of the King's troops was actually marched to Holyrood and drawn up in the Abbey court, and kept under arms during the whole time that the proceedings lasted, for the purpose of overawing the peers. The records of the elections at Holyrood are full of Protests, Petitions, and other remonstrances against this unwarrantable influence, the remonstrant Peers denouncing the influence of the Government, and the unwarrantable use of the name of the Sovereign, in the most determined manner. It is but justice to the House of Lords to say that they endeavoured to protect the freedom of the election, in the interests of the House against the Ministry, but in vain. The history of the elections during the last, the eighteenth century, is not agreeable to look back upon.

The assumption of authority on the part of the House of Lords, alike in regard to appeals from the Court of Session and to the elections at Holyrood, prepared the way for the policy of engrossing the jurisdiction over Scottish Peerage claims into their own hands, which I have above spoken of. The first attempt took place in 1711-1714, when the House originated *proprio motu* a claim to the Scottish Lordship of Dingwall on the part of the Duke of Ormonde, which had been dormant for ninety years, and decided it in his favour, without any reference from the Crown, which was pre-requisite to their intervention, even in the case of an English Peerage. This assumption of independent jurisdiction was not subsequently repeated, at least with such open disregard of the Sovereign. But on subsequent occasions the House summoned various pretenders assuming dignities, and some acknowledged peers of Scotland, in the case of contested elections, to prove their right at the bar of the House. And it became habitual in the House to speak of themselves as possessing a claim to jurisdiction in Scottish Peerages, notwithstanding the recognition of the judgment of the Court of Session in the Lovat case in 1730, and in the case of the Crawford and Sutherland precedency in 1746 and 1771, above mentioned.

But what especially contributed to this practical usurpation by the House of the functions of the Court of Session, was the practice initiated in the Somerville claim in 1723, and which became more and more confirmed as the century rolled on, of claimants to Scottish dignities petitioning the Sovereign for adjudication on their claims, in conformity with the usage in the case of English dignities. Somerville of Drum, the lineal heir-male of Gilbert, the eighth Lord Somerville, who flourished under James VI., and ruined his family by his extraordinary hospitality, assumed the dignity after a non-assumption dating from the death of Gilbert, and tendered his vote afterwards at the election of 1723; but the Marquis of Tweeddale, afterwards Chief Secretary for Scotland, protested against reception of the vote "without warrant or order of the Most Honourable House of Lords, and until he make out before them that such an honour and Baronage is now subsisting, and that he is entitled to it." There was much reason for this Protest, for the dignity was neither on the Union Roll, nor even in the Decreet of Ranking. Lord Tweeddale's suggestion that the case should be tried by the House of Lords was evidently based on the pseudo-precedent of Dingwall in 1711-14; but Somerville petitioned the Sovereign, George I.; and Lord Townshend, the Secretary of State, referred the petition to the House, thus enforcing the English practice in dignities, as against the autocracy of the House of Lords on the one hand and the constitutional authority of the Court of Session on the other. Some constraint may have been exercised in this instance; and the precedent was followed in the Colville of Culross claim the same year, and that of the Lordship of Duffus in 1734. All this being, as I shall show more fully, matter of private and unauthorised arrangement between such claimants and the Sovereign, the Court of Session had no occasion for making its voice heard on the question; and it is so long now since the Court has been applied to on such a subject, that at the moment of the Montrose claim, nearly thirty years ago, the right of the subject to resort to the Court of Session, and the duty of the Court to adjudge a right to Scottish Peerages, had almost faded from recollection in England, under the prevalence of the idea that dignities were matters of privilege, like ribbons or garters such as a breath can mar as a breath can make them, dependent

upon Royal favour, and standing apart from the common rules that regulate matters of inheritance. The opposition offered to the Montrose claim necessitated a full inquiry into, and vindication of, the authority of the Court of Session in dignities.

Meanwhile, in the midst of this scene of legal and constitutional degradation, the voice of the Court of Session rang ever clear and resonant as a bell when appealed to on the question of its authority in questions of Scottish honours. On two occasions, when a party to a claim of dignity prosecuted before the Court ventured to suggest the superior competency of the House of Lords, the Court was true to its traditions of independence, and maintained its own supreme and exclusive competence. The first of these was the Lovat case in 1730, the second the Oxenford case in 1733.

In the Lovat case in 1730, on the question of their right to adjudicate being mooted by the claimant, Simon Fraser, the Court sustained its competency, and proceeded to judge finally, as in former times, and, as has been shown, without appeal at the time, and with subsequent recognition by the House of Lords and the legislature. I do not know whether it has been noticed that Lovat, who had threatened this appeal in 1730, abstained from urging the incompetency of the Court, with the view of saving his life by such a plea, in 1745.

The Court once more sustained their competency in the claim to the Viscounty of Oxenford brought before the Court of Session in 1733, by competition between James MacGill of Rankeillour, the heir-male, and Robert Maitland MacGill, grandson and heir of line of the last Viscount Oxenford, although from the former removing his suit, by petition to the Crown, to the House of Lords in 1734-5, no decision followed in the Court upon the claim itself. The summary of the argument as urged by the respective advocates before the Court has been preserved to us in the "Minutes of Process," preserved in the Rankeillour charter-chest, and it is impossible to put the question before the reader more clearly. The defender, the heir of line, urged "that it was a rule of the law of England that the House of Peers were the only judges of their own privileges," and "that it was one of the privileges of the Peers that the right of their peerages could not be tried

directly but in the House of Peers," and "that the Courts of law had no original jurisdiction, nor could they determine betwixt two parties which of them was the peer, or, upon an action brought, to declare any one person to be a peer; that this question belonged exclusively to the jurisdiction of the House of Lords; that any peer of Great Britain claiming his peerage behoved to apply to the House of Lords for ascertaining his right, and could not insist in a declarator in a Court of law." It will appear presently how thoroughly mistaken was this representation of the law and practice of England in dignities; while, even had it been correct, it could not affect Scottish rights under the Treaty of Union. The argument of the pursuer, MacGill of Rankeillour, the heir-male, in reply, as represented by the Lord Advocate—that Lord Advocate being the celebrated Duncan Forbes of Culloden, so distinguished for his learning and integrity, and afterwards President of the Court of Session, was as follows,—and his pleading was a noble protest for the right alike of the Court of Session and the subjects of Scotland. He urged:—

"*Primo*, that there was a great difference betwixt the privilege of peers that were acknowledged to be such, and the right to the peerage. That, however, the House of Lords might preserve to themselves the sole right of judging what was the privilege of peers, yet it would not from thence follow that they had the right of judging by way of declarator of the right to a peerage, much less that they had the exclusive jurisdiction in such declarator. On the contrary, it is certain that they had no original jurisdiction in any matter of right whatever, as should be noticed more fully afterwards.

"And, *secundo*, that there was a great difference, in point of jurisdiction, between the privileges of a peer and the privilege of Parliament. That the House of Peers had always claimed, and been possessed of, an exclusive jurisdiction with respect to privileges of Parliament. They had excluded all other courts from judging who had a right to be called to, or to sit in Parliament; and, where the question was with regard to a seat in Parliament, no other court in England had been in use to interpose. And in the same manner with respect to the privileges competent to peers, in consequence of their seat in Parliament. But the decisions of the House of Peers with

respect to the privilege of Parliament had no influence neither upon the peerage nor upon the other privileges competent to a peer; and for this he appealed to the noted case of my Lord Banbury, who was found by the House of Peers to have no privilege of Parliament, and yet by the courts of law he was afterwards found to be a peer, and to have the privilege of peers; and it is well known that the House of Peers had refused to give a seat in Parliament to two peers of Scotland that had, after the Union, been created Peers of Great Britain" (namely, the Dukes of Queensberry and Hamilton, who at that time had been respectively created Dukes of Dover and Brandon), "yet it was certain they were in all other respects Peers of Great Britain; and if by any accident the Peerage of Scotland should happen to be sunk, they would remain Peers of Great Britain, though they were excluded from the privilege of Parliament.

"And, *tertio*, that the House of Lords had no original jurisdiction in any cause whatever, and therefore no declarator of a right of peerage could be brought before them. That the only form in which they judged of the right to a peerage was either by incident, in another question, or if application was made to the Crown claiming a peerage, when the King was in use to refer the matter to the House of Peers for advice, who therefore inquired into the case, and pronounced no judgment" (the reference being here to English practice only), "but advised the King what it was proper for him to do; and therefore the jurisdiction of the Court of Session could not be excluded upon the account that the House of Peers had an exclusive jurisdiction, for it is certain they had no jurisdiction at all in such a declarator, nor was it any better objection to the jurisdiction of this Court, that the Courts at Westminster had no jurisdiction in such an action, for no declarator of any right whatever was competent to them. They had no such form. But then, as by the law of Scotland every subject was entitled to declare any right competent to him, whether a right to lands, to an office, jurisdiction, or a peerage, so that the Court of Session were the judges competent, and the only judges in such declarator, and accordingly many instances may be brought of declarators of peerage that have been carried on in the Court of Session, particularly the noted case in 1633, *Oliphant v. Oliphant*, and in

many other instances. And as, by the Articles of Union, the private rights of the subject were reserved, and the jurisdiction of the Court of Session, the same right of pursuing declarators of any right competent to the subject remained with them, and the power of judging in such declarators remained with the Court of Session after the Union. And so it was adjudged in the mutual declarators betwixt the two competing Lords of Lovat, where, after the decree formerly pronounced had been reduced, and when Simon Lord Lovat came to insist in his declarator, the question concerning the jurisdiction of the Court was stated for the defender, and the Court, after reasoning on the point, sustained the jurisdiction, and the declarator went on, and your Lordships decerned in favour of the pursuer.”¹

I may add that Robert Dundas, afterwards Lord President of the Court of Session, and father of Henry Dundas, the first Lord Melville, and who acted with the Lord Advocate on behalf of the pursuer, introduced a further argument in his speech, grounded on the distinction between the right to sit in Parliament, and sit on the trial of peers, conceded by the Treaty of Union to the sixteen Scottish Representative Peers, and the remaining privileges of peerage, which were concurrently reserved to the Peers of Scotland who should not be Representative Peers—contending that whatever right the House of Lords might possess, “of admitting or refusing to admit any person who shall offer himself, according as they shall see his title perfect or deficient,” their power extended no further, and “the right to a peerage that produces no privilege that is dependent on a seat in the House of Lords falls necessarily to be determined by the ordinary courts of law.” He founded specially on the two cases of the Dukedoms of Brandon and Dover, which the House of Lords had resolved could not give seats in the House to the Scottish Dukes of Hamilton and Queensberry, the Resolution to that effect still standing unrescinded in 1734:—“As far as the pursuer knows,” said Dundas, “it was never imagined that the two noble Lords whom those Resolutions affected are not Peers of Britain to every extent and purpose, except that of having immediate seat

¹ Printed from the original in the Rankeillour charter-chest, in Riddell's Peerage and Consistorial Law, pp. 297-299.

and voice in the House of Lords. And no man doubts that if the Peerage of Scotland, which is represented by election, were extinct, those noble persons would rightfully be admitted to their seats in the House of Peers." But I need not follow these ingenious arguments further.

The Court of Session sustained their competence in 1733, as they had previously done in 1730, upon the argument of the Lord Advocate above set forth.

The House of Lords applied to the Court of Session for information on the actual state of the Scottish Peerage in 1739-40, and the Court supplied it with a learned Report on the subject, which I shall speak of elsewhere, only mentioning it here inasmuch as the Court inform the House incidentally, but with unreserved precision, that if claims come before them they "must" give their opinion, which from their lips, under the Treaty of Union, would be a decision, such as they had pronounced ten years previously in the Lovat case.

Meanwhile, the process of gradual engrossment of the functions of the Court of Session in the matter of dignities steadily went on; and a premonitory sign of a policy of dealing with them on notions of expediency is established in a letter of the Rankeillour agent in the Oxenford claim, after it had been transferred by the heir-female to the House of Lords through petition to the Sovereign in 1735. The dignity, having become dormant, did not appear on the Roll of Parliament at the time of the Union which is now styled the Union Roll: but Lord Islay (afterwards third Duke of Argyll, and at that time paramount in Scottish matters in London) told William Murray, Rankeillour's counsel before the House, that it had been resolved not to favour claimants to such undefined predecessors—this William Murray being no other than the celebrated Lord Mansfield, whose influence has been so great on the fortunes of the Scottish Peerage since 1762. When the House in 1711-14 originated the Dingwall claim *proprio motu*, and decided it in favour of the Duke of Ormonde, that Lordship was not on the Union Roll, and had been dormant since 1621!

A corresponding tendency to rule matters in the case of Scottish peerages by English instead of Scottish law, developed

itself a few years afterwards in 1748. John second Earl of Stair, distinctively known as Marshal Stair, received from Queen Anne, by charter under the Great Seal of Scotland, 27th February 1707, proceeding upon his resignation, power and authority to nominate, at any future time during his life, whatever heir he might choose to succeed to his honours and estates, provided such individual should be descended from the body of James Viscount Stair, his grandfather. Marshal Stair subsequently nominated in 1747, in proper formality, John Dalrymple, son of George, his (the Marshal's) father's third son, in exclusion of James Dalrymple, son of William, his father's second son. On the death of the Marshal, both John and James claimed the dignity by petition to the Sovereign, and the Sovereign having referred the petitioners to the House of Lords for advice, the House reported that the power exercised by Earl John in 1747 was "not valid in law," and that James Dalrymple had a right to the honours. The nomination, whatever may be thought of the policy of such powers, was in accordance with Scottish law, which alone could rule in the case; and it was granted by a royal charter, which could not be disallowed without setting at defiance the royal prerogative, while such supersession of the law was a violation of the Articles of Union; and yet the House of Lords thus acted, and, as has been recorded by a contemporary, the distinguished advocate Sir William Pulteney (paternally Johnstone), "upon the footing of the English law."

Shortly after this, a serious blow was dealt at the Court of Session and the Scottish Peerage, in the interest of the House of Lords, by a writer whom it is more correct to style ingenious, graceful, and elegant than learned, a Scottish lawyer, and—I grieve, I blush to write it—a Lord of Session, Henry Home, Lord Kames. In his "Historical Law Tracts," published in 1759, Lord Kames asserted that "to determine a right of peerage is the exclusive privilege of the House of Lords," and that "the Court of Session . . . assumed a jurisdiction which they had not when they sustained themselves judges in the dispute of precedency betwixt the Earls of Crawford and Sutherland," which he affirmed to belong to the jurisdiction of the Lord Lyon; that "it was a still bolder step to sustain themselves in the Peerage of Oliphant, mentioned in Durie's

Decisions," *i.e.* in 1633, "and in the Peerage of Lovat, decided a few years ago"—his ground of objection being, in all these instances, that "none of the foregoing claims make any pecuniary interest." The utter wildness of these assertions can need no remark after what I have shown; but I may cite Lord Stowell's observation with respect to Lord Kames, "that his extreme inaccuracy in what he ventures to state with respect to the ancient canon law and to the modern English law tends not a little to shake the credit of his representations of all law whatsoever." Yet not only Lord Mansfield cited evidence from it in his speech on the Sutherland case, but Lord St. Leonards, in his Montrose speech in 1853, argued upon the preceding statements as if the shallow volume had been a text-book; and I suspect that many other noble and learned Lords, foreigners so far as the law of Scotland is concerned, have adopted its views without question or deeper research—a natural mistake to fall into, considering that the author was a judge of the Court of Session. It was in reference to this work that George Wallace, an able writer, states in his "Nature and Descent of Ancient Peerages," published in 1783, "It was only lately that Scotch lawyers were taught to number among the privileges acquired to the Peers of Scotland by the Union, that of subjecting their legal pretensions to the arbitrary decision of the Crown."

I am only dealing here with the judicial authority of the Court of Session, and with the general action of the House of Lords towards its subversion, and therefore reserve the special rules already spoken of as adopted by the House in the Cassillis and Sutherland claims, for a future section.

Lord Mansfield, who had originally practised at the Scottish bar, fully recognised the judicial competency of the Court of Session up to the date of the Union, but affirmed that it was not competent to decide in the Lovat case. Lord Loughborough, on the other hand, originally Mr. Wedderburn, fully recognised and founded on the authority even of the Lovat decision. But their successors, as a rule, were less fortunate, because less familiar with Scottish law. It may easily be understood that the position of inferiority and subordination to which the Court of Session had been illegally and unconstitutionally reduced by the process exhibited in the

preceding sketch, excited a strong and increasing but natural influence on the minds of English law Lords advising Committees for Privileges; inducing them to believe, as Lord St. Leonards avowed his belief in his speech on the Montrose claim, that the Court of Session must have acted under a similar condition of inferiority, and that their judgments must have been subject to the revision of some superior authority before the Union. It could only have been through some such process of thought that the Committee for Privileges in 1875 could have disregarded the decret of 1626 and others above spoken of. The heresy on this point obtained full development in Lord St. Leonards' speech just referred to, which prepared the way by overruling of the judgment of the Court of Session in the Glencairn and Eglington case in 1648, for the overruling of the judgment of 1626 in the recent Mar case. Lord St. Leonards' reasoning in 1853 may be reduced to this formula—1. It is the usage in 1853 for claims to Scottish Peerages to come, somehow or other, before the House of Lords; 2. There is nothing in the Treaty of Union to deprive the Court of Session of any jurisdiction that they may have possessed over peerages previously to that Treaty—a very important admission; 3. That jurisdiction was consequently vested before the Union, not in the Court of Session, but in Parliament; and it must have been from the Parliament, therefore, that the House of Lords derives its present jurisdiction in peerages. Lastly, and consequently, 4. The Court of Session was not invested with the authority ascribed to it by the claimant before the Union. But “must” is no argument in the presence of fact; and facts have the force of battering-rams when directed against the houses of cards built up by the hands of ignorance and speculation. It cannot be said that the question of authority, as between the Court of Session and Parliament, *i.e.* the Three Estates of Parliament, started by Lord St. Leonards, was not answered by the vindication of the truth. The answer, already fully set forth in the Montrose claimant's “Supplemental Case,” was given by his counsel (although it fell on ears deafened by prejudice), in ample time for Lord St. Leonards to have appreciated it; and I gave it once more with full proof, under Mr. Riddell's

guidance, in my published report of the Montrose claim. After such exposition, persistency in error can only be accounted for by the influence of accumulative tradition and the rooted conviction of the House of Lords that they possess a discretionary power in dealing with dignities. I venture, however, to believe that the period is near at hand when a better spirit will prevail (of which there are already premonitory symptoms) in the House of Lords.

I trust I have made the position of matters clear, as between the tenants and claimants of Scottish dignities on the one hand, and the Court of Session and the House of Lords on the other, in respect of the laws that govern the existence of those dignities, and the exposition of those laws in particular cases by the Court of Session. I have selected the salient points and epochs, without attempting minute detail; but the lines are, I think, sufficiently distinct.

Such then, as aforesaid, being the general and constitutional sanctions of the law of Scotland, as provided by the eighteenth and nineteenth articles of the Treaty of Union, the following results follow as obligations on the House of Lords or the Imperial Parliament, and on the Sovereign:—

Beginning with the Sovereign, the Sovereign cannot resume any jurisdiction which he has delegated to a court of law, as, for example, the jurisdiction in civil causes, including dignities, which was conferred upon the Court of Session in 1532. "The king," writes Mr. Riddell,¹ commenting on the statute of Charles II. in 1681, and its abrogation by the Claim of Right, "can as little encroach upon or compromise the rights of any jurisdiction properly constituted and ratified, especially like that of the Session in honours, both by immemorial usage and the solemn enactments of the Union, as the meanest subject in the realm. Whatever may be the large extent of his prerogative in the accession of dignities, where a distinction is to be drawn, it is here superseded, and in fact gone." Mr. Riddell proceeds to enforce upon this ground "the incompetency of a reference or delegation, by the king, of a Scottish peerage claim, upon the petition of a party, to the House of Lords, seeing he

¹ Riddell's Peerage and Consistorial Law, p. 320.

cannot by our law delegate any jurisdiction to a tribunal other than those who possessed it. In the present instance, the proper tribunal is obviously the Court of Session." The practice of preferring claims by petition to the Crown is thus purely by allowance and irregular; but of this I shall speak hereafter.

Further, the Imperial Parliament cannot alter the laws of Scotland affecting private right, except "for evident utility of the subjects within Scotland," and *a fortiori* no lesser authority can do so.

Again, the House of Lords, being only one of the Houses of Parliament, and having no legislative power apart from its colleague, cannot supersede the laws of Scotland affecting private right, nor set aside the final decreets of the Court of Session, by virtue of any private rules, or resolutions, on tacit understanding of their own, subversive of those laws or the rights depending on those decreets.

Again, no alteration of the laws of Scotland, or diminution of the authority and privilege of the Court of Session, competently effected by the Legislature in conformity with the Treaty of Union, can apply retrospectively to rights in respect of dignities originated before the Union, and which must be interpreted by the laws as they then stood, according to Lord Stair's maxim.

Moreover, the subjects within Scotland are secured and warranted by the Treaty of Union in resorting to the Court of Session for adjudication upon their claims to Scottish peerages, if they so think fit, as Simon Lord Lovat did in 1730, without any necessity of petitioning the Sovereign; and the Court is in like manner warranted, entitled, and under constitutional obligation so to adjudicate and determine finally in cases of competition in such claims.

Finally and consequently upon all that is premised, all protests for remeid of law against miscarriage or withholding of justice, whether those transferred from the books of the Scottish Parliament to those of the House of Lords in 1708, or those lodged since, including my two Protests which form the subject of the present vindication, are ultimately addressed to the Court of Session, as the Supreme Civil Court of Scotland, and form the legal basis for subsequent

processes, if found necessary, towards obtaining final adjudication from that Court.

These responses to the second question in the series enumerated at the beginning of this letter, as leading to the establishment of principle, will be found to have prepared the way for the consideration of the third question now to be proposed and replied to.

SECTION III.

Under what authority, and by what allowance, does the House of Lords intervene in claims to Scottish as distinguished from English dignities; and what are the limitations on that intervention?

A distinction exists between Scottish and English dignities, as coming by reference from the Sovereign before the House of Lords. It is most important to appreciate this distinction.

According to English usage, claims to the Peerages of England are preferred by petition to the Sovereign, craving a writ of summons under the dignity claimed, such petitions being petitions of right. The Sovereign may either determine upon the petition with the advice of the Attorney-General, under approval of the Lord Chancellor, or he may refer it, in complicated cases, to the House of Lords, after examination and report by the Attorney-General, commanding the House, according to the usual formula, to examine the allegations thereof, and inform His Majesty how the same shall appear to their Lordships, whereupon he acts.¹

The petitions of claimants to Scottish dignities ask simply for recognition of the right to the dignities claimed, the restriction of seats in Parliament to such of the number of the Peers as may be chosen as Representative Peers, precluding any request for a writ of summons.

But, as has been shown in the preceding section, the supreme jurisdiction in Scottish honours is in the Court of

¹ Cruise on Dignities, p. 257.

Session, the Sovereign having surrendered his original prerogative of jurisdiction to that Court, and being precluded by statute from resuming it. It is only, therefore, by allowance on the part of claimants, and by consent of the Sovereign to act as arbiter, that such claims can by any possibility (consistently with legal and constitutional obligation) come before the Sovereign; and various limitations and protective sanctions thus develop themselves in respect to such, in addition to those which attend upon the intervention of the Sovereign in the case of English dignities.

I shall notice the conditions which attach to English claims first, and then those attaching to Scottish dignities.

I do not know that I can state the theory and practice of the intervention of the House in English Peerage claims more unexceptionably, at least in the eyes of Lord Kellie, than in the words of the late learned and respected Lord Chelmsford, one of the law Lords who advised Her Majesty upon Lord Kellie's recent claim to an Earldom of Mar created in 1565. Lord Chelmsford spoke as follows, with admirable lucidity in his speech on the claim to the ancient English Earldom of Wiltes, in 1869:—"The proceedings"—viz., in a claim to peerage—"commence with a petition to the Crown, the fountain of honour, praying for a writ of summons by the title of the dignity claimed. The petition is referred to the Attorney-General, who examines into the claim, and reports upon it. Although his Report may be favourable to the claimant, it is in the discretion of the Crown whether or not the claim shall be referred to the House of Lords." The House upon the reference "makes an order that the petition be referred to the Committee of Privileges. Upon hearing the case, the Committee come to a Resolution, which is reported to the House, either that the claimant has established, or that he has failed to establish, his right to the dignity claimed. The Resolutions of the Committee are merely for the information and advice of the Crown. The Crown, though it generally acts upon, is not bound by them. It may exercise its own discretion in giving or refusing its assent to the Resolutions. They" (the Resolutions) "cannot be regarded as final judgments which, when once pronounced, must not be departed

from," and for this reason, that "if the opinion expressed by one Committee of Privileges"—that is, in the speech or speeches upon which the Resolution is formulated—"are to be binding upon all that follow, . . . an error once committed must be perpetuated to all future time in the advice given by the House to the Crown upon claims to dignities of a similar description:" these last clauses, upon which the report in the Wiltes case proceeded, being (I may observe) in accordance with the Willoughby of Parham and the Brandon precedents of the last century, upon which Lord Chelmsford founded his advice to the Committee against the claim; but in contradiction of the doctrine laid down by Lord St. Leonards in his speech on the Montrose claim in 1853, when the Resolution on the claim to the Earldom of Glencairn in 1797, moved and passed at the instance of Lord Loughborough in a speech teeming with inaccuracies, which Lord St. Leonards did not attempt to deny, and which the Montrose claimant proved to be in absolute contradiction to the final and standing judgment of the Court of Session on the identical case in 1648, was held by Lord St. Leonards to be binding, right or wrong, on the House, and thus decisive against the Montrose claim.

These definitions by Lord Chelmsford are in accordance with the rules and precedents covering many centuries which are collected and commented upon by Cruise in his valuable "Treatise on the Origin and Nature of Dignities."

According to received practice up to the early years of this century, all the members of a Committee for Privileges, lay as well as legal, took part in the consideration of a claim, and voted in determining the Resolution. But of late years it has come to be understood that only the law Lords take part either in the investigation or in determining the Resolution, the lay Lords being reduced to the condition of dummies. Apart from the law Lords, the majority of whom do not consider themselves bound to give uniform attendance, the lay members of each day's Committee are made up of any Peers who may be caught or induced to attend by request from the parties interested, seven being requisite to make up a quorum. It is by no means clear that the innovation has been of unmixed advantage. At all events, the successful claimant in the most

important Scottish claim of last century, the Earl of Cassillis, although rightfully entitled, was only so entitled on grounds which the law Lords disallowed in their speeches; while there is reason to believe that the votes of the lay peers, one of whom spoke on the occasion, determined the Resolution (so far as conceived in terms of the ancient formula apart from interpolation) on those very grounds which their legal brethren repudiated. Lord Redesdale, a layman, has taken active part in advising Committees for Privileges of late years in the capacity of Chairman of Committees; but this, of course, is exceptional. He took no such prominent position at the time of the Montrose claim in 1853, much to my regret at the time and since.

The intervention of the House of Lords in English dignities, according to the English usage, is limited, in the interest of claimants and the public, by various necessary conditions of a restrictive character.

Nothing is more indisputable than the fact that the House of Lords has no prescriptive right to be consulted by the Sovereign on peerage claims; and it is only within the last few years that claims have been referred to the House as a matter of course for report to the Crown. The claim to the Earldom of Huntingdon, for example, recognised by King George III. in 1819, almost within our own time, and involving complicated scrutiny into descent and pedigree extending back for nearly three hundred years, was investigated by the Attorney-General exclusively, and decided upon by the Sovereign (theoretically so, of course, under the circumstances) without any reference to the House. It is only in fact since the reign of King Charles II. that it has been the rule to refer difficult cases to the House of Lords: in earlier times the Sovereign referred them to Commissions, including usually the two Chief-Justices and other able legal and constitutional advisers, and in still earlier days to the Court of Chivalry; that of the Lord High Constable, and after the abolition of that office in England, that of the Earl Marshal, being considered the proper Courts for adjudication.

Nothing, again, is more generally recognised than that the House of Lords possesses no original jurisdiction in any case;

it can only act judicially as a Court of Appeal or *dernier ressort*, under special provision of the Legislature. The House consequently can take no cognisance of any right, unless brought before it *ab externo*, and *a fortiori* in honours, in which it can pronounce on no claim or case, unless that case or claim has been specially referred to it by the Sovereign for advice in his character of supreme judge. (It will be kept steadily in remembrance that I am speaking here exclusively of the English practice.) Hence, for example, the well-known Resolution of the House in 1692, that Charles Knollys, asserting himself to be Earl of Banbury, was not a peer, was disregarded by the courts of law, the question of Knollys' right not having been competently brought before the House;¹ and the clause in the Resolution in the Montrose case in 1853, inserted by Lord St. Leonards by a sudden thought at the last moment, to the effect that the grant of the Dukedom of Montrose *de novo* in 1489 had been merely for life, was *ultra vires* upon English principle, no claim having been made to the Crown under that grant, and the House of Lords not having been called upon or empowered to pronounce upon it. The House fell, as will appear, into the same error that it did in 1692 and 1853, in the case of the original Earldom of Mar, in so far as it took action on the Order 26th February 1875, on the theory that the original Earldom had been extinguished by the Resolution of the House; Lord Mar, the tenant in possession, never having empowered the House to pronounce upon his right by petition to Her Majesty.

Nor has the House, apart from the House of Commons and the Sovereign, any legislative power. The possession of such power has been virtually assumed by the House, in so far as it has from time to time, as already shown, passed general resolutions affecting dignities, not only English, but Scottish, and laid down private rules for its own guidance in Scottish cases,

¹ "The earldom of Banbury was an inheritance, and the inheritances of the peers in these honours were determinable by the same law and in the same manner as those in their lands; and the Lords had not, nor ever had, any right to determine them; and the counsel for the King had not produced, and, he supposed, could not produce, any instance where the peers had determined of such a matter."—Cruise on Dignities, p. 303. "Dignities," adds Cruise (p. 98), "although now become little more than personal honours and rights, are still classed under the head of real property."

in supersession of the law of the land, as I have yet to prove. This possession of legislative power has been recently and widely disclaimed by the House, as will appear in due time; and the general resolutions in question, which have always been held to be *ultra vires* in law, and the private rules, which have been remonstrated against for generations past by Scottish lawyers, stand thus condemned—or, at least, reduced to their legitimate proportions, as mere opinion, to be tested by law—by the mouth of the House of Lords itself, as well as every report or action of the House in which it can be shown that wrong has been inflicted by insistence upon them. The House, consulted by the Sovereign on a question of dignity, is bound to advise according to the law of the land, the common law, which governs dignities in England no less than Scotland in all matters of inheritance.

If a difficult question of law arise, it is customary for the House to call in the advice of the judges, and demand their opinion upon an abstract case, drawn up and placed before them, embodying the difficulty, with the view of guidance towards forming their own opinion.

The advice of the House tendered to the Sovereign in the matter of a claim to Peerage is expressed in the Resolution; while these Resolutions “cannot,” in Lord Chelmsford’s words, “be regarded as final judgments,” much less can the speeches delivered by noble Lords in Committee for Privileges be credited with that character. These speeches have been printed of late years under the title of “Judgments;” and it has been usual, for many generations, to represent them as such, and to found upon the *dicta* of noble and learned Lords delivered in Committee as having judicial weight and as decisive on the points dealt with. It was by thus importing the *dicta* of Lord Loughborough upon the effect of a statute styled the Act Rescissory, as expressed in his speech on the Glencairn claim in 1797, into the Resolution reported to the Crown on that occasion, that Lord St. Leonards ruled in 1853 that that Resolution was a judgment and a precedent binding on the House, and fatal to the Montrose claim, although (as already observed) Lord Loughborough’s statement and inference had been refuted by the Montrose claimant, point by point, which Lord St. Leonards did not venture to deny. Lord

Mansfield's *dicta*, so frequently quoted in these Mar discussions as decisive on the subject of the presumption in favour of heirs-male, have no higher value. The House of Lords, in like manner, acted upon the opinions expressed by Lord Chelmsford, Lord Redesdale, and Lord Cairns in their speeches on Lord Kellie's recent claim, in such a manner that if those speeches had amounted to a judgment, the right of the heir-general would have been absolutely extinguished, as far as a Resolution of the House could have that effect. But the House has subsequently retreated from that false position so far as to affirm the principle that the speeches in Committee are not judgments, and cannot be imported into the Resolution, although the Resolution, as they affirm, once pronounced, is final and irreversible. This latter proposition is at variance with Lord Chelmsford's speech in the Wiltes claim; but, what is of more consequence, it is contradicted by the precedents in the case of the Dukedom of Brandon and Barony of Willoughby of Parham in the last century, as urged by Lord Chelmsford in 1862; while the fact that the Sovereign is the ultimate judge (which the House appears now to have entirely forgotten) and not the House of Lords, according to the English theory, stamps the affirmation with error.

It was with this view that Lord Chelmsford defined the nature and character of a peerage claim in the passage of his speech above quoted and referred to in the Wiltes claim, as tending strongly to show that a Resolution of a Committee for Privileges, adopted by the House and reported to the Sovereign, was in no sense a judgment, and though admitted to be *prima facie* valid and conclusive, yet it did not establish a precedent "which all future Committees were bound to follow;" while he further defined his meaning by stating, in disallowance of the argument that the right of the Wiltes claimant had been conclusively settled in his favour by the decision in the Devon claim, that "he could not agree that the determination of one Committee for Privileges must be a binding and conclusive authority upon another. It might be conceded that an opinion expressed by those who were exercising a quasi-judicial function would always be entitled to respect and consideration; but it could not claim the authority of a final decision upon any particular point of law, in the same manner as a judicial

determination of the House sitting as a tribunal of ultimate appeal from the judgments and decisions of the courts of law and equity." All this proceeded upon the assumption that the reasoning upon which the Devon Resolution proceeded, as expressed in the speech of Lord Brougham, was to be imported into the Resolution—a manifest error, although of inveterate standing till 1876, when it was happily repudiated. But the position thus assigned to the speeches is accurate, and must henceforward be adhered to—always subject to the remembrance that the Sovereign alone is judge in honour, according to the English principle which we are now dealing with.

It must not, of course, be supposed that, because the speeches in Committee are only opinions, and cannot be imported into the Resolution so as unduly to extend its effect, they are void of value. On the contrary, they are especially valuable as affording the means of estimating the value of the Resolution arrived at, by consideration of the arguments upon which the Resolution proceeded, as for example in the Mar, Montrose, and Glencairn cases above referred to.

The preceding view of the speeches and the Resolution may be rendered more clear by the observation that what passes the Committees for Privileges is, so to speak, privative to the House of Lords: no echo of the speeches therein pronounced ascends to the foot of the throne, except by special invitation—nothing but the Resolution, as adopted and reported by the House itself. The *rationes* upon which the Committee have come to their Resolution and reported that Resolution to the House, may be asked for by the Sovereign, but do not otherwise come before him. The opinions expressed in such speeches may be, and have often been, contradictory: it is only in the common Resolution that the general opinion reported to the Sovereign is to be found.

Lastly, the Resolution behaves to be framed according to ancient formula, to the effect that A. has or has not made out his claim to the satisfaction of the House, leaving it to the Sovereign to inquire into particulars, if he thinks fit. There have been instances in which the House has reported that the petitioner had no right to his writ of summons, or was not entitled to the dignity claimed: but the Resolution was usually so worded as not to preclude further consideration, in the event

of further evidence being discovered. The custom of introducing extraneous and uncalled-for matter into the Resolution, either as giving reasons for the opinions tendered, or with the view of laying down rules to govern future cases, is a travelling beyond the prescribed bounds of their utterance, and an impertinence; and still more so, the intrusion of observations regarding any right or claim which has not been specially referred to the House for their opinion and advice, such as were introduced by Lord St. Leonards in the Montrose Resolution above noticed.

The views above enforced have been substantially recognised both by Lord Chelmsford and by Lord Cairns, subsequently to the Resolution in favour of Lord Kellie. Lord Cairns expressed himself as follows on the 21st July 1876, on the Annandale claim: "An opinion of the Committee for Privileges is not a judgment;" to which Lord Chelmsford added: "Technically, it is not a judgment;"—a qualification which may imply some secession from his statement in his Wiltes speech, but in a wrong direction. It could only have been through losing sight of the cardinal fact in the English theory, viz. the ultimate fiat of the Sovereign, who may disallow a Resolution, although passed unanimously by a Committee for Privileges, if he thinks it unjust, that the views protested against in this exposition could ever have been entertained.

It follows necessarily from the purely consultative character of the House of Lords that the House becomes *functus officio* after tendering its advice to the Sovereign, embodied in a Resolution; and possesses no authority to take action in regard to a dignity, favourably or unfavourably, till the Sovereign has confirmed the Resolution, any action taken previously to such confirmation being by similar necessity *ultra vires*, premature, null and void, as proceeding *a non habente potestatem*. The House, in a word, cannot take this assent of the Sovereign for granted, and act upon that assumption. On the other hand, it is to be presumed that the Sovereign, a responsible judge, according to the acknowledged theory in English dignities, will not blindly accept a Resolution of the House, and *a fortiori* when unfavourable to a claimant, or indirectly compromising the rights of others, but will investigate and form an independent judgment upon the merits of the case. The Sovereign

cannot escape from this responsibility, cannot shut his ear to remonstrance, should that be offered by an aggrieved party, on this clear ground, that if the Report of the House of Lords is to be considered as final, irrespective of a *bona fide* revision by the Sovereign, then the right to a dignity, the most important of all heritage and privilege, alike in a public and private point of view, is determinable by a court at once of primary and ultimate instance, without appeal; whereas, in the words of Lord Chief-Justice Holt, "it is the wisdom of this nation, and, as he believed, of all nations, to give to the party an appeal, and not to conclude his right upon the first trial." How nearly, if not absolutely, this state of things has been reached must be familiar to every one conversant with peerage claims as at present prosecuted before the House of Lords.

It remains to be stated that while theory represents the Sovereign as the supreme judge in honours, the law of England, as expounded by that learned, conscientious, and independent judge, Lord Chief-Justice Holt, in his celebrated speech on the case of the Earl of Banbury in 1692, recognises no obligation on the part of the subject to claim a dignity by petition to the Sovereign,—he may do so before the courts of law. "But if the party does not submit the matter to the King, or does not abide his determination, then the King ought"—so the Lord Chief-Justice lays down the law—"to indorse his petition with a *soit droit fait*, and send it into Chancery."¹

I have to add on the general question of jurisdiction, that, while the House of Lords has offered, from times before the Union, the most determined opposition to most of the limitations above laid down, and while it has over and over again asserted its possession of a jurisdiction over dignities, the supreme authority of the Sovereign as ultimate judge has usually been recognised, parenthetically at least, if not cordially, by the House of Lords, till within the last two years, when the House has affirmed its authority and acted upon that assumption, to an absolute ignoring and superseding of the jurisdiction of the Sovereign. This doctrine, affirmed by Lord Cairns and

¹ *Rex v. Earl of Banbury*, Skin. Rep. 517; *Cruise on Dignities*, pp. 302, 303.

Lord Selborne in the debate upon the Duke of Buccleuch's motion, hereafter to be reported, is taken for granted in the Report of the Select Committee constituted on the withdrawal of that motion, and has since been laid down by Lord Selborne—but on his own responsibility—in his speech in reply to a question raised by the Marquis of Huntly, 11th July 1879, which I shall report in due time. How completely all this is at variance with the principles established in the preceding paragraph, how absolutely the House stands self-invested with absolutism, how thoroughly the right of all Peers, English as well as Scottish, are thus flung under the feet of the law Lords in the House of Peers, how decisively they have thus repudiated Lord Chelmsford's doctrine and that of past generations as laid down by that noble and learned Lord in 1862, needs no comment.

Such being the conditions and limitations attending and circumscribing the intervention of the House of Lords in English Peerages, where (at least by custom) the jurisdiction is practically vested in the Sovereign, and there is no statutory provision debarring him from the exercise of such jurisdiction, we have next to take note of the conditions and limitations attending the intervention of the House in the matter of Scottish dignities, where the jurisdiction is vested by statute in the Court of Session, and the Sovereign is, as has been shown, precluded by statute from resuming or exercising that jurisdiction. The effect of this is, as I have already noticed, that it is by an irregularity unsanctioned by the constitution, by the assumption by the Sovereign of the office of arbiter, in a friendly not a judicial capacity, at the instance of claimants who prefer that course to a resort to the legitimate tribunal, that the Sovereign intervenes in the case of a Scottish dignity, and requires the advice of the House of Lords, or, if he pleases, some other commission of inquiry, towards pronouncing his award according to the English practice. The following conditions and limitations follow therefore upon this distinction in point of jurisdiction as affecting Scottish claims and the right generally to Scottish dignities:—

As the intervention of the Sovereign is sought for, under an implied and understood compact that the award shall be in accordance with Scottish law, and Scottish law exclusively, so

it follows correlatively that if that compact be violated by the disallowance of Scottish law and its supersession by English law or by rules of doctrine laid down by the House of Lords for its own guidance and convenience, and thus possessing no legislative authority, and upon the application of which the advice of the House or other commissioners of inquiry to which the petition has been referred proceeds, the claimant in such case re-enters into his original right, which in fact he could only voluntarily renounce, to apply for justice and recognition of his right to the Court of Session; while, under any circumstances, he would, according to the English law as laid down by Lord Chief-Justice Holt, be entitled to do so, if dissatisfied. It need scarcely be said that, unless breach of compact in the manner foresaid were clearly established, a claimant would be bound in honour to submit to the arbitration he had invited. But this could not, of course, be binding on his heirs and successors.

Further, it is evident that no person having right or pretension to a Scottish dignity, and much less a Peer in legal possession of such dignity, the right to which is claimed by another through petition to the Crown, can be subjected by the act of such competitor to the jurisdiction of the Crown or the intervention of the House of Lords, unless through his acquiescence therein by petitioning the Sovereign himself for adjudication, or, more properly speaking, arbitration between his rival and himself. If inconvenience arise from this in the event of a Peer in possession declining thus to subject his right of possession to the Sovereign or the House, and simply defending his legal status against aggression, the blame rests not with the man who holds by the legitimate tribunal, but with him who abandons that tribunal for arbitrement by a lesser, and in strict law incompetent authority. The saddle must in such case be put on the right horse. Arbitration cannot take place except by consent of both parties; nor can any man or body of men legally give away the property of another. No decision given in absence of both parties interested is final according to Scottish law; and to constitute presence of the parties, *litiscontestatio* must be established through the submission of their antagonistic claims by each and both to the adjudication of the Court.

Further, whereas it has been affirmed recently by the House of Lords, as above shown, that the House is invested with supreme jurisdiction in dignities, this, granting the position *pro argumento*, can only apply to English dignities, inasmuch as the jurisdiction in Scottish dignities stands constitutionally vested in the Court of Session. The House could not derive such jurisdiction by devolution from the Kings of Scotland, inasmuch as they had been absolutely denuded of that jurisdiction since 1532; nor from the Scottish Parliament, for the Scottish Parliament never possessed it. The House could not have become possessed of that jurisdiction in any other way than by an Act of the Legislature removing it from the Court of Session and vesting it in the House of Lords, which would have been a direct violation of the Treaty of Union, the creation of a court without appeal, and the subjection of the laws and liberties of the people of Scotland, in the present important particular, to the absolute mercy of the court in question. Such an idea is too wild to be seriously spoken of.

Lastly, on the analogy of the usage of consulting the judges on difficult points of law affecting English Peerages, the House of Lords, advising the Crown, ought *a fortiori* to consult the judges of the Court of Session on questions of Scottish law affecting dignities, and frame their reports accordingly. That they did not so consult Scottish judges, especially in 1762 and 1771, has been the fruitful source of evil and injustice. Had they done so in the recent case of Mar, the present controversy would never have come into existence.

These limitations upon the action of the House of Lords, whether as affecting English or Scottish peerages, are of paramount necessity for the protection of the subject in the matter of honours. There can be no security for any peer or peerage—none for the rights and privileges of the peers as a body—unless they be jealously watched and vindicated.

It is for the reader to judge how far the theory of the absolute jurisdiction of the House of Lords in dignities, as affirmed by Lord Kellie in accordance unquestionably with the leading representatives of law in the House, is compatible with the proofs here given in disproof of that theory. Lord Kellie's assertion is that the House, sitting in Committee for Privileges, or affirming the report of a Committee for Privileges, is "a

court," and "the only competent tribunal" in such claim—that it pronounces "judgments," and that those judgments are "final and irreversible," the authority of the Sovereign being altogether set at naught and disregarded. Elsewhere he speaks of the House as "a tribunal which has authority to decide peerage cases, and one, even, which does not consider the law laid down by the Court of Session as . . . infallible," referring to the final judgment in the Oliphant case in 1633, of which I shall have to speak in the ensuing section.

To conclude thus far:—The reader will recollect the question at the head of this section, viz., "Under what authority and by what allowance does the House of Lords intervene in claims to Scottish as distinguished from English dignities; and what are the limitations on that intervention?" My response is as follows:—

The House of Lords, reporting upon a peerage claim according to English usage, is not a legal tribunal, a court of law, but a consultative body, constituted afresh in each instance when a claim is referred to it by the Sovereign for the purpose of obtaining its advice, a commission of inquiry possessed of no judicial power, and which, having tendered its advice in response to the gracious invitation of the Sovereign, is *functus officio*, all that follows proceeding from the Sovereign as, in the English theory, the supreme and final judge.

The Resolutions of Committees for Privileges, adopted by the House and reported to the Sovereign, are not "judgments" in a legal or any sense, nor "final and irreversible;" the words "resolved and adjudged" which preface Resolutions, and have misled many, being merely a formula to the effect that the House has formed such or such an opinion, the actual judgment—which may be in disregard of the Resolution—resting (according to the English theory and usage) with the Sovereign.

The authority of the House is thus derivative, not original, nor of standing continuance. The House cannot originate an opinion, much less act on such opinion, upon a dignity, the right to which has not come before it by reference from the Sovereign, or *ab externo*.

General Resolutions and general rules, laying down principles of interpretation affecting dignities *en masse*, and by which one Committee for Privileges may attempt to dictate to its successors, are still more clearly *ultra vires*.

In Scottish cases, as distinguished from English, there can be still less any question of jurisdiction in the House. The jurisdiction resides neither in the House nor in the Sovereign, but in the Court of Session; and therefore, the petition to the Crown and the consent of the Crown to arbitrate being alike irregular, neither the Sovereign nor the House can acquire any jurisdiction thereby at the expense of the Court, through the defeasance of the subject, there having been no *laches* on the part of the Court, which has never flinched from sustaining its competence when legally challenged; while the provisions of the Treaty of Union protective of the jurisdiction of the Court could only be defeated by a revolutionary Act of Parliament, subverting the foundation of the happy union of the two kingdoms. Lastly,

Of the limitations attendant upon the intervention of the House of Lords as advising the Sovereign in the matter of Scottish dignities, the most important is that which proceeds from the compact between the claimant and the Sovereign, and between the claimant and the House as advising the Sovereign, viz., that the decision shall be in obedience to Scottish law and in conformity with the provisions of the Treaty of Union. If that compact be broken, recourse to the Court of Session is still open to parties, whether claimants or merely opponents of a claim.

SECTION IV.

What in particular is the law of Scotland which governs the succession to dignities, where no charter or patent exists to testify to the limitation in the original grant?

As I have already stated, the law and presumption governing the descent of dignities is in favour of heirs-general, the *onus probandi*, the burden of proving an exception, resting with the heir-male collateral. I have now to prove this; and the

principle is so important that I must do it, as I endeavour, indeed, to do everything I undertake, thoroughly.

It is necessary to repeat and enforce that dignities are a heritage by Scottish law ; that the words of heritable constitution are the same in dignities as in lands ; that such words are interpretable by the same rules ; while, in the absence of words of destination or limitation in existing charters or patents, or when the charters or patents are missing, the legal presumption as to descendibility is the same in both. I need not cite authorities for these rudimentary facts ; it may be sufficient to say that the converse propositions were unheard of till the Sutherland, Erroll, and Crawford processes for precedency, and the Lovat claim at the close of the seventeenth and during the early years of the eighteenth century, when the advocates of the exclusive male succession asserted before the Court of Session that lands and dignities were, or rather must have been governed by distinct laws of succession, on hypothetical grounds (which I shall deal with in the ensuing section) but without citing any institutional writer except one, whom they misunderstood. Lord Hardwicke and Lord Mansfield were strongly influenced by these views when urged by the heir-male in the Cassillis case in 1762, although fortunately (as already stated) the actual decision proceeded, there is reason to believe, on more correct principles ; while such was undoubtedly the case in the Lovat claim before the Court of Session in 1730, the proof of an exception to the general law and presumption being established in both cases to the benefit of the heir-male, although this has been overlooked and misapprehended. When, however, the same distinction between lands and dignities was reiterated in the Sutherland claim by the collateral heir-male, it was repudiated, especially by Lord Camden, whose words ought to be of dominant authority with Lord Kellie :—" They endeavour to make a distinction between lands and dignities. I can find no distinction."¹

I propose to exhibit the law of succession in dignities where proof of the original limitation is wanting, and the descendibility must be determined otherwise, under four heads :—(1.) By reference to the universal custom of Scotland from the earliest times ; (2.) By the testimony of Kings and Parlia-

¹ Maidment's Report of Sutherland Claim, p. 25.

ment; (3.) By the testimony of the Court of Session in a final judgment in a case of honours; and (4.) By that of our leading institutional writers. I shall conclude, (5.) By sketching briefly the system of feudal tenure upon which the Scottish law of succession depends, and apart from which the *rationes* of that law can hardly be adequately appreciated; and (6.) By adducing the testimony of the eighty Scottish jurors invited by Edward I. in 1292, to respond to questions touching the descendibility of the kingdom of Scotland according to the law of Scotland.

1. For charter and documentary proof that the succession of heirs-general, including females, was the universal custom of Scotland from the earliest times till the beginning of the fourteenth century, and has been the prevailing custom, the legally sanctioned system, ever since, I may refer the reader to Lord Hailes's Additional Sutherland Case, already so frequently mentioned in these pages. When the question arose in 1771 between the heir-general and the respective heirs-male of the first and second houses of Sutherland, as to the right of succession to that ancient Earldom, and the two heirs-male asserted the exclusive right of the heir-male on the ground, as I shall show, that such was the ancient Lombard law, and that that law, as localised in Scotland (such was their assumption), governed the case, Sir David Dalrymple, otherwise known as Lord Hailes of the Session, one of the guardians of the heir-general, the late Duchess-Countess of Sutherland, then an infant, wrote the Additional Case in question on behalf of his ward, "not pleading as a counsel"—such were Lord Mansfield's words in referring to it in his speech upon the claim—"but delivering it as his opinion as a judge;"¹—a Case which has always been looked upon in Scotland as a work worthy of the reputation of that great feudal lawyer and genealogical antiquary. It had great influence upon the Resolution arrived at by the Committee for Privileges, modifying their views on points of detail, although Lords Mansfield and Camden refused to recognise the fundamental principle contended for, or to renounce the contrary principle which Lord Hardwicke and Lord Mansfield had established as a private rule for the House in the Cassillis claim, eleven years previously. In this case

¹ Maidment's Report of Sutherland Claim, p. 33.

Lord Hailes reviewed, first, the entire succession of the ancient Scottish dignities, which had been a subject of scrutiny and discussion ever since the beginning of the century, and vindicated the fact that the rule and presumption was in favour of the heir-general on the broadest possible basis, as shown under the following heads, which I copy from the titles to the successive chapters of the case:—"1. Female succession in land-estates always the law of Scotland." "2. In early times, jurisdiction," such as the offices of Constable, Marischal, etc. etc., "has descended to females." "3. A grant of an estate *hereditibus suis* meant to heirs-general," under which head Lord Hailes showed "by a series of examples from the reign of Alexander II. to the reign of James I." (*i.e.* from 1219 to 1406) "that females took by a limitation *hereditibus suis*, in exclusion of the remoter heir-male, and that when the intention was to limit the succession to males in exclusion of females, it was done by very express words." "4. Connection between land and titles of honour"—"the most ancient method of conferring honours in Scotland being by erecting certain lands into an earldom, etc., and by investing the grantee in the lands." And, "5. Titles of honour descendible to females,"—for, "as in ancient times, land-estates and jurisdictions in Scotland were descendible to females as heirs-general, in like manner ancient territorial peerages were descendible and did *de facto* descend to females."¹ I may repeat here that Lord Hailes proved that nine out of thirteen Scottish Earldoms, including Mar, existing at the close of the thirteenth century, descended to females, a tenth having been forfeited, so that it is impossible to ascertain its constitution; while Mr. Riddell subsequently proved that the remaining three likewise descended to females. Both Lord Mansfield and Lord Camden accepted the proof as decisive, Lord Mansfield, indeed, qualifying his acceptance with the remark, "Though ten of the original peerages stated in Lady Elizabeth's case have gone to females, yet I am not convinced but that the original limitation might have been to heirs-male"—a purely gratuitous suggestion, reminding us of the aphorism of Hudibras—

"The man convinced against his will
Is of the same opinion still."

¹ Additional Sutherland Case, pp. 21, 71.

On the other hand, Lord Camden, upon whom Lord Hailes's Case made a much deeper impression (at least on this special point) than on Lord Mansfield, referred to the subject in words which I may here give in full, having only referred to them in my opening letter:—"I see, from indisputable evidence, that no less than nine of the thirteen ancient Earldoms passed through females and came to females." And again: "Every one of the nine instances of ancient peerages stated by Lady Elizabeth proves the husband taking the title in right of his wife," *i.e.* by the courtesy of Scotland, as it was styled, the wife being countess in her own right, as affirmed by Lord Hailes. The descendibility and the actual descent of the earldom to females thus, as I have already noticed, formed an element of proof upon which Lord Camden and Lord Mansfield (with the gratuitous comment above noticed) advised the Committee for Privileges, as they did, in favour of the Sutherland heir-female in 1771.

2. It was customary in Scotland for the King, on attaining majority, to pass an Act revoking grants or actions done in his name during the recent minority in prejudice of the interests of the Crown or against public justice and morality. The diversion of heritage from the heirs-general to heirs of provision or entail was usually included in these revocations, as done in violation of natural justice and law. I may refer to the revocation by James III., 4th July 1476, of "omnes tallias a legitimis hæredibus per eum factas;" that by James IV., 26th June 1493, of "all tailzies maid fra the airis generale to the airis mail of ony landis in our realme;" that by Queen Mary, 20th June 1555, in the same terms, with the additional qualification, "aganis the law and gude conscience;" and by James VI., 29th July 1587, with the still further addition, "quhair the saidis landis were disponit befor to the airis quhatsumever, and the saidis infeftmentis changeit be resignatioun in the same persoun and to his airis mail."¹ These revocatory enactments may show that the descent was to heirs-general as the rule at common law, and that provisions to heirs-male were viewed as exceptional and to be discountenanced; the presumption, therefore, being necessarily in favour of the rule and against the exception. With this salvo, the "tailzies," or entails, struck at

¹ Acts of the Parliaments of Scotland, 113, 236, 500; iii. 441.

by these general Acts, were recognised by the law and acted upon throughout the period covered by the Acts in question. When James VI. prosecuted his claim to the Earldom of Angus as heir-at-law on a similar plea before the Court of Session in 1588, his claim was rejected, on the ground that what would otherwise have been the right of the heir-general had been barred by an entail in favour of the heir-male in 1547. Entails were required to be rigidly proved, as being exceptional to the ordinary course of the common law, and with the presumption consequently against them. The maxim is that what is ordinary is presumed, and *vice versa*.

3. The law of succession *ut supra* was affirmed and enforced in the celebrated judgment of the Court of Session on the claims to the Lordship of Oliphant, decided in 1633 precisely in accordance with all that has been stated.

The question was, broadly, as to the right to the dignity of Lord Oliphant, as between Anna, daughter and heir of line of the deceased Laurence Lord Oliphant, and Sir James Douglas of Mordington her husband for his interest, on the one hand, and Patrick Oliphant, the heir-male collateral, on the other, to which personage the late Lord had disposed by contract the fief of the family and the dignity, executing at the same time a procuratory of resignation of both fief and dignity into the hands of the King, but upon which the King had taken no action up to the date of the death of Lord Oliphant. A further question arose in consequence of this latter specialty which it is unnecessary to deal with here. The case was decided by the Court of Session on the 11th July 1633, in the presence of Charles I. as a spectator, on the occasion of his visit to Edinburgh in that year. The case is reported by Lord Durie, one of the Lords of Session who determined it, in his Decisions (p. 685). After laying it down that dignities, that is, titles of honour, were not *in commercio* nor alienable at the will of the possessor without the express assent of the sovereign—which struck at the root of the validity of the conveyance of the dignity (as distinguished from the fief) by Laurence Lord Oliphant to his cousin Patrick; and, further, that dignities required no seisin or infeftment, that is, under the *jus sanguinis*, by that time universally recognised—the Lords affirmed the rule of succession in dignities, both generally and in special reference to the case of Anna, the

heir of line, as follows :—Seeing that Laurence Lord Oliphant, “her father, had bruikit (enjoyed) the title of lordship during his lifetime, by ryding in Parliament and by being designit in the infestments of his lands granted to him be the King ‘his cousin’ with that title of Lord Oliphant, and by doing of all other acts whereby it might appear that he was Lord Oliphant—there being no writ now extant nor patent to show any erection of it in a lordship,” *i.e.* a creation of the dignity by erecting the territorial fief into a dominium or lordship, carrying the title of honour, “or whereby he, or his predecessors, were created lords, but only the custom foresaids, and such acts as is before mentioned, they,” *i.e.* the Lords of Session, in consequence of this, “fand (found) that this use was enough conform to the laws of the realm, to transmit sic titles in the heirs-female where the last defunct had no male children, and where there was no writ extant to exclude the female.” The preferable right of the heir-general, the exceptional character of a more restrictive limitation, and the *onus* or responsibility of proof incumbent on an opponent to make good such restriction, were thus amply vindicated by this judgment—in application, as is expressly stated, of “the laws of the realm.” What followed, turning upon the special question of the procuratory of resignation, is irrelevant to the present question, although, I may state, it was in absolute accordance with the principles of the feudal law of Scotland.

But the proof from the Oliphant case is not yet exhausted. Charles I. determined, under the circumstances attending the procuratory of resignation, to act as if there had been no resignation of the dignity, the transfer never having been perfected, and to allow the honour to flow in its natural and legal course at common law; and he accordingly confirmed the dignity to Anna and her husband by warrant under his sign-manual, 16th March 1640, narrating the position and interest of the parties in the recent suit, and stating that “the titles and honour which he” (Laurence Lord Oliphant, Anna’s father) “could not dispone or transmitt to any other, not being the true and lineal heir of blood, without his Majesties consent, is due and proper, to the said Dame Anna, as lineally descended of umquhile (the deceased) Laurence Lord Oliphant, her grand-schir, . . . and his Majesty being graciouslie pleased that the said

title of honour and dignity, quhilk is inherent in the rycht of blood flowing from the first Lord Oliphant . . . shall be established in the person of the said Dame Anna and of the said Sir James Douglas of Mordington, her spouse, and of the heires lawfully procreate betwixt thame and their aires," etc., "therefore his Majestie ordaines ane lettre to be expedie under his Majesties Great Seal declaring . . . that the undoubted right and title of the honour and dignity of the lordschip of Oliphant and Aberdalgy and Duplin, is, by the right of blood and lineall descent, standing in the persone of the saide Dame Anna Oliphant and the heires lawfully procreat or to be procreat betwixt thame," etc. It is hardly necessary to remark that if any thing could be wanting to vindicate the soundness of the judgment of the Court of Session in 1633, and its conformity to "the laws of the realm," and the understanding in such matters, it would be afforded by this confirmatory testimony and action of Charles I. The reader will observe the contrast between the principle affirmed by King Charles, in absolute accordance with law, that the dignity was "inherent in the right of blood flowing from the first Lord Oliphant," *i.e.* in the heir-general, and the principle laid down in the private rule of the House of Lords, originated in the Cassillis case, enforced by Lord Mansfield in the Sutherland, and, as Lord Mansfield said in the Spynie case in 1785, "anxiously adhered to ever since," that the presumption in similar cases is in favour of the heir-male of the body of the first grantee, excluding the heir-general. But the testimony of Charles I. is even more valuable, as showing his deference, I might say his obedience, to the supreme authority of the law as laid down by the Court of Session in the judgment above cited, but the authority of which, as binding on themselves, the legal advisers of the House of Lords have constantly repudiated, as Lord Kellie in fact has boasted in his recent letter.

4. I come, fourthly, to the testimonies of our ancient and leading institutional writers, among which I select those of Sir James Balfour, President of the Court of Session in 1567, our earliest institutional authority; of Sir John Skene, appointed Lord of Session in 1594, a learned antiquary; of Sir Thomas Craig, author of the "Jus Feudale," completed in 1603, but not published till 1655, and of which I shall have some-

what to say likewise in the ensuing section; of Lord Stair, the greatest authority in Scottish law; of Andrew Macdowall, Lord Bankton, a distinguished Lord of Session, author of the "Institute of the Law of Scotland," a work of approved merit; and of Lord President Craigie, otherwise Lord Glendoick, "allowed," in Mr. Riddell's words, "to be the greatest feudal lawyer of his time,"—stopping thus at the middle of the last century, before the heterodox doctrine in supersession of the orthodox law of succession in dignities had been adopted by the House of Lords.

"Immediat airis," according to Sir James Balfour ("Practiques," pp. 221-223), "ar the sone and the dochter." "Gif ony man deceis, leivand behind him ane dochter, scho sould succede to him as air to all and hail his heritage."

"Gif the defunct," says Sir John Skene (*De Verborum Significatione*, art. *Eneya*), "has ane douchter allanerlie," *i.e.* only, "shee suld succede to all her father's heritage in the forme and manner the son succeedis to his father." And (under art. *Varda*), "The aire femail is in the ward and keiping of hir superiour until sche be fourteene yeirs of age . . . at the quhilk time sche may lauchfully marie with consent of her superiour . . . Mairover, sche being married with consent of her overlord, her husband may doe sik service as suld be done to him by the possessour of the landes,"—*i.e.* by the courtesy of Scotland, which the House of Lords, advised by Lord Mansfield dubiously, and more particularly by Lord Camden, recognised as determining the succession of the heir-female in the Sutherland case in 1771.

The testimony of Craig is as follows, in his treatise "*De Unione Regnorum Britanniaë Tractatus*," preserved in ms. in the Advocates' Library:—"In fœminis idem jus in Anglia scilicet ut in Scotia, ut hæreditas inter filias et sorores, aut alias, si non sunt mares, et in æquis gradibus sint, in capita dividatur; reservata tamen filiaë maximæ natu sua etiam prærogativa, nempe principali mansione defuncti cui succeditur, nam ea in divisionem non venit, ut neque superioritas vassallorum, quæ tota primogenitaë filiaë debetur, itaque in renovatione sive continuatione feudorum, nulla inter nos prorsus est differentia." This passage will be better understood when I speak of the tenure and succession of feudal fiefs, as I shall do under article

fifth of this section. Craig's evidence on the question now particularly before us is remarkable and to be noted, inasmuch as his writings are the fundamental authority invariably cited by the heterodox school of Scottish lawyers in proof of an exclusive male succession as the law of Scotland, which the House of Lords were induced to recognise and adopt in 1762, and enforced with some modification in 1771 as the law governing the succession of dignities—notwithstanding the remonstrance of Lord Marchmont, a Scottish peer, on the first, and Lord Hailes's disproof of it and vindication of the genuine law on the second occasion. The lawyers referred to misapprehended and misrepresented Craig's doctrine through overlooking or disregarding the distinction he repeatedly makes, between what he assumes to be the teaching of the feudal law generally, as derived from the Lombards, and the "mos" or custom which exists "apud nos" in Scotland, constituting (as he enforces it) a distinction peculiar to Scotland, and by which alone consequently (it is a fair inference) Scottish rights are governed and determinable. It is thus that in his "Jus Feudale," after stating that the feudal law prescribes an exclusive male succession (in which he was in error, mistaking the Lombard law of Italy for that of all Europe), and that the presumption is in favour of male heirs, he adds, "Usus tamen noster longe dissentit; præsumit enim feudum ad fœminas æque ac mares descendere, nisi expresse heredibus masculis fuerit provisum."—(I. Dieg. 6, § 6.) In accordance with this Scottish exception to what he esteems a general rule, Craig defines a "feudum talliatum" or entailed fief as "quod, exclusis fœminis, licet veri heredes sint, hæreditatem ad masculos vi provisionis trahat."—(II. Dieg. 16, § 3.) And he exhibits the origin of "feudi talliati," or entailed fiefs, with especial reference to dignities and the aspect in which they are regarded by the law "apud nos," *i.e.* in Scotland, in the following remarkable words: "Apud nos talliæ nomen quam apud ullos frequentius est. Ratio est, quod antiquarum familiarum splendor et continuatio cum dignitate in maribus potius consistat quam in fœminis. Quod, licet maxima nobilitatis pars et sentiat et cupiat, nostro tamen jure talliæ odiosæ reputantur, et strictissimam interpretationem recipiunt, semperque in dubiis pro generali successione interpretatio voluntatis sive tenoris fit, et etiam sub revocatione

cadunt, non solum minorum qui alienaverunt, sed etiam minorum superiorum, qui tales tallias concesserunt; nam sine superioris consensu vix talliæ locus esse potest.”—(II. Dieg. 16, § 12.) After which he notices “quod gravius est,” that the entails in question are included in the general Acts of Revocation of the Kings of Scotland on attaining their majority, respecting which I have spoken in the second section of this letter, *supra*. I have given Craig’s testimony at some length, because (as already stated) his authority has been the watchword of the heterodox school of which I have spoken; and I may add that I use this word “heterodox” in no invidious sense, but simply to mark the character of the school as that of dissenters from the law of the land, as here exhibited; the ultimate development of their teaching being the dogma that the succession of fiefs and dignities originally, and that of dignities from first to last, was to the heirs-male of the body of the original grantee, exclusively of heirs-female—the dogma adopted by the House of Lords as their rule for the future in 1762. Craig had been educated in the maxims of the Lombard law under the great Cujacius, in France, and he mentions in his work, the “Jus Feudale,” that in all doubtful cases of Scottish law, the Lombard law, as identified (by him) with the feudal, ought to regulate the decision. Many passages in that work, taken detachedly by themselves, appeared to support the view of the exclusive descent of heirs-male: but Craig’s Scottish disciples overlooked the fact that he invariably subjoins in such case the reservation that “nostri mores” or “nostri usus,” the law and custom of Scotland were different, as in the passages above cited. The genuine Scottish law and presumption of succession was never played traitor to by the Court of Session, was never even questioned (I must repeat and enforce) till the school in question came into prominence through their employment by peers or claimants, whose interest it was to maintain the rigid male succession, as in the Sutherland and Crawford, the Lovat, and the Cassillis and Sutherland cases above mentioned. Sir David Dalrymple of Hailes, Lord Hailes’s grandfather and Solicitor-General to Queen Anne, indicated the true value of Craig’s testimony as against his pseudo-followers in a learned “Information” on behalf of Sutherland against Crawford in 1706; but his refutation was either forgotten or

overlooked in 1762, when the heterodox doctrine was affirmed by the House of Lords in the Cassillis claim in that year. Lord Hailes once more placed Craig's testimony on its true foundation, and blew the entire fabric based upon the misrepresentation of it to atoms, in his Additional Case, and thus induced a modification in the rigid rule as established by the Cassillis Resolution in the House of Lords, which I shall notice in the ensuing section of this Letter. Since then Craig's testimony has ceased to be appealed to: but the heresy, with the superficial modification referred to, still dominates in Committees for Privileges in the House of Lords. I must apologise for occasional repetitions when the identical point comes before us under different aspects in these Letters.

Lord Stair's words, in his "Institutions of the Law of Scotland" (iii. 5, § 11, 12), are, as usual, comprehensive and weighty:—"Heirs-portioners are amongst heirs of line; for when more women or their issue succeed, failing males of that degree, it is by the course of law that they succeed; and because they succeed not *in solidum*, but in equal proportions, they are called heirs-portioners; and though they succeed equally, yet rights indivisible fall to the eldest alone, without anything in lieu thereof to the rest: As, 1. The dignity of Lord, Earl, etc.; 2. The principal mansion, being tower, fortalice, etc.; . . . 3. Superiorities are accounted indivisible, and befall only to the eldest daughter and her issue, and thereby all the casualties of the superiority, either preceding or following the defunct's death, as ward, relief, marriage of the vassal's heirs, non-entry, liferent escheat, etc. The reason is because the vassal's condition ought not to be worsted, and *they* made subject to many superiors by such successions." "Heirs-male, and of tailzie," Lord Stair proceeds to state, "succeed not by law, but by the tenor of the infestment and provision, and therefore have that benefit and no more, which is so provided to them, or which is accessory thereto."

Lord Bankton writes in his "Institute of the Law of Scotland" (I. 2, § 30) as follows:—"The successors of peers in their honours and dignities may be termed peers by descent; but truly it is the title conferred by the patent that dignifies the successive heirs of the patentee, for it

devolves upon them in the terms thereof. If there is no patent, but only possession, which is the case of our ancient lords, the title of honour must go to the heir-at-law, who inherits all hereditary rights where a provision in favour of other heirs does not appear; but if the old rights of the barony or lordship belonging to the family have always gone in a perpetual channel to heirs-male, then all titles of honour thereon founded will be understood to go in the like manner to the heir-male, though the rights of the estate came afterwards to be defined to heirs whatsoever; for the feudal peerage must go as the estate would at the time when the great barons, on account of their holdings, remained Lords of Parliament, and the small ones were allowed to send a commissioner to represent them. At the same time 'tis plain that the ancient feudal peerage, as all other territorial dignity, could not be enjoyed by any other than those having a right to the lands and baronies to which the same was annexed; but this is long since antiquated, and peerage is become a personal dignity, derived from the King, the fountain of honour, to the patentee, and such heirs as are by the patent limited, without respect to the lands from whence perhaps the designation is taken."

Lord President Craigie's statement, although given as a legal opinion, may be added here in consideration of his eminence in feudal law. He is advising a client (in 1754) on the question of a claim to the ancient Lordship of Ross of Halkhead: "*Primo*, I am humbly of opinion that by the law of Scotland a peerage is an estate of inheritance, descendible to heirs. *Secundo*, That where the descent of the peerage is not limited by a deed (or) by the patent, that it descends to heirs-general, or of line, in the same manner as other heritages; and as a consequence of this, *Tertio*, As the peerage of Lord Ross appears to have existed in this family" (that of the client who consulted him, and who claimed through a female) "long before any peerage in Scotland was granted by patent, and as there is no patent limiting the descent of the peerage to heirs-male, I am humbly of opinion that 'the peerage is descendible to the heirs of line.'"¹

I conclude by citing the words of a lay peer, the learned and accomplished Earl of Marchmont, who, in his speech on

¹ Riddell's Peerage and Consistorial Law, pp. 192, 193.

the Cassillis claim in 1762, at a time when laymen took part by word as well as vote in Committees for Privileges, protested in support of the national law, in the following words, as reported at the time: "That Craig makes a doubt with regard to female succession"—too strong a statement, as above shown—"but certainly our succession was always lineal and always female; and where there was an heir-male, he was no heir-at-law, but an heir of provision."¹

5. I propose now to exhibit the connection of the Scottish law and presumption of succession with the system of feudal tenure to which it was subsidiary, and apart from which, as already stated, its *rationes* cannot be adequately appreciated. I have thus far established the law as a hard and dry matter of fact, which all will stumble over if they do not recognise and take account of it. The conditions and limits of Lord Hailes's Additional Case in vindication of the right of the heir-general of Sutherland against the crude assumptions of the two heirs-male collateral, Sutherland of Forse, and more especially Sir Robert Gordon, and the abhorrence entertained by that master in historical criticism for the theoretical and *a priori* reasonings and inferences which betrayed such men as Lord Kames and Sir Robert Gordon's counsel into the path of error, induced him to confine his proof within the channel which I, too, have thus far followed; but the conditions of the present vindication of my two Protests as impugned by Lord Kellie, admit of a more extensive survey; and I do not, indeed, see how the dry bones which I have exhibited to the reader can be re-animated so as to arise and stand up and testify, an exceeding great army, with a living voice, to the intelligence, not only of lawyers but of the laity of Scotland, unless by taking my stand on an eminence above the valley of time, and showing how the course of tenure and of succession has rolled continuously down from the obscure mountains and mists of the past, through the centuries intervening between the establishment of the social system introduced into Scotland as a variety of the feudal and in supersession of the older Celtic policy in the twelfth century, and the present day. Lord Stair's maxim, cited and expressed at the opening of this letter, appears to me to prescribe such a survey. Lord Hailes

¹ Maidment's Report of Cassillis Claim, p. 42.

himself might have delineated it, had he so thought fit, from the materials given in his own Case. I need only premise that the hereditary devolution of the thirteen Scottish Earldoms of Celtic origin, including Mar, as flourishing before and after the year A.D. 1300, depended throughout, as all later dignities equally have done, on the working of the system now to be briefly sketched as existing in Scotland during the period. This sketch will incidentally illustrate other points of importance in the succeeding narrative.

According to this system, originally nearly the same with the Anglo-Norman polity, but gradually divergent from it, a kingdom was practically a fief held by the king from God, the overlord; and the lands of the kingdom were held by the king's great vassals *in capite* of the various fiefs into which the kingdom was divided, and who paid the king homage and services accordingly. The tenant *in capite* subdivided his fief among vassals of his own, who held under the same conditions, and rendered homage and service to him in the same manner, as he himself did to the king. Every such great barony or earldom was thus an *imperium in imperio*, a petty principality; and these baronies and earldoms were frequently invested with sovereign power through the grant of regality, or supreme jurisdiction in the four points or pleas of the crown. These great vassals had their councils, or senates, their "nobiles" or chief vassals, their bailies or justiciaries, their heralds and pursuivants, and, in a word, all the paraphernalia of royalty.

The kingdom, or royal "dominium," was concentrated in and represented by the capital castle and town; and the feudal fiefs, or dependent principalities each in like manner, in and by its chief messuage or castle-stead, styled in ancient Scots the "kemys" or "kaimes," each of these capital towns or castle-steads representing the original seat of power from which "dominium" was extended over the lands subordinated to it. Kingdom and fief were thus, in English phrase, mere "parcels" of the capital town and chief messuage. The king's right and titular designation were only inchoate and prospective, not perfected and enjoyable, till he had been inducted into corporal possession of the kingdom by the ceremony of coronation at the hands of the Church as representing God, the Supreme

Overlord, at the capital seat of empire: the right and titular designation of the baron or earl were similarly in suspense and imperfect until he had been inducted into corporal possession of his fief by infestment, or seisin, at the hands of the king, as represented by the sheriff or royal officer, at the chief messuage of the fief. It was then only that the fealty of their respective vassals became due; it was only after that consummation that the revolt or rebellion of those vassals was stamped with the full character of feudal delinquency; and it was through an anxiety to preclude the possible results of such *interregna* that kings so frequently caused their heirs to be crowned during their lifetime, and that their feudatories in like manner resigned their fiefs for investiture of their sons in fee, to them and their heirs, with reservation of life-enjoyment to themselves. Hence as matter of fact, for the reason foresaid, the grantee of a Scottish "comitatus" or "baronia" was not warranted either by law or custom to assume the title of dignity, grant charters, or exercise any right of superiority native to the fief, before his infestment upon the grant had been duly completed, and till he had been put in corporate possession of the fief which gave him the title and privileges in question. And by similar consequence the sons and heirs of Scottish earls and barons were designated as commoners by their simple Christian name and surname, and not by any title of dignity, during the interval between the death of their predecessors and their own infestment—the latter proceeding upon legal proof of the filiation and heirship, of the particular tenure of the fief, and of their predecessors having died in the faith and peace of the king, as legal subjects, laid before and reported upon by a jury or inquest, appointed by the sheriff under authority of the royal Chancery, and returned to that Court, the province of which was to watch such "retours of service," as they were called, with close scrutiny in the interest of the sovereign, with reference to the fees attendant on succession, or the power of resumption reserved to the sovereign in case of the deceased vassal having died in rebellion or under forfeiture, or having incapacitated himself by other feudal delinquencies. It further followed from the preceding conditions that, the tie between the great vassals and the king being that of fealty, or homage paid in acknowledgment of a "beneficium" or fief, the tenant

or beneficiary might, in certain cases, in accordance with feudal law (or, at least, understanding) renounce his fealty by renouncing the "beneficium;" and of this we have many examples, although the renunciation was usually prompted by anger at some act of confiscation or injury on the part of the sovereign. Such renunciations required to be duly verified and notified to the overlord.

From this gravitation of the fief to the chief message, as of the kingdom to the capital, as the central point of attraction, the tenure of the fief, the personal intitulation of the tenant as earl or baron, and the superiority over the whole fief, with the correspondent responsibility to the overlord, the sovereign, were inseparably annexed to and identified with the possession of the chief message; and in this sense, but in this sense only, fiefs were described as impartible or indivisible. The chief message, as possessed by a vassal duly invested therein, represented the entire earldom or barony, with all its lands and services, in the eye of the sovereign, who had no occasion to look further. Hence it was a matter of indifference to the sovereign, and practically permissible to the tenant *in capite* to alienate large portions of the *dominium utile* or profitable lands of the fief, through settlement on younger sons or daughters, or even by sale to strangers; but for the tenant to alienate the chief message, which involved the superiority over the whole fief, without the king's consent, to the effect of imposing on his overlord a vassal other than himself without his consent, was a grave feudal delinquency, inferring a breach of the covenant between vassal and lord; and the overlord, whether king or tenant *in capite*, could, under such circumstances, "recognosce" or resume the fief, the alienation being viewed as null and void, as severing *ipso facto* the connection between vassal and superior through breach of tenure. The only exception to the penal consequences attendant upon such *outrévidence* was when the tenant of a comitatus or baronia, having executed a charter of alienation on his or her own responsibility and risk, without the consent of the overlord the king, the king nevertheless ratified and confirmed it, to the condoning of the delinquency and renunciation of the right of recognition, by a subsequent charter under the Great Seal, either simply reciting and confirming the charter, or referring

to its contents and regranting the fief in conformity with it. The only voluntary alienation of the chief messuage was in cases when the tenant *in capite* resigned the dependent fief into the hands of the overlord, either *in perpetuam remanentiam*, to remain with the crown for ever, or for a regrant in the prospect of a marriage, or to meet some family contingency, in all which cases the resignation (apart from which no vassal could be deprived of his right except under attainder) was invariably recited in the charter of regrant—so invariably, in effect, that it is matter of the strictest law that if such resignation be not recited, it cannot be presumed. On the other hand, cases occurred from time to time of involuntary alienation of the fief as dependent on the possession of the chief messuage in favour of the crown, and usually *in perpetuam remanentiam*, through moral compulsion or barefaced oppression and coercion; and in such cases it was open for the tenant to recover his right by process before the superior civil court at a more favourable time or season; and the understood and formal procedure towards such recovery was for the oppressed individual to protest for justice before the assembled parliament, or, if under such dread of life or goods as may befall a constant man, before chosen and respectable witnesses in the presence of a notary-public, recorded his complaint and protestation “for remeid of law at fitting time and place,” in an instrument under his name and notarial monogram. Notaries public at that time were officers commissioned under authority of the Papacy and the Holy Roman Empire; and their testimony was accepted as beyond question by the whole Christian world. Processes for restoration against the compulsory alienations here spoken of, as well as against other acts of spoliation perpetrated or practised by the crown, were usually based upon notarial protests of this description.

In each and every one of the preceding cases of alienation, the tenant, self-denuded of the chief messuage, ceased at the same moment to be entitled to the dignity or intitulation annexed to it. And it thus appears, once more, that, in the early times spoken of, titles of dignity were in no sense distinct entities, like modern peerages, the subject of special creation apart from office and territory, and necessarily granted by distinct patents; but were qualifications or official titles dependent upon and

annexed to the actual possession of the great fiefs of the crown, which had been "erected," as the phrase was, and as above stated, into earldoms or baronies. There exists a survival (to use a current scientific word) of the ancient Scottish dignities of this description at the present day, in the case of one of the most interesting of the Scottish lordships of Parliament, popularly mis-styled baronies, that of Torphichen or "St. John of Jerusalem," held by the distinguished house of Sandilands, heirs-general of the original Earls of Douglas, and which is expressly recognised by Act of Parliament in the reign of Charles I. as attached to the possession of the chief messuage of the old Preceptory of Torphichen. It followed, once more, from the conditions of tenure above shown, that the modern English principle of the indefeasibility of dignities, in the sense of the blood of any one created a peer and sitting in Parliament being thereby "ennobled," and a vested right to the inheritance of the dignity established in his descendants, was wholly unknown in Scotland. As late as 1706 we find the Scottish Parliament permitting a peer to take his seat among the barons, under reservation of the better right of a counterclaimant if it could be established before the Court of Session, in which case the claimant would become a peer, and the peer *in posse* relapse into a commoner. On the other hand, the doctrine and rule that the heirs of those originally possessed of feudal dignities were entitled to the inheritance of those dignities, in the sense which we now attach to "peerage" as a title of honour, and this, through the *jus sanguinis*—applicable alike to dignities and lands—even although the chief messuage of the fief, from which the intitulation is taken, had been alienated—was fully established in the reigns of Queen Mary and James VI.

The great fiefs I have been speaking of, with the dignities attached to the possession of the chief messuages, were descendible at common law to the heirs-general—expressed broadly by the limitation "hæredibus"—from at the latest the beginning of the twelfth century in Scotland, as proved (to say no more) by Lord Hailes in his Additional Sutherland Case; while, as I have above stated, let me repeat here, as it cannot be too emphatically dwelt upon, the thirteen original earldoms of Scotland—exclusive of that of March, of the con-

stitution of which, having been forfeited, we can only judge by analogy, but inclusive of that of Mar—actually devolved on heirs-general, heiresses; Mr. Riddell having shown, by evidence previously unknown, that the same rule which Lord Mansfield and Lord Camden actually recognised and founded upon in 1771 as governing the succession of nine of those earldoms, equally applied to the three others, exclusive, of course, of March, which went uninterruptedly from father to son.

If the earl or baron died, leaving no son, but a daughter, she succeeded (as by special proof already given) in preference to the earl or baron's younger brother, and so as to remoter male relationship. In such cases she succeeded of course to the whole fief. But if there were two or more daughters co-heiresses, the eldest succeeded by law to what was called the *præcipuum*, the chief messuage, carrying the superiority over the whole fief and the title of dignity; and after due infeftment at the chief messuage, bore the title, and acted, in all respects, on the footing of the original grantee, and this even although the comitatus itself in a territorial sense, that is, the lands and territory, was divided between herself and her sisters, and thus into two, three, or even, as in the case of the Earldom of Caithness in the fourteenth century, four separate portions, descending in four lines of descent; the dignity nevertheless continuing in the line of the elder sister till, in this case of Caithness, specially resigned by the then tenant into the hands of Robert II. Instances of such disintegration and disruption of the fief, accompanied with survival and transmission of the dignity in the manner stated, were of constant occurrence. The custom continued precisely the same after titles, in the sense of "peerage," had been recognised as hereditary in virtue of the *jus sanguinis*, as above stated and illustrated. I may refer here to the law on this point as laid down by Lord Stair in the preceding section of this letter. It was thus that feudal dignities were partible as regarded the length and breadth of the fief, but impartible as regarded the identification of the superiority and intitulation with the chief messuage, as above stated. The mistakes of the advocates of the exclusive male succession in fiefs and dignities, according to the Lombard law, arose, in a great measure, from

their fixing their eyes exclusively on the impartibility of fiefs, irrespectively of the correlative sense in which they were partible.

It will be observed that the succession of the eldest daughter, or her representative, to the title of dignity in Scotland was contrary to the English practice, by which, where there are more than one daughter, or co-heir, to a barony granted by writ of summons, the title is said to fall into abeyance, and the sovereign is considered to be entitled to allow it to remain dormant, or rather absorbed into the crown, and to reconstitute it at pleasure in the line either of the elder or younger co-heir at any distance of time. English authorities, it will be seen, viewed this contrast between the practice of England and Scotland with very jealous eyes during the last century.

During a minority, the fief was in the hands of the sovereign, who drew the revenues, a certain sum being allowed for the maintenance and education of the heir. The ward and marriage of the heir, whether boy or maiden, was frequently granted by the king to some noble who had a son or daughter, between whom and the heir he was thus empowered to arrange a marriage—very often to the repair of fortunes which had become dilapidated through family settlements or otherwise. When the ward and marriage were retained by the king in his own hands, he could either bestow the heir in marriage at his pleasure, or forego the right on adequate compensation. Any risk from the contingency of heiresses falling into the hands of adventurers of the higher or men of meaner estate, unfitted for the position of great crown-vassals, was thus precluded; and, on the contrary, the interests, alike of the crown and the feudal aristocracy as a body, were maintained inviolate. Nor could an heiress, tenant of the crown, even after legal majority, bestow her hand without the consent of her suzerain, his rights to homage and feudal service giving him a vested interest in the question of her marriage and succession. The law of succession was thus protected by sanctions, as regarded female inheritance, which precluded abuse; while it was in itself a provision essential to the vitality and activity of the system now under consideration.

Till the "heir" was given in marriage by the king, the fief

was generally administered by a "custos comitatus" appointed by the king. When an heiress married, her husband at once entered into possession, not through infestment, but in her right, under what was styled the "curialitas Scotiæ," or "courtesy of Scotland" (a privilege not unknown, indeed, in England), and bore the title of dignity, led the vassals, and sat in Parliament, all in the official capacity incidental to the fief. On the other hand, in complement of their duality in unity, the "comitissa," or "domina," always figures in legal and civil transactions affecting the fief or other property originally her own, as the chief actor, and her husband in a secondary character, in legal phrase "for his interest." In cases where the heiress, being of age or a widow, alienated the fief to her intended husband, either with the previous consent or subsequent confirmation of the king—the indispensable sanction, as above explained—the husband figures as principal in all subsequent transactions. Such alienations became less frequent as centuries wore on, and latterly the tenure by the courtesy prevailed almost universally.

It followed practically as a consequence upon the identification of the dignity or title of honour with the possession of the chief messuage or castle-stead of a noble fief, and the impartibility of the fief in the sense above defined, that the original charters of, say, a feudal comitatus or earldom, never as a rule specify or even allude to the title of dignity, or what in modern phrase is called the "peerage," a thing unheard of in Scotland till the year 1587, when the great body of the feudal barons were, for the first time, absolutely deprived of their right to sit in Parliament otherwise than by election and representation, except in the case of dukes, earls, and those barons who were styled Lords of Parliament. And to the last, it must always be recollected, there was no House of Peers or Lords in Scotland, the peers sitting and voting in the same chamber with the other Estates of Parliament, as has been already stated. The chief messuage or castle-stead granted by the charter carried the dignity, and the sovereign no more thought of specifying it than of granting the shadow of the castle along with the castle itself. This form of conveyance was perpetuated from the earliest times to within a few years of the close of the sixteenth century, as can be shown by a

long series of examples, in every one of which the earl or baron, the grantee, enters into possession, with full designation according to his title, from the moment that his rights under the charter have been perfected by seisin or infeftment. Exceptions to the rule occurred, but always under peculiar circumstances; and it was upon these exceptions, misunderstood and taken as the rule (as in the parallel case of heirs-male as against heirs-general), that Lord Camden grounded the private rule of the House of Lords which has been identified with his name, to the effect that no charter of comitatus shall be understood to convey the title of honour, unless it is specially conveyed by it—a rule which has been applied with such disastrous consequences against the right of Lord Mar in respect of Queen Mary's restitution of the comitatus in 1565, in the recent speeches of 1875. I shall vindicate the genuine Scottish rule, and indicate the true character of the exception in a subsequent Letter, when dealing with the charter of 1565. In the meanwhile, I must be allowed to submit that the theory of "peerage-earldoms," as personal honours, apart from lands, created by distinct grants whenever a charter of comitatus was granted without specification of title, but followed by the assumption of title by the grantee (a theory originally started by the unsuccessful claimant in the Sutherland claim, and which Lord Redesdale in particular urged with emphasis throughout his speech in 1875), derives no support from the genuine law and practice of Scotland in the feudal times we are now dealing with.

The most ancient form of prescribing the limitation of descent, up to the beginning of the fourteenth century, was the phrase, "A. et hæredibus suis." It was contended by the heterodox lawyers of the last years of the seventeenth century, and the first half of the eighteenth, on the theory that the Lombard law prevailed in Scotland, that "hæredibus" was to be understood exclusively of male heirs, excluding females; but Lord Hailes proved the contrary in his Additional Sutherland Case. But according to orthodox authorities, and by universal practice, the destination "hæredibus" in Scottish law is of the broadest signification when unfettered by special provisions or attendant circumstances; it is presumed even when not expressed; heirs-general are included under it: but the

term is at the same time flexible, and where the standing investitures of a fief are to heirs-male, the term "heirs" in subsequent conveyances fall invariably to be read by the light of those investitures, and construed as heirs-male of the body or heirs-male collateral (the presumption being in favour of the latter as less restrictive), according as the principal fief stands limited in the said leading investitures. In like manner, in cases where there is no patent or charter extant to define the limitation, the descendibility of the dignity, whether to the heirs-general or the heirs-male, falls to be determined *inter alia* by an inquiry how the investitures stood at the time of the creation, the presumption being necessarily in favour of the descent of the lands and dignity in the same channel. The law Lords in Committees for Privileges have usually repudiated the doctrine that the investitures can afford any clue to the descent of dignities; but not always so, Lord Loughborough having recognised the testimony of the investiture in the Glencairn case in 1797, and Lord Mansfield in the Spynie case in 1785, although he rejected it in the Sutherland instance in 1771, and the Cassillis in 1762. But it is only on the Scottish doctrine that the Cassillis decision can be vindicated; and the Scottish doctrine must rule in all Scottish cases of dignity.

I think we may now perceive that the law and presumption of succession in Scotland, as affecting dignities, was the necessary outcome of the feudal system as established in that country, by which the fief was, in the eye of the law and the sovereign, the dominant consideration, and the continuity of the male succession of the original grantee in the direct line a secondary object. On the contrary, the policy of the crown was distinctly bound up with the prevalence of the succession of heirs-general, inasmuch as under that law the services due to the crown were secured in the case of the devolution of the fief on an heiress by the right of her wardship and marriage accruing to the sovereign; while in the case of several sisters, the crown, suffering from the power of the great feudal barons, gradually learnt to esteem the diminution of their power through the division of the *dominium utile*, or estates of the fief, as a positive security and advantage. I shall show hereafter how the policy of our kings after the accession of the House of Stewart was to depress the earls and greater barons, and

multiply and elevate those of comparatively inferior power upon their spoliation. In the fourteenth century many of the leading Scottish families—my own among the number, and I think they were quite right—began to protect themselves against this risk of a separation between the male representation of a house and the fiefs pertaining to it, by executing tailzies (entails) excluding females; but, as above shown, this was exceptional, and although tolerated by the law, was discountenanced by it, and the presumption was always against such, and in favour of the heirs-general. The kings naturally disliked these entails, as the crown was deprived thereby of its control over the marriage of heiresses, and its power of equalising (so to say) the power of the aristocracy by strengthening its weaker members, while they were undermining the power of the stronger.

Such were the *rationes* on which the Scottish law of succession depended in connection with the tenures of fiefs. Their agency was most stringent in the oldest times, during the twelfth, thirteenth, and fourteenth centuries, the period when the history of the thirteen ancient Scottish Earldoms, including Mar, repeatedly illustrated their operation: but the limitation to heirs-male, introduced under Robert Bruce and the earliest Stewart kings, was never wholly prevalent, and continued to be exceptional; and the rule and presumption in favour of heirs-general is as decided now, in all cases of heritage, as it was in the reigns of Alexander III. and his predecessors in the thirteenth and twelfth centuries. There is no greater mistake than to consider entails in favour of heirs-male as a relic of Scottish feudalism. They were intended to correct and obviate what the civilised world has always regretted, the tendency of the feudal system to break up the great families whose continuity contributes so much to the glory of a country, and subject the people at large to the tyranny of an autocrat. The law of succession in Scotland is that of feudalism, and, as such, I vindicate it against my personal prejudice and family tradition.

In this sketch of the ancient system to which the law of succession was ancillary in Scotland, I have merely stated what is familiar in detail to every historical and legal antiquary of the old and orthodox school. It would take a volume to set forth the proofs at large, but the law, as laid down by Lord

Stair and others in the preceding section, reposes upon them as on its basis, and every old Scottish charter-chest would supply illustration.

6. I have reserved, for the last item of evidence on the present head, a very remarkable piece of evidence, which has been much misunderstood, and has been made the basis of a leading point urged by Lord Kellie and by Lord Chelmsford against Lord Mar, evidence which could hardly be properly appreciated till the scheme of the feudal system had been put before the reader, as in the preceding article. This evidence consists in the responses rendered by the eighty Scottish Commissioners, including the leading "magnates" of the nation, elected on the part of Baliol and Bruce and the less considerable competitors, to certain questions put to them in 1292 by Edward I., in his assumed character of overlord of the kingdom of Scotland, on the occasion of the claim advanced by John Lord Hastings, the representative of the third of the coheirs, viz., that the kingdom should be divided into three portions as between Baliol, Bruce, and himself, with reservation of the title and office of king to Baliol, as representing the eldest coheir. In answer to a previous question put to them some months before—viz., "Is the succession to the kingdom of Scotland to be determined upon otherwise than in the case of earldoms, baronies, and other tenures?"—the Commissioners had replied, "No"—"quod de prædicto regno est judicandum quoad jus succedendi sicut de comitatibus, baroniis, et aliis tenuris impartibilibus," upon which I may remark that the insertion of the word "impartibilibus" was an intimation of their own, not called forth by the question, and thus, however accurate, somewhat beyond their commission. On the subject of the demand of Hastings, based on the plea that the kingdom was partible, the Commissioners replied, in response to many questions of Edward:—1. That the kingdom was not partible, "quod regnum Scotiæ non est partibile." 2. That earldoms were not partible, "quod Comitatus in prefato regno Scotiæ non sint partibiles;" and that this had been adjudged in the "Curia Regis" in the case of the Earldom of Athole, "et hoc fuit inventum per judicium curiæ regis Scotiæ de comitatu de Astheles," adding, however, that baronies were partible, "dicunt tamen quod baronie sint partibiles." And they subjoined, in respect to a supplementary

question put in the interest of Hastings, that when a comitatus descended to female heirs, the elder sister took the whole ; but it was becoming—although a matter of grace, not of right—that an assignment, or provision, should be made to the younger sisters, in case their father had not provided for them during his lifetime, “si comitatus devolvatur ad filias in prædicto regno Scotiæ, primogenita totum integre importabit, veruntamen si nullæ aliarum sororum vivente patre aliquid fuerit assignatum, decens est quod primogenita quæ hæreditatem importat certam assignationem sibi faciat et respectum ; et hoc est de gratia, non de jure,” adding, however, or rather premising, that nothing of the sort had, to their knowledge, occurred in regard to the kingdom.

I may state here, that the proceedings of the Athole judgment are not on record ; but the case must have arisen early in the thirteenth century, when, as matter of history, Henry Earl of Athole died, leaving two daughters, the elder, Isabel, the wife of Thomas, Lord of Galloway, the younger, Fernelith, wife of David de Hastings. The elder sister became Countess of Athole, necessarily in right of the chief messuage of the Earldom accruing to her ; and after the death of her son, Patrick Earl of Athole, without issue, Fernelith, her sister, succeeded as Countess of Athole, the chief messuage devolving upon her, as it had previously done on her sister.

The result of this evidence is that earldoms were impartible or adivisible, and that the succession to the kingdom followed the same rule ; and that the succession in such “earldoms” went to the eldest heir-female, failing males to the same degree, without any right on the part of a younger sister to a share in the heritage ; but that it was in the power, either of the father during his life, or the elder sister after her succession, to make provision for such younger daughter or sister out of the fief. The superficial incongruity between the impartibility of the “comitatus” and the practice to be carried out by alienation of a portion of it to the younger sister, as by the testimony of the Commissioners, disappears in the light of the exposition in the preceding article ; inasmuch as such alienation, necessarily out of the *dominium utile*, would not affect the superiority over the entire fief resident in the chief messuage, which was all the king, the overlord, looked to, and in which sense only the

comitatus, like the kingdom, was impartible. For, as already stated, the impartibility of the kingdom consisted in the dependence of the various fiefs into which it was parted upon the capital seat or chief messuage, the possession of which by the king gave him superiority over the whole, and the correspondent right to homage and allegiance.

The misapprehension on the matter here in question, and which induced the misdirection above adverted to on the part of Lord Chelmsford, began with a statement of Lord Mansfield in his speech on the Cassillis claim. Speaking of the establishment of the feudal system in Scotland, "Earldoms and other territorial dignities," he said, "most certainly descended to the issue male, and this representation was in the right line, that is, the heir always took under the first grantee, and as descended of his body, not as connected with the last succession. How long these territorial dignities continued, we are totally in the dark. . . . When they came to be *in commercio*," which the noble and learned Lord fixes as about 1212, "the alteration from territorial to personal dignities followed by degrees. Territorial dignities"—and this is the matter of our present remark—"could not remain after the fee was dismembered. The dignity could not fall to any particular parcel or part of the lands more than to another, unless the dignity had been annexed to the capital seat, or some other part of the fief; but nothing of this kind can be shown."¹ Comment upon this is unnecessary after the proof given. But these *dicta* of Lord Mansfield evidently prepared the way for the theory that, inasmuch as earldoms were impartible, the dignity necessarily ceased if the fief were dismembered or broken up, and for the application of that theory in a substantial argument by Lord Chelmsford in his speech on Lord Kellie's claim, to the effect that "the grant of considerable portions of the Mar lands" by the Crown, subsequently to the usurpation from the Erskines, "thus severing them from the Earldom or Comitatus," had the effect of breaking it up, and preventing the possibility of restoring the territorial dignity in its integrity, *i.e.* by Queen Mary in 1565. The insistence by Lord Chelmsford and Lord Redesdale on another point, which I shall have to deal with, *viz.*, that the Erskines only claimed half of the "Comitatus"

¹ Maidment's Report of Cassillis Claim, p. 45.

between the days of the Countess Isabel and Queen Mary, is based on the same misapprehension. The Erskines, as senior coheirs, were entitled to and claimed the chief messuage, which carried the superiority and the dignity, and this whether they claimed half the Comitatus only or the whole. If they claimed a half, it was the half which carried the superiority over the whole, and the title of dignity; if they claimed the whole (as they as frequently did) it was in the name of the superiority, without prejudice to any right of the junior coheirs to a half of the *dominium utile*, could such be established. It came to the same thing under either of these alternatives.

I may close this article by the observation, due to Lord Hailes, that if Edward I. had perceived in the customs of Scotland any circumstance analogous to the Longobardic law in the matter of female succession, he would have asserted his pretensions of overlord, have pronounced to Baliol as he did to Bruce, "quod nihil capiat," and have chosen for his vassal the feeblest as the most obsequious of the competitors.

I may add that Lord Camden in his speech on the Sutherland claim, founded expressly on the responses of the eighty Commissioners (which he seems to claim as his personal discovery) in support of the doctrine of female succession as the law of Scotland. After quoting the answers to the questions, "By what law and custom judgment should be given, and whether otherwise concerning the kingdom than concerning earldoms, baronies, and other fiefs," he adds, "This satisfies me; it is a great authority." He observed in the same breath, "It is remarkable, too, that both Bruce and Baliol claimed in right of women, and it was admitted that by the law of Scotland the kingdom itself, as well as dignities, passed to women."

The responses of the eighty Commissioners, above given, were adduced for Lord Mar in the recent claim.

The general law of succession, as above stated in favour of heirs-general, including females, unless a better right can be proved on behalf of the heir-male, is of daily and universal recognition and force in Scotland; and it is only in fact in the case of dignities that it has ever been questioned, while no countenance has ever been given by the Supreme Court of Scotland to the counter heresy. The torch of orthodoxy and

remonstrance has been handed down by the late Mr. Riddell, the greatest feudal and genealogical lawyer of his day in Scotland, whose works have contributed so much additional and corroborative matter to the former store; while others in the same line of succession from Lord Hailes—among whom I may specify the late learned and venerable Mr. Maidment, Mr. Riddell's friend and, I am proud to say, my own likewise—have continued to transmit the heritage of truth and protestation. Mr. Maidment had been the able exponent of Lord Mar's right from the commencement. My Protests were submitted to his approbation before presentation; and I have to lament the loss of his criticism, to which I had looked forward while writing these Letters. His knowledge of the law of Scottish dignities was as profound as his acquaintance with the history of our old Scottish families was extensive; and his interest in every branch of the literary antiquities of Scotland unwearied and enlightened. The learning and zeal of my old and valued friend, the late Mr. Alexander Sinclair, an antiquary of the same stamp, although, like myself, an amateur, have similarly been lost, to my disadvantage in dealing with this case of Mar, subsequently to my first Protest. But although thus isolated, I feel no misgivings, knowing the firmness of the ground on which I stand.

SECTION V.

I come now to the reply to my fifth question, viz. :—

What in particular is the doctrine and rule upon which the House of Lords is in the habit of advising the Crown upon claims to Scottish dignities under the conditions aforesaid? And when, and how, and by what authority, was that doctrine and rule first laid down?

Lord Kellie has stated the doctrine with substantive correctness so far as he goes :—“ Since the Union, the succession to peerages where no patent exists, has been conclusively established by repeated judgments of the House of Lords to be in favour of heirs-male. In the Cassillis case, decided in 1762, the doctrine was so laid down. . . . The later case of Glencairn,” in 1797, “ was decided on the same grounds by Lord Loughborough, and the presumption in favour of heirs-male has ever since been acted upon, and is so firmly established

that it cannot now be upset by irrelevant protests, which attempt to set up a crude code of peerage law by the most unsafe of all legal guides, an amateur lawyer."

Lord Kellie's statement does not, however, exhibit the full extent and bearing of the doctrine introduced in 1762 and subsequently. In the Cassillis claim, the resolution proceeded, as affirmed by Lord Mansfield in 1771, on the principle that dignities, where no patent or charter exists to show the limitation, must be presumed to be descendible to the heir-male of the body of the original grantee; and the resolution was drawn up expressly—so Lord Mansfield affirmed—to establish this as a principle for the subsequent guidance of the House. But in the Sutherland claim and resolution of 1771, while the Cassillis doctrine was affirmed in the abstract, a modification was allowed to the effect that the presumption in favour of the heir-male might be contradicted by an exception proved in favour of the heir-general, the *onus probandi* resting with the heir-general. It is upon the rule and presumption affirmed by these two decisions conjointly, that the Spynie claim in 1785, and the Glencairn in 1797 (in part), and, passing over all intermediate cases, the claim of Lord Kellie to the Earldom of Mar in 1875, have been reported upon.

Lord Kellie, as has been seen, opposes the authority of Lord Mansfield, Lord Loughborough, and their successors who have advised the House of Lords on these claims, from 1762 to 1875, as conclusive against my Protests; but the question is not between myself, whose views can carry no weight as a layman, but between the noble and learned Lords in question and the army of witnesses testifying to the law of succession in dignities as established at the time of the Union, and protected by the Treaty of Union, which I have drawn up, a Macedonian phalanx, in the preceding section. It is with them that Lord Kellie has to contend. My wish is, as the French say, to "efface" myself so far as may be possible in this controversy. It may be well too to remind the reader that the noble and learned Lords, from Lord Loughborough downwards, have merely echoed and reiterated the *dicta* of Lord Mansfield in 1762 and 1771, without the slightest answer made to the increasing remonstrances against those *dicta*

in Scotland, on the principle of "I say *ditto* to Mr. Burke." No accumulation of blind asseveration can give strength to the weak point in a chain such as the *catena* of affirmation on which Lord Kellie lays stress.

It is evident that the doctrine thus appealed to by Lord Kellie is in point-blank contradiction to the law of succession in Scotland, as laid down and illustrated by the authorities in the preceding section, and notably by the final judgment of the Court of Session in the Oliphant claim in 1633. The relative position of the heir-general and the heir-male is completely reversed by the rule founded on by Lord Kellie; the presumption of law is transferred from the heir-general, with whom it rests, according to Scottish law, to the heir-male, and the *onus probandi*, which rests according to Scottish law on the heir-male, to the heir-general. Never was there, except on the stage of pantomime, such a transformation of parts and characters.

It may be asked, How is it possible that the advisers of the House of Lords should have committed it to such error? and, contrariwise, must it not rather be presumed that the error is on the side of those who impugn their advice? The answer may be given by a brief notice of circumstances which preceded and attended upon the discussion of the Cassillis and Sutherland claims in 1762 and 1771, claims which I am compelled again and again to refer to in these Letters.

As I have already stated, the counsel of the Earls of Crawford, in their defence against the process for reduction of the Crawford precedency, carried on by the Earls of Sutherland in the Court of Session in 1706 and previously, had founded *inter alia* on the Lombard law as affirming the exclusive male succession, citing Craig as their authority, but misunderstanding his teaching, while shutting their eyes to every counter-testimony. The process in question, in which Crawford's main defence was prescription, was determined in his favour in 1706, but through a technical specialty (evidently intended to have that effect), not finally, so as to prevent Sutherland from reopening the question, as we have seen he did by the summons and decret of wakening in 1746. The counsel for Simon Fraser, claiming the Lordship of Lovat in 1730 against the heir-general in possession, similarly founded on the Lombard law

of succession and on Craig—affirming indeed at the same time, that even if the Scottish law of succession were in favour of the heir-general, as urged by the heir-general, Simon's opponent, the speciality that the ancient investitures of the fief stood to heirs-male, established an exception in his favour. We learn from Lord Hailes that the judgment of the Court of Session proceeded on this latter speciality, and was thus strictly conformable to the law of Scotland. The words of the judgment, as given in the full and absolute decret pronounced on the 3d July 1730, merely affirm Simon's right as heir-male; but it could not have been otherwise than as Lord Hailes states, inasmuch as that judgment was simply a reduction of the decret given in favour of the heir-general, 2d December 1702 (which had been delivered in absence of the heir-male, and was therefore not final), in no wise impugning the application of the law by which Hugh MacKenzie Fraser, the heir-general, had been recognised by the decret as entitled to the dignity under the ordinary rule of succession; but reducing the decret, and declaring Simon Fraser's right, on the recognition of an exception to that ordinary rule in favour of the heir-male—no other exception being urged in the pleadings, except that founded on the investitures as existing in the sixteenth century, which thus prevailed in Simon's favour. The importance of this decision is great, independently of its proceeding upon the general law and presumption of succession, inasmuch as the House of Lords has repeatedly, although not invariably, refused to look at the investitures as affording any clue or assistance towards discovering the original limitation of a dignity. The same problem which had presented itself in the Lovat case emerged once more in the Cassillis claim, which was brought before the House of Lords in 1762. In that case, the heir-general, the Earl of March and Ruglen, claimed on the ordinary rule and presumption of Scottish law; while the heir-male, Sir Thomas Kennedy, founded primarily on the Lombard law, interpreted by the supposed authority of Craig; his counsel, as in earlier cases, overlooking the distinction which Craig invariably draws between the Lombard law and the "mos" and "usus" of Scotland; and, secondarily, on the investitures as standing to heirs-male at the time of the creation, and thus establishing an exception in their client's favour against the rule at common law as

pleaded by Lord March, the heir-general. I have shown in the preceding section that the doctrine upheld in all these cases by the heir-male as founded on the Lombard (assumed to be the type and criterion of European feudal) law was absolutely heterodox, unheard of in Scotland previously to the Restoration, was never countenanced by the Supreme Civil Court, and is controverted by every conceivable description of authority, as well as by the testimony of universal practice and observance.

The motives and reasonings which induced Lord Hardwicke and Lord Mansfield, who advised the House of Lords on the Cassillis claim, to adopt and enforce the heterodox doctrine, are exhibited to us in their speeches on the claim, and explained by Lord Mansfield in his speech on the subsequent Sutherland claim with a *naïveté* which shows how completely he and Lord Hardwicke believed themselves justified in what they did; although, viewed from a higher standpoint of morality, their action was wholly indefensible. The motive cause which rendered a report in favour of the heir-male desirable in the Cassillis claim, and which induced the noble and learned Lords so to word the Resolution as to establish a general rule to that effect for future guidance, was the advantage it would be if in putting a bar upon claims to Scottish dignities founded upon the descendibility of such dignities to heirs-general. A contrast existed at present between the practice of Scotland and England: inasmuch as in England, when peerages devolved upon coheirs, and thus fell into abeyance, it was in the option of the Crown either to confirm them to such of the coheirs, elder or younger, as it thought fit, and at any distance of time, or not to confirm them at all, and thus practically extinguish them, which would appear to have been considered the desirable course to follow; whereas in Scotland the practice of abeyance did not obtain, and the dignities stood so perpetuated through devolution on the eldest heir-female in the case of coheirs, and her issue. If, therefore, there was nothing to impede the application of the Lombard principle to the Cassillis claim, the important point held in view *ut supra* would be gained. It is difficult to account for the importance attached to this object, except on the consideration that the Scottish Peerage was suspected of being Jacobitically inclined, viewed with jealousy, and kept as much as possible under control; and everything

which tended to diminish their number would be a gain to the cause of the House of Hanover. This, of course, is matter of speculation, which those conversant with the springs of political action during the last century will assent to, or disallow, as the evidence appears to them to point to the above suggestion or the contrary.

The process of reasoning followed was this, as exhibited in Lord Hardwicke's speech in 1762, and Lord Mansfield's two speeches in 1762 and 1771, on which I may remark that Lord Mansfield's speech in 1771 is in great measure an exposition and defence of his former speech in 1762, and the two must be taken together in order duly to apprehend it. It is open to every one to form their own opinions as to the course of the argument, but my own impression, after long familiarity with both speeches, with both cases, and with the previous cases founded upon by Lord Mansfield, is as follows:—

No law affecting Scottish dignities can be discovered as in existence before the Union. The only exception to that is the Oliphant decision in 1633, which affirms the succession of heirs-general to dignities as the law of the realm; but the judgment at the same time rules that, owing to a resignation of the dignity into the King's hands, and the King not having acted upon that resignation, the tenant and his daughter were denuded, which was "manifestly wrong, and against common sense," and vitiates the whole judgment. The decision in favour of Crawford against Sutherland in 1706 (which Lord Mansfield in 1762 believed to have been final), and that in favour of Simon Fraser in the Lovat case in 1730, each decision being by the Court of Session—Lord Mansfield treating the Court as competent in 1730 in his Cassillis speech of 1762, but incompetent in his Sutherland speech of 1771—were both in favour of heirs-male as against female succession in dignities. If, therefore, there be any authority in Scottish law supporting the presumption in favour of heirs-general, or if, as asserted by the heir-general, the Oliphant judgment proceeded on that principle, it is neutralised by the decisions of 1706 and 1730; a *tabula rasa* is thus effected, and it is open to our wisdom to determine, on grounds of expediency, what the rule and presumption shall be in cases such as the present, when the original patent or grant of the dignity is lost. Passing, there-

fore, to general principle, the presumption in favour of heirs-male, as founded on by the heir-male and supported by the authority of Craig, is founded on law and truth. The feudal law excludes females as incompetent to fulfil the duties of the tenants of fiefs, and limits the descent of the fief to the heirs-male of the body of the original grantee. This, therefore, must have been the law of Scotland, and must be presumed and enforced in every case of uncertainty and doubt. No argument from the investitures can be available to remove such uncertainty and doubt, and lead to any conclusions as to the descent of the title of dignity; although, on the other hand, it cannot be supposed that it can ever have been intended that dignities should descend apart from the property necessary to support them—the latter position being somewhat inconsistent with the former. The present case of Cassillis exhibits the uncertainty and doubt here spoken of—the argument I am thus analysing thus proceeds—the investitures (although in favour of heirs-male) cannot assist us, and the only safe course, therefore, is to rule according to the feudal presumption in favour of heirs-male of the body of the original grantee, and make the rule one of permanent obligation, in order to preclude the recurrence of similar claims by heirs-general.

These conclusions were arrived at by Lords Hardwicke and Mansfield in the face of such authorities as those of Lord Stair and his predecessors, including Craig himself, all presumably in the library, if not on the table, of the House of Lords; and with the power of consulting the Scottish judges, the Lords of Session, or the Scottish law of succession, or rather, I should say, under the obligation so to do; probably from the same latent distrust as to what the answer might be, which induced the House of Lords, after summoning the judges of England to advise them on the question of the Dukedoms of Brandon and Dover in 1718—to abstain from putting a single question to them. What was most inexcusable of all, Lord Mansfield, both in 1762 and 1771, left out of view the special interlocutor in the Oliphant judgment, testifying to and applying the law of the realm as existing at the time, and which I have given in the preceding section; and qualified the entire judgment as “a very bad judgment,” “very ill-determined,” and to which he would “pay no regard,” imputing error (as above shown) to a

distinct utterance of the judgment connected with the law of feudal resignation, which he wholly misunderstood, and which in no possible way affected the leading interlocutor in favour of the heir-general, expressed in the memorable words given in the preceding section, and upon which, as Mr. Riddell has subsequently shown, the King, Charles I., acted.¹ Moreover, the two noble and learned Lords overlooked or disallowed the fact that this Oliphant judgment on the point before them was binding upon all future judicatories or commissions of inquiry, including, of course, the House of Lords as reporting to the Sovereign; and that they had no choice in law but to report in favour of the Cassillis heir-general, in conformity with that judgment and the law of the land upon which it proceeded, unless an exception could be proved in favour of the heir-male, such as I have said, clearly existed through the evidence of the investitures.

In his speech on the Sutherland claim, Lord Mansfield refers, not obscurely, to the statement of Lord Hailes, in his Additional Sutherland Case, that the Cassillis decision in favour of Sir Thomas Kennedy, the heir-male, went upon the establishment of an exception to the common law and presumption of Scotland, founded on the Cassillis investitures in favour of heirs-male, and thus in opposition to the ruling of Lord Hardwicke and himself in their speeches—a statement which I have attempted to account for, by suggesting that the majority of the Peers sitting in committee voted in support of Sir Thomas according to the evidence before them and the testimony of Lord Marchmont, a Scottish Peer of great influence for his ability and learning, preferring to act upon his authority and their own judgment, rather than on the *dicta* of Lord Hardwicke and Lord Mansfield, strangers to the law of Scotland. Be that as it may, the noble and learned Lords impressed their own significance on the Resolution reported to the Sovereign. Lord Mansfield in 1771 meets Lord Hailes's statement by the answer that the Cassillis Resolution was drawn up by himself, under the eye of Lord Hardwicke, for the express purpose of establishing the principle embodied in it, as a rule for the guidance of the House in all future cases involving the question of succession to Scottish dignities.

¹ [See above, p. 115; Riddell's Peerage and Consistorial Law, p. 180.]

It was settled," he says, "with Lord Hardwicke, that in cases where no instrument of creation or limitation of the dignity appeared, the legal presumption was in favour of the heir-male. The judgment was penned at his sight, with this view. It does not mention the investitures of the estate, but says that the title and dignity belonged to Sir Thomas Kennedy, as heir-male of the body of the person first ennobled—why? Because it was to be presumed that the dignity descended in that line when no evidence to the contrary appeared. If it had gone upon the presumptions and upon the limitations of the land estate, Lord Hardwicke's accuracy would have so worded it."¹ This testimony is so important that I may give Lord Mansfield's words likewise from another contemporary and very accurate report of his speech:—"I settled with Lord Hardwicke the penning of the judgment, and so settled it with a view that it might be a rule, so as to exclude all further questions. It was declared that Sir Thomas Kennedy had a right to the dignity of Earl of Cassillis as heir-male descended of the body of David, the first Earl of Cassillis; and also to the dignity of Lord Kennedy, as heir-male descended of the body of Gilbert, the first Lord Kennedy. If the Peerage had been adjudged to Sir Thomas Kennedy because he was heir under the original investitures of the estate, some of your Lordships were too well acquainted with my Lord Hardwicke's accuracy to suppose that this ground would not have been stated in the judgment."² Lord Mansfield uses expressions in 1771 indicating that the rule of 1762 was liable to an exception being proved in favour of an heir-general; and it may be said that, as every rule has its exception, the principle of the Sutherland Resolution was latent in that of the Cassillis case; but there is certainly no such opening in the speeches of 1762—it was not so understood at the time; and it was the belief that the Cassillis decision had laid down an absolute rule in favour of heirs-male of the body of the first grantee, on the rigorous principles of the Lombard law, so long as such heir-male should exist, and no special provision had been made in later times diverting the succession to heirs-general, which induced the two heirs-male of the Sutherland Earldom to come forward as claimants of that dignity against the heir-general

¹ Maidment's Report of Sutherland Claim, pp. 11, 12. ² *Ibid.* p. 36.

in 1771. I may be pardoned, perhaps, for looking upon the development placed by Lord Mansfield upon the terms of the Cassillis decision, when he came to review it in the Sutherland case, as a happy afterthought.

Lord Mansfield proceeds to indicate the advantages accruing. "Many claims would start up were it departed from. A contrary doctrine would," he proceeded, "be attended with greater inconveniences in Scotland than in England, because the King can grant to any of the heirs-female in England, but in Scotland the dignity must go to the eldest, and consequently must be enjoyed for ever." Lord Hardwicke, in the same spirit, impressed on the House in 1762, that "if ancient peerages, where no patents appear, are found to descend to the heir-general of line, it may have very extensive consequences;" and he concluded, therefore, after an argument ending with the statement that "there has been only one instance proved of the descent of a peerage to an heir-female where no patent appeared"—this being before Lord Hailes's illustrations from the Celtic Earls of the thirteenth century. "Therefore, where the instrument is lost, I think there is the strongest presumption in favour of the heir-male; and I think this is by much the safest method of proceeding in cases of ancient peerages." Lord Mansfield stated in his speech in 1771, as if in illustration of the narrative thus far given, that "it is of importance that all questions concerning peerages should be settled upon the principles of expediency as well as of law," a doctrine which places the fortunes of every Scottish dignity at the mercy of the House of Lords, and which was practically vindicated by Lord Brougham, in one of the most questionable procedures in the House of Lords, in the progress of the Montrose claim in 1853 as the "large discretion" residing in Committees of Privilege advising the House in such matters. It is impossible to escape the conviction that, by Lord Mansfield's own acknowledgment, the object of the Resolution of 1762 was to establish a rule, and bind it round the neck of the House for ever, for the purpose of discountenancing and suppressing claims to Scottish Peerages by the heirs-general—a rule "anxiously adhered to," as Lord Mansfield himself said on the Spynie claim in 1784, "ever since," and equally in honour, as testified by the speeches of noble and learned Lords

in Committee in 1875. The reader may now judge as to the degree of respect due to the Cassillis resolution, such being its motive and sanction, independently altogether of its being absolutely repugnant to and contradictory of the law of Scotland.

The danger of deserting the beaten path of legal right for such uncertain quicksands, became apparent when the three competing Sutherland claims came before the House of Lords and Lord Mansfield himself, by reference from the Crown, eleven years afterwards, in 1771. The position was full of embarrassment. The Cassillis Resolution of 1762, and the *rationes* upon which the Resolution proceeded, however they may afterwards have been explained and expanded, left no apparent opening for an heir-general in cases of doubt, and yet most grievous hardship would ensue if the right of the heir-general of Sutherland was not recognised. On the other hand, the Cassillis Resolution had (as has been said) brought two heirs-male into the field, both of whom were warranted in claiming under it as decisive on their pretensions—not to one, but to two Earldoms of Sutherland.

In conformity with the common law of Scotland, when the direct male line of the Earls of Sutherland ended in the person of John Earl of Sutherland, who died in 1514, his sister Elizabeth, wife of Sir Adam Gordon, became entitled to the dignity, and succeeded as Countess in her own right, and her husband became Earl of Sutherland by the "curialitas" or courtesy, in which character he acted in the usual manner on such occasions. On the death of William Earl of Sutherland, the lineal heir and representative of the Countess Elizabeth and her husband Adam, in 1766, his infant and only child, a second Elizabeth, became heir of line, in precisely the same position as her ancestress, and Countess of Sutherland *de jure* and *de facto* on the same principle of Scottish law. Her guardians entertained no doubt on this fact. But her right to the dignity was questioned, in a perfectly legitimate way, first, by Sir Robert Gordon of Gordonstoun, and secondly, by George Sutherland of Forse, heirs-male of the first and second line of the Earl of Sutherland respectively. These petitions, and a counter-petition on the part of Lady Elizabeth, indicating her right, were presented to the Sovereign, and by him referred to

the House of Lords for advice, in the usual manner in the case of English peerages.

Lady Elizabeth's claim rested on the general Scottish rule of succession, by which the dignity devolved on the heir-general as a matter of immediate right, liable only to challenge on behalf of the heir-male through proof of a special provision in his favour, the *onus probandi* lying on such heir-male, and the heir-general being in possession till such proof was established.

Sir Robert Gordon of Gordonstoun claimed the Earldom on the ground laid down in the Cassillis Resolution, as heir-male of the body of Adam Gordon, husband of Elizabeth, the heir of line in 1514, and Earl of Sutherland—but Earl, as Sir Robert contended, by a new and independent personal creation, the original territorial or feudal Earldom having ceased to exist on the death of Earl John. He maintained that the tenure by courtesy was a figment, that Elizabeth, a female, was incapable of succeeding, and that the Earldom in Adam Gordon and his successors behoved thus of necessity to have been a new and personal creation by a patent now lost, the presumption as to which must be *ut supra* that it was limited to the heirs-male of the body of Earl Adam, and that Lord Robert being the nearest heir-male, the dignity thus vested in himself. Sir Robert's status was precisely identical with that of the late Lord Kellie in the recent Mar claim. Both claims were founded upon the heterodox doctrine affirmed by the Cassillis Resolution of 1762.

Sutherland of Forse, the rival heir-male, claimed as heir-male of the body of Kenneth Earl of Sutherland, flourishing in 1367. There was no doubt as to his descent and propinquity. His plea was, that his ancestor, who stood in the same relative position to the Countess Elizabeth in 1514 as the late Lord Kellie did to the Mar heir-general on the death of the late Earl of Mar in 1866, was disabled from asserting his claim and vindicating his right in the presence of so formidable a rival as Adam Gordon; but that the right being that ancestor's and his own, alike by the Lombard or feudal law, and by the Resolution of 1762, no lapse of time could impair it, prescription not running against dignities. Mr. Sutherland's plea, as grounded proximately on the Cassillis Resolution, was worded as follows:—"In peerages where no grant in writing appeared, as the

descent of the dignity to the nearest heir-male of the person first ennobled has uniformly taken place in a great number of the noble families in Scotland; so this rule of descent was fully established in the cases above mentioned, of the peerages of Lovat in 1730, Cassillis and Borthwick in 1762. These judgments ascertain the principle that such titles of dignity are annexed to the blood of the first grantee in a male line, and upon the extinction of males of the first branch, do descend upon the males of the second branch, lineally descended from the body of the first grantee, and upon each male of that branch as he comes to the succession, as heir-male of the body of the original grantee; and consequently," he concluded, "the claimant having brought sufficient proof of his pedigree by the documents herein referred to, the dignity of Earl of Sutherland has descended upon him." It was evident, under these legal consequences of the Cassillis Resolution, either that Adam Gordon, Earl of Sutherland, must have been an usurper, and all the subsequent Earls of Sutherland usurpers in his person (an incredible supposition), or that Adam Gordon must have been created Earl of Sutherland by a lost patent—according to Sir Robert's own theory—as to which the presumption, according to the rule of 1762, would be in favour of heirs-male of the body; in which case Sir Robert Gordon would be entitled to the supposed personal peerage of 1514, and the laird of Forse to the ancient territorial earldom, the existence of which was proved as in 1275—each being heir-male of the body of the original grantee. It is difficult to see how Forse's pretensions and those of Sir Robert Gordon, each to a distinct Earldom of Sutherland, could be resisted, if the doctrine of 1762, which (so far as was then understood) recognised no opening for female succession, and limited the direction of dignities by the survival of heirs-male of the body, was correct.

But more than the title of honour was involved in the question of the Sutherland succession. By the last settlement of the late Earl, the Sutherland estates had been incautiously destined to the heirs succeeding to the Earldom. A report in favour of either or both of the heirs-male would, if approved by the Sovereign, necessarily denude and beggar Earl William's daughter, and beyond her, in case of her death unmarried, would cut off her aunt, Lady Elizabeth Wemyss, Earl William's

sister, and her children, who would then become heirs of line of the family, while the further question would arise, whether the estates, in the event of a decision against the heir-general, were to go to the one or the other heir-male—a question evidently opening the door to a whole army of doubts, riding upon contingencies. These remoter contingencies never came within the public view; but the untoward consequences of Earl William's settlement were brought before the Committee for Privileges and the House of Lords by a petition addressed to the House by Lady Elizabeth Wemyss, craving to be heard in her own and her children's interest contingent on the possibility of her infant niece dying without issue. Her petition and a case in her behalf were accepted by the Committee, and she was permitted to appear by counsel in opposition to Sir Robert Gordon and Mr. Sutherland. Her pleading was that, if the dignity did not descend to Elizabeth, her infant niece, "the consequence would be that it is extinct, as it is clear that neither of the other claimants have right to it; then an extinction of the Peerage would vacate the limitation in the last settlement of the family estates, in favour of the heirs who shall be found to have right to the dignity, which has given rise" (she alleged) "to the claims of the remote heirs of the family," and that "thus an extinction of the dignity would preserve the family estate to the heirs-at-law, called to the succession by all the previous settlements of the estates, and prevent its passing to very distant collateral heirs, who most certainly were never in the contemplation of the makers of these settlements." The purport of all this was a prayer that the House of Lords, if they could not find for the heir-general, would extinguish the dignity altogether, in order to prevent the loss of the estates to the family. It cannot be supposed that these considerations would have availed even to influence the views of Lord Mansfield and Lord Camden, the two noble and learned Lords who advised the Committee for Privileges (Lord Hardwicke having now passed from the scene) even under the dictates of expediency; but the Additional Case of Lord Hailes, written in reply to the Additional Case of Sir Robert Gordon, came opportunely to suggest a means of extrication from the very serious difficulty in which they found themselves in the presence of the Resolution of 1762.

In that case, emerging from the broad and fundamental proof alleged of the Scottish law and presumption of succession in favour of heirs-general, open to contradiction on establishment of a special provision to heirs-male, Lord Hailes pointed out, *inter alia*, that if the rule and presumption in favour of heirs-male of the body of the original grantee, exclusive of females, was correct, more than one of the ancient Celtic Earldoms of Scotland ought to have devolved upon such heirs-male of the body, at the time when they respectively devolved upon and were enjoyed by heirs-female, or heirs of line, in the precise position of Elizabeth Sutherland, sister and heiress of John Earl of Sutherland, and Countess in her own right subsequently to 1514; whereas, as matter of fact, the dignities did not so descend, but passed direct to the heirs of line, who at once became Countesses, and their husbands Earls by the courtesy, in their right. The Earldom of Angus ought thus, on the principle of 1762, to have devolved on the house of Ogilvie, the heirs-male collateral of the last of the original line of Earls and heirs-male of the body of Gilbert Earl of Angus, flourishing during the early part of the thirteenth century; and the Earldom of Ross, in like manner, should have gone to the Rosses of Rarichies (now represented by the Rosses of Pitcalnies), the heirs-male of the body of Hugh Earl of Ross, slain at the battle of Halidon-hill in 1333. We have, it may be added, similar cases in the Robertsons of Struan, chiefs of Clan Donachie, heirs-male of the body of the first Celtic Earl of Athole, and the Macfarlanes of that ilk, who stood in the same relation to the first Celtic Earl of Lennox. Sutherland of Forse, ancestor of the claimant of 1771, stood in the same position in 1514, as heir-male of the body of the first Earl of Sutherland. But none of these heirs-male of the body succeeded; the heirs of line took the honours with universal recognition; and therefore, on this ground alone, the rule and presumption affirmed by the Resolution of 1762, was without foundation. Lord Hailes further showed, in answer to Sir Robert Gordon's argument for a new creation by a lost patent, presumably to heirs-male of the body, based upon denial of the tenure of dignities by husbands in right of their wives through the courtesy of Scotland, that in the cases of Angus, Ross, and innumerable other instances, the husbands actually held the

dignities by that tenure, and that Adam Gordon, husband of the Countess Elizabeth, thus did so—the courtesy being a real right, and not an imaginary phantom, as Sir Robert Gordon contended was the case. Upon all these grounds, Lord Hailes showed that the rule and presumption established by the Cassillis Resolution, and founded upon by the heirs-male, was utterly false; while he asserted (as I have stated) that the Cassillis decision really went upon the genuine Scottish doctrine, for that an exception to the rule, in favour of the heir-general, had been established by the proof that the investitures had been to heirs-male at the time of the creation. Lord Mansfield resented this averment, and contradicted it by the enumeration of *rationes* above given; but it is clear, from what he states, that the Resolutions were dictated by Lord Hardwicke with his concurrence—the two consulting together, with an ulterior end in view in the interest of expediency: and the probability is that the lay members of the Committee, who acquiesced in the Resolution, did so in blind confidence, without appreciating its ulterior significance. It was thus that the Committee for Privileges in the Montrose claim in 1853 acquiesced in and passed a Resolution in which Lord St. Leonards inserted, at the last moment, by a stroke of the pen, after the Resolution had been read over and proposed to the Committee, an additional clause, which committed the House to a declaration *ultra vires*, which it could not have fallen into had it not been taken by surprise.

In other respects, however, the Additional Case came effectively to the rescue of the infant heir, Lady Elizabeth, and of the House of Lords. The exhibition of an exception in the Scottish law of succession in favour of the heirs-male, would appear to have suggested the importation of an exception in favour of the heir-general into the iron rule of 1762, tempering its rigidity, and affording an opening for recognition of the Sutherland heir-general, mainly through recognition of the courtesy, which the Committee had either ignored or been ignorant of in 1762. Lord Mansfield and Lord Camden ought indeed to have receded from the false position of 1762, as Lord Chelmsford advised the Committee for Privileges to do in the Wiltes case from what he considered the erroneous principle affirmed in the Devon case by Lord Brougham, and

to have frankly recognised the Scottish law of succession with its consequent presumption as proved by Lord Hailes, "not pleading as a counsel," as Lord Mansfield expressed himself, "but delivering" the Additional Case "as his opinion as a judge."¹ But whether courage was wanting, or the doctrine of expediency was held to control their action, the noble and learned Lords abstained from that recognition, and adopted the *mezzotermine*, the mongrel and disastrous compromise against which I remonstrate. It is evident from the report of the speeches delivered on the occasion, as well as from a survey of the whole case, that Lord Mansfield and Lord Camden were firmly determined to uphold the principle of the Cassillis Resolution, viz. that the rule and presumption were in favour of heirs-male of the body and against the heir-female, but open (as they now admitted, so far as the evidence goes, for the first time) to contradiction by the heir-female. This was expressed in the Resolution, and the effect was to affirm the reversal of the Scottish law and the presumption which had been effected in 1762, not legislatively, be it remembered, but as a mere private rule for the House, with allowance of the exception in question—an exception which served the purpose of saving the right of the Sutherland heiress, but could not cover many other cases, and, on the contrary, was calculated to work injuriously against them by throwing the *onus probandi*, the burden of proof, on the heir-general, the effects of which I have to exhibit in the attitude assumed by the House towards Lord Mar since Lord Kellie's claims brought the question of right before it. "Penny wise and pound foolish" might be affixed as a motto to the speeches of 1771. The two noble and learned Lords stumbled upon justice, in so far as they advised the Committee in favour of Lady Elizabeth; but the path by which they reached that conclusion was one of difficulties and errors which can only be appreciated by those who have analysed the speeches and checked the deliverances of each learned Lord on each particular point, by arraying them in parallel columns. Lord Camden (as I may here repeat), less hampered by personal reminiscences than Lord Mansfield, admitted in the frankest manner that Lord Hailes had proved the descent of nine Celtic

¹ Maidment's Report of the Sutherland Claim, p. 33.

earldoms (Mar being one of them) to heirs-general, and that the tenure of dignities by the husbands of countesses in their own right in virtue of the courtesy was the rule and practice of Scotland in 1514, when Elizabeth Sutherland succeeded her brother as Countess of Sutherland, and her husband became Earl through the courtesy. A step further, which in consistency he ought to have taken, would have led him to advise the Committee on the genuine Scottish law, with frank acknowledgment that the *ratio* of the Resolution of 1762 had been wrong. But he acquiesced, nevertheless, in Lord Mansfield's formulation of the Resolution, in contradiction to the main proof given by Lord Hailes. Moreover, while acknowledging, with emphasis, that he could perceive no distinction between the descent of dignities and lands, he went out of his way to affirm and introduce into the Resolution, by a distinct clause, the doctrine already noticed, and which I have spoken of as Lord Camden's Law, viz., that unless the dignity be specially conveyed in words, the charter or grant of a comitatus or territorial fief does not carry the dignity, and this in the face of proof to that effect given by Lord Hailes. Lord Mansfield, on the other hand, while admitting the proof that the nine earldoms, including Mar, had devolved upon heirs-female, expressed himself (I must repeat the statement) as not satisfied but that the original limitations might have been to heirs-male, *i.e.* on the Lombard rule and presumption; and argued during the first half of his speech that the courtesy could not have survived the period when he assumed that territorial earldoms became extinct, viz. 1214; while in the second moiety he founded upon the courtesy as operative in 1514, and established the exception in favour of Lady Elizabeth—thus introducing contradiction into his own argument; while the result, as following upon the combination of his speech and Lord Camden's, both tending to the same result, exhibits a network of bewilderment, contradiction, and confusion.

I have employed the speeches of the noble and learned Lords above cited in their legitimate use as indicative of the *rationes* on which they supported the Resolutions which they proposed to the Committees for Privileges of the House of Lords: but it must always be remembered, as I have proved in a former Letter, that it is the Resolution that has to be looked

to in all these cases as the only utterance for which the House itself is responsible. The speeches of even Lord Mansfield and Lord Hardwicke are in no sense part of the so-called judgment, as I have elsewhere urged, and as has been deliberately acknowledged by noble and learned Lords and recognised collectively by the House of Lords subsequently to the Resolution of 1875, as I shall hereafter prove.

I may complete this narrative by citing the words of Lord Mansfield in the Spynie claim in 1784, from the brief notes preserved of his speech:—"Wherever limitation of a peerage does not appear, established rule now fixed and settled, that presumption is in favour of heirs-male of the body. So decided in case of Cassillis, and anxiously adhered to ever since. In Sutherland case, the contrary rule of descent proved." He proceeded to found strongly upon the family investiture, in departure from his rule, in 1771. In Lord Loughborough's speech on the Glencairn claim in 1797, he said, "It has been fixed by repeated determinations of this House (and I know of no other authority competent to decide in matters of this nature), that where the limitation of a peerage is not to be discovered, the presumption is that it descends to heirs-male of the body of the original grantee. In the case of the peerage of Lovat, where there was a competition between the heir-general and the heir-male, it was determined by the Court of Session in favour of the latter, and on the ground of that opinion Lord Lovat was tried as a peer,"—but not, I must interpose, on the principle of 1762, as by Lord Loughborough's own testimony (to say nothing of Lord Hailes's) in the case, signed by his name, drawn up for Lord March, the heir-general, claimant of the Earldom of Cassillis, in which it is stated that "what weighed with the Court there was, that the right to the lands of the barony of Lovat had gone in a perpetual channel to heirs-male." "The judgment of this House," continued Lord Loughborough in 1797, "was passed expressly to mark the opinion of their Lordships, that the presumption of law was against the heir-general, in favour of the heir-male. The judgment in that case was followed in several other instances by this House, down to the cases of Sutherland and Spynie. . . . If there be anything certain in the law of peerage, it is this presumption in favour of heirs-male."

Lord Loughborough proceeded, therefore, on this basis to advise the Committee against the claim of the heir-general, Sir Adam Fergusson. And yet Lord Loughborough, in a conversation with Sir Adam subsequently to the decision, expressed his dissent from the doctrine which he had thus enforced against him. The fact would be incredible but for a memorandum of the conversation made by Sir Adam, a man of unquestioned integrity and honour. "He (the Chancellor) said, Lord Mansfield was clearly wrong in his opinion on the case of Cassillis, in which he had been misled by William Gordon. He seemed, however, to limit this error to supposing a presumption in favour of males in the succession of land, and to hint at a distinction between land and honours. He avoided saying that the decree in the case of Cassillis was wrong; though Mr. Chalmers" (*i.e.* James Chalmers, an eminent London solicitor, the principal agent in Scottish peerage claims at the time) "assured me that he had said to him that the judgment itself was wrong; and Mr. Grant told me that Mr. Anstruther had said the Chancellor had spoken of it in the same terms to him. He then went to Lord Mansfield's speech in the case of Sutherland, and repeated what he had hinted at in his speech in my case, that Lord Mansfield had then stated that all or most of the instances of female succession in peerages were to be accounted for by special circumstances, and were not inconsistent with the general rule of male succession. I told him I remembered myself Lord Mansfield saying so; but that he had not supported such a position by any instances. Indeed it is not to be supported. He made no answer to that. That the Chancellor's own opinion is, that the presumption in favour of heirs-male is contrary to the ancient law of Scotland, it is impossible for me to doubt. His admiration of Lord Hailes's Case for the Countess of Sutherland, which he expressed on a former occasion so strongly to myself as to say, that it was the most fortunate thing on earth that such a mass of falsehood had been given in for Sir Robert Gordon as to prompt Lord Hailes to produce the most valuable work on the subject of peerages—a work, however, which can have no other effect but to lead into error if Lord Mansfield's doctrine has any foundation. The same language held to others, all prove it; nay, in

speaking in the House of Lords, he had gone out of his way to speak of the case of Cassillis as having come before the House at a time when the law had not been explained, as it had since been by a learned antiquarian and judge, Sir David Dalrymple (*i.e.* Lord Hailes), who had shown that the female succession had prevailed in Scotland, in the earliest times, both in land and in honours. How then," Sir Adam concludes, "is his supporting that very doctrine in my case to be accounted for? Was it for want of resolution to combat a prevailing error? I know not. He has, however, in so doing, disappointed me, and, I think, has lost a fair opportunity of acquiring fame to himself."¹

I need not trace the descent of Lord Mansfield's law further down. But this I may remark, that after Lord Hailes had blown the supposed authority of Craig to atoms, no one has ever advanced an argument in its support. In lieu of such argument, a succession of compliments and praise, reiterated parrot-like by successive generations of the legal advisers of the House of Lords, has given the doctrine a fictitious sanction and development, till it has overshadowed the field of Scottish honours like a black cloud, the womb, not of sweet and refreshing rain, but of the desolating whirlwind, threatening our inheritance. The fundamental errors of the doctrine, as exposed by Lord Hailes, have been condoned and forgotten—the long line of authorities testifying to the genuine Scottish law, and constantly set forth in protest by men like Mr. Riddell and Mr. Maidment, not listened to. The House reports according to its tradition and practice, not according to law, although unconscious of being a lawbreaker; and it has come to this, that it was actually possible for Mr. Fleming, Lord Kellie's able counsel, to open his case before the House with the assertion that, if the Earldom of Mar, conferred by Queen Mary in 1565, was a new dignity, "then Lord Kellie, according to the law of Scotland, as finally settled by the Cassillis, Glencairn, and Spynie cases, is, as the heir-male of the body of the grantee, certainly entitled to that dignity;" the private rule of the House being thus elevated to the rank of "the law of Scotland"—"finally settled" by the House of Lords, by an assumption of legislative power which it does not possess, and against the prohibitive sanctions of the Treaty of Union!

¹ Riddell's Remarks on Scottish Peerage Law, 1833, p. 147.

Such is the origin, such the authority of and for the rule and presumption opposed by Lord Kellie as conclusive against my two Protests and the Scottish law of succession. I have already shown that the House of Lords possesses no power of legislation: and this rule and presumption of 1762-71 being merely a private rule established avowedly for the convenience and guidance of the House, cannot stand for a moment against the law of Scotland, which it expressly controverts, protected moreover as that law is by the Treaty of Union. The same observation applies to what I have called Lord Camden's rule affirmed in 1771, contradicted as that is by the practice of Scotland as illustrated in ancient charters of territorial earldoms and baronies, and by the interpretation placed by the law upon such grants and conveyances. And it applies likewise to the doctrine of Lord Mansfield disallowing reference to the investitures in the case of the loss of the original patents or grants of dignities: but in a less degree, inasmuch as the practice of the House has not been consistent in this respect, even Lord Mansfield himself having founded upon the investiture in the Spynie case and Lord Loughborough in the Glencairn.

I need only add, to preclude misunderstanding, that it must not be supposed from what I have said, that all the reports of the House of Lords under the influence of the Cassillis and Sutherland principle have miscarried. On the contrary, and most fortunately, they have, in many cases, been in favour of the rightful claimants, although on wrong grounds. The Cassillis heir-male was rightfully entitled as against the Scottish presumption in favour of the heir-general on the specialty affirmed by Lord Hailes, and pleaded by Sir Thomas Kennedy, that of the investitures being to heirs-male when the dignity of Cassillis was created. The Sutherland heir-general was rightfully entitled, not through the establishment of an exception in her favour through the courtesy, but through the operation of the common law, the investiture being to heirs-general, and the heirs-male, both of the first and of the second or Gordon line, being unable to prove an exception in their favour. The House was less fortunate in the Spynie case in 1785: but the Resolution against the heir-general in the Glencairn claim in 1797 was so far right that not only had the dignity already, in the seventeenth century, passed over the heir-general to vest in

the heir-male collateral, but the investitures of the family when that Earldom was created were to heirs-male, which is sufficient proof that the limitation of the dignity was so likewise—two exceptions thus existing favourable to the heir-male. In the recent claim of Lord Kellie, both Lord Mansfield's and Lord Camden's rules combined, by a curious infelicity, to crush down the law of Scotland, and work a complication of error and injury as against the heir-general, the one and only Earl of Mar legally in possession, without a parallel.

SECTION VI.

After what has been thus far established, the answer to the last of the present series of questions will not surprise us:—

If the law of Scotland, sanctioned as aforesaid, and the private rules or doctrine of the House of Lords, come into collision, either on the question of succession or any other controverted point, which is binding on the recognition alike of Sovereign and subject, and in the result which is to prevail?

My reply is, that the law of the land must be obeyed and upheld by every good citizen and loyal subject *coute qui coute*, against any private rules or doctrine not passed by legislative authority, and which it must be presumed were affirmed in ignorance of the law thus controverted. It is to be remembered that the law, being the enactment of the whole nation, is immutable in its calm and stern simplicity; whereas private rules, such as the rule of 1762-1771 and Lord Camden's rule of 1771, which form conjointly the pillars that support Lord Kellie's claim, are necessarily subordinate and variable at the pleasure of those who adopt them, and therefore binding only upon themselves so long as they please to observe them, and not at all binding upon others. The private rule of 1762-1771 is especially stamped with invalidity by its being in direct repudiation of the law as laid down by the Oliphant judgment of 1633, in assumption and exercise of the power to disregard and set aside the final judgments of the Court of Session and the protective sanctions of the Treaty of Union.

I may now recapitulate the answers to the foregoing questions in the form of facts, postulates, and principles—principles of law and obligation, which will be my weapons in the controversy to which Lord Kellie has challenged me. They are as follows:—

I. The House of Lords is bound to regulate its reports to the Crown on claims to Scottish dignities by the law of Scotland.

II. The law of Scotland includes the statutory and customary laws, and the definitions and applications of those laws, laid down in the final decreets of the Court of Session—decreets which are binding and irreversible; the Court being invested by statute with authority to decide and determine all civil causes, including rights to dignities, without appeal to King or Parliament, the Sovereign being constitutionally precluded from reclaiming the jurisdiction in question. The Treaty of Union reserves and protects the laws of Scotland affecting private rights, and the authority and privileges of the Court of Session as they stood at the date of the Union, prohibiting any alteration in those laws or diminution of the authority and privileges of the Court, except by Act of Parliament, under certain prescribed conditions and limitations. No such alteration has ever been carried through as affecting the authority and privileges of the Court of Session, in which claims to dignities have been prosecuted since the Union, and may still be so. As respects laws, no legislation can act retrospectively so as to affect Scottish dignities, all such dignities having been created before the Union, and rights to them falling to be determined exclusively by the laws of Scotland as they stood when the Treaty of Union was signed, even although the laws may have been subsequently altered.

III. The House of Lords possesses no original jurisdiction, and can in no case, whether of English or Scottish peerage, initiate or determine claims to dignities. It investigates claims merely by delegation from the Sovereign, under reserve of the authority of the Sovereign to give final adjudication in the background. The House possesses no power of independent legislation, and thus is not empowered to pass general Resolutions affecting dignities or institute rules

for its guidance subversive of the law of the land. According to English principle, the Sovereign is the sole judge, and the House of Lords merely advises as a commission of inquiry, the ultimate adjudication resting with the Sovereign. The speeches in Committees for Privileges are therefore not judgments, but mere opinions. The Resolutions reported by the House to the Sovereign are not judgments, but simple advice tendered in response to a request from the Sovereign. Nor has the House any preferable claim to be consulted by the Sovereign. But the jurisdiction in Scottish dignities lies vested in the Court of Session; and the Sovereign being constitutionally precluded from resuming that or any other jurisdiction from the ordinary courts of law, claims to Scottish dignities, preferred by petition to the Sovereign, can only be determined by the Sovereign, whether with the advice of the House of Lords or otherwise, as an arbiter, not a judge, in virtue of an implied contract or compact between the claimant and the Sovereign, that the case shall be decided in accordance with the law of Scotland; the petitioner being still entitled to resort to the Supreme Civil Court of Scotland in case the compact be not observed, and the award being against the law, while such compact cannot bind third parties.

IV. The law of Scotland governing the succession to dignities, where no charter or patent exists to testify to the limitation, presumes in favour of the heir-general; the *onus* of proving an exception through special provision resting with the heir-male collateral.

V. The doctrine, rule, and presumption of succession upon which the House of Lords advises the Crown upon claims to Scottish dignities, under the preceding condition of no charter or patent being preserved, is in favour of the heir-male of the body of the first grantee, the *onus* of proving an exception resting with the heir-general—thus in absolute contradiction of the Scottish law.

VI. If the law of Scotland, sanctioned as aforesaid, and the private rule or doctrine of the House of Lords, either on the question of succession on any other point affecting Scottish dignities, come into collision, the private rule of the House, not proceeding from legislative authority, must give

way to the law of the land, the utterance of the Legislature ; and Sovereign and subject are alike bound to recognise and support the law in question, and vindicate the rights dependent upon it.

These are principles of law and obligation, which, as the expression of Scottish law, and sanctioned by the Treaty of Union, dominate and control the solution of the various problems connected with the continued existence and descendibility of the ancient Earldom of Mar—principles which underlie and are appealed to, in every line of the two Protests which are the subject of Lord Kellie's denunciations—principles which will be the basis upon which I shall build the historical narrative which will be the subject of the ensuing letters, and, standing upon which, I shall direct my criticism against the views set forth in the speeches pronounced in the Committee for Privileges on Lord Kellie's claim, and upon which, on the warrant for the Resolution and Order of the 26th February 1875, Lord Kellie claims the respect and adherence of the Peers of Scotland in his recent Address.¹

The private rule of the House of Lords, originated by Lord Camden, that charters of dignified fiefs shall not be understood to convey the title of dignity unless it be expressly specified and granted in the charter, is as much at variance with ancient Scottish legal practice, and as mischievous in its operation, as Lord Mansfield's law affecting the right of succession : but I have not included the converse of that law in the preceding category, as the error is one of practice rather principle. But it is not the less to be protested against and repudiated.

¹ To take merely the leading points in my Protest, my assertion that Lord Mar, the heir-general, is Earl of Mar, actually in possession, and entitled to vote at the election at Holyrood, rests on the principles or answers marked 1, 2, and 4, *supra* ; my remonstrance, that the private rules of the House of Lords, initiated by Lords Hardwicke, Mansfield, and Camden, cannot overrule Lord Mar's right under the Scottish law of succession, is vindicated under numbers 3, 5, and 6 ; and my Protest against the Order 26th February 1875, as *ultra vires* of the House, because (independently of other objections) it was granted prematurely, taking the assent of the Crown for granted, and usurping the authority conceded to her in English practice, is shown to be just under number 5.

LETTER III.

THE EARLDOM DOWN TO 1435.

THE issue raised by Lord Kellie's Address resolves, as I stated at the beginning of the preceding letter, into three heads:—1. Are the principles I have appealed to in my Protests the law of the land, and thus of dominant authority, and binding on the House of Lords or not? 2. If they are, has the House observed them in advising the Sovereign in favour of Lord Kellie's claim to an Earldom of Mar created in 1565? And, 3. If the House has not observed those principles, but advised the Sovereign on a totally different basis, are not my Protests justified? and what, in such case, becomes of the Resolution in favour of Lord Kellie, and of the Order of the 26th February 1875, addressed to the Lord Clerk Register, and of all that has since taken place in disallowance of Lord Mar's right? I have, I think, proved to demonstration in the preceding letter, that the principles I appeal to in my Protests are of permanent obligation, and that the Sovereign, Parliament, the House of Lords, and the lieges, are bound to their observance by the Treaty of Union, if by no other consideration; and that the General Resolutions and private rules imposed on themselves by the House of Lords, and in particular the rules identified with the names of Lord Mansfield and Lord Camden, and the assumption by the House that it has the power of overruling the final judgments of the Court of Session, are *ultra vires* and untenable, inasmuch as they contradict those principles. I have to show, in terms of the second of the three heads above stated, that the House of Lords has *not* observed the principles in question in advising the Sovereign on Lord Kellie's claim, this being the ground and object of the remonstrance I have ventured to lodge in support

of the prior, legal, and exclusive right of the heir-general, Lord Mar, as tenant in possession by the law of Scotland since the death of the late Earl in 1866. It might be supposed that I have said enough already; but it is one thing to vindicate principles, another to justify their application to any particular case, and point the moral in reprobation of any contrary construction; and I propose, therefore, in the present and the immediately succeeding Letters, to set forth the chequered history of the Earldom of Mar up to the present time, in the light of legal and constitutional antiquity, under the guidance of the principles in question, pointing out at the proper points the divergence of the views of the noble and learned Lords who have addressed the House of Lords on Lord Kellie's claim, and exhibiting my reasons for dissent. The process may be somewhat tedious, but I do not see how the question between Lord Kellie and—not myself, but—the laws of Scotland, the Treaty of Union, and the vested interests of the entire peerage of Scotland, if not of the Scottish people, can be adequately placed before the tribunal of public opinion, which Lord Kellie has appealed to, in any other manner. And I trust it will be found that in the result I have applied the principles of my Protests correctly, and that if the result be, as I affirm, that the House has *not* observed those principles, but reported on a totally different basis, I shall stand “assoilzied” from that “contempt” for the “decisions” of the House of Lords, and for the recent Report in particular, which has been charged against me by Lord Kellie; and that the justification and weight of my Protests may be duly recognised in consequence, and, what is more, acted upon.

I may refer prospectively to one expression which has fallen from Lord Kellie, and which I impute to misunderstanding; but it is a word of injurious aspect, and not to be passed over without remonstrance. I shall notice in its proper place Lord Kellie's complaint that I have “suppressed” in my Protests argument and evidence adduced by his counsel on his behalf. I do not admit that I have done so—quite the contrary; but this much I may say at the present stage, that neither in my Protests nor in these Letters am I writing a Report of the Mar claim, in which, as in my Report of the Montrose claim, every fact and argument adduced on either side falls to be exhibited,

analysed, and done justice to. It would require a thick folio to do this in the present case. What I propose to do, consistently with this distinction, is (as I have already said, but must perforce reiterate) to exhibit the series of events in their sequence and proportion, as governed by laws of which the proofs are before the reader, duly noticing point after point in which the law has been misapprehended and set aside by the noble Earl and those who have reported in his favour to her Majesty through the influence of rules of interpretation hereditary in the House of Lords, but contradictory of the law of Scotland, and thus inducing the obscuration of truth and substitution of error. Having said thus much, I have a right to request the reader to suspend his judgment on the justice of Lord Kellie's complaint for the present.

SECTION I.

Earldom from 1014 to 1404.

The history of the Earldom of Mar falls naturally into five periods, the first ending with its devolution upon heirs-general in the persons of Margaret and Isabel, mother and daughter, successively Countesses of Mar in their own right, at the end of the fourteenth century, and the liferent tenure of the Earldom by Alexander Stewart, Isabella's husband, who died in 1435; the second comprising the period of *interregnum* during which the lawful heirs, the Erskines—they are spoken of by King Robert III. as the "veri hæredes" in 1395,—were excluded from the succession by fraud and oppression, a period of one hundred and thirty years; the third, commencing with the restoration of the fief and its attendant dignity by Mary Queen of Scots to John Lord Erskine *per modum justitiæ* in 1565, and the proceedings which culminated in the great Decree of the Court of Session in 1626, this period terminating with the attainder of John Earl of Mar in 1715; the fourth, a period of obscuration through that attainder from 1715 to 1824; and the fifth, or current period, dating from the restoration by the grace of the Crown in 1824, and including the devolution of the dignity upon the heir-general, and the recent controversy.

The question of the antiquity and descendibility of the Earldom of Mar has been dealt with by the House of Lords as

from the starting-point of the fourteenth century; and this is amply sufficient for the purpose. But as Lord Kellie has noticed with (if I mistake not) some slight scepticism an assertion in one of the two papers written by me, and printed in my absence from England in anticipation of the debate on the Duke of Buccleuch's Resolution, viz., that the Earldom existed as early as 1014, while he has taken advantage of it (as he supposes) to my disadvantage, I may state that the historical date referred to is attested by a venerable and authentic Irish chronicle, the "Annals of Ulster," recently published, in which it is stated that Domnall or Donald, Mormaer—the Gaelic equivalent for Comes, Jarl, or Earl—of Mar came with a contingent from Alban, or Scotland, to the assistance of Brian Boruimbe, the heroic Ard-righ, or King of all Ireland, and fell along with him in the hour of victory at the great battle of Clontarf, in the year mentioned, against the Danes. Earl Donald is described as the "son of Emnin, the son of Cainnech," and it is added, "of the race of Old Ivar is he; and he is of the Clan-Leod of Ara." Lord Kellie has apparently overlooked the fact that this evidence was offered by "the opposing petitioner," as the House of Lords qualified Lord Mar, and was accepted by the Committee of Privileges on production of the original ms. of the Annals, and certification of its import in English, and the passage is printed in the Minutes of Evidence.¹ "Old Ivar," the patriarch of the race, is elsewhere described in Irish mss., hitherto unpublished—as "Ivar the Great, of the Judgments, from whom are the race of Ivar the Old, in Alba, and in Erin, and in Lochlin," *i.e.* Scandinavia. It would thus appear that although a Celtic Earl, and thoroughly Celticised, Earl Donald and his ancestors were remotely of Norse blood. The grandson of Ivar, according to those last cited authorities, was "Aralt" or Harold, described as king of Lochlin; and the line of his Scottish descendants in one very distinguished branch is carried down by the Irish genealogists through "Magnus of the Quick Ship," "Forgall of the Cold Land," Leod (of whose wife, Lair, or Lara, it is said that "she came from the Fairy Hills" in the shape of a mare—a legend reminding us of Hindu fable—and bore three sons, from whom descended distinct families); and

¹ Minutes of Evidence in Mar Claim, pp. 659, 702.

in later succession, Bron Berbe, Loarn of the Sea, and others, to the chiefs of the Clan-Leoid, or Macleod, still flourishing in the two great branches of the race of Tormod and the race of Torquil, in the Hebrides and the north-west of Scotland. The Irish genealogies are looked upon with suspicion by Scottish and English critics; but they have a value and credibility of their own within due limits, dependent upon conditions and a state of society wholly foreign to those of Normanised Scotland, England, or the Continent, and having closer analogy to the genealogical traditions of the Arabs; and it is remarkable how frequently they are found to be correct, or are invested with probability, by the testimony of historians and of topographical and otherwise surviving traditions. Those familiar with the learned researches of the lamented O'Donovan, George Petrie, and O'Curry, and, to name no others, their survivor, Mr. W. M. Hennessey—to whom, I may add, I am indebted for the references and extracts last cited,—will not think that I lay undue stress on Irish testimony. It was under a kindred inspiration that our learned and trustworthy W. F. Skene conceived the happy idea in his early youth of seeking to reconstitute Scottish history by collation of the testimony of the Irish and Scandinavian chronicles, not only to the restitution of much which had been absolutely lost sight of in Scotland, but to the re-establishment of more than one historical fact—such as that of the battle of Largs in 1263, which had been expunged by too severe a criticism—the critic was Lord Hailes—from the annals of Scotland. The genealogical notices above given may at least show at this point how illustrious and widely known was the house of the Mormaers or Earls of Mar in those early times.

If it be objected—to linger for a moment more on this Earl Donald I. of Mar—that there was no written proof that he was ancestor of the Earls of Mar who appear in continuous succession from the beginning of the twelfth century, my answer would be that in purely Celtic times in Scotland, as in Ireland—that is before the reign of David I., as Prince of Cumbria or Strathclyde, and King of Scotland—the proprietorship of every great territorial division of Scotland, and the supremacy or chiefship over the population, was vested in “the tribe of the land,” and the chiefship and dignity attached to it was always

confined to the male descendants of the founder of the tribe, although the succession occasionally passed over a more immediate heir, to settle upon a more distant but more powerful or able agnate. Mr. Skene has illustrated this in his great work, now in progress of publication, "Celtic Scotland," with reference especially to the analogous case of the succession to the abbacies of the great Columban monasteries in Scotland. There can be no doubt therefore that the succession between Earl Donald of 1014 and the Earls of Mar of the two or three subsequent generations was in the same stock and lineage, the "tribe of the land," whether the intervening links ascended to Earl Donald personally or not. The fact thus founded upon, viz., that agnates of very remote descent were eligible and constantly promoted to important posts under the Celtic polity, may illustrate the accuracy with which genealogies were kept in ancient times among the Celtic, as among the Hebrew people, and the credit due to them when testified to by trustworthy authority.

Thus much I have said with respect to the remote *origines* of the Earls of Mar. Charter evidence only begins with us in Scotland at the commencement of the twelfth century; and from that date we have a profusion of evidence which will be found for the most part in the Minutes of Evidence adduced in the recent Mar claim, and which illustrates the history of the Earldom and its tenants till the extinction of the Celtic dynasty of Scotland at the close of the thirteenth century. Two series of Earls appear in rivalry and competition, and many of the Earls cannot be properly affiliated. But the reader must not imagine that I propose to entangle him in a maze of genealogical discussion, for which the present letters are no proper place. On the other hand, there are two or three salient points which bear directly on the right of Lord Mar and the heir-general at the present day. These I shall fix upon to the effect of establishing buoys or lighthouses for insuring a safe passage through a perilous navigation till we emerge upon the open sea of historical and legal expatiation.

The series of Earls on record, covering the period of confusion and controversy above spoken of, may be briefly enumerated as follows:—1. Ruadri, or Rotheri, who figures as Comes Rotheri under Alexander I., *circa* 1120, and David I., within

the years bracketed as 1124-1127, and as "Ruadri Mormaer of Mar" in a Gaelic charter to the Monastery of Deer in 1132.

2. Earl Morgund, or Morgrund, witness to charters granted between 1147-1152, 1165-1171, 1153-1178, and whose wife, the Countess Agnes, makes grants on a footing which induced Dr. Joseph Robertson to view her as having been Countess of Mar in her own right. Morgund is stated to have been son of a previous Gillocherus or Gillocher, Earl of Mar, and to have been restored to his father's earldom after a period of suspense; but this is doubtful, as will appear presently. His legitimacy was challenged, but appears to have stood its ground.

3. Earl Gillicrist, or Gilchrist, who appears in charters between 1170-80 and 1204-11. His filiation is unknown. He represented apparently the succession opposed in hereditary claims to that of Earl Morgund.

4. Earl Gartnait, or Gartney, or Gratney, first of the name, flourishing, with his son Malcolm, 1203-1214, and who may be presumed to have been akin to his predecessor, while he succeeds in opposition to the line of Morgund.

5. Earl Duncan, son of Earl Morgund and of the Countess Agnes, and who became Earl of Mar between 1222 and 1228. Illegitimacy was imputed to him as well as to his father. A composition had been entered into between himself and the representative of the opposing interest: and although the question was re-opened, as we shall find, in 1257, after his death, no other Earl of Mar appears thereafter except as his direct descendant. I pause at this point to indicate the points of interest which emerge about these troubled waters like islands from an archipelago.

I must remark, in the first place, that, for the reason assigned in a former paragraph, I think that the earlier Earls of this era, down at least to Earl Morgund, the husband of the Countess Agnes, must have been of "the tribe of the land," agnates of the clan or family of Mar. But it will be recollected that it was under David I., the contemporary of Earl Ruadri, that the feudal system was introduced into Scotland, with its complicated conditions of tenure radiating from the Sovereign. The Celtic Mormaerships, henceforward styled Comitatus or Earldoms (as above shown in the case of Ruadri), all passed under this change. According to the House of Lords, the early feudal system in Scotland was founded on preference for the male



succession, excluding females, the fief reverting to the Crown on the death of the last legitimate male descendant of the first grantee. But in practical refutation of this theory, the Celtic Earldom, originally descendible to male agnates only, became thenceforward descendible to heirs-general, like every other description of hereditary office and dignity, as amply proved by Lord Hailes.

I have just shown that Earl Morgund's legitimacy was disputed, and that his alleged descent from a previous Gillocherus Earl of Mar is doubtful. I have now to step on uncertain, even volcanic ground—"per ignes suppositos cineri doloso"—on which the reader can either tread lightly, following my lead, or, with more discretion, take Dante's advice to Virgil, and simply glance at the matter and pass on.

A charter is in existence purporting to have been granted by King William the Lion on the 16th of the kalends of June 1171, to "Morgundum filium Gillocheri quondam comitis de Marre," granting him the Earldom of Mar "tanquam jus suum hæreditarium, sicut predictus Gillocherus pater suus obiit vestitus et saisitus," with limitation to himself "et hæredibus suis," on the report of an inquest certifying that he was the lawful son and next heir of his predecessor Gillocher. The charter was printed by the illustrious John Selden in his "Titles of Honour," from the original, which he states was in his hands. Lord Mar, in his character of "opposing petitioner," offered this document as printed by Selden as evidence showing the descendibility of the Earldom to "heirs," *i.e.* heirs-general, in 1171; but the Committee for Privileges rejected it, as only appearing in a printed book. It was not then known what had become of the original; but the charter itself has been recently discovered by a search among Selden's papers preserved in the library of Lincoln's Inn. This original parchment was certainly in existence as early as 1291, as it is referred to in the English records connected with the affairs of Scotland in that year, as published by the late Sir Francis Palgrave in his "Documents and Records of Scotland." Doubts, however, of the authenticity of the charter as printed by Selden, grounded on internal evidence, had been expressed by Mr. George Chalmers early in this century; and since the discovery of the original Mr. Skene has reviewed the question, and, while rejecting some of Mr.

Chalmers's arguments, has adduced others which, proceeding from such an authority, cannot but weigh very forcibly against the document. My late friend, Mr. Maidment, was not disposed to give up the point of its authenticity without further discussion. I do not myself think that its rejection is of the slightest consequence to Lord Mar's argument, as the limitation "hæredibus" to heirs simply, including heirs-female, is the ordinary, I think I may say universal, form during the twelfth century, and long afterwards; and the rule that what is ordinary must be presumed renders the evidence of the charter superfluous.

On the other hand, any supposed loss in the way of proof on Lord Mar's behalf on the point in question would be more than made up by a piece of evidence which appears to have escaped the notice of his advisers—a document preserved in the archives of the Vatican,¹ and which is given in the "Illustrations of the Topography and Antiquities of the Shires of Aberdeen and Banff," printed by the Spalding Club²—a precious collection, which illustrates the history of the Earls of Mar in almost every generation from the twelfth century downwards, the successive charters and documents being commented on in notes by the profound learning of Mr. Skene and of the late Dr. Joseph Robertson, too soon, like Dr. John Stuart and their Irish contemporaries, lost to historical science. I can allude to few now of those whose antiquarian learning I have venerated and profited by, whether older or younger than myself, without such *threnodia*. The document in question is briefly described by Mr. Skene thus, the date being 1257:³ "A question was raised between Alan Durward and William Earl of Mar as to the right of the latter to the Earldom. A Papal Rescript issued in that year, directing an inquest to be held, proceeds on the narrative that our beloved son, the nobleman Alan, called the Doorward, hath signified to us that, whereas the nobleman William of Mar, of the diocese of Aberdeen,

¹ There is a transcript of it in the valuable series of "Monumenta Britannica, ex autographis Romanorum pontificum deprompta," copied from the archives by the orders of Pope Leo XII. at the request of King George IV., and now in the British Museum. The document here in question is referred to as in vol. ix. p. 155.

² Vol. iv. p. 149.

³ Proceedings of the Society of Antiquaries of Scotland, xii. p. 603.

hath withheld the Earldom of Mar, of right belonging to the aforesaid Alan, and the same doth occupy to the prejudice of him the said Alan, and that Morgund and Duncan deceased, to whom the said William asserts his succession in the said Earldom, was not begotten in lawful matrimony"—therefore, in a word, inquiry is to be made and justice done. "William," Mr. Skene adds, "remained in possession;" and there cannot thus be any legal doubt of his legitimate descent. But the point that bears upon the question of descendibility, and which Mr. Skene has abstained from touching upon, is this,—that the claim of Durward could only have been grounded upon the basis of his being the next heir to the Earldom in case the illegitimacy were established. Had the Earldom been descendible to heirs-male of the body, or heirs-male simply in the more extended signification, he could have had no claim; while, if Earl William or his predecessor had been illegitimate, the fief and dignity would have lapsed to the Crown *ratione bastardiæ*. It will not do to reply that Durward's claim was unsuccessful, because the Earldom was descendible to heirs-male exclusively, inasmuch as the claim was based on the imputation of illegitimacy, and on an appeal to the common law to the effect that on failure of legitimate heirs in the direct line, the next heir, whether male or female, succeeds as matter of course. Mr. Skene connects this Rescript of 1257 with the charter of 1171, which he conceives to have been forged in 1257 in order to support Earl Morgund's legitimacy. I suspect that Durward's claim was grounded on representation through his mother of the Earls Gilchrist and Gratney, who appear as rivals of Earl Morgund in the foregoing series. The Durwards possessed very large property in Mar, which must have come to them through marriage, and perhaps was so settled in their favour in 1222-1228, when a settlement or composition was entered into between Earl Duncan and Thomas, the father of the Alan Durward of 1257. The settlement is now lost, but is enumerated in a schedule of Scottish records delivered by Edward I. to King John Baliol in 1292 as follows:—"Item, in uno sacculo existente in eadem maletta veteri una pixis sigillata, in qua est compositio inter comitem de Mar et Thomam Ostiarium olim facta."¹

¹ Acts of Parliaments of Scotland, i. p. 116.

I may observe that difficulties not unfrequently arose in the cases of Celtic families through the conflict between the native laws regulating a legitimate marriage and those of the Church of Rome. Men branded with illegitimacy by the Vatican and by the European States subjected to St. Peter's chair were often of unexceptionable descent according to their national law, or even according to the rule of their own branch of the Church. Traces of this conflict and its consequences are recognisable in the history of the Scottish Highlands as late as the fifteenth and sixteenth centuries. The fact, I may observe, that illegitimacy was imputed to Earl Morgund no less than his son, shows that he must have been of the noble stock of the Earl of Mar.

The fact that emerges from this evidence is that the Earldom of Mar was susceptible to descent to female heirs at the close of the twelfth century. This is taken for granted as a matter of course throughout these prolonged litigations by the Durwards. This evidence as to the descendibility of the Earldom is thus far more strong than the mere limitation "*hæredibus suis*" in the charter of 1171, inasmuch as the latter would be liable to the observation, from the point of view held by Lord Kellie and the House of Lords, that "heirs" simply in those days meant "heirs male," according to the Lombard law. No evidence can be shown of any subsequent resignation and regrant with a restriction to heirs-male; and thus the descendibility to heirs-general must have been the same in 1377 and 1388—dates of which the significance will appear in due time—as in 1228-1257. The point stands out prominent in the retrospect, and no less so the fact that, notwithstanding the imputation of illegitimacy, the line of Earls descended from Morgund held their right: and we should probably find their legitimacy recognised, if the report of the inquest ordered by the Rescript of 1257, had come down to us. A further proof, I may add, would be afforded of the descendibility of the Earldom to heirs-general, if the Countess Agnes, wife of Earl Morgund, was Countess in her own right, as the learned editor of the "*Illustrations of the Antiquities of Aberdeen and Banff*" considers her to have been. I think under these circumstances we may leave the charter of 1171 to shift for itself. I may observe, however, that I should not be surprised if evidence some day emerged to show that Morgund was really the son of Gillocherus or Gillocher, possibly

Earl of Mar. The forger of a charter would be careful to proceed upon accurate data, so far as they were attainable, and the lapse of eighty years between 1171 and 1257 was not sufficient to obliterate memory as to who Earl Morgund's father really was. Even a supposititious document may render evidence when critically scrutinised.

Duncan Earl of Mar was succeeded by his son, Earl William, whose name occurs repeatedly in history from 1244 to 1273, his rival, Alan Durward, and himself coming especially in political opposition in 1255, but coalescing in reconciliation in 1258. William was father of Earl Dovenald, or Donald II., who figures in 1290 as one of the "septem comites regni Scotiæ," in whom the privilege had been vested from ancient times, that "whenever the royal throne should become vacant *de facto* and *de jure*, they should, concurrently with the 'community' of Scotland, constitute the king, and place him in such royal seat, and confer upon him all the honours belonging to the government of the kingdom of Scotland."¹ Duncan Earl of Fife and Donald Earl of Mar protested upon this ground, as two of the members of this ancient court, before the Bishop of St. Andrews and John Comyn, guardians of Scotland during the *interregnum* in 1290, against any unwarranted action on their part in regard to the appointment of a king, placing themselves and their rights under the protection of Edward I., and protesting against the choice of Baliol, and in favour of the right of Bruce to the throne. The original, indorsed "Appellationes septem comitum regni Scotiæ," is preserved among the other documents relating to the competition of Bruce, Baliol, and Hastings, in the Public Record Office of England. It was discovered, published, and commented upon by Sir Francis Palgrave in the work above cited, published under authority of the late Record Commissioners. The names of the five earldoms that furnished the elections, other than those of the Earldoms of Fife and Mar, do not appear on the face of the protest. The claim was apparently considered as antiquated, and was disregarded; but there can be little doubt that it was of ancient Celtic origin; Sir Francis Palgrave, a pre-eminent authority, compares the court of the "septem comites" to the electoral colleges consisting of the same number, more celebrated in his-

¹ Palgrave's Documents and Records of Scotland, Preface, p. xi.

tory; and the pre-eminence of the Earldom of Mar flourishing at the end of the thirteenth century is thus still further illustrated. It will be observed how continuously the Celtic nomenclature of the line of Earls is preserved down to this time, and subsequently. I have qualified Earl Donald as Donald II., inasmuch as his great-granddaughter, Margaret, sister and heiress of her brother Thomas Earl of Mar, describes her father as Donald III. No other Earl Donald is known of except the Earl Domnall of 1014; and it will thus appear that the memory of that great chief was still fresh in the remembrance of the house.

Donald II., Earl of Mar in 1290, had two children, Gartney or Gratney II., Earl of Mar, and Isabel, wife of King Robert Bruce. Gratney II. married Christiana Bruce, sister of King Robert, with whom he received the rich Lordship and Earldom of Garioch, held in free regality, apparently as her portion, and left issue Donald III., Earl of Mar and Regent of Scotland; and two daughters, of whom the eldest, Elyne, or Ellen, was ancestress, as will be shown more fully, of Sir Robert Erskine, who succeeded as Earl of Mar in 1438, and was ancestor of John Lord Erskine, to whom Queen Mary restored the Earldom in 1565. The younger sister married the ancestor of the Lords Lyle. Earl Gratney II. is thus the common ancestor of all the parties interested in the subsequent succession to the Earldom of Mar, the present Lord Mar's right as Earl ascending to him, under the territorial Earldom restored in 1565, and flowing down to him in the right line from Earl Gratney, so that he stands in precisely the same position as the heir-general of Oliphant did according to the testimony of Charles I. in 1640, cited in the preceding Letter.

Donald III., Earl of Mar, the son of Earl Gratney, had been detained by Edward I. as a hostage in England during the War of Independence, was brought up with the Prince of Wales, afterwards Edward II., and seems to have been warmly attached to that unworthy monarch, although not one of his favourites. He preferred, we are told, to live in England, although the nephew of the Scottish King; and almost his first visit to Scotland was with the object of obtaining assistance towards the restoration of Edward after his deposition. He favoured the views of Edward Baliol in the first instance, but ultimately threw himself into the interest of the infant

David II., his cousin-german, was appointed Regent on the death of Thomas Randolph, Earl of Moray, and fell shortly afterwards at the disastrous battle of Dupplin in 1332. He left two children, a son, Earl Thomas, and a daughter, Margaret, the wife of William, first Earl of Douglas.

Earl Thomas, Donald's successor, was the last Earl of Mar of the original or Celtic stock. He survived till 1377, after a long career, at one time fighting for honour in the army of Edward III. in France, at another quarrelling with his native sovereign, David II.; but speedily reconciled; while as a token of favour from David, the latter granted him a charter of confirmation to himself and his heirs whatsoever of the whole lands and lordship of Garioch, to be held by him and his heirs aforesaid as freely as David Earl of Huntingdon (brother of King William the Lion) had held the same in the twelfth century. The charter is briefly noticed in Robertson's Index to the Missing Charters in the Register of the Great Seal; but Sir Robert Douglas describes it *ut supra* in his "Peerage of Scotland," published in 1764, writing with the Mar charter-chest before him. Whether the charter is still there I do not know. I shall revert to the subject of this charter and the Earldom of Garioch in a future page. This Earl of Mar married Margaret Stewart, Countess of Angus in her own right, whose intrigues will be the subject of a future section.

On the death of Earl Thomas without issue in 1377, his sister, Margaret Countess of Douglas, succeeded him in his fief and dignity as Countess of Mar in her own right; and her husband Douglas assumed the additional style of Earl of Mar, under what right I shall discuss in the coming section of this Letter. Earl William died in 1384, and his widow, the Countess Margaret, subsequently married Sir John Swinton of that ilk, but bore him no children. By her first husband, Earl William, she had two—James Earl of Douglas and of Mar, and Isabel. Earl James fell in the chivalrous battle of Otterburn in 1388, leaving no legitimate issue; and his sister Isabel succeeded him in the unentailed lands of the house of Douglas, and in the Earldoms of Mar and of Garioch, her mother's heritage. She bore accordingly the title of Countess of Mar, or Countess of Mar and of Garioch, the latter title being constantly given to her as well as the former. The Earldom of

The first part of the report deals with the general situation of the transport system in the country. It is noted that the transport system is in a state of transition, with a view to the introduction of a new system of transport. The report also mentions the need for a comprehensive study of the transport system, taking into account the various factors involved, such as the economic, social, and geographical aspects.

The second part of the report deals with the specific aspects of the transport system, such as the roads, the railways, and the air transport. It is noted that the roads are in a state of disrepair, and that the railways are in a state of decline. The air transport is also mentioned, and it is noted that it is in a state of development.

The third part of the report deals with the financial aspects of the transport system. It is noted that the transport system is a major source of revenue for the government, and that it is in a state of financial crisis. The report also mentions the need for a comprehensive study of the financial aspects of the transport system, taking into account the various factors involved, such as the economic, social, and geographical aspects.

The fourth part of the report deals with the administrative aspects of the transport system. It is noted that the transport system is in a state of administrative chaos, and that there is a need for a comprehensive study of the administrative aspects of the transport system, taking into account the various factors involved, such as the economic, social, and geographical aspects.

The fifth part of the report deals with the technical aspects of the transport system. It is noted that the transport system is in a state of technical backwardness, and that there is a need for a comprehensive study of the technical aspects of the transport system, taking into account the various factors involved, such as the economic, social, and geographical aspects.

The sixth part of the report deals with the social aspects of the transport system. It is noted that the transport system is a major factor in the development of the country, and that there is a need for a comprehensive study of the social aspects of the transport system, taking into account the various factors involved, such as the economic, social, and geographical aspects.

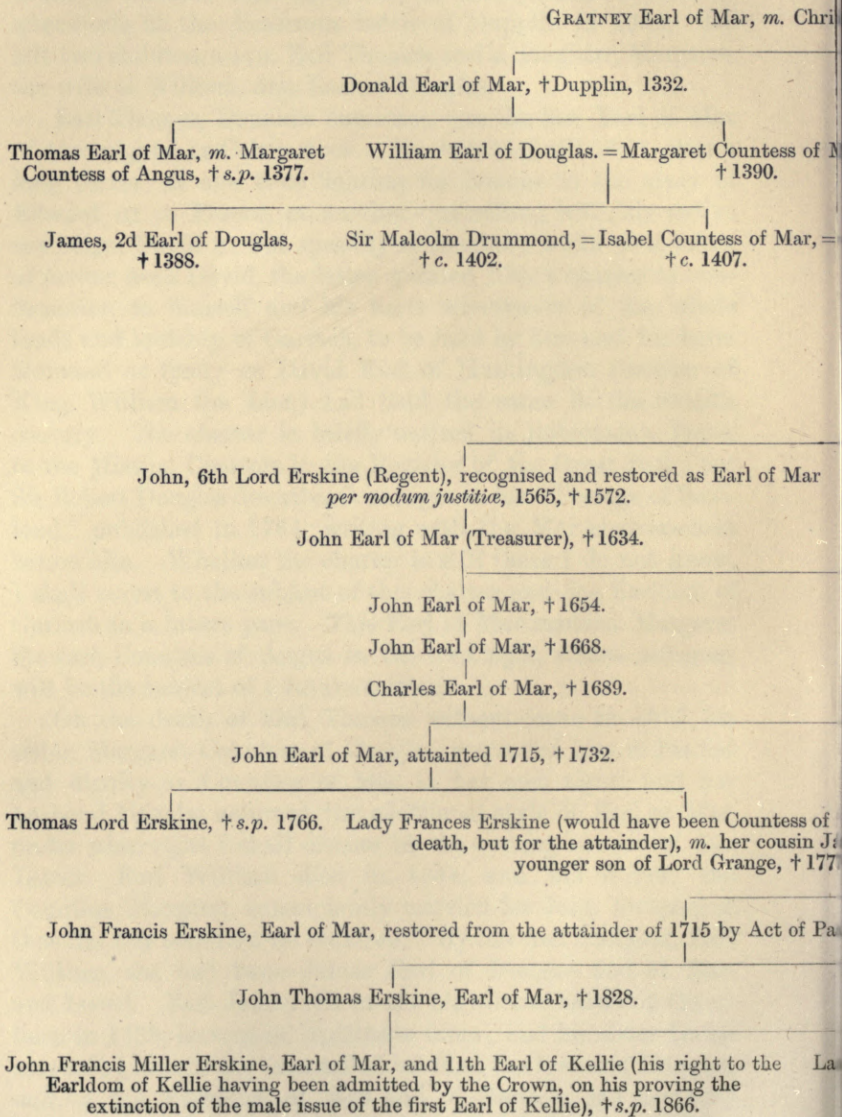
The seventh part of the report deals with the geographical aspects of the transport system. It is noted that the transport system is a major factor in the development of the country, and that there is a need for a comprehensive study of the geographical aspects of the transport system, taking into account the various factors involved, such as the economic, social, and geographical aspects.

The eighth part of the report deals with the economic aspects of the transport system. It is noted that the transport system is a major factor in the development of the country, and that there is a need for a comprehensive study of the economic aspects of the transport system, taking into account the various factors involved, such as the economic, social, and geographical aspects.

The ninth part of the report deals with the political aspects of the transport system. It is noted that the transport system is a major factor in the development of the country, and that there is a need for a comprehensive study of the political aspects of the transport system, taking into account the various factors involved, such as the economic, social, and geographical aspects.

The tenth part of the report deals with the legal aspects of the transport system. It is noted that the transport system is a major factor in the development of the country, and that there is a need for a comprehensive study of the legal aspects of the transport system, taking into account the various factors involved, such as the economic, social, and geographical aspects.

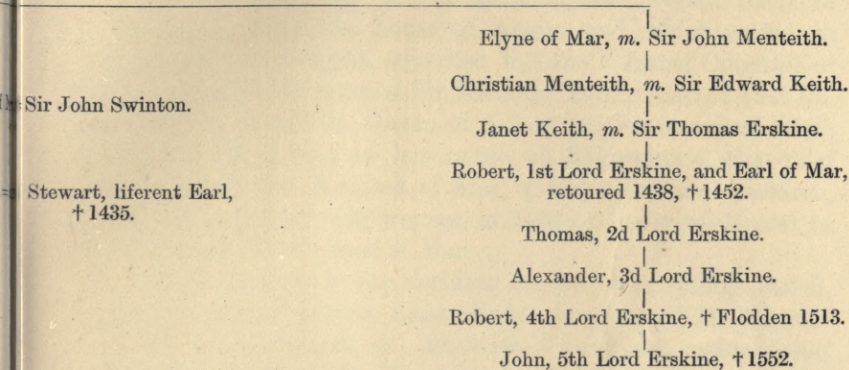
GENEALOGY OF



John Fra

THE EARLS OF MAR.

Bruce, sister of King Robert I.



Sir John Swinton.

Stewart, liferent Earl, † 1435.

Alex. Erskine of Gogar.

Sir Thomas Erskine of Gogar, Earl of Kellie, 1619, with limitation to heirs-male. His male issue failed 1829.

James Erskine, Earl of Buchan in right of his wife.

Henry Erskine, Lord Cardross *a quo* later Earls of Buchan.

James Erskine, Lord Grange (a Lord of Session), † 1754.

James Erskine (younger son) *m.* his cousin Charles Erskine (elder son),
 Lady Frances Erskine, † 1785. † *s.p.* 1774.

1824, as grandson of attainted Earl, † 1825.

Henry David Erskine, † 1848.

Frances Jemima Erskine,
 J. Goodeve, Esq.,
 † 1842.

Walter Coningsby Erskine,
 12th Earl of Kellie, † 1872.

Erskine Goodeve-Erskine,
 Earl of Mar.

Walter Henry Erskine, 13th Earl of Kellie. Held by Committee for Privileges entitled to Earldom of Mar created in 1565.

The first part of the report
 contains a general statement
 of the work done during the
 year, and a list of the
 names of the persons who
 have been employed in the
 service of the department.
 The second part of the
 report contains a list of
 the names of the persons
 who have been employed in
 the service of the
 department during the
 year, and a list of the
 names of the persons who
 have been employed in the
 service of the department
 during the year.

The third part of the
 report contains a list of
 the names of the persons
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 the service of the
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 year, and a list of the
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The fifth part of the
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 have been employed in the
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 during the year.

Douglas, with the entailed property, passed under a standing entail to a collateral branch of the house of Douglas, of illegitimate descent, in the person of Archibald, third Earl of Douglas, ancestor of the second line of the Douglasses, styled Black in distinction from the house of Angus, and which ended in James Earl of Douglas, who died in 1488. Isabel Countess of Mar and Garioch married Sir Malcolm Drummond of that ilk, brother of Annabella, Queen of Robert III., but survived him; and she was living in her castle of Kildrummie, the chief messuage of the Earldom of Mar, a widow without children, and no longer a young woman, in 1404—a memorable year in the history of the house of Mar.

The next heir to the Earldom in that year, failing Isabel, was her second cousin, Janet Keith, daughter of Sir Edward Keith, by Christiana de Menteith, Christiana again being daughter of Sir John Menteith by Elyne or Ellen of Mar above mentioned, the eldest daughter of Gratney, and the elder sister of the Regent Donald Earl of Mar, who fell at Dupplin (as I have said) in 1332. Janet Keith (who had been first married to Sir David Barclay, without issue) was then wife of Sir Thomas Erskine of that ilk, and was mother of Sir Robert Erskine, who succeeded, as I have stated, as Earl of Mar in 1438, and was legally recognised as such, although his right was afterwards illegally disallowed. That right was ultimately recognised and indicated—alike, as I affirm, to fief and dignity—by Queen Mary, in the person of John Lord Erskine, Earl Robert's lineal descendant and representative, in 1565.

The descent of these various personages from the common ancestor, Gratney II., Earl of Mar, in 1294, may be seen on the pedigree opposite. I might have commenced this narrative in his person,—and yet the earlier notices of the Earldom are not uninteresting in themselves, while they supply an intelligible reason for the interest which I myself take, in common with all Scottish antiquaries and not a few Scottish peers, in its preservation. It is not, as has been lately imputed to us, through any “personal” feeling, as in favour of Lord Mar or against Lord Kellie, that we attach such interest to the vindication of the ancient Earldom; but—setting the question of right and justice altogether aside—from feelings akin to those

which animated Lord Chief-Justice Crewe in his celebrated speech on the claim to the Earldom of Oxford in 1626; and, if our English friends should think it too much to say, as the "great peer and a learned" referred to by Crewe did in regard to Oxford, "there was no king in Christendom had such a subject as—Mar," it may at least be urged that the Earldom of Mar is one of the brightest jewels in Her Majesty's Crown, and an honour to the whole British peerage. For, in the words of Mr. Riddell¹—whose stern and masculine intellect, repudiative of everything but the strictest proof, was like a rugged rock covered all over with flowers and growths of historical memory and classical allusion—"Mar is not only now the oldest Scottish earldom by descent, but in many respects the most remarkable in the Empire, for the present Earl"—the late Earl, Lord Mar's uncle, this having been written in 1842—"is the direct heir-at-law, through a long and illustrious ancestry, of personages who were Earls of Mar *ab initio*, and never known under another character:

"Certa retro series" *comitum*, "sed cujus origo
Oceani cum fonte latet!"

SECTION II.

Two Hypotheses regarding Extinction of Earldom.

It is at this point of the history that the first difficulty presented itself to Lord Chelmsford and Lord Redesdale, when considering Lord Kellie's claim and the pleas advanced against it by the heir-general of Mar in 1875. The proposition that the original Earldom was extinct was the basis of that claim, and both the noble Lords came to the conclusion that it was so, although by distinct processes of reasoning, and on assumptions mutually destructive of each other. Lord Redesdale may be said to represent both Lord Mansfield, and Lord Chelmsford the Lord Camden of the disputed claim, the former strong on the male succession, the latter not unfavourable to the female; each admitting and each denying what the other denied and admitted,—Lord Redesdale thus fixing on 1377 as the death-time of the old Earldom, Lord Chelmsford on the other hand prolonging its existence till 1435, but both concurring in the

¹ Riddell's Peerage and Consistorial Law, p. 169.

sentence that the Earldom became extinct—through what process, in the alternative of 1435, we shall find in the ensuing Letter.

The problem, as it presented itself to Lord Chelmsford, is stated by him thus :—“ One of the great difficulties in this case . . . is, to ascertain in what right Margaret, the sister of Earl Thomas, and after her, her daughter Isabella, had successively possession of the earldom or comitatus, and respectively assumed the title”—it would have been more correct to have said, were respectively designated by every one, from the King downwards, by the title—“ of Countess of Mar.” Lord Redesdale proposes the same problem in the question, By what title was “ William Earl of Douglas and Mar,” “ the husband of Margaret, only sister of Thomas Earl of Mar, the last heir-male,” “ called Earl of Douglas and Mar”? Lord Redesdale’s views are by much the most uncompromising, and I shall therefore give them the precedence in this criticism.

Lord Redesdale commences his address by two observations, which are very important, as giving the key to his reasoning throughout his speech. The first is that, while “ the ancient Earldom of Mar was probably held by tenure of the comitatus or fief, the earldom we have to decide on,”—that is, as claimed by Lord Kellie,—“ is the peerage independent of the comitatus; and it is important and necessary to treat the peerage and comitatus separately.” He thus assumes *ab initio* that the Peerage of Mar claimed by Lord Kellie as created in 1565 actually existed as a “ peerage-earldom ” distinct from the original and extinct dignity, whereas it appears to me that this was the matter to be proved—that proof of that existence ought to have been alleged in the first instance before taking that existence for granted. I have already shown that so long as dignified fiefs existed—and one of them exists in Scotland at the present day—the fief and the title of honour co-existed inseparably, under the proviso that the tenure of the fief proceeded directly and uninterruptedly from the Sovereign; while Lord Camden in the Sutherland claim positively disavowed the doctrine that the two could be separated, at the same time, indeed, that he laid down a rule which practically contradicted his *dictum*. Lord Redesdale’s second observation was that, “ There is no record of the creation of this ancient earldom, and

I presume, therefore, that the Committee will accept Lord Mansfield's *dictum* in the Sutherland case, as the ruling principle in this claim. On that occasion he said, 'I take it to be settled, and well settled, that when no instrument of creation or limitation of honours appears, the presumption of law is in favour of the heir-male, always open to be contradicted by the heir-female upon evidence shown to the contrary. The presumption in favour of heirs-male has its foundation in law and in truth.' Is this presumption of law," Lord Redesdale asked, "contradicted by the female in this, as it was successfully in the Sutherland claim? . . . In the case before us it appears to me that the opposing petitioner asks the Committee to adopt the reverse of Lord Mansfield's *dictum*, and to hold that the presumption of law is in favour of the heir-female. The force of the evidence before us is against his claim, unless we allow it to be constantly overruled by such a presumption." It is impossible, I need scarcely observe, to place the question between the private rule of the House of Lords and the law of Scotland in a more explicit antagonism than in the alternative which Lord Redesdale's clear perception indicated in the preceding words; and I must be allowed to say that if the question of Lord Mar's right, as heir of the ancient and only Earldom of Mar, rested simply (as it does not) upon presumptions, as asserted by Lord Redesdale, the Scottish law would be decisive in his favour. There is no doubt whatever that the "opposing petitioner" "asks" the Committee throughout his pleadings to adopt the reverse of Lord Mansfield's *dictum*, and presume accordingly, as Lord Redesdale represents it; but it was less a request than a demand, however courteously expressed, and on the footing of right, not of claim, that injustice should not be done to him by reporting in Lord Kellie's favour upon the presumption assumed by Lord Redesdale to be irrefragable on Lord Mansfield's authority, although in contradiction to the law of Scotland. Lord Redesdale's observation was general, but it applies to the question immediately before us as well as to every successive incident in the Mar history.

Starting therefore from the basis of the two assumptions thus defined,—first, a distinction between the comitatus or fief and the "peerage-earldom" or title, which Lord Redesdale

currently identifies with the right of sitting in Parliament (as if there had been a House of Lords in Scotland, and every baron was not entitled and bound to attend the Great Council of the nation); and, secondly, the presumption in favour of heirs-male of the body against the heirs-general as laid down by Lord Mansfield, Lord Redesdale comes to the deliberate conclusion that, whatever doubts may exist (and the difficulty is admitted to be great) as to the right of Margaret and Isabel to the dignity of Countess of Mar, the overruling presumption is against their having held the dignity in their own right; and that the earldom, fief, and dignity (or "peerage-earldom" in conjunction) became extinct in the person of Earl Thomas, the last heir-male, in 1377, never more to revive except by distinct creation as a "peerage-earldom" absolutely disconnected in point of continuity with the original honour.

Turning to Lord Chelmsford's address, it is far less positive on the point here under consideration; and his dissent from Lord Redesdale, although indicated rather than expressed, is patent from the very commencement. He subordinates the question whether the fief and the dignity were conjoint or independent to the more important point, "how the dignity, or the dignity with the lands, was originally descendible" and he lays his ground as follows:—"Although it is probable that in limiting lands connected with, or which carried a dignity with them, they would be granted by preference to male heirs, there is no reason to believe that in such cases females were always excluded. In the competition between Bruce and Baliol for the crown of Scotland, the assessors appointed by King Edward, in answer to questions put to them, stated that "earldoms in the kingdom of Scotland were not divisible, and that, if an earldom devolved upon daughters, the eldest-born carried off the whole in entirety," thus speaking of a descent to females as a possible event, but, as we shall find, misunderstanding the conditions under which the comitatus was held to be divisible as regarded its component members exclusive of the chief message, but not divisible in the view of the chief message, carrying the superiority of the whole and the title of honour. "Lord Mansfield," concluded Lord Chelmsford, "in the Cassillis case uses language too unqualified in saying of earldoms and other territorial dignities, 'they most certainly descended to the

issue-male.'” Lord Chelmsford’s assertion of the presumption in favour of heirs-male was thus much more guarded than Lord Redesdale’s, and thus, while the latter paused at 1377, and denied that Margaret and Isabel were Countesses by inheritance, Lord Chelmsford shrank from denying that inheritance, and recognised the transmission of the earldom in virtue of the feudal inheritance through the two ladies in question to the death of the husband of Isabel, Margaret’s daughter, in 1435.

Lord Chelmsford and Lord Redesdale are in substantial agreement as to the special points of difficulty which stand in the way (as they conceive) of a recognition of Margaret and Isabel, mother and daughter, as Countesses of Mar in their own right. These may be summarised as follows:—

1. William Earl of Douglas and Mar, the husband of the Countess Margaret, deals in charters with the lands of Mar as if they were his own property, warranting for himself and his heirs, accepting resignation, making regrants to hold of himself and his heirs in the earldom, etc. etc. If, Lord Chelmsford contends, Earl William had held in Margaret’s right, his warranty would have been invalid without her concurrence; but that concurrence is not expressed, and therefore his right must have been independent of any right from her. This is excellent reasoning, but on an insufficient basis. Lord Redesdale, on the other hand, after suggesting three alternatives, under either of which Earl William might have been styled Earl of Mar, and rejecting two of them, declines (as it appears to me) to commit himself to the third; he rejects the suggestion of a new creation in Earl William’s favour; he rejects the idea that Margaret might have succeeded to the “peerage-earldom” as distinct from the fief, and that he thus held in her right; and on the only remaining alternative proposed, that he may have been styled Earl of Mar “by courtesy as holding the comitatus or fief” independently of the “peerage-earldom”—he abstains from giving any opinion, clearly perceiving (as I imagine) that, if the comitatus was divorced from the title of dignity, the possession of the comitatus could not warrant Earl William’s assumption of a designation by the title of dignity, even “by courtesy.”

2. James Earl of Douglas and Mar, the son of the Countess Margaret, took the style of Earl of Mar while his mother was

yet alive. This could not have been the case (I am now stating the second of the points of difficulty as started by the noble and learned Lords) had Margaret been Countess of Mar in her own right; the dignity could not have vested in her son, Earl James, till after her death. This, I may observe, along with the other objection, was urged by Sir Robert Gordon, Lord Kellie's prototype in the Sutherland claim; and Lord Hailes answered it in the Sutherland case by the question, "If James was put in fief of the earldom by his mother, what would have been the impropriety of his styling himself Earl of Mar even in his mother's lifetime?"

3. Sir John Swinton, the second husband of the Countess Margaret, and Sir Malcolm Drummond, the first husband of the Countess Isabel, never appear under the designation of Earl of Mar, which would have been the case by the courtesy of Scotland if their respective wives had been Countesses in their own right. But their husbands took the style of "dominus de Mar," and "Lord of Mar," never that of "comes de Mar." Lastly,

4. Although, as Lord Chelmsford observes, the King styles Isabel "Countess of Mar and Garioch" in 1397, she never describes herself as Countess of Mar till 1403, but as "Lady of Mar," upon which I may observe *en passant* that the testimony of the Sovereign has usually been considered decisive on such a question, the King superior being supposed in law to know his vassal, his rights, and his proper designation. Further, if I understand Lord Redesdale correctly, he infers from the fact assured that Garioch was a "dominium" or lordship, and nothing more, and from Isabel being alternatively styled Countess of Mar, and Countess of Mar and Garioch, and Lady of Mar, or Lady of Mar and Garioch, that Mar was in her case as much a mere "dominium" or "lordship" as Garioch, and that she was not therefore in any proper sense Countess of Mar, and certainly not Countess by hereditary descent as heir of line, or in her own right. Lord Redesdale lays stress on the fact that no right to the Earldom of Garioch is asserted by the opposing petitioner, Lord Mar; but such an argument, from the admissions or non-claim of a party, ought not to be turned against him except by counsel at the bar. In connection with this objection generally, Lord Redesdale affirms, on the basis

of two charters of the Earldom of Carrick cited by Lord Kellie, the first by King Robert Bruce to his brother Edward, granting the comitatus and specifying the name and dignity, the second by David II. to William de Cunningham, granting the comitatus without specifying the name and dignity, after which, in a charter adduced, William figures as merely "dominus de Carrick," that "when a peerage was attached to a comitatus, the holder of it was earl, and when a peerage was not attached," *i.e.* by the grant of name and title, "lord only." But according to this theory, no grant of a comitatus could carry the dignity unless it was specially granted, which is, in fact, Lord Camden's law of 1771, and is refuted in almost every case of ancient Scottish dignities; whereas such special conveyance is always exceptional, and a determining cause can usually be assigned for the circumstance. In the grants of the Earldom of Carrick that cause is sufficiently apparent; for the Earldom was a dignity hereditary in the Kings of Scotland, descendants of Robert Bruce's father (the English doctrine of merging in the Crown being unknown in Scotland); and thus, when Robert I. granted the fief of the Earldom to his brother, it was necessary that he should divest himself of the title of honour by special grant in his brother's favour; and when David II. granted the fief to William Cunningham without such special grant, the presumption must be either that in other charters (besides the solitary one cited) William bore the title of Earl of Carrick,¹ or that David, in granting the fief, did not choose to divert the dignity from the royal succession. As respects Garioch, I cannot myself see how the present heir-general of Mar is not Earl of Garioch at the present moment as well as Earl of Mar. Isabel is styled so, and her husband, Alexander Stewart, likewise, and Sir Robert Erskine after his investiture in 1438, in her right, as we shall see hereafter. Whatever right Robert Earl of Mar possessed is in his descendant and lineal representative at the present moment. I may be mistaken, and the defect may be in my own apprehension, but it appears to me that both

¹ [The argument from the charter to William of Cunningham is disposed of by an entry in Robertson's Index to Missing Charters (p. 64, no. 18) to the effect that David II. confirmed a charter "by William Cunningham, *Earl* of Carrick, to James Likprevik, of the half lands of Polkarne in Kingskylly, vic. de Air."]

Lord Chelmsford and Lord Redesdale betray a certain haziness and indecision in their criticism upon the preceding points of difficulty; and that while believing them to be a most formidable obstacle in the way of the "opposing petitioner," and founding upon them accordingly, they are at the same time somewhat doubtful whether that obstacle be not like the iron gates in fairy tales which open before the path of the fortunate hero who is privileged to pass them with impunity. In the present instance it is not only possible to discern the iron gates by pure induction from the circumstances of apparent difficulty above noticed, but to discover and apply the key which will open them and dispel the mystery of their concealment.

Both Lord Chelmsford and Lord Redesdale, in fact, betray an impression, amounting almost to a persuasion, that there must have been some *interventus* which, if rightly understood, would clear up the matter—possibly to the effect of establishing an exception in favour of the heir-general—the doubt, however, being liable, in circumstances of such obscurity, to be overruled by the dominant presumption in favour of the exclusive male succession. But, if a doubt exists, the Scottish law of succession, as opposed to the private rules founded on by the noble and learned Lords, prescribes a solution of the doubt in the interest of the heir-general; and this suggests a presumption in favour of the succession of Margaret and Isabel as Countesses of Mar in their own right so overpowering and irresistible that it is necessary to estimate the given position from this side also before considering the question of an *interventus* thus suggested.

If, therefore, the presumption of Scottish law be in favour of heirs-general, as I have shown to be the case; if the original descent of the Earldom of Mar was to heirs-general, as the House of Lords recognised in 1771; if the testimony of Robert III. in 1395 was (as I shall presently show was the case) that the Erskines, descending through Janet Keith from Elyne of Mar, were the "veri hæredes" to the Countess Isabel; and if Queen Mary recognised them in that capacity in 1565, and the Court of Session judicially affirmed the same in 1626, it follows upon these facts that the succession to the fief and dignity of Mar passed continuously without inter-

ruption from the personality of Earl Gratney, the common ancestor in 1294, to Thomas Earl of Mar, who died in 1377, and then to his sister and niece as Countesses of Mar, to Sir Robert Erskine legally served as Earl of Mar in 1438, as by the judgment of 1626, and so down to John Lord Erskine, the Earl restored in 1565, and down to the present heir-general, Lord Mar: and thus that the points of difficulty stated by Lord Chelmsford and Lord Redesdale, the dealings of Earl William with the comitatus during his wife's lifetime, the enjoyment of the dignity by Earl James during his mother's life, and the varying nomenclature of the Countess Isabel, must all of them have been the result of circumstances, causes, and usages compatible with and subordinate to the grand fact of the unbroken succession certified by the evidence just appealed to. The phantoms of night and of error vanish with the rising of the sun of daylight and truth; and it is with the above difficulties as with the phantom to which the poet refers, the delusions of Paganism at the advent of Christianity—

“The flocking shadows pale
Troop to th' infernal jail,
Each fetter'd ghost slips to his several grave.”

But the errors here in question are not so easily laid in the Red Sea. I cannot dismiss them so unceremoniously.

The objections of Lord Chelmsford and Lord Redesdale are based—first, on the assumption that tenure of an earldom by the husband of a countess in her own right, she being throughout the moving agent, and he merely concurring “for his interest,” according to the legal formula, was the only recognised mode by which a husband could bear his wife's title in feudal times,—an assumption which, as we have seen in the preceding letter, is too much to predicate—and, secondly, on the presumption supposed to be generated against the right to a higher title, matters otherwise being alike, when the person distinguished in some cases by the higher, is in others designated by the lower title,—the truth being that the attribution of titles was constantly governed by the circumstances of the fief or property to which the person entitled stood in feudal relation. These considerations, it appears to me, are sufficient to suggest, as matters of positive presumption, that

an *interventus* must have occurred shortly after the death of Earl Thomas in 1377, and, as matter of strong probability, that some trace of the legal manner in which it was effected may still be extant, and that evidence to the same effect from the devolution of contingent interests may confirm this induction.

My own belief, in the face of the circumstances founded on as difficulties by the two noble Lords, and apart from any other consideration, would be this—that Margaret Countess of Mar, after succeeding to the comitatus with the dignity attached to its chief message on her brother's death, either resigned the comitatus into the King's hands for a new investiture in favour of herself and her husband and the longer liver of the two, and with destination to the heirs of their bodies, and failing such to the heirs of Margaret, or perhaps, and more probably, conferred the comitatus on her husband by a charter of donation with a similar destination, which was subsequently confirmed by the King (apart from which confirmation it would not have been valid)—precisely as we shall find that her daughter Isabel did in favour of her husband, Alexander Stewart. Neither of these two processes would interrupt the devolution of the ancient Earldom in the line of the heirs-general, unless a special provision to the contrary, proceeding on resignation, was introduced in favour of heirs-male collateral; and this, as shown by the various subsequent documents and authorities above referred to, most certainly did not take place: on the contrary, the succession stood unaltered in the personality of the representatives of Elyne of Mar, as stated, the heirs to the comitatus being necessarily heirs to the dignity annexed to it, as already shown. Applying these alternative suggestions to the objection before us, Earl William would, especially under the latter, act as absolute proprietor of the Earldom—while, dying before Margaret, his son would succeed as Earl, although his mother was still alive. Margaret, self-denuded of her hereditary fief and dignity by resignation in favour of her husband and herself in conjunct fee and their heirs, would henceforward rank as Countess of Mar under that character exclusively, although she would enter on the full right of dealing with the property, granting charters, etc., after her husband's death, as surviving tenant in liferent, subject only to the conditions of the investiture.

Her second husband, Sir John Swinton, could have no claim to take the dignity of Earl by the courtesy under such circumstances, Margaret having ceased to be Countess in her own right from the moment of the resignation and regrant, and necessarily before her marriage with Sir John; while, moreover, even had she retained her original status, and Swinton had been her first husband, they had no children; and the birth of a child heard crying within four walls was prerequisite, according to ancient custom, to entitle him to the benefit of the courtesy. Under these circumstances, Isabel would become heir to her brother Earl James in the hereditary fief and dignity on the death of the latter; but her mother's life-tenure possession would preclude her entering upon her full right until that brother's death, or till her mother should resign the comitatus in her favour. The Countess Margaret was alive on 5th December 1389, although dead in 1391; and Sir Malcolm Drummond, Isabel's first husband, was dead before November 1402; so that the dates are in accordance with the preceding explanation. Even had Sir Malcolm survived, he would have been incapable of the courtesy, Isabel having borne him no child. Neither William Earl of Douglas, nor Isabel's second husband, Alexander Stewart, held the dignity by the courtesy, as will be shown presently in regard to the latter personage.

All this is as legitimate in speculation, on the Scottish presumption in favour of heirs-general, as the speculation of the noble and learned Lords is on the contradictory basis of the English presumption in favour of heirs-male, while it has the advantage of accounting for all the difficulties which the contrary view evokes and exasperates without charming away their venom. But Lord Kellie has, in fact, himself produced some evidence which supplies a positive basis for the explanation just offered, although he founds upon it a proof of a new creation of the Earldom in favour of William Earl of Douglas, which Lord Redesdale repudiates. Lord Chelmsford speaks of this evidence as follows:—"To account for these acts of dominion by Earl William" (of Douglas and Mar), "it was suggested on the part of the petitioner that there must have been a new charter of the Earldoms of Mar and Douglas granted to him. The evidence to warrant that suggestion is of the most meagre description. No charter of creation has been

discovered ; but in the Douglas charter-chest, folded up in a notarial copy of a charter granted by Isabella, styling herself Lady of Mar, and her husband Malcolm Lord Drummond, to George Earl of Angus, the following memorandum was found : — ‘Memorandum (either for or from) y^e Registeris 102 Roull contening 25 Chart granted be (by) King Robert the 2nd wherein there is ain Charter granted to W^m Earl of Douglas and Mar, concessé.’¹ This word ‘concessé’ is difficult to understand, and no satisfactory explanation of it was afforded us during the argument. If, as suggested, it means ‘granted,’ it is a superfluous and an unmeaning repetition. There is nothing in the memorandum to show what was the subject of the charter, which for anything that appears, although in favour of the Earl of Douglas and Mar, may have been a grant of something wholly unconnected with the Earldom or Comitatus of Mar. At all events, I do not think that this loose memorandum can be accepted as any proof that there had been a resignation of the Earldom into the King’s hands and a regrant following upon it, of which resignation not a trace appears.” Lord Redesdale likewise treats of this memorandum in reply to the question propounded by himself, “Did William Earl of Douglas become Earl of Mar by a new creation?” “There is no evidence of such creation.” “The Lord Advocate, as counsel for the Earl of Kellie, called the attention of the Committee to a memorandum in which a charter is mentioned, granting to William Earl of Douglas the Earldoms of Douglas and Mar, ‘concessé,’ as having been with other documents in a roll of twenty-five charters of Robert II. But as the charter itself is not forthcoming, it is impossible for the Committee to accept the memorandum as evidence that it was a new creation of the peerage-earldom of Mar. Moreover, the great inaccuracy of the description in the memorandum of the contents of the notarial copy of the charter in which it was found renders it of little value, except as proving that a charter of Robert II., relating to the Earldom of Mar as connected with William Earl of Douglas, was once in existence, but has been lost or destroyed since that memorandum was made, to which fact I shall refer hereafter. Probably the charter referred to the

¹ Minutes of Evidence, p. 331.

comitatus only; the word 'concesse,' which is not of any certain interpretation, appearing to me most likely to mean 'surrendered.'” Lords Chelmsford and Redesdale thus rejected the memorandum as evidence, that is, as evidence of a new creation as contended for by Lord Kellie; but by Lord Redesdale's acknowledgment it proves “that a charter of Robert II., relating to the Earldom of Mar as connected with William Earl of Douglas was once in existence,”—and this admission is sufficient for my purpose.

The scrap of paper in question was evidently a memorandum or note for the legal advisers of the Douglasses of certain charters recorded in, and to be extracted from, the Register of the Great Seal, for the purpose of some process or action then pending. Early charters under the Great Seal were inscribed on Rolls, few of which are now preserved. The Roll here referred to was marked “102.” It contained twenty-five charters of Robert II.; and the Roll was further identified by the first charter recorded on it being one in favour of David the son of Patrick, burgess of Haddington. It is no wonder that Lord Chelmsford and Lord Redesdale were staggered by the curt and almost unintelligible style of the memorandum, and especially by the word “concesse,” of which each noble Lord has given a conjectural explanation, both, I think, being erroneous. My impression is, that the charter referred to in the memorandum was, in reality, either a charter by Robert II. to William Earl of Douglas of the Earldoms of Douglas and Mar, the former proceeding on his own resignation, the latter on that of his wife, the Countess Margaret, into the King's hands for new investiture to Earl William and the Countess Margaret his wife in conjunct fee, and to their heirs; or a charter of King Robert confirming a charter of donation by Margaret of the Earldom of Mar to her husband, such as that granted by the Countess Isabel, her daughter, to Alexander Stewart, which we shall have to deal with presently. The word “concesse” appears to me to favour the latter alternative, as it is not unfrequently used in reference to charters in the Great Seal Register, as “confirmatio carte concesse” to such or such an one. Under this latter alternative I should imagine that Earl William resigned the Earldom of Douglas direct into the King's hands, while he at the same time asked for confirma-

tion of the charter of his wife conferring on him the Earldom of Mar after her brother's death. On whatever basis the charter proceeded, it is clear that, as the charter referred to conveyed both earldoms to Earl William, it must have been with diverging limitation, either specially qualified, or falling to receive interpretation on the principle *reddendo singula singulis* under the general term "hæredibus," *i.e.* the heirs under the standing family investitures of the respective families of Douglas and Mar, according to a well-known principle of Scottish law. I may add that the probability of this is supported by an induction which may be independently arrived at, namely, that the succession of Archibald, third Earl of Douglas, the representative of an illegitimate branch of the house, to the fief and dignity of Douglas, after the death of James, the second Earl, in 1388, can only be accounted for by a royal intervention in the shape of a charter proceeding on resignation of the earldom and regrant, of which no trace is now preserved, but of which the existence is certain from the fact of the succession in question; while the charter referred to in the memorandum would not only supply evidence (if my argument is sound) of the *interventus* which Lord Chelmsford and Lord Redesdale have pointed at, and which Lord Redesdale has asserted in the case of the Earldom of Mar, but supply evidence of the *interventus* essential to account for the succession of Earl Archibald to the Earldom of Douglas, notwithstanding his hereditary ban of illegitimacy. We shall have occasion presently to notice a parallel case, by which the resignation of the comitatus of Angus by Margaret Countess of Angus in her own right, into the King's hand in favour of her illegitimate son, had the effect of investing that son and his descendants in the dignity. I may add the further observation that, if the charter, the memorandum of which has been the subject of so much criticism, conveyed the succession of the Earldom of Douglas to Archibald, Earl William's collateral and illegitimate kinsman, failing issue of his own son, over the head of his daughter Isabel, in virtue necessarily of a strict destination or entail in exclusion of females, it follows that Earl Archibald ought equally to have succeeded to the Earldom of Mar, unless the destination was of the contrary character, inclusive of heirs-general or females; and as he did not so succeed, and by the law and custom of Scotland at the

time daughters succeeded to their fathers' or mothers' fiefs and dignities, unless a provision to the contrary existed, it follows necessarily that Isabel succeeded as Countess of Mar in her own right on her brother Earl James's decease.

It is needless for me to add that the existence of such a charter as that referred to in the memorandum can in no wise assist Lord Kellie's argument for the existence of that hitherto undiscovered planet, a "peerage-earldom" in the fourteenth century, the limitation of which is unknown; inasmuch as not only would the presumption be in favour of heirs generally, but, as above stated, the actually existing charter of 1404, and its confirmation by Robert III., prove that the eventual right of the collateral heir-general, flowing from a common ancestor flourishing in the reign of King Robert Bruce, was in full recognition at that time, bridging over every suggested difficulty connected with the succession of the Countesses Margaret and Isabel. Robert III. himself acknowledged, as I shall show specifically in due time, that the heirs-general, the Erskines, were the "veri hæredes" to the comitatus of Mar in 1395; and the only possible escape from the consequences of this acknowledgment lies in a denial that the succession to the comitatus carried the dignity, and the theory of endless creation of "peerage-earldoms" by lost patents, which was advanced by Sir Robert Gordon but rejected by the House of Lords in 1771, although it has now been affirmed, so far as the Earldom of Mar, alleged to have been created in 1565, is concerned, by the House of Lords, in 1875.

Little need be said on the subject of the varying nomenclature "Earl" and "Lord," "Countess" and "Lady" of Mar, especially as connected with Margaret and Isabel. The difficulty, if such there be, is diminished and put out of court by the fact that the Erskines were the "veri hæredes" of Isabel through common descent from Earl Gratney, and by the other authorities above founded upon by anticipation, establishing the unbroken continuity of the succession, necessarily through Margaret and Isabel as Countesses in their own right. In subordination to this comprehensive response, it may suffice to add that the title "comes" and "dominus" were constantly used interchangeably in those ancient times, as Lord Hailes showed long ago, in cases where

persons in actual possession of higher were designed by lower titles of honour. The title of "dominus" or "domina" was moreover constantly and intentionally used when a "comes" or "comitissa" was dealing with lands of which he or she was the feudal lord, without specification of the higher title, and without impeachment of the right of possession in it, an illustration of which I may cite a remarkable case in the Minutes of Evidence in this Mar case, where the Earl Palatine of Strathearn styles himself simply "dominus de Strathearn" in reference to that regality. This question of nomenclature is not a matter of the importance attributed to it by Lords Chelmsford and Redesdale, and falls to be governed and overruled throughout by the attendant conditions of obligation. I feel indeed that in what I have said I have deviated somewhat from the wise and cautious reserve of Lord Hailes, who remarks on Sir Malcolm Drummond taking the style of "dominus de Mar," "Why he did not assume the title of Earl of Mar, as the husband of peeresses generally did, is uncertain; and it is judged better to leave it uncertain than to account for it by doubtful conjecture." It must not be supposed that I have ventured to speak on my own authority where Lord Hailes recommends silence. What I have written is on the lines which Mr. Riddell long ago traced in dealing with the Glencairn case in reference to the Montrose claim; and when the same objection from designation by an inferior title was urged in the Glencairn and Eglinton process in 1648, the Court of Session overruled it.

The conclusion come to by Lord Redesdale upon the preceding problem is, that the ancient Earldom of Mar became extinct, through failure of heirs-male, on the death of Earl Thomas in 1377. But Lord Chelmsford, impressed, like Lord Camden in 1771, with the evidence for female succession, considered that the Earldom passed to Margaret and Isabel successively, as Countesses of Mar in their own right, and tinued in existence after Isabel's death, till the death of her husband, Alexander Stewart, in 1435, after which date it ceased to exist; and the break-up of the historical Earldom prevented (such was his theory, which I shall deal with hereafter) the possibility of its resuscitation. The two noble Lords fell out by the way, but arrived by separate roads at the same harmonious conclusion.

The preceding inquiry is, in fact, one of curious interest rather than importance, inasmuch as the succession of Margaret and Isabel as Countesses of Mar in their own right, and the succession of Sir Robert Erskine as Isabel's next heir and representative in 1438, are recognised in the final judgment of the Court of Session in 1626, to say nothing of a previous and remarkable Act of Parliament of 1587, stamping the fact with binding assurance. I may remind the reader once more that the report on the Sutherland claim proceeded, *inter alia*, on the argument from the fact that nine out of the thirteen ancient earldoms, including Mar, have been proved by "indisputable evidence" to have been descendible to heirs-general—the inference being that Sutherland must have been so likewise; while even if we abstract Mar from the nine, and substitute Sutherland in its place, the argument, it will be seen, is precisely the same now as in 1771. The fact already mentioned that the other three earldoms—March only being left uncertain—descended to heirs-general, as proved by Mr. Riddell, clinches the argument. The Countesses Margaret and Isabel succeeded, in a word, according to the ancient Scottish rule of succession, as already illustrated: and this would rule, in the absence of any distinct proof of any exception excluding females in favour of heirs-male, even if the judgment of 1626 had never been pronounced.

The difficulty thus noticed in respect to the Countesses Margaret and Isabel is not, I may conclude, a novel one. It was urged by Simon Fraser in the Lovat claim before the Court of Session in 1730, "that the honour was in the Earl of Douglas himself and not in the lady his wife, although the estate was in her person;" and by Sir Robert Gordon in the Sutherland claim in 1771 on the same ground,—viz., "that after his" (Earl William's) "death, his son was designed 'comes de Douglas et de Mar' in several charters, though his mother Margaret was then alive." Sir Robert's theory was that William Earl of Douglas had been created Earl of Mar, the dignity not descending to his daughter, and that Isabel derived her title as "the wife of a former husband, who had been created Earl of Mar,"—on which Lord Hailes remarks that "Sir Robert Gordon, in his objection" to these instances of female succession in the Earldom of Mar "has multiplied pre-

sumptions upon presumptions, in such a manner as to distinguish his hypothesis in this case from all his other hypotheses." The hypothesis in question amounted, in fact, to the proposition that previously to her second husband, Alexander Stewart, and her first husband, Sir Malcolm Drummond, Isabel had been previously married to a third husband, the first in order, who had been created Earl of Mar, but of whose existence, and *a fortiori* of whose creation as Earl of Mar, no proof existed—a presumption, to cite Lord Hailes's remark, "singular, even in an argument composed of presumptions. To presume a creation is no great matter, for we are favoured by Sir Robert with a multitude of such presumptive creations; but to presume a third husband to a woman who has two upon record is new." Lord Kellie avoided falling into this snare: but his position in course of argument is precisely that of Sir Robert Gordon in other respects, as will be yet further seen. I have only to remark that it is impossible not to admire Lord Redesdale's patience and conscientiousness in analysing and commenting upon the multifarious evidence common to Margaret and Isabel; and if I venture to draw a different conclusion from that evidence, it is in consequence of a familiarity with the theory and the practice of feudal tenures and succession in Scotland, which may be more naturally credited to a Scottish than an English antiquary, and of a pre-occupation with the Scottish law and presumption of succession, and of the binding value of the judgment of 1626, the force of which is overruled in Lord Redesdale's mind by the traditional maxims of the House of Lords.

The result is that, applying the principles of Scottish law as established in the preceding Letter, the succession to the Earldom of Mar must be held to have devolved on Margaret and Isabel successively as Countesses of Mar in their own right, on failure of the heir-male, unless proof can be adduced by Lord Kellie, on whom the *onus probandi* rests, of a special provision excluding heirs-general, in which case only can the Earldom be held to have become extinct: and such proof must be clear and positive, as the principle and presumption in favour of heirs-general must prevail—an absolute contradiction to Lord Mansfield's *dictum* and the private rule and tradition of the House of Lords. But no such provision can be established;

and the suggestions adduced in its support either melt away in the fuller light of the feudal system prevailing in Scotland in the fourteenth century, or furnish additional proof and illustrations of the unbroken succession through which the dignities held by Earl Gratney, the Countesses Margaret and Isabel, Robert Earl of Mar, and John Lord Erskine, the Earl restored in 1565, have descended to and now vest in the present heir-general, Lord Mar, the opposing petitioner in the late claim.

I am sorry to have been obliged to meet the present point of difficulty at so great a length; but with the exception of incidents in the person of Countess Isabel immediately to be spoken of, any objection started reposes more or less upon it as its basis—the basis namely of an extinction of the ancient historical Earldom of Mar either in 1377 or in 1435.

SECTION III.

“Raptus” and two Charters of Countess Isabel.

Resuming the narrative with the year 1404, when Isabel Countess of Mar and Garioch was residing at Kildrummie, I may preface my narrative of what then took place by the observation that, while a widow, childless and unprotected, there seems reason to believe that she was, if not facile in character, feeble at least in health, as may perhaps be inferred from her having had no children, from the impression which seems to have been entertained, even while she was still comparatively young, that she was not likely to have any, and from her premature death.

Possessed of the vast Earldom of Mar and Garioch in right originally of her mother, and of the unentailed fiefs of the house of Douglas as her brother Earl James's heir, and without the prospect of any lineal heirs of her own, Isabel had for some years been the central object of a network of intrigues affecting the ultimate destination of her property as coming to her from both sides of the house, her father and her mother, and became the victim ultimately of an act of atrocity unparalleled even in that day, which not only threatened for a time to defeat those intrigues by absorbing the property contended for into the grasp of a bold and unscrupulous adventurer, but tended ultimately, there seems little doubt, to shorten the unfortunate woman's life.

A short notice of these intrigues is necessary to the due understanding of what took place in 1404, upon which we shall hereafter have to fix our attention. I shall speak first of those affecting Isabel's Douglas inheritance. I may remark here, in Lord Hailes's words,¹ that "concerning this lady there are more writings extant than concerning any other Scottish peer of ancient times; and they all agree in proving her to have been Countess of Mar in her own right." Other documents have been discovered since Lord Hailes's time; and almost, though not quite, the whole series is printed in the Minutes of Evidence in the Mar claim, the interest of which is beyond appreciation, although the miscellaneous manner in which they are printed, in the order—or rather absence of order—in which they were poured down upon the table of the House of Lords, and the absence of any index or table of contents, is a disgrace to the system, or rather want of system, which permits such a chaos to take place.

Margaret Stewart, Countess of Angus in her own right, the widow of Thomas Earl of Mar, Isabel's maternal uncle, who died in 1377, was the motive agent in these intrigues. A woman of masculine energy, no law, human or divine, no sense of ordinary shame, appear to have controlled the impulse of her will. In youth she had an intrigue with her brother-in-law, William Earl of Douglas, the husband of Margaret, her own husband's sister; and the fruit of this intercourse, which was in fact incestuous, was a son, her only child, George Douglas, who was thus the Countess Isabel's illegitimate brother. In her love for this son and passion for his aggrandisement, Margaret made no scruple of openly acknowledging her early lapse into incestuous adultery; and, on his attaining manhood, she resigned her Earldom of Angus personally to King Robert II. in Parliament, and King Robert granted it to him by charter dated 10th April 1389—the simple resignation and regrant of the "comitatus" conveying, as usual, the dignity or title annexed to the fief without specification of the title; while the Countess, thus self-denuded by the resignation, is no longer designated as Countess of Angus in the charter, but simply as Countess of Mar in right of her dead husband's Earldom, although she took the style of Angus afterwards as her husband's widow.

¹ Additional Sutherland Case, v. p. 42.

In addition to this princely provision, Margaret laboured to obtain settlements of the unentailed estates of her deceased paramour, Earl William, in favour of his and her son, either absolutely or in reversion. Next to Isabel, in the event of Isabel dying without issue, the Douglas succession vested in Sir James Sandilands, Lord of Calder, the son and heir of Eleanor Douglas, Earl William's sister, and ancestor of the present Lord Torphichen, the heir-general of the original Earls of Douglas. Sir James had only one son, a youth under age. But, beyond all this, Margaret fixed her eyes upon the hereditary possessions of Isabel on her mother's side, the Earldoms of Mar and Garioch; and these, too, she plotted to sweep into her son's possession. George Douglas, now Earl of Angus, actively seconded his mother's operations in his behalf.

Robert III., weak as water, and faithless as weak, had lent himself to these intrigues. He entered, 24th May 1397, into an indenture with "Margerate Contas Marr and of Angus," covenanting that in consideration of "Jorge of Douglas, hir son, Lord of Angus," marrying one of his daughters, he, the King, should grant to George the hereditary possessions of his mother, with other property, to him and the heirs-male of the marriage, with this further provision, that "the forsayde our Lord the Kyng sall confirm, approve, and ratyfy under his Gret Seyll all giftys, talizeis, settyngys and condysyouyns mad or for to be mad by Dame Izabell Contas of Mar, to the sayde Jorge hir brothir, of all the landys, rentys, and possessyounys the quhilkis sho has, or may haf, within the kynryc (kingdom) of Scoteland; and als at our Lord the Kyng sall resayve all resignasyounys at the said Dame Izabell lykys to make, and with hast" (that is, in order to anticipate expostulation from interested parties) "he shall giff chartyr and possessyoun erytabyll to the sayde Jorge and his dochtyr in fourme and manner as the condysyounys requyris:—Alswa," the indenture proceeds, "the Kyng obliges hym lely" (in order evidently to preclude action on the other side) "that he sall nocht resayve na resignasyounnis made be that ilke Dame Izabell of na landys, rentys, na possessyounnis to na man's profit, na ma [nor may] confirmaryoun gif thar-upon but only to the ayres and the profyte of the foresaid Jorge, hir brother, or takande" (*i.e.* even although) "gif he has gifyn ony letre to Sir Thomas of Erskyn. Alswa, our Lord the

King sall confirme all talizeis, giftys, settingys, and condysounis made or for to be made by Sir James of Sandylandys, lard of Calder, to the sayde Jorge, of all his landys, rentys, and possessyounis, the quhylkys she has or may have within the kynric," the indenture ending with the King's obligation "at his power to mainteyn the forsayde lady, hir men, hir landys, and thaire possesyounis the quhylkys sho has within the kynric, as he does his awyn propyr."¹ The King thus covenants—1. To confirm to George Lord of Angus all Isabel's possessions, whether on the side of her father or mother, she being willing to resign them in George's favour, and this without loss of time, on her consent being obtained, so as to clinch the transaction; while he binds himself not to sanction Isabel's disposition of them to any one else; and, 2. He confirms the transfer to George of the whole of Sir James Sandilands' property, if the latter in like manner should be willing so to dispose of it. The reader will recollect throughout the fact that charters or dispositions affecting fiefs held *in capite* could have no validity without the assent or confirmation of the overlord. The reference to "ony lettre" that the King may have given to Sir Thomas Erskine will be illustrated presently.

The first victim to succumb was Sir James Sandilands. Feeling himself in all probability impotent to resist, and unwilling to incur the enmity of Margaret and her son, he renounced by charter, for himself and his sons, in favour of George Earl of Angus, his right of succession to the barony of Cavers, the sheriffship and keeping of Roxburgh Castle, with the lordship, castle, and forest of Jedburgh, which was annexed to the barony, the lordship of Liddesdale, and other properties and superiorities belonging to the unentailed Douglas succession, together with all expectant rights to which he was competent to succeed "post decessum Isabellæ comitissæ de Mar et de Garviauch, sororis prædicti Georgii." The charter was confirmed by Robert III. on the 9th November 1397, seven months after the indenture of marriage;² and on the same day Sir James Sandilands executed another by which, "with the counsel of my kin and friends," he placed his son and heir, and all his lands, in Angus's keeping, appointing

¹ Antiquities of Shires of Aberdeen and Banff, iv. p. 165; Minutes of Evidence, p. 89.

² Minutes of Evidence, p. 406.

Angus his son's tutor and guardian in case of his own decease, and making Angus his heir in the barony and castle of Calder, in case that son should die without issue¹—Calder, I may mention, having been the provision granted by William Earl of Douglas, with his sister Eleanor, to Sir James's father. But this prospective assurance was not deemed sufficient; and on the 9th April 1400, Sir Malcolm Drummond, the Countess Isabel's husband, acting with her consent, executed a charter to Earl George of the lordship of Liddesdale, which he held in her right, together with his wife's and his own eventual right to the terce-lands or marriage-provision of Margaret Countess of Mar and Angus, George's mother, in Mar, Garioch, and elsewhere. Margaret produced the charter on the 10th November 1400 before a notary, who engrossed it in the instrument by which it is known to us,—an instrument the orthography of which is strangely corrupt for such an official.² Later in the year, on the 7th August 1400, Isabel herself granted a charter to Angus with consent of her husband Drummond, of the lands of Cavers, Jedburgh Forest, Barony of Jedburgh, Drumlanrig, and the sheriffship of Roxburgh, omitting Liddesdale, a charter our knowledge of which is derived solely from the "Memorandum from the Registeris" already spoken of, but from which, if credit be attached to it, it must have been confirmed by the King. What *interventus* took place I cannot say; but, ultimately, at some period later than this, Isabel granted a charter of Cavers and office of sheriff of Jedburgh to Archibald Earl of Douglas, the third Earl, her brother James's successor, and his heirs. This appears from a charter of Robert III. to Sir David Fleming of Biggar, 10th August 1405, by which he grants Cavers to that baron on the recital that the fiefs in question pertained to the King by royal right by reason of escheat, because "the said lands and office before pertained heritably to Isabel Countess of Mar, and she had alienated and given seisin thereof to Archibald of Douglas, without the King's licence asked and obtained, though she held same of the King in chief."³ The fief had thus been recognised, Isabel's charter been disallowed, and the lands resumed by the Crown.

While the Countess Margaret of Angus and her son were

¹ Minutes of Evidence, p. 407.

² *Ibid.* p. 330.

³ Antiquities of Shires of Aberdeen and Banff, iv. p. 171.

thus pressing Isabel and Sandilands in one direction with respect to the Douglas succession, Janet Keith and her husband Sir Thomas Erskine had not been wanting to themselves in endeavouring to provide security for their eventual right of succession to Isabel's possessions by the mother's side, the Earldoms of Mar and Garioch. Unfortunately, as will appear, Sir John Swinton, husband of Margaret Countess of Mar and Douglas, Isabel's mother, and Sir Malcolm Drummond, Isabel's husband, the latter the brother of Annabella, King Robert's queen, had been working together against the Erskine interest. Under these circumstances, as early as 1390-1, about a year and a half after the resignation of the Earldom of Angus to George Douglas by his mother, Sir Thomas Erskine made his appearance before the King when sitting in full Parliament at Scone, "*super montem ex parte boreali monasterii ejusdem extra cymyterium,*" and thus addressed him in the Scottish, or vulgar tongue:—"My Lorde the Kyng, it is done me til undirstand that thare is a certane contract made bytwene Schir Malcolm of Dromonde and Schir John of Swynton, upon the landis of the Erledom of Marr and the Lordship of Garvyauch, of the quhilkes erledom and lordschip Issabell, the said Schir Malcolm's wyf, is verray and lauchful ayre, and failliand of the ayrez of hir body, the half of the fornemmyt erledom and lordschip pertains to my wyfe of richt of heretage. Therefore I require you, for Goddis sake, as my Lord and my Kyng, as lauchful actornay to my saide wyfe, that in case gif ony sic contract to be made in prejudice of my saide wyfe of that at aucht of richt and of lauch perteigne til hir in fee and heritage, failliand of the said Issabell, as is befoir saide, that yhe grant na confirmacione thairapon in hurtyng of the common lauch of the kynryk and of my wivis richt." To this the King replied, "that hym thocht his request was resounable," and promised Sir Thomas that he would do nothing to his wife's and his own prejudice. A notary-public, whom Sir Thomas had brought with him, then and thereupon executed an instrument at his demand recording the requisition and the engagement in the usual form. This remarkable scene took place on the 18th March 1390-1.¹ The reader will observe the gist of the request,

¹ Acts of the Parliaments of Scotland, i. p. 216 ; Antiquities of Shires of Aberdeen and Banff, iv. p. 162 ; Minutes of Evidence, p. 358.

—that the King would not confirm the contract referred to. I need not insist further on the significance of the pledge thus given by the King, the overlord.

In subsequent reiteration of this pledge, Robert III. granted to Sir Thomas Erskine a letter under his Quarter Seal, 22d November in the fourth year of his reign, *i.e.* 1395, by which he pledges himself “quod licet Isabella de Douglas comitissa de Mar et de Gareoch ex informatione vel contractu cujuscunque personæ, dictos comitatus vel aliquam partem terrarum vel annuorum reddituum eorundem, aut aliquas terras sive annuos redditus suos alibi jacentes infra regnum nostrum, quibus heredes dicti Thomæ succedere debent in hæreditatem nobis voluerit resignare, aut alienationes de eisdem cuicunque personæ facere, in prejudicium *verorum hæredum suorum*, nos siquidem hujusmodi resignationes non recipiemus in futurum, nec hujusmodi alienationes, ratificabimus, vel confirmabimus.” To which the King added, in significant acknowledgment of his own facility, “Et si aliquas hujusmodi recepciones, confirmationes, aut ratificationes forsan negligenter fecerimus, ipsas pro irritis et vacuis reputari volumus et haberi, ita ut careant virtute penitus firmitatis,”—always reserving the rights of the Crown (the usual salvo) in the said Earldom. Lord Hailes printed this charter, transcribed from the original, in his Additional Case for the heir-general of Sutherland;¹ but I do not see it in the Minutes of Evidence in the recent Mar case. The reader will remark that Sir Thomas Erskine’s heirs are here acknowledged as the true heirs to the entire Earldoms of Mar and Garioch. Stress has been laid on Sir Thomas’s only claiming one half in 1390-1; but there is no discrepancy. Sir Thomas then claimed as one of the two coheirs (in right of his wife) of Thomas Earl of Mar; but as eldest coheir, the superiority of the entire Earldom, with all its rights, territorial and titular, identified with the right to the chief messuage in that capacity, was vested in him, as we now see it recognised by the King, the overlord, in this charter of 1295.

Two years after this solemn renewal of his pledge to Sir Thomas Erskine, Robert III. violated it by engaging in the indenture with Margaret Countess of Angus, 24th May 1397, to disregard the right of the Erskines, although in his own

¹ Additional Sutherland Case, ch. v. p. 44; Antiquities of Shires of Aberdeen and Banff, iv. p. 165.

words the "veri hæredes," in favour of George Douglas, in case Isabel could be prevailed on to resign or make over the Erskine heritage of Mar and Garioch in his favour—the letter under the Quarter Seal just cited, being there referred to in the words we have noted, "or takande gif he has gifyn ony lettre to Sir Thomas of Erskyn." It will have been noticed that the charter of 1395 anticipates and precludes any such breach of faith, which, had it been accomplished, would thus have been overruled, or at least could not have been divested of the taint of illegality.

Meanwhile Sir Thomas Erskine and his wife, Janet Keith, had a warm friend in one who appears, along with Robert Duke of Albany, as an intimate counsellor of the Countess Isabel, both being styled by her "de consilio nostro speciali." This was David Earl of Crawford, who stood in close relationship both to Isabel and Sir Thomas, his grandfather's sister, Beatrice de Lindsay, having been wife successively of Sir Thomas's father, Sir Robert Erskine, and of Isabel's grandfather, Archibald Douglas the regent, father of William Earl of Douglas. An indenture was drawn up at Brechin on the 20th of December 1400, "betwix nobil and nichti Lords, Sir David the Lindissay, Erle of Crauford, on the ta part, and Sir Thomas of Erskyn, Lord of that ilk, [on the] tothir part;" by which, in the event of a marriage projected between Sir Thomas's son and heir, Sir Robert Erskine, and a daughter of Crawford's, "the foresaid Erle oblys him that efter the deceas of the Lady of Mar that now liffis, he sal with al his power consail, help, supponel, and maigteigne the foresaid Sir Thomas, and Dame Jone his wife, gif she consentis to the mariage beforesaid, for til recover lachful possession of all the lands of Mar and Garviach til him pertinent and till her heritably because of hir, and till al othir landis that he and sho has richt to."¹

While such, as above shown, was Isabel's character and her *entourage*, the intrigues above exhibited gradually enthralled her like spider's threads from the centre of operations in the Lowlands, the bold adventurer already mentioned—a man of high though illegitimate birth, yet a chief of Highland caterans or robbers—in Bower's words, "multum indomitus et ductor catervanorum"—conceived the idea of possessing himself of Isabel's person and all her possessions by what

¹ Minutes of Evidence, p. 385.

was indeed a bold stroke for a wife. This was Alexander Stewart—no Highlander himself, but a scion of the royal family, being the illegitimate son of Alexander Earl of Buchan of evil memory, popularly styled and still remembered in tradition as the “Wolf of Badenoch,” a son of Robert II. by his first wife, Elizabeth More. According to popular belief he had been the instigator of the attack upon Sir Malcolm Drummond, Isabel’s husband, and the virtual author of his death; and if so, the outrage that now followed was but the issue of a premeditated plan of operations. Mr. Tytler, the Scottish historian, asserts that “there seems to have been little doubt that the successful wooer and the assassin of Drummond was one and the same person.” Isabel, as has been stated, was living at Kildrummie, the capital messuage of the Earldom, in the summer of 1404, when this Alexander, the terror of the country, swooped down upon his prey. He seized her person, her castle, and her estates, and extorted, or at least obtained from her under circumstances which justify the expression, under covenant of future marriage, a charter, bearing date the 12th August 1404, by which, on the preamble that she was acting under no restraint of fear or force, but as a free agent, she bestowed the Earldoms of Mar and Garioch, the forest of Jedworth, two hundred marks in annual rent from the royal customs, and, in general terms, all her other lands, superiorities, and properties belonging to her by hereditary right, or to which she might be entitled, in Scotland or beyond Scotland, upon Alexander in free gift, with destination to the heirs to be begotten between them, whom failing, upon—not her own (Isabel’s) heirs, but Alexander’s heirs and assignees whatsoever, and without any reservation of liferent to herself—the whole to be held as freely “as we or our predecessors, Earls of Mar or of Douglas,” held them, and binding herself against any future revocation of the grant. The effect of these provisions was that if Alexander should die before herself, and no children were born of the marriage, the whole property—always presuming that the charter was duly confirmed by the King, apart from which it would be but waste parchment—would pass away from herself, leaving her absolutely a beggar, denuded of her inheritance—unless in so far as a terce might be provided for her by the law—and vest—not indeed in Alexander’s heirs, inasmuch as

he was a bastard, and a bastard has no heirs, but in the King as "ultimus hæres." Alexander sinks the fact of his bastardy in the charter, describing himself as eldest son (simply) of Alexander Earl of Buchan; but there is nothing more fully proved than his illegitimacy, both by contemporary evidence and by what followed on his death.

The immediate effect of the charter was of course to cut off, not only the Erskines from their succession to the Mar Earldom, but George Earl of Angus and Sir James Sandilands, in so far as the latter had not irredeemably compromised his right, from their prospect of succession to the Douglas portion of Isabel's inheritance.

All this was very well, as far as it went, as between Alexander Stewart and Isabel. But there was a third and all-important party to be consulted, of whom it appears to me that Lord Kellie and the House of Lords have taken little account.

By the feudal law, as I am obliged again and again to enforce, no innovation upon the existing destination or limitation of the descent of a fief or dignity could be effected except through resignation by the tenant into the hands of the superior or overlord, and a regrant by that superior to the resigner or his nominee with an altered limitation—this being the regular course of procedure; or through confirmation by the superior of a charter or donation by the vassal, denuding himself of the fief in favour of another—this last being an irregularity, an act of presumption in taking the overlord's consent for granted, liable to punishment through recognoscing or escheat of the fief, and thus requiring condonation. No resignation, it is needless to point out, had taken place on Isabel's part to her overlord the King, under the first alternative; it remained to be seen whether the King would confirm or ratify her charter, salving its deficiency. Apart from such confirmation, that charter was absolutely worthless, a dead letter, a mere piece of waste parchment, impotent to effect the transfer of private right and feudal obligation contemplated, independently altogether of the circumstances of force and terror under which it had been extorted. There seems to be no certain evidence that seisin or infeftment followed upon the charter, apart from which a charter is *nil*; while, even had it taken place, it could only have been validated

retrospectively by royal confirmation of the grant upon which it had proceeded. In a word, as might have been expected, the King, the feudal superior, did not confirm the charter of the 12th August 1404. It had sprung up like a fungus, an obscene birth, from the rank soil of violence, and it was a few weeks afterwards kicked aside and trodden under foot—but, unfortunately, not into dust—by all who passed by. The original document is not preserved, but it is known to us by a registration in the Great Seal Register, inserted therein—irregularly and against precedent, as it was never confirmed under the Great Seal—at the special command of James III. in 1476, seventy-two years afterwards, during the period of the Mar *interregnum*, under circumstances of peculiarity which will appear in due time in this narrative.

The Highland border was always sufficiently disturbed, and unwarrantable actions were frequently committed there: but the outrage committed on Isabel's person and property by Alexander Stewart, and the extortion of the charter of the 12th August 1404, were too flagrant in themselves and affected too many contingent interests to remain unredressed. On the other hand, Alexander's connection with the royal family, together with his father's great power, and the paralysis of law in those northern regions, may have secured him from actual punishment. The result was that a compromise was arranged, by which the rights of all the parties concerned were secured, and under which Isabel appears to have been willing, so far as her words and actions bear testimony, to condone the violence of her rough wooer.

For implement of this arrangement Isabel executed a new charter¹ in favour of Alexander Stewart, designing herself as "Isabella de Douglas, Comitissa de Mar et Garviach," and dated the 9th December 1404, to the same general effect as the former one, granting him the Earldoms of Mar and Garioch, and other possessions, under contract of marriage, but with reservation of liferent enjoyment to the longest liver, and ultimate destination in case of there being no issue from the marriage—not to his (Alexander's), but to her (Isabel's) heirs "ex utraque parte," viz. to Janet Keith and the Erskines on the side of her mother, and to the Douglas heirs on the side

¹ Minutes of Evidence, p. 91; Lord Hailes' Additional Sutherland Case, ch. v. p. 46.

of her father, the ultimate rights under the existing and duly warranted investitures thus standing unaltered. It is true that entry upon those rights on the part (for example) of the Erskines was postponed beyond the death of Isabel, if that should occur during Alexander's lifetime, to the death of the latter; but this, however hard upon the Erskines, was in conformity with law, and unavoidable in such cases of conjunct fee or liferent.

But before executing this charter, it was considered necessary in Isabel's interest that the wrong previously done should be publicly redressed, and Isabel replaced in her free rights and exercise of free agency, by the actual hand which had despoiled her of them. Everything in those days was done with picturesque ceremonial. Isabel accordingly, accompanied by Alexander Bishop of Ross, Sir Andrew Leslie of Syde, Walter Ogilvy, and other gentlemen of the district, and attended by a large concourse of people, took up her station on a meadow outside the great gate of Kildrummie Castle, and stood there, as it is described, conversing familiarly with the Bishop and others. Stewart, on the other hand, who had apparently retained possession of the castle, or had re-occupied it for the occasion, then came forth of the gate, and advanced to where she stood; and, in the presence of all assembled, delivered over to her the castle, with its charters and evidents, the silver vessels and other jewels, and everything therein, placing the keys in her hands in symbolism of the transfer, to dispose of the whole—the castle, that is, the chief messuage which carried the entire comitatus, the charters and jewels, and her person—as no longer under constraint—at her free and uncontrolled pleasure. This having been done, Isabel, holding the keys in her hands as *châtelaïne*, made choice of Stewart as her husband before all the people, and gave him in free marriage the castle, the Earldom of Mar and Garioch, and all that she possessed, as detailed in the charter, the deed of conveyance above spoken of. All this took place on 9th September 1404, and the preceding description of the ceremony is taken from a notarial instrument of renunciation drawn up on the occasion, in which the subjects which had been conveyed by the charter of 12th August were solemnly renounced by Alexander in favour of Isabel, to be reconveyed by her to him in the exact terms in which they were actually reconveyed in the charter of 9th December,

This instrument of renunciation, although not produced from the Mar charter-chest in 1875, was there in 1764, when the article "Mar" in Douglas's Peerage was written, where it is described at length. Our knowledge of it however does not rest on the authority of Sir Robert Douglas alone; it was, as I shall show in a future Letter, produced and founded on in the processes instituted before the Court of Session by the Treasurer Earl of Mar for the recovery of the estates of the earldom, where we have a minute description of the instrument; and in one of these processes a special interlocutor was pronounced affirming its authenticity. It is hardly necessary to say that if no sasine had passed on the charter of 12th August, it was so completely extinguished by the renunciation that no sasine could afterwards have been taken on it, and it could not have been validated by the royal confirmation.

The second charter, dated as has been seen on 9th December 1404, three months after this ceremony, was followed by infeftment or seisin, with the usual formalities, the whole being in anticipation of the royal confirmation, which could alone validate what had been done.

It is remarkable that the Bishop of Ross and several of those present on the 9th September had been witnesses to the charter of the 12th August 1404. They may possibly have acted under constraint at the time, or their names had been used without their consent; this can be but matter of conjecture; but the Bishop's protection and influence had doubtless been exerted on Isabel's behalf during the interval. I have little doubt too that David Earl of Crawford, Isabel's cousin and counsellor, had proved her friend at this crisis of her life. He had been absent for about two years in France in command of a fleet which cleared the French seas and the Bay of Biscay from the English cruisers, but returned to Scotland in 1404, leaving Edinburgh for London on an embassy about three weeks after the date of Isabel's charter of the 9th December. His influence with the King was great, being his brother-in-law; and he was bound to exert it in the interest of the Erskines by his indenture with Sir Thomas Erskine and Janet Keith of the 20th December 1400.

The charters of the 12th August and 9th December 1404 are of such importance that I have printed them on the opposite

CHARTER by ISABEL COUNTESS OF MAR to ALEXANDER STEWART,
dated 12th August 1404.

Omnibus hanc cartam visuris vel auditoris Izabella Comitissa de Mar et Garviach Salutem in omnium Salvatore. Noveritis nos in nostra pura et legitima viduitate constituta non vi aut metu ducta, dedisse, concessisse et hac præsentia carta confirmasse dilecto nostro et speciali Alexandro Senescalli, filio primogenito domini Alexandri Senescalli comitis Buchanie, causa contractus matrimonii inter eundem Alexandrum Senescalli et nos conferendi, Totum et integrum comitatum nostrum de Mar et Garviach forestamque de Gedworde, ducentas marcas de custumis regiis, prout carta regia nobis inde confecta proportat, cum omnibus aliis et singulis terris nostris, tenendiis, tenementis et terrarum superioritatibus universis nobis jure hereditario in regno Scotiae vel extra pertinentibus quibuscunque cum pertinentiis: Tenenda et habenda eidem Alexandro et hæredibus suis *inter ipsum et nos procreandis, quibus forte deficientibus, veris et legitimis hæredibus vel assignatis predicti Alexandri quibuscunque in feodo et hereditate in perpetuum, in boscis, in planis, viis, semitis, moris, marresiis, in pratis, pascuis et pasturiis, mossis, stangnis, molendinis, aquis, piscariis, turbariis, petariis et eorum sequelis cum tenendiis et libere tenencium serviciis, cum curiis et eschaetis et eorum exitibus, ac cum omnibus aliis et singulis commoditatibus, libertatibus et asiamentis ac justis pertinentiis quibuscunque tam non nominatis quam nominatis tam subtus terra quam supra terram ad prefatum comitatum de Mar et de Garviach ac alias terras nostras et proprietates suprascriptas spectantibus seu juste spectare valentibus quomodolibet in futurum, Adeo libere, quiete, integre, honorifice, bene et in pace in omnibus et per omnia, sicut nos aut predecessores nostri comites Marrie vel de Douglas aliquo tempore tenuimus tenuerunt vel habuerunt, sine contradictione vel revocatione quibuscunque per nos vel aliquem nomine nostro in futurum. Reddendo inde domino nostro regi servitium debitum et consuetum tantum pro omnibus aliis exactionibus questionibus seu demandis quæ per nos vel hæredes nostros vel aliquem nomine nostrum exigi poterunt vel requiri: In cujus rei testimonium sigillum nostrum presentibus est appensum apud Kintdromy duodecimo die mensis Augusti anno Domino millesimo quadringentesimo quarto: Testibus venerabili in Christo patre Alexandro episcopo Rossensi Andrea de Lesley, Johanne Forbes, militibus, Alexandro de Forbes filio, Alexandro de Iryne, Duncano de Forbes, Willelmo de Camera seniore, scutiferis, et multis aliis.*

CONFIRMATION by ROBERT III. of Charter

Robertus Dei gracia rex Scottorum omnibus probis hominibus tocius regni nostra confirmasse donacionem illam et concessionem quas fecit dilecta consan nostro Alexandro Senescalli filio Alexandri comitis Buchanie in liberum marita dominio de Garviacht cum servitiis liberetenencium eorundem comitatus et d comitatum de Banf et baronia de Crechmond in Buchania, cum omnibus suis pen et foresta de Jedworthe cum omnibus terris ad illam forestam pertinentibus, ac ab ipsa detentis tam ex parte patris quam ex parte matris, *preterquam de baro predicto Alexandro ac Isabella predicta et eorum diutius viventis, ac hæredibus inte terrarum antedictarum, dictas terras cum annuo reddito supradicto, excepta pre salute anime sue eadem Isabella per cartas dare proposuit, cum omnibus et si quiete, plenarie, integre, honorifice, bene et in pace, sicut carta dictæ Isabellæ s nobis et hæredibus nostris dictus Alexander et Isabella et eorum diutius vivens, dictæ Isabellæ quicunque servitia de predictis terris debita et consueta et de an*

CHARTER by ISABEL COUNTESS OF MAR to ALEXANDER STEWART,
dated 9th December 1404.

Omnibus hanc cartam visuris vel auditoris nos Isabella de Douglas comitissa de Marr et de Garviach Salutem in Domino sempiternam. Noveritis nos in nostra iura et libera viduitate proviso solemniter tractatu et diligenter dedisse concessisse et hac presenti carta nostra confirmasse nobili viro Alexandro Senescalli, filio obilis domini et potentis, domini Alexandri Senescalli comitis Buchanie, in verum maritagiū cum persona nostra contrahenda, Totum comitatum ostrum de Mar cum castro nostro de Kyndromy, totum dominium nostrum de y Garviach cum serviciis liberetenentium nostrorum dicti comitatus et domini, cum ecclesiarum advocacionibus, necnon baronias de Strathalveth infra vicecomitatum de Banff, necnon baroniam de Crechmond in Buchania, cum omnibus arundem pertinentiis, et ducentas marcas annui redditus custume de Hadington, necnon forestam de Gedword cum omnibus terris ad illam forestam pertinentibus, cum etiam omne jus et clameum quod vel quæ habemus vel habere poterimus in quibuscunque terris a nobis injuste detentis tam ex parte patris quam ex parte matris: Tenenda et habenda *predicto Alexandro et hæredibus inter ipsum et nos procreandis, quibus forte deficientibus hæredibus nostris legitimis ex utraque parte semper reservatis liberis tenementis omnium predictarum terrarum cum pertinentiis dicto Alexandro et nobis et nostrorum diutius viventi pro toto tempore vitæ nostræ, cum omnibus juribus et consuetudinibus et pertinentiis ad dictum comitatum, cum castro de Kildrymmie, dominium de Gareoche predictum, et omnes alias terras predictas seu annuos redditus spectantibus seu spectare valentibus quomodolibet in futurum, exceptis terris elemosinatis et annuis redditibus suis et quos pro salute anime nostre antecessores et successores nostrorum proponimus conferre per cartas nostras et cum licentia domini nostri regi: Reddendo de dictis omnibus terris domino nostro regi servitia debita et consueta: volumus etiam et concedimus pro nobis et heredibus nostris, quod nullus hæreum nostrorum habeat introitum aut sasinam aut possessionem aliqualem in feodo dicti comitatus, domini de Gareoche predicti, vel omnium aliarum terrarum aut reddituum durante toto tempore vitæ dicti Alexandri, sic quod aliquis hæredum nostrorum in proprietate, possessione, et libero tenemento dicti comitatus de Mar cum castro de Kildrymmie predicto domini de Gareoche predicti, vel omnium aliarum terrarum aut reddituum predictarum nullo modo possit vendicare durante tempore vitæ predicti Alexandri: Quasquidem venditionem et concessionem nostram obligamus hæredes nostros ad observandum dicto Alexandro in omnibus tractis et articulis ante concessis sine contradictione aut exceptione aliquali. Et cuius rei testimonium nos libere potestatis existens, non vi coacta sed in presentia reverendi in Christo patris Alexandri Dei gracia episcopi Rossensis et omnium nostrorum tenentium huic presenti carte nostre, extra castrum nostrum de Kyndromy, non in eadem clausa vel detenta, sigillum nostrum apponi fecimus ibidem nono die mensis Decembris anno Domini millesimo quadringentesimo quarto.*

9th December 1404, dated 21st January 1404-5.

et ac laicis Salutem. Sciatis nos approbasse, ratificasse, et hac presenti carta nostra Isabella de Douglass comitissa de Marr et de Garviacht dilecto nepoti nostro dicta Isabella, de toto comitatu de Marr cum castro de Kyndromy, et toto in cum ecclesiarum advocacionibus necnon et baronia de Strathalveth infra vicecomitatu, et de ducentis marcis annui redditus custume burgi de Hadyngtoun, necnon et iure et clameo quod vel quæ habet vel habere potuit in quibuscunque terris *de Caverys cum pertinentiis infra vicecomitatum de Roxburghe: Tenenda et habenda legitime procreandis, quibus forsitan deficientibus, legitimis heredibus dictæ Isabella baronia de Caverys, et terris elemosinatis ac annuis redditibus, quos et quas pro libertatibus, commoditatibus, aysiamentis, et justis pertinentiis adeo libere et iure confecta in se juste plenius continet et proportat: Reddendo et faciendo inde hæredes inter ipsos legitime procreandi, quibus forsitan deficientibus, legitimi hæredes et redditu supradicto. In cuius rei testimonium, etc.*

The first part of the report deals with the general principles of the standardization of the ...
The second part of the report deals with the details of the standardization of the ...
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page in parallel columns, so that the points of agreement and of dissimilarity may be at once apparent.

Nothing now remained to render the charter of the 9th December 1404 valid but the royal confirmation, and that was granted by a charter of Robert III., passed under the Great Seal on the 21st January 1404-5, giving to that charter and all that followed upon it the stamp of validity. This confirmation was, be it observed, in conformity with the King's acknowledgment both in 1390-1 in the presence of Parliament, and by his letter under the Quarter Seal of 1395, that the Erskines were the "veri hæredes" of Isabella. In his weakness and under evil influence he had receded from his pledge in 1397; and in accordance with the indenture with Margaret of Angus he must have refused his confirmation to any conveyance by Isabel not in favour of the house of Angus. But, as we now see, he adhered, on the 21st January 1404-5, to his previous engagement on the side of justice; and this may excuse his previous vacillation.

I have printed the confirmation of the 21st of January 1404-5 below the two charters, on the annexed sheet.

A remarkable fact may be noticed in comparing the royal confirmation with Isabel's second and valid charter, namely, that the King, while ratifying the grant by Isabel of all she possessed, whether on the father's or mother's side, to Alexander Stewart, expressly excepts the barony of Cavers, which was held by Isabel as part of the paternal heritage, thus disallowing the charter in that particular. Cavers accordingly did not pass to Alexander after his wife's death. It has been maintained, as will be seen, by generation after generation, and is now affirmed by Lord Chelmsford, that the earlier charter of the 12th of August 1404, although renounced and unconfirmed, was the dominant investiture, and that of the 9th December, although confirmed, was a nullity. But the simple fact that Cavers did *not* devolve upon Alexander is sufficient *per se* to prove the contrary; for if the charter of 12th August ruled, needing no confirmation, then Cavers would necessarily have devolved upon Alexander under its provisions. This proof that the second was the ruling charter, superadded to the renunciation by Alexander Stewart of such right as he had under the first charter, ought surely to be convincing, even to those who disallow the necessity of a confirmation of a vassal's charter by

the superior: to those who recognise the law of feudal tenure upon this point, both are of course superfluous.

That the fate of the barony of Cavers, with its annex, the sheriffdom of Jedburgh, was viewed with very anxious eyes at the moment of Robert III.'s confirmation of the charter of December 1404, is apparent from the fact that the King granted a letter to Sir James Sandilands under the Privy Seal, dated the 7th of February 1404-5, engaging that he would not accept any resignation or hereditary alienation of that barony, held from the King by Isabel Countess of Mar, and declaring that if through negligence or forgetfulness he shall admit such, the confirmation should be null and void, and revoked by the letter then presently sealed.¹ It is evident that Cavers was still in Isabel's possession at the date of the letter; Isabel holding it in vassalage independently of her husband; but she had forfeited that possession through escheat to the Crown before the 10th of August 1405, in consequence of having alienated it by a charter probably during the interval, to Archibald Earl of Douglas without the royal permission. The King refused to confirm the charter, recognised the fief in consequence of the feudal dereliction, and granted it on the recital of the preceding facts to Sir David Fleming, Lord of Biggar, by charter of the above date, as has been above explained.² Fleming's tenure was not of long duration, as he was murdered by the Douglasses in their resentment: and the barony subsequently became the property of a branch of the house of Douglas descended from an illegitimate son of Earl James, Isabel's brother.

Meanwhile the action of the King illustrates my assertion that Isabel's charters of the 12th of August and of 9th December 1404 were both invalid in themselves, as proceeding *a non habente potestatem*, and rendering the grants liable to escheat and forfeiture of the fief conveyed, unless the feudal delinquency was condoned by the superior,—in this case the Sovereign. It was doubtless in respect of the constraint exercised on Isabel and the renunciation by Alexander of the subjects conveyed that the charter of 12th August 1404 was not visited by this penalty, while that of the 9th December

¹ "Quod si contingat nos negligenter forsitan et immemorem hujus nostræ concessionis et promissionis aliquam alienationem admittere, illam nullam esse volumus et etiam per præsentem revocamus." [Printed in Riddell's Tracts Legal and Historical, p. 215; Minutes of Evidence, p. 343.]

² *Supra*, p. 198.

was probably the result of an agreement between the friends of Isabel and Alexander Stewart at headquarters, with the approbation of the King—Isabel being, in fact, at a distance, and unable to repair to the royal presence and make a formal resignation in Alexander's favour, according to the more regular practice in such cases.

This confirmation of the 21st of January 1404-5 is only represented in the Minutes of Evidence taken before the Committee for Privileges by an ancient copy from the Mar charter-chest, in which the witnesses, date, etc., are omitted;¹ but the date appears from the proceedings in the great process before the Court of Session in 1626, and Lord Hailes cites it in his Additional Case, under the date 21st January 1404-5, from the original charter in the claimant's possession, *i.e.* in the Sutherland charter-chest. I presume it must be there still, and that its existence was not suspected in 1875.

I have dwelt at some length on these charters of the 12th August and the 9th of December 1404, and on the circumstances which attended upon them; but not without reason, inasmuch as they became the foundation-stones respectively of all that has followed, just and unjust, legal and illegal, valid and invalid, subsequently to their execution. They have been borne, and are still borne, as standards of battle, *insignia* of strife, for nearly five hundred years. The last, legal, and confirmed charter of the 9th December 1404 was in full recognition during the remaining years of the Countess Isabel's life, and after the death of her husband, Alexander Earl of Mar, was the basis of the right of Sir Robert Erskine, Earl of Mar, to the fief and dignity to which he succeeded under a retour of 1438 by legal right, as finally determined in 1626. The first, extorted, non-confirmed, renounced, and rejected charter of 12th August 1404 ruled from 1457 till 1565, but was formally condemned (as we shall see), with all that followed upon it, as null, void, and of no effect, by the final judgment of 1626, which at the same time recognised and enforced the charter 9th December 1404, as confirmed by the royal charter 21st January 1404-5, as the standing and ruling conveyance, with all that had followed upon it. An attempt has now been made by the House of Lords to set up the rejected charter of the 12th August 1404

¹ Minutes of Evidence, p. 90.

once more; and the Order of the House, 26th February 1875, proceeding upon the Report of the Committee of Privileges as adopted by the House, has through means of it silenced for the moment the vote of Lord Mar, and intruded the newly-discovered Earldom of 1565 into the place, precedence, and privileges of the ancient Earldom. But the Order, as I contend, is *vox et præterea nihil* in point of law.

The Countess Isabel, the unhappy victim of the alternate intrigues and violence above depicted, died at some date previous to the 10th of February 1407-8, about two years after her marriage. She left no children by Alexander Stewart, Earl of Mar.

The legal view of the status of Earl Alexander on the one hand, and of the Erskines, Isabel's heirs on the maternal side, on the other, after the royal confirmation of the charter 9th December 1404, is this—that Alexander was Earl of Mar and Garioch, holding the fief and the dignity annexed to it under the conditions of the charter and confirmation, in conjunct fee with his wife Isabel; while the succession to the Earldom, failing heirs from the marriage between Alexander and Isabel, stood vested in Janet Keith, the eldest heir-general, the descendant and representative of Elyne of Mar and wife of Sir Thomas Erskine, and in her son, Sir Robert Erskine. Alexander's tenure of the fief and dignity after Isabel's death was simply that of liferenter; and nothing can be more certain on every principle of law and practice that he had no power in that capacity to divert the succession from the legitimate heirs by resignation to the Crown or otherwise; nor had the Crown power to receive such resignation, or act in any way upon it, in opposition to the legal right vested in the heirs of Isabel, and which emerged and came into active operation on the death of Alexander. I use the word power here in its legal sense as synonymous in right. Neither Alexander nor the Crown observed this obligation.

It is recorded by our historians, and supported by the public records, that, subsequent to his marriage, and after having been invested in his wife's ample principality, Alexander Earl of Mar exhibited qualities with which he had not previously been credited. He became an active statesman, was employed in foreign embassies, and especially

distinguished himself by suppressing the rebellion of Donald of the Isles at the battle of Harlaw in 1441. All this was to his credit as a public man, and his name stands blazoned on the page of history accordingly. But his personal and private activity was unscrupulous to the last. He never lost sight of the original purpose with which, as chief of caterans on the Highland hills, he seized upon the person and property of the unfortunate Isabel.

Alexander is said after Isabel's death to have married a noble lady of Brabant; but there is no evidence that he ever had any legitimate children. He had, however, an illegitimate son, by name Thomas, afterwards Sir Thomas Stewart. Thomas married Margaret Countess of Buchan, daughter of Archibald, fourth Earl of Douglas, and widow of John Earl of Buchan (the Regent Albany's son), a lady who was subsequently the wife of William Earl of Orkney, and was living in 1455-6. It was in the interest of this bastard, and of the descendants who he hoped might be the issue of Thomas's marriage, that Alexander now plotted to acquire for himself and for them in perpetuity the Earldoms of Mar and Garioch by a quasi-legal title, in exclusion of the legitimate heirs, the Erskines.

The charter of the 12th August 1404, apart from all question of its revocation on 9th September following, had been superseded, as we have seen, through the King's refusal to confirm it; and to effect Alexander's purpose it would be necessary to set aside that of the 9th December and the royal confirmation by a new right, in terms of the earlier unconfirmed charter, although even injustice and violence could not as yet openly found upon that charter. The process adopted was to take it for granted that Alexander held under it. The character of the two Dukes of Albany, Robert and Murdoch, Regents of Scotland during the captivity of the young James I. in England—the former, as Lord Redesdale expresses it, as unscrupulous as Alexander himself; the latter of gentler nature, but not insensible to the suggestions of expediency—lent itself to his purpose. Earl Alexander's power was great, and it was their interest, conscious of the precarious tenure by which they held their power, and the risk of punishment in the event of James's return, to play into his hands. Three pieces of evidence, two adduced before the Committee for Privileges in 1875, and one which I

may cite in illustration of Alexander's general policy, bear upon the present subject-matter; and I shall notice the latter first. It deals with a tragic page in Scottish family history.

The marriage projected between a daughter of David Earl of Crawford and Sir Robert Erskine, as by the indenture of 1400, took place in due time; and the issue was a daughter, Janet, grown up and marriageable in 1421. In that year, on the 6th of the Kalends of May (the 26th April), a dispensation was granted by Pope Martin v. for Janet's marriage with Walter Stewart "de Levenax," otherwise Master of Lennox, the eldest son and apparent heir of Murdoch Duke of Albany by Isabel, eldest daughter of the venerable Duncan Earl of Lennox—that Isabel who afterwards became Countess of Lennox in her own right after the cruel execution of her father. Walter and Janet were within the third degree of consanguinity, that is, were second cousins; Isabel's grandmother, Elizabeth Countess of Crawford, having been a daughter of Robert II., the common ancestor of the young couple. But an *interventus* of crushing weight took place, probably after the dispensation had been applied for, or before its arrival in Scotland. An indenture was entered into and completed on the 16th November 1420 between Murdoch Duke of Albany, Walter's father, and Alexander Stewart, Earl of Mar, by which, among other mutual covenants, the Duke, in the first place, stipulates to confirm a conveyance of the Earldom of Mar to be made by Alexander to Sir Thomas Stewart, a transaction for which the contracting parties are to endeavour to obtain the additional security of a confirmation by the captive king; and in the second place, binds himself not to consent to the marriage of his son Walter with the daughter of Sir Robert Erskine without Mar's consent, it being further recited in the document that Walter had bound himself to his father not to marry the lady in question without his father's consent. The words are as follows:—"That sen (since) Walter Steuart, the sone and ayire appirand of our forsaid Lord the Governour, is oblished till (to) the forsaid Lord his fader, that he sall not tak in mariage the dochter of Schir Robert Erskeine without the consent of hes forsaid Lord and fader, our forsaid Lord the Governour is oblischeit and oblishis him be this indenture till his said cusin the Earll of Mar that he sall nocht gife his consent till

the fulfillan of the said mariage without wittinging and consent of the said Earll of Mar.”¹ It was undoubtedly a material object with Earl Alexander to adopt any measures to weaken the influence of the Erskines; and nothing would have strengthened that influence more towards the ultimate defeat of his cherished schemes upon the Mar inheritance than Janet’s marriage with the heir of the house of Albany, the heir presumptive to the throne, failing James I. On the other hand, Alexander’s power was so great and his talents so acknowledged that Duke Murdoch might well be tempted to co-operate with him against the marriage. Walter’s own consent against his plighted faith and presumed happiness may have been superficial only; but there is evidence—historical indeed, not properly legal—that he was entangled at the time with another lady, on whose behalf, as well as on Janet’s, claims of lawful marriage were afterwards asserted by genealogists. There cannot, I think, be a doubt that the *interventus* proved by the indenture was effectual; for it is incredible that either Albany or Earl Alexander would relax their bond of mutual interest; while Walter, even if recalcitrant, could do nothing openly in opposition to them; and it is obvious that if a marriage took place, celebrated in secret, and not *in facie ecclesiæ*, the concealment would render it illegal by the canon law, notwithstanding the Dispensation, and thus render the offspring illegitimate. One child, at least, was born to Walter and Janet, a son, who was bred up and provided for in the Erskine country among his maternal kin, and became the ancestor of a powerful and distinguished house which has never ceased to assert their lawful descent. Meanwhile Earl Alexander’s object was effected *pro tempore*; and the judicial murder, for it was no less, of Walter himself, of his father Duke Murdoch, and of the aged Duncan Earl of Lennox, by James I., within five years afterwards, in 1425, after his return from England, removed any further anxiety.

The second piece of evidence bearing upon the present point is a statement by a certain Alexander Young, the King’s Chamberlain between the waters of Dee and Spey, in the Exchequer Rolls under the year 1455-6, in regard to the lands

¹ [From a copy in the British Museum, printed in Pinkerton’s History of Scotland, vol. i. p. 454, and in Antiquities of Shires of Aberdeen and Banff, iv. p. 182.]

of Soynahard in Mar. Young's statement is that "Alexander tunc comes de Mar," holding the Earldom by "liberum tenementum," under infeftment by Robert III., on the resignation of the deceased Euphemia (an evident error for Isabella) Countess of Mar, that is, by the royal confirmation of 21st January 1404-5 of Isabella's charter of the 9th December previous—"dictum comitatum in manibus quondam Roberti Ducis Albanie, tunc regni Scotie gubernatoris, Domino quondam rege ultimo defuncto in Anglia pro tempore existente, virtute resignationis et infeodationis predictarum, pure et simpliciter resignavit, deinde prefatus dux Albanie eundem comitatum quondam domino Thome Stewart, filio naturali ejusdem quondam domini Alexandri comitis, virtute dicte resignationis in manibus suis facte, assignato dicti quondam Alexandri comitis, tanquam gubernator dicti regni contulit, et eundem quondam dominum Thomam per cartam suam infeodavit hereditarie de eodem."¹ It thus appears that in prosecution of his schemes, and even before the accession of Duke Murdoch to power and the execution of the indenture of 1421, and with full complicity on the part of Duke Robert, Alexander Stewart, although holding, as Young correctly states, under an infeftment which could be none other than that of the 21st January 1404-5, and which he subsequently explains as such, resigned the Earldom to Albany as Regent, and received it back from him by a charter cutting out the heirs of Isabel, the Erskines, and substituting his illegitimate son Sir Thomas Stewart and his heirs in their stead; he being, as Albany must have known, a mere liferenter, and incapable of resigning any interest beyond what was limited and ended by that tenure. The charter thus granted by Duke Robert is not known to exist, and there is no registration of it on record. But Young's statement is so precise, and his authority so good, that there can be little doubt that it was passed, although it was superseded after the return of King James from England, either through some informality or otherwise. In a brief reference to this narrative, Lord Redesdale observes that the Chamberlain Young speaks of Earl Alexander as "assertus comes de Mar"—the words being in their abridged form "Alexri assti cõitē de Mar"—which he has translated "self-styled Earl of Mar," founding upon this in support of his view

¹ Minutes of Evidence, p. 36.

(to be dealt with in due time) that Alexander was only Earl by assumption or usurpation of the title, and not by any legal right during all the intervening years.¹

Meanwhile, as has been stated—and I now come to the third of the three pieces of evidence illustrative of the intrigues of Earl Alexander—James I. returned from England; Murdoch Duke of Albany and his son Walter were executed; and a new world began in Scotland. I shall sketch James's general policy in the ensuing letter: in the meanwhile it may suffice to say that Alexander Earl of Mar, although so lately the ally of Albany, obtained an equal ascendancy over the young King, to the extent at least of securing his co-operation in his scheme against the Erskines. With James's consent, or rather complicity—and in using such words in distribution of praise or blame, I do so, be it remarked in every instance, with the solemn judgment of the Court of Session in review of the whole series of these transactions ringing in my ears—Alexander resigned into his hands the Earldom of Mar, and received it back by charter on the 28th May 1426, to himself for life, and to his natural son Sir Thomas in fee, with destination to the heir-male of the body of Thomas, and with a final remainder to the Crown—"nobis et hæredibus nostris libere reversurum." There is no reference whatever to the previous grant from Robert Duke of Albany the Regent. While the renounced and unconfirmed charter of the 12th August 1404 is the first, this royal charter of 1426 constitutes the second, of the illegal and invalidated documents condemned by the Court of Session in 1626, but affirmed and supported by the Committee for Privileges in 1875. The words used by the Chamberlain Young in 1455-6, with reference to the charter from Duke Robert, are equally applicable to that of James I.

That this charter was illegal is patent upon the surface, inasmuch as the right of Janet Keith and her son Sir Robert Erskine, under the charter of 9th December 1404, could not be invalidated except by a renunciation on their part, or of the survivor, which would have been expressed according to unvarying form and necessity in the *quæquidem* clause of the charter, had such taken place; while the resignation by Earl Alexander proceeded *a non habente potestatem*, he being (as repeatedly

¹ [See below, p. 267 and note.]

enforced) a mere liferenter; while the King, who must be presumed to have known perfectly well what he was about, was equally incompetent to accept such a resignation, and to regrant the Earldom in virtue of it. The pretext undoubtedly was the first unconfirmed charter, 12th August 1404, which equally played into the hands of the Crown; but that charter, quadruply vitiated, through the evidence by which it was extorted, the injustice it wrought, its solemn renunciation four weeks after it had been granted, and its non-confirmation by the Sovereign, could afford no legal basis for the transaction of 1426.

Earl Alexander's scheme was now apparently crowned with success. The Erskines were excluded; his son Thomas, already enriched by his marriage with the Countess of Buchan, was in fee of the Earldom; and nothing seemed wanting but a child to inherit and enjoy the fruits of iniquity. But, as in the case of Margaret Countess of Angus, the cup was struck from Alexander's lips; his son died in his lifetime, childless; and on the death of Earl Alexander himself in 1435, the King seized the Earldoms of Mar and Garioch, either in virtue of the charter 12th August 1404, according to the pleadings for the Crown during certain proceedings in 1457, to be dealt with in my next Letter, or under the charter of 1426; '*ratione bastardiæ*,' as *ultimus hæres*, according to the alternative view of the Court of Session in 1626, but whether in the one or the other case in violation of justice—the right thus acquired by the King being stigmatised by the final and ruling judgment of 1626, as "ane simple and nakit possessioun, without all richt of propertie;" a sentence not to be disputed in the present day, even by the legal advisers of the House of Lords. The successive Kings of Scotland, down to Queen Mary, maintained this right to the Earldoms by the strong hand, in exclusion of the rightful heirs, during the whole period between the death of Earl Alexander in 1435 and 1565.

Alexander Earl of Mar died in the full blaze of public honour at the Feast of St. Peter ad Vincula (the 1st of August) 1435; and the reader may read with interest the account given of him by the continuator of the historian Fordun in noticing his death:—"Hic fuit vir magni conquestus, qui in juventute erat multum indomitus, et ductor catervanorum. Sed postea ad se reversus, et in virum alterum mutatus, pla-

center trans montes quasi totum Aquilonem gubernabat. Homo magnarum opum et ingentium expensarum, clari nominis, et famosus in diversis regionibus habebatur. Cujus industriosæ probitati adscripta est victoria facta apud Legez pro parte Johannis ducis Burgundiæ; et similiter apud Harlaw de insularis sibi attribuitur præconium triumphale. Potens erat enim valde in rebus animatis et mobilibus. Quibus omnibus utpote bastardi, succedit rex.”¹ These last words probably indicate the view set forth at the time as to the right of succession to the fief. Another chronicler described him as “primeva etate, efferus, indomitus ac caterranorum dux, postea mitis justus, patrie rector, et dives conquæstor extitit, anno predicto circa festum Sancti Petri quod dicitur ad Vincula, obiit in Marr.”² A mass was said yearly afterwards for his soul at the altar of St. Catherine in the cathedral of Aberdeen, not in consequence of any endowment by himself or any of his kindred, but through the charity of an obscure person, John of Clat, canon of Brechin and Aberdeen and prebendary of Cloveth, a feudal dependency of the Earldom of Mar.

SECTION IV.

Opinions of Lords Chelmsford, Redesdale, and Cairns, and discrepancies in their views.

I have now to contrast the opinions pronounced by the noble and learned Lords who advised the Committee for Privileges in 1875, in regard to the two charters of 1404 and the charter of 1426, with the views which I have thus far indicated—which are those upon which the judgment of the Court of Session proceeded in 1626, and upon which, as I shall show, the predecessors of Lord Chelmsford, Redesdale, and Cairns advised the Crown in the Sutherland case in 1771.

I shall commence by placing the *ipsissima verba* of the noble and learned Lords before the reader, and then analyse and comment upon them so far as is necessary for the establishment of truth, as I have previously done in the second section of this Letter:—

LORD CHELMSFORD.—“My Lords, the claim of the petitioner to the dignity of the Earl of Mar is involved in some difficulty,

¹ Scotichronicon, xvi. c. 25; ed. Goodall.

² Extracta e variis Cronicis Scotiæ, p. 234.

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

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

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

“The fact of there having been a continued lineal descent of males from the first Earl down to Earl Thomas, the last of the male line before

Queen Mary's charter, by no means removes one of the great difficulties in the case, which is to ascertain in what right Margaret, the sister of Earl Thomas, and, after her, her daughter Isabella, had successively possession of the earldom or comitatus, and respectively assumed the title of Countess of Mar. Margaret, in her brother Thomas's lifetime, had married William, the first Earl of Douglas (which dignity he acquired after the marriage), who assumed the title of Earl of Douglas and Mar. The latter of these titles belonged to him in right of his wife, if she were Countess of Mar by inheritance, and she bore that title both before and after her husband's death.

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

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

accepted as any proof that there had been a resignation of the earldom into the King's hands, and a regrant following upon it, of which resignation not a trace appears.

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

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

“After the death of Drummond, Isabella married Alexander Stewart, an illegitimate son of the Earl of Buchan, brother of King Robert the Third. The dealings with the earldom or comitatus before and after this marriage demand particular attention. Taking the case of the opposing petitioner to be correct, that Isabella had the earldom of Mar by descent, she, on the 12th August 1404, by charter styling herself Countess of Mar and Garioch granted by reason of a contract of marriage the earldom of Mar and Garioch to Alexander Stewart and the heirs to be begotten between them, whom failing to the heirs and

assigns of Alexander. This charter was recognised and relied upon as valid in a proceeding in 1457, held for the purpose of inquiring into the validity of a retour of service of Robert Lord Erskine, as heir to a moiety of the earldom of Mar, to which I shall have occasion to advert more particularly hereafter.

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

“A good deal of controversy arose as to the proper translation of the habendum in this charter of December. The words of the ultimate destination are ‘*hæredibus nostris legitimis ex utrâque parte semper reservatis liberis tenementis.*’ The petitioner contended that the words ‘*ex utrâque parte*’ are applicable not to the heirs but to the lands on both sides, which it was said was clear from a former part of the charter in which Isabella confirmed to Alexander Stewart ‘all right and claim which we have in any lands soever unjustly detained from us *tam ex parte patris quam ex parte matris.*’ The words ‘*ex utrâque parte*’ were interpreted by the Lords of Session in an action brought by the Earl of Mar against Lord Elphinstone in 1624 to mean that ‘Dame Isabella Douglas ordained that the lands which fell to her on

her father's side, in case of her decease without children of her own body, should pertain to her nearest and righteous heirs upon her father's side, and that the lands which fell to her by her mother should in case foresaid pertain to her nearest and righteous heirs on her mother's side.' This construction of the words (which appears to me to be correct) is necessary to be maintained by the opposing petitioner, as he derives his title from Isabella, who, as he alleges, took by descent from her mother Margaret.

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

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

"Isabella died in 1407, and Alexander Stewart, who survived her, lived till 1435. During his wife's life he bore the title of Earl of Mar and Garioch, and after her death by the same title he dealt with the lands of the earldom. In 1426 King James the First confirmed a charter granted by Alexander Stewart, Earl of Mar and Garioch, to Alexander de Forbes, of the lands of Glencarure and Le Orde, the *habendum* of the charter being 'to have and to hold of us and our heirs, successors, or assigns, Earls of Mar.' On the 28th May 1426 a most important dealing with the earldom took place. King James the First, by charter reciting that Alexander Stewart, Knight, and his natural son Thomas Stewart, Knight, had of their free will resigned into the hands of the King all the right and claim of themselves and their heirs to the earldom of Mar and lordship of Garioch, granted 'all and whole the said earldom and lordship to be held by Alexander for the whole time of his life, and after his decease to Thomas and the heirs-male of his body, whom failing to revert freely to us and our heirs.' It nowhere appears what right Thomas had in the lands. It will be observed that in the charter Alexander is called Alexander Stewart, Knight, from which it may be inferred that the dignity was connected with the lands, and that when a person holding a territorial dignity resigned the lands into the hands of the King to receive a new grant, between the times of the resignation and the regrant he ceased to be a peer. This is rendered probable from the fact that King James the First, shortly before this charter, and in the same year, 1426 (as already mentioned), confirmed a charter of Alexander Stewart, Earl of Mar and Garioch, and a few months after the charter again styled him Earl of Mar, and in a subsequent charter of the same King he is mentioned as having sat in Parliament under that title.

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

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

“ While the lands of Mar were thus in the hands of the Crown, it dealt with them and also with the dignity. In 1460 King James the Second granted the earldom and the dignity of Earl of Mar and Garioch to his son, Prince John Stewart. The Prince sat in Parliament as Earl of Mar; and it is worthy of notice that Lord Erskine, the common ancestor of the contending parties, frequently sat with him in the same Parliament. In 1482 King James the Third granted the earldom (*i.e.* the lands) of Mar and Garioch to his brother the Duke of Albany and the heirs whomsoever of his body, the charter being witnessed by Lord Erskine. The Duke was ‘forefaulted’ and escaped to France, upon which the Crown took possession of the lands and retained possession of them till 1562, a period of 80 years. The Duke died in France, and his son Alexander became Duke of Albany and afterwards Regent of Scotland, and was acknowledged by the then Estates of the Realm to possess (amongst other titles) that of Earl of Mar and Garioch. I cannot understand in what right he could have assumed this title. His father is not stated to have had any grant of the dignity, and if it belonged to him as necessarily accompanying the grant of the lands it could not descend to his son, as at the time of his father’s death the lands were in the hands of the Crown. Besides thus granting the dignity of Earl of Mar the Crown from time to time made grants of considerable portions of the Mar lands, thus severing them from the earldom or comitatus, and thereby, as it was contended, breaking it up and preventing the possibility of restoring the territorial dignity in its integrity.

“ It is natural to ask what was done by the Lords Erskine (from whom both the petitioner and the opposing petitioner derive title) during the long interval when the Crown was conferring the dignity and dealing with the lands of Mar at its pleasure, to the prejudice of their assumed right to the succession which opened to them, as it is alleged, on the death in 1407 of Isabella Countess of Mar without issue. I have already adverted to the fact that in 1466 the Lord Erskine of that day sat in Parliament with an Earl of Mar created by

King James the Second, and that he was also a witness to a royal charter of the earldom of Mar in prejudice of his hereditary claim. And it appears most conclusively that the Lords Erskine never at any time claimed the entire earldom or comitatus of Mar, to which alone (if at all) the dignity could be joined, but invariably limited their claim to one half of the earldom or comitatus, and never asserted any right to the dignity itself. In 1390, during the life of Isabella, a supplication was presented to the King in Parliament by Thomas Lord Erskine, stating that if Isabella should die without issue, his wife, formerly Janet Barclay, would be entitled to one half part of the earldom of Mar and lordship of Garioch, and praying the King not to confirm any contract in relation to the lands to the prejudice of the rights of his wife. It is unnecessary to inquire into the nature of the title of Janet Erskine, my object in noticing this proceeding being to show that from the very first the claim of the Erskines was confined to one half of the earldom.

“After the death of Alexander Stewart Earl of Mar in 1435, when, as already observed, the dignity of Earl of Mar practically at least ceased to exist, Sir Robert Erskine in April 1438 obtained a retour of himself as heir of Isabella Countess of Mar and Garioch. The circumstances connected with this and a subsequent return of the same year lay them open to a good deal of observation. Soon after the death of Alexander Stewart, as a preparatory to these judicial proceedings, Sir Robert Erskine and his son entered into an agreement with Sir Alexander Forbes, the sheriff-depute of Aberdeen, before whom the proceeding for a retour would be held, to secure his services in their favour (covered with the decent pretext of his doing all his business and diligent care to help and to further them with his advice and counsel) by a grant to him of certain lands in Mar as soon as they should be recovered out of the King’s hands. At this time Sir Robert Erskine claimed as coheir or co-parcener with Lord Lyle. In this retour of April 1438 the jury found that ‘Sir Robert is the lawful nearest heir of the Lady Isabella of one half of the lands of the earldom of Mar and lordship of Garioch, which are in the hands of the King by reason of the death of Alexander Stewart, who held the lands by gift of the Lady Isabella for the term of his life.’ This retour is false in fact, for the lands were not in the hands of the King on the death of Alexander Stewart, who held under the gift of Lady Isabella for his life, but were claimed and possessed by the Crown by reason of the reversion in the charter of 1426 which vested in possession on the death of Alexander.

“In the month of October 1438 Sir Robert Erskine obtained another retour as to one half of the earldom of Mar, upon which some controversy arose. On the part of the opposing petitioner it was asserted that this was a retour of the other half of the earldom, though

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

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

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

"Nothing was done towards obtaining a judgment upon Lord Erskine's claim to one half of the earldom of Mar until the year 1457,

when proceedings were taken against some of the jurors who sat upon the inquest of 1438, for an unjust deliverance of the retour upon such inquest. The delinquent jurors begged pardon of the King and were pardoned. Then the following proceeding took place. The King with the Chancellor and Lords passed into the Town Hall (of Aberdeen) for justice to be done to Lord Erskine with respect to his claim of the lands of the earldom of Mar. An inquest was chosen. Lord Erskine alleged that the deceased Robert Lord Erskine his father had last died vested and seised as of fee of half of the earldom of Mar, and that he was the heir of his father. Issue was taken upon this allegation, the Chancellor answering that although Lord Erskine was heir of his father he was not heir to the said lands, and that the lands were in the hands of the King as his own property. Lord Erskine in support of his claim produced the charter of Isabella of the 9th December 1404 granted upon her marriage with Alexander Stewart; in answer to which the Lord Chancellor on behalf of the King 'publicly produced a certain charter of taillie of the deceased Isabella of a date preceding the date of the other charter' (being Isabella's charter of the 12th August 1404) 'made to the deceased Alexander Earl of Mar her husband and the heirs lawfully begotten or to be begotten of his body' (the true destination being 'to the heirs to be begotten between them') 'whom failing to the lawful heirs of Alexander whomsoever.' By virtue of that charter the Chancellor declared the King the true heir and lawful possessor of the said lands, Alexander having died a bastard vested and seised as of fee of the said earldom of Mar, and the King being lawful heir by reason of bastardy. The jurors retoured that Robert Lord Erskine did not die seised of the half of the lands of the earldom of Mar claimed by him, and that the said lands were in the hands of the King by reason of the death of the late King.

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

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

upon several occasions. He subsequently resigned the dignity and the lands of Mar, and was created Earl of Moray.

“I have thought it necessary to go fully into the history of the dignity prior to Queen Mary’s charter because it appears to me that it may materially assist in determining the question of the limitation of the dignity to which the petitioner lays claim.

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

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

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

the earldom upon the inquest held in 1457 had not been in any degree impeached, and the alleged 'undoubted hereditary right' had been allowed to slumber during the whole of the long period of the Crown's possession of the lands.

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

"As already observed, Queen Mary's charter contains nothing with respect to the dignity of Mar. This, I think, was not disputed in the argument, and it is proved by the fact that the charter being of the date of the 23d June, the grantee sat almost daily in the council from the 8th to the 28th July as Lord Erskine, and appeared at the board for the first time as Earl of Mar on the 1st August. He must, therefore, have obtained the dignity by creation in some way or other before this day. The question arises, When and how did this creation take place? There is no writing or evidence of any kind to assist us. It was suggested, with great probability, that Queen Mary's marriage with Lord Darnley having taken place on the 30th July, and Lord Erskine having sat in the council by his old title of Erskine on the 28th July, and as Earl of Mar on the 1st of August, he must have been created an earl upon the occasion of the marriage, and probably by a ceremony well known in those days, called 'belting.' To this it was objected, that, according to the remarks of Lord Hailes upon the *Spynie* case (*Maidment*, page 11), this ceremony could only take place in Parliament, and that if this was the manner of the creation some record of it would have appeared. But Lord Loughborough, in the *Glencairn* case (*Maidment*, page 16), proved that Lord Hailes was in error in limiting as he did the place of the ceremony of belting, for he mentioned three cases of the creation of earls by belting elsewhere than in Parliament.

"Whether Lord Erskine's creation was in this particular form and manner seems to me not to be very material. It is certain that he must have been created Earl of Mar about the time of the Queen's marriage, and, as no record of the creation is in existence, the limitation of the dignity must be left to the ordinary presumption of law,

unless there is something in the case to rebut this presumption. Lord Mansfield, in the Sutherland case (Maidment, page 9), said, 'I take it to be settled, and well settled, that where no instrument of creation or limitation of the honour appears, the presumption of law is in favour of the heir-male, always open to be contradicted by the heir-female upon evidence shown to the contrary ;' and a similar statement of the presumption in favour of the heir-male was made by Lord Loughborough in the Glencairn case (Maidment, page 25). The *prima facie* presumption, therefore, is that the dignity of Mar, created by Queen Mary, is descendible to heirs-male.

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

"What was chiefly relied upon as indicating the intention of the Queen, either to restore the old dignity of Mar, which was said to be descendible to females, or that if she created a new dignity she meant it to descend in the same channel of limitation, is the language of that part of the charter in which the Queen states that she was moved by conscience to restore the earldom to the rightful heirs from whom it had been unjustly detained, and that acting from this motive she restored the lands to the grantee, his heirs and assigns. And it was argued that the dignity being revived about the same time as the charter, the Queen must have intended to create the dignity with similar limitations in order that it might never be separated from the lands. This, however, is pure conjecture. There is nothing in the charter to point to the intentional or probable revival of the dignity, and it is not at all a necessary conclusion that because the Queen was desirous of giving back the lands of Mar, which she was prevailed upon to believe had been unjustly withheld from Lord Erskine and his predecessors, she therefore contemplated reviving a dignity which had not been practically in existence for nearly 140 years, and granting it with a limitation to heirs whomsoever. Even if the intention to connect the lands with a dignity about to be created can be assumed, there was no necessity to make the limitations correspond, because, by giving the lands to the person ennobled, his heirs and assigns, he would have the power of directing the succession to the lands in the same line as the descent of the dignity. And the power of alienation by the grantee of the lands disposes of the suggestion as to the Queen's intention that the dignity and the lands should never be separated. The reasoning on this subject indeed is altogether speculative, and, at the utmost, raises nothing more than the very slightest probability.

"A strong inference against this presumption of the limitation of the dignity, so as to extend to heirs-female, may, I think, be derived from the fact (already mentioned) that only four years before the charter

in question, the Queen, when giving the same dignity of Mar to her brother, limited it strictly to his heirs-male.

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

“The dignity appears at first to have been claimed as depending solely upon the creation by Queen Mary, for the new earl sat in the council and was ranked as the junior earl. Again, in two commissions issued by the Crown in relation to matters in Parliament, when, as Lord Loughborough said in the Glencairn case (Maidment, page 17), ‘a due precedency would probably be given to the several noblemen,’ the Earl of Mar is named as junior earl. I am not disposed to lay any stress upon the order of precedence prior to the Decreet of Ranking, because I cannot discover any uniform practice as to the placing of the Earls of Mar in Parliament previously.

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

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

“The Earl of Mar, in support of his title to precedence, produced

to the Lords Commissioners the charter of Dame Isabel Countess of Mar of the 9th December 1404, and the King's charter of confirmation, the Act of Parliament of 1587, and an extract of a retour of the 20th March 1588, whereby John Earl of Mar was served nearest and lawful heir to Dame Isabel Douglas Countess of Mar. The relationship to Isabel found by this retour is thus traced. She was a granddaughter of Donald Earl of Mar, who was the brother of Helen of Mar, who was the great-grandmother of Robert, who was the grandfather of Alexander, the great-grandfather of John the Earl whose claim to precedence was in proof. No records of the ancient dignity, and nothing prior to the charter of December 1404, were produced to the Commissioners. Isabel's charter of the 12th of August 1404 seems to have been purposely kept from them. The finding of the Commissioners that John Earl of Mar was heir to Isabella through Helen of Mar was erroneous in a double sense. He could not have been heir to Isabella, who was heir to Margaret, the law of Scotland not allowing heirship to be traced through the mother, and he could not legally claim by heirship of blood to Helen, as by the same law there is no succession to land upwards through females (*Erskine's 'Institutes,'* Book III. Title viii. sections 9 and 10).

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

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

“The proceedings of the six earls to reduce the retour of 1588, by which the Earl of Mar was served heir to Isabella Douglas, Countess of Mar, seem to have stimulated his activity to obtain some further

support to his claim of precedence. Accordingly, on the 22d January 1628, he procured no fewer than five retours finding him heir respectively to Donald Earl of Mar, to Gratney Earl of Mar, to Donald Earl of Mar, the son of Gratney, to Thomas Earl of Mar, the son of Donald, and to Margaret, the sister of Thomas and mother of Isabella. If these retours prove nothing else, they show how easily in those days retours could be procured, and consequently how little reliance can be placed upon them. Retour jurors are usually chosen on account of their supposed knowledge of the facts upon which the service as heir to the person last feudally vested depends. But these five retours were taken in respect of alleged heirship to persons who had died feudally vested from 250 to 350 years before. Whatever value may be supposed to belong to retours, which of course found only the fact of heirship generally, and determined nothing more than the existence of that relation with the several persons named, they can have no effect whatever upon the question whether the succession to the dignity of Earl of Mar was open to an heir-female. It may be observed that the judicial proceeding of service of heirs does not apply to honours and dignities. And it may fairly be asked why in this claim of precedence before the Commissioners, founded upon his title to the ancient dignity, the Earl of Mar did not bring forward the proof of his heirship to the predecessors of Isabella upon which he afterwards obtained these retours.

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

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

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

“The Act restoring John Francis Erskine and all entitled after him to the honours, dignities, and titles of Earl of Mar, recites that he is the grandson and lineal representative of John Earl of Mar. He was

the grandson of John Earl of Mar, through his mother Lady Frances Erskine. Upon this fact the counsel for the opposing petitioner argued that it was intended by the Act to restore the dignity to the person entitled as the lineal representative of the attainted Earl, and as the person restored was only lineally descended from John Earl of Mar through a female it amounted to a parliamentary recognition that the dignity before the attainder was descendible to females.

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

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

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

“The inquiry may be said to commence with Gartney Earl of Mar, who died before 1300. From his son Donald the peerage and comitatus descended in direct succession to Thomas the last heir-male. From Gartney’s daughter Helen the Erskines claim to be his heirs on

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

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

"On the death of Thomas Earl of Mar, the last heir-male, William Earl of Douglas, the husband of his only sister Margaret, was called Earl of Douglas and Mar. He may have assumed the latter title for one or other of three reasons: as being in possession of the comitatus; in right of his wife's succession to the peerage as heir-general; or by a new creation. There is the clearest evidence that at that time it might have been allowed to him in courtesy only as holding the comitatus. His daughter, Isabella, called herself Countess of Garioch in the surrender of the comitatus of Mar to her husband Alexander Stewart; and in the Crown charter confirming the same she is called Countess of Mar and Garioch. There cannot be a doubt that in her Garioch was only a lordship. The opposing petitioner, to whom the point is of vital importance, does not pretend to assert that it was a peerage-earldom; and, though the Earl of Douglas may for a time have claimed the earldom of Mar, there is evidence which makes it doubtful whether, under whatever claim he may have first assumed the title on his brother-in-law's death, he always continued to assert that claim and to use the title. In the Scotch Roll of Richard the Second (1377) he is Earl of Douglas and Mar. In those of February 1381

and March 1383, he is Earl of Douglas only (pp. 743, 4, 5), and, though he is called Earl of Douglas and Mar in 1383, it is only when mentioned as a witness in two royal charters (pp. 28 and 618). These are the only documents in which he is called Earl of Mar after 1381 ; and in the only two charters of his wife after that date, while she calls herself Countess of Douglas, she styles herself only Lady of Mar and Garioch, putting these latter titles on a par, and as inferior to that of Douglas (pp. 383, 490). Her late husband being called Earl of Douglas only, in the charter (p. 490), together with her own change in title, is a very significant fact. The importance of this distinction between the titles of countess and lady will be noticed hereafter.

“Did Earl Douglas become Earl of Mar in right of his wife’s succession to the peerage as heir-general to her brother? There is no evidence whatever of the title having been recognised as a peerage while held by William, who lived to 1384, or by his son James, who called himself Earl of Douglas and Mar in 1388, in a charter (p. 346), and Earl of Douglas only in another charter of about the same, or perhaps rather earlier, date (p. 721). He fell at Otterburn in 1388. The period of ten or twelve years is not a long one, and proof of parliamentary recognition of a peerage in those days is not of very frequent occurrence ; but we must not forget that the presumption of law is against Margaret’s inheriting the peerage ; and so far as there is evidence before us there is none that she, or her husband, or her son, were ever in possession of it. It is further to be observed that the ancient earldom of Mar was many centuries older than that of Douglas, and yet it was always placed after it, and that when after the Earl’s death she married John of Swynton, he became, even after the death of her son, Lord of Mar only, and never was Earl of Mar (p. 724). It is important also to notice that in all the contemporary documents in evidence a countess peeress is always a countess. The widow of Thomas Earl of Mar is Countess of Mar and Angus, not Lady of Angus like the Countess of Douglas and Lady of Mar. The Countess of Angus too, though so in her own right, always puts Mar before Angus as the more ancient title, both in her being peerages.

“The evidence before us shows clearly that when a peerage was attached to a comitatus the holder of it was earl, and when a peerage was not attached, lord only. In page 362, in the charter of Robert the First, granting to his brother Edward Bruce, ‘*totum comitatum de Carrick*,’ he is made an earl by the following words, ‘*Cum nomine, jure et dignitate comitis*,’ he died without legitimate issue. In the same page a charter of David the Second grants to William de Conyngnam, ‘*totum comitatum de Carrick*,’ without those words ; and in a charter of this William de Conyngnam, he is ‘*dominus de Carrick*’ only. The case of Garioch affords similar evidence. In Isabella’s charter (p. 745) she, calling herself Countess of Mar, but only Lady

of Garioch, confirms the charter of David, formerly Earl of Garioch, brother to King William. David had only one son, who died without issue, and the peerage earldom became extinct; and although Isabella usually, when she called herself Countess of Mar, called herself also Countess of Garioch, there cannot be a doubt that on the extinction of the peerage Garioch became in law a lordship only, and that in dealing with the lands which she had inherited, she assumed no higher title, though confirming the act of her predecessor an Earl of Garioch. The same is to be observed in her charter (p. 489) and in that of Alexander her husband, confirming the same after the marriage, in which he calls himself Earl of Mar and Lord of Garioch only.

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

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

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

“Margaret died in 1390, and was succeeded in the comitatus by her only daughter Isabella, and in the peerage earldom, if such was in existence. She was the wife of Malcolm Drummond. In November 1390, probably after Margaret’s death, he is Malcolm de Drummond, Knight, in a license from the Crown to build a tower at Kindrocht in Mar (p. 619). Probably, as John de Swynton was Lord of Mar in right of his marriage with Margaret, Malcolm was unable to assume that title till some arrangement was come to about it. In March 1391, the King confirms a grant from Malcolm de Drummond, Knight, to John de Swynton, Knight (neither calling himself Lord of Mar in this transaction), of 200 marks annual rent (p. 29), and in 1393, in a royal charter (p. 619), which granted forty pounds sterling annually to Malcolm, he is called Lord of Mar, and he bore that title till he died before March in 1402. He is proved, therefore, to have been about twelve years husband to Isabella after her succession to the comitatus, and yet he never became Earl of Mar. He is Lord of Mar and Garioch, and she Lady of Mar, Garioch, and Liddisdale in the important charter of 19th April 1400 (p. 330), cited in the notarial copy of it, which is the only charter in evidence made by her in his lifetime. He evidently did not allow her to call herself Countess, because she was not entitled to the peerage, which, if she had been, would have made him Earl. He was nearly related to the King, who had married his sister, and was in favour, as is proved by the before-mentioned grant. Under these circumstances the evidence afforded by the above-mentioned charter of 1400 is conclusive against a continuous succession to the peerage earldom.

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

“Many years after, in 1430 (p. 586), Alexander is shown to have sat in Parliament as Earl of Mar. Did he assume that title im-

mediately after his marriage? We have evidence before us that this was not the case. From the Forbes charter-chest a receipt from him has been produced (p. 725), dated 2d January 1405, as Lord of Mar and Garioch only; nearly a month after he had seisin of the comitatus; soon after, however, he assumed the title of earl. But in order properly to understand this point, and others which follow it, it becomes necessary to enter into the history of Scotland at the time, which I am surprised was not more referred to than it was by the counsel on either side.

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

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

“Thus we come to the surrender and regrant of 1426, when the King confirmed to Alexander and Thomas the comitatus which *they* surrendered to him (thus acknowledging the validity of what had been done under the Regent) and regranting it to them, and to Thomas’s heirs-

male, failing whom with remainder to the Crown. This latter condition was probably rewarded by a grant of a peerage earldom with remainder to Thomas. The policy pursued by the King after his return from England, and which ultimately cost him his life, was to increase the territorial influence of the Crown, and to reduce that of the nobles; and this reversion of the lands of Mar on the death of a youth of perhaps a weak constitution, for he died before his father, was well worth a peerage concession. And we find the first and only proof of Alexander's sitting in Parliament in the charter of James the First in 1429 (p. 586). He died in 1435, and his natural son Thomas having died before him, the comitatus under the settlement of 1426 lapsed to the Crown.

“In considering what then occurred, we must again refer to the state of Scotland. James the First had so offended and alarmed the nobility by his acts that some of them conspired against him, and he was murdered in 1437. His son was a minor, and there was a regency. In 1438 Robert Lord Erskine got himself served heir to Isabella in half the comitatus, and, notwithstanding the remainder to the Crown in Alexander's settlement of 1426, got possession of that half, as will be hereafter shown. In 1440 we find him calling himself Earl of Mar, but sitting in Parliament as Lord Erskine. Mr. Hawkins says, ‘the Crown kept him out of the earldom.’ Is it credible that a regency, the result of a rising against the late King, whose acts against the aristocracy the nobles were determined to resist, could have prevented such a man as Lord Erskine from taking a seat in Parliament to which he had lawfully succeeded? If the ancient earldom was in existence as descendible to heirs-general, he had a right to it as heir to Earl Gartney. Every peer had an interest in the question of such a succession, and late events had proved that they were not so weak or the Crown so strong as to render such a refusal possible. Lord Erskine was not the man, nor in the position, to be so treated. Look at the agreement in 1440 (p. 588) in which the King, with the advice of his council, delivers the castle of Kildrummy to him, and allows that ‘the revenues of half the earldom of Mar, *which Lord Erskine claims as his own*, shall remain with them till the Crown allows him a sufficient fee for keeping the castle.’ It is clear from this document that Lord Erskine was, under the retour of 1438, in possession of half the lands of the comitatus which the Crown claimed under Alexander's charter, but which the regency was unable to get from him, and which probably remained with the Erskines until the retour of 1438 was set aside in 1457. It must also be noticed that the ancient peerage, if in existence, descended to him independently of the comitatus as heir-general of Gartney, and that the claim of the Crown to the comitatus was based on acts done in relation to it by Isabella and her husband, in no way to be affected by Lord Erskine's possession of the peerage.

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

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

“The argument in support of the grant of the earldom by Queen Mary in 1565 being a restoration and not a new creation must be next considered. The last preceding grant of the comitatus was by that Queen to her natural brother James, by charter in 1562, in which a right to a seat in Parliament was specially provided, thereby proving (if it were necessary to do so) that the comitatus did not then confer a peerage. James surrendered both in the same year, sitting as Earl of Mar on the 10th September, and as Earl of Moray on 15th October. On the 23d June, nearly three years afterwards, the Queen granted the comitatus to Lord Erskine in a charter in which she acknowledged him to be heir to Isabella, and that he and his ancestors had been unlawfully deprived of the comitatus. Still he continued to sit as Lord Erskine, as is proved by the records of sederunt, in the Privy Council, in which he is found as Lord Erskine on 28th July, more than a month after he had been declared by the Crown heir to Isabella. Stronger proof cannot be required to show that there was no earldom for him to succeed to through her. On the 1st August he is in the council as Earl of Mar. Between those days the Queen's marriage took place, and without accepting Randolph's letter as evidence, common sense tells us that he was created Earl of Mar on that occasion. If it was thought necessary that some course should be taken to prevent any idea of the restoration of the old peerage, none could be devised more decided than insisting on time being allowed to intervene between the

restoration of the comitatus to him as heir to Isabella and his recognition as Earl.

“Taking all these circumstances into consideration, I am of opinion that the earldom which John Lord Erskine of 28th July is recorded to have enjoyed on the 1st August 1565 was a new creation, and probably by charter. Why that instrument is not now forthcoming, I will discuss hereafter.

“In support of the opinion that at a later period the ancient peerage was held to be extinct, I would refer to the documents lodged by the Earl of Mar in 1606 for the decret of ranking. These were the surrender by Isabella in 1404, and the regrant to herself and Alexander, and to her heirs, and the confirmation thereof by Robert the Third: a letter from that king to Sir Thomas Erskine in 1390 promising that he would not recognise any resignation of the comitatus to his prejudice; and the Act of Parliament of 1587 which ratified the grant of the comitatus by Queen Mary. All these documents related to the territorial earldom only. No records of the ancient peerage were produced, and the ranking sought was confined to whatever might have been granted in 1404, which would give a precedence of 161 years over that given by Queen Mary in 1565. Mr. Hawkins, in answer to a question why earlier documents were not produced, said that the Earl probably produced the earliest Crown charters he could find, and that as far as he was aware there were no earlier documents on the Mar title, omitting to notice the Acts of Parliament at pages 591 to 597 of the evidence, in which Donald Earl of Mar in 1283 is mentioned, and Thomas, Isabella’s uncle, in 1369, public documents as accessible to the Earl on that occasion as for the present inquiry.

“The ranking sought for was obtained, and a necessity thereupon arose for destroying all records which would, if discovered and produced at any future period, take away that precedence. If the charter referred to in the memorandum before mentioned granted a peerage earldom of Mar to William Earl of Douglas and his heirs-male by Margaret, or if, as is more probable, it dealt with the comitatus in a manner adverse to its having a peerage attached to it, it might be fatal to the ranking obtained through the production of Isabella’s charter of 1404, and the destruction of the deed is thus accounted for. If Alexander had obtained a grant of peerage in 1426 to himself with remainder to his natural son, or an earlier one to himself and his heirs male or general by Isabella, the production of either would upset the ranking obtained by means of the charter relating to the comitatus with remainder to her heirs-general. Equally fatal would be a charter by Queen Mary granting the earldom as a new creation in 1565. Having obtained a ranking to which he was not entitled by the production of documents which the present inquiry has shown related to the lands of the comitatus only, the destruction of charters which were

no longer wanted for the purposes for which they were granted, but which would be fatal to the retention of that ranking, appears a probable and almost a necessary consequence; and the memorandum relating to the charter of Robert III. affords some evidence that such destruction may have taken place.

“In summing up the evidence before us in this case given in support of the claim of the heir-female, let us compare it with that which was accepted in the Sutherland case as contradicting the legal presumption in favour of heirs-male. The sole point of resemblance is that the Earl of Douglas assumed the title of Earl of Mar on the death of the heir-male, as Adam Gordon did that of Earl of Sutherland, but it is far from certain that he continued to do so at a later period. That Gordon’s assumption of the title was of right was proved by a continued and uninterrupted succession of heirs in direct line for 252 years, with representatives of the male line in existence to contend for the title, had the descent been properly under that limitation. In this case there was no succession to the peerage earldom. The Earl of Douglas’s wife survived him and her son, but her second husband was Lord of Mar only. After her death, Isabella, the next heir-female, was for twelve years Lady of Mar only, and her husband Lord of Mar and not earl, though brother-in-law to the King. The evidence derived from the assumption of the title by her second husband, Alexander Stewart, a lawless man in a lawless time, under the government of his infamous uncle the Regent, cannot be held of the same value as that which took place during her first marriage. All her recorded deeds relate to the territorial comitatus only. Alexander dealt with the latter illegally after her death, and his last settlement of it contained a bribe to the Crown which probably obtained for him a grant of peerage, with remainder to his natural son, who was to succeed him in the comitatus. It has been stated as a probable reason why neither Swynnton nor Drummond became Earls of Mar in right of their wives’ peerages that they had no issue by them. If there is any force in this objection it is equally good against the assumption of the title by Alexander being in right of his wife’s peerage, and would add to the probability of his having been created Earl of Mar, as suggested, in 1426. After the Erskines became heirs-general, one only is recorded to have ever called himself Earl of Mar, and none of them for 130 years attempted to claim the peerage. This fact, and the fact of the Crown during that long period, having treated it as extinct by new creations, are fatal blows to the claim. The interval of more than a month after the public acknowledgment by the Crown of Lord Erskine as heir to Isabella (which gave him the ancient earldom if it was held to descend to heirs-female) before he became Earl at the time of the Queen’s marriage, is the final and conclusive blow to it. No other earldom but that could be in Isabella, and the Earl did not presume to

contend for it in the decret of ranking, but set up a fancy title commencing with her. It was too well known in 1606 that the old peerage was held to be extinct in 1565 for him to attempt to get it.

“The only point remaining to be considered is what shall be held to be the remainder under Queen Mary’s creation. The presumption is in favour of heirs-male. What is there in the evidence before us to contradict that presumption? The only points urged are the charter restoring the comitatus to heirs-general, and the fact of the person to whom the earldom was restored after the attainder being called in the Act the ‘grandson and lineal representative’ of the attainted Earl, he being grandson only through a female. The charter being a restoration to the heirs of Isabella before the new peerage was created, naturally left the comitatus to the old limitations, and the words quoted from the Act of Parliament cannot be held to determine a matter not then inquired into, when the person obtaining the earldom was heir-male as well as grandson through an heir-female. There cannot be any doubt of the barony of Erskine going to heirs-male under the presumption before mentioned, and the same presumption leads me to consider that when John Lord Erskine was created Earl of Mar, that earldom must be held to go with the barony to heirs-male.

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

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

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

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

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

Beginning with the two charters of 12th August and 9th December 1404, the speeches of Lord Chelmsford and Lord Redesdale exhibit, it will be allowed, an extraordinary contrast, and indeed opposition, of opinion. Lord Chelmsford pins his faith upon the charter of the 12th August; while Lord Redesdale repudiates it, and recognises the legal validity of that of the 9th December, but on the other hand escapes from the legitimate consequence of that acknowledgment by a swish of the tail worthy of Hobbes's Leviathan.

Lord Chelmsford gives his full adhesion to the charter of 12th August 1404 as valid, overlooking the injustice worked by it to the right and left in every direction, and unaware that the gift had been renounced by the grantee less than a month after it had been made. He represents the charter of the 9th December as proceeding from one who had already denuded herself of the fief, and was impotent to deal with it subsequent to that denudation, “without a regrant to her,”—and he considers that the ceremonies which took place on the green in front of Kildrummie Castle could not amount to such a regrant. But Lord Chelmsford takes no account, and was evidently unaware, of the fact that a vassal has no power to denude himself of his fief, that is, of the chief messuage or *caput baroniæ*, without the consent of his

superior, and of the distinction thence arising between a charter thus executed without authority and not subsequently validated by confirmation, or in other words disowned by the overlord, and a charter of the same fief by the vassal, granted without the prevenient sanction of the overlord, and thus invalid in itself and rendering the granter liable to escheat, but validated through confirmation by the overlord, the feudal dereliction being thus condoned, or, in Scottish phrase, homologated. The damning fact that the charter 12th August 1404 neither proceeded on Isabella's resignation to the Sovereign, the overlord, nor received confirmation from the Sovereign by a subsequent charter, and was thus null and void *ab initio*, is completely excluded from Lord Chelmsford's view of the question.

From this standpoint Lord Chelmsford has no difficulty in recognising the right of Alexander Stewart, Earl of Mar, holding, as he supposes, under the charter 12th August, to resign the Earldom to James I. in 1426 for a new investiture, establishing the order of succession in practically the same line as that of the charter of the 12th August, and which stood till Earl Alexander's death in 1435, "up to which time," he adds, "it may fairly be assumed that the dignity of the fief and title in conjunction continued to be territorial"—a concession to the territorial principle in which he is at variance with Lord Redesdale. He recognised, in fact, the continuous succession of the Earldom—the feudal Earldom, fief, and title—from the Countesses Margaret and Isabel down to 1435, and consequently the validity of a charter of "comitatus," such as that of the 12th August 1404, to carry the dignity of Earl, even although not specified in the charter—thus not only in opposition to Lord Redesdale's view that the territorial Earldom ceased in 1377, but in contradiction of the rule established by Lord Camden in 1771. Once assuming that the charter 12th August 1404 was the only valid one, Lord Chelmsford's course was clear and without a single impediment in his way to the affirmation of a new creation in 1565—although he ought in consistency to have construed Queen Mary's charter of the comitatus of Mar, 23d June 1565, as carrying the dignity along with the fief, although not specified, as, according to his assumption, the charter of 1404 did.

Lord Redesdale, on the other hand, knew too much of the ancient law of charters to be so easily satisfied. He clearly, if I mistake not, appreciated the defects attaching to the charter 12th August 1404, and, passing it over *sub silentio*, recognises the charter of the 9th December, the instrument of seisin, and the charter of confirmation 21st January 1404-5, which validated the charter and seisin as legally effective, and by which the descent of the "comitatus" was to be determined. On the other hand, he observes that "these charters related to the territorial comitatus" only—those founding on Lord Camden's rule, which Lord Chelmsford repudiates so far as the succession of the Countesses Margaret and Isabel is concerned. Lord Redesdale, I need scarcely say, distinguishes throughout between a comitatus or territorial earldom, a mere fief, and what he calls a "peerage earldom," or single title of honour, which he believes to have been conferred exclusively by special words either in the charter of the comitatus or in an independent document, like the patent of a modern peerage. Lord Redesdale thus, with perfect consistency, having already disallowed the status of Margaret and Isabel as Countesses in their own hereditary right, proceeds to deny that Alexander Stewart became Earl of Mar in virtue of the charter of 9th December 1404, and its confirmation, although these documents invested him legally in the fief. He holds that Alexander had no right whatever to the dignity, the title of Earl of Mar, even by the courtesy, till long after his wife's death, and that his bearing it was by usurpation on his own part and acquiescence on the part of those in authority. He suggests that his playing into the hands of the Crown in the matter of the charter of 1426 may have been rewarded by the grant of a "peerage earldom," conferred of course by a document distinct from this charter, such as Lord Redesdale and the House have held was conferred subsequently to the lapse of the charter of the Mar comitatus in 1565.

The second point of discrepancy here under notice between Lord Chelmsford and Lord Redesdale is on the subject of the charter of 28th May 1426, and whatever had passed previously between Earl Alexander and the Duke of Albany.

Lord Chelmsford not only represents the charter of 1426

as "a most important dealing with the earldom," which was undoubtedly the fact, but cites it as the pivot of subsequent dealings with the earldom or comitatus, which "may render the question which arises upon the charter of December 1404 wholly irrelevant." He concludes, "Thomas Stewart died without heirs in the lifetime of his father. On the death of Alexander Stewart, Earl of Mar, the earldom or comitatus was considered to have reverted to the Crown under the charter of 1426, and thereby the territorial dignity ceased to exist. At all events there was no Earl of Mar with an acknowledged title" (*i.e.* intitulation as Earl of Mar) "between the time of the death of Alexander and the charter of Queen Mary in 1565 a period of nearly 140 years, except some occasional grants of the dignity in the interval." All this, as previously observed, follows naturally from the position assumed by Lord Chelmsford, that the charter 12th August 1404 was the dominant instrument. He overlooks the fact, in proof before the Committee, that by the decision of the Court of Session in 1626, as well as by Act of Parliament in 1587, the charter of 9th December 1404, and not that of the 12th August, was the dominant instrument; and that on the death of Earl Alexander in 1435, Sir Robert Erskine succeeded *de jure* under that charter, was served Isabel's heir under it, and was invested in the fief *de facto* by infeftment, and bore the title of Earl of Mar by right, although his possession in every particular was disallowed and crushed down by the arbitrary power of the Crown.

According to Lord Redesdale, however, James I., possessing no right to receive a resignation of the Earldom from Alexander Earl of Mar, did, nevertheless, by granting the charter of 1426, acknowledge the validity of what had been done under the Regent, while he adds, with reference to the final reminder to the Crown, "that this latter condition was probably rewarded by a grant of a peerage earldom with remainder to Thomas," his bastard son, as above commented upon. "The policy," to repeat his words, for they are very important, "pursued by the King after his return from England, and which ultimately cost him his life, was to increase the territorial influence of the Crown, and to reduce that of the nobles; and the reversion of the lands of Mar on the death of a youth of perhaps a weak

constitution, for he died before his father, was well worth a peerage concession." "Thomas," adds Lord Redesdale, "having died before his father, and Earl Alexander dying in 1435, the comitatus under the settlement of 1426 lapsed to the Crown." In less conventional language, James seized the Earldom, whether on the ground of bastardy, as *ultimus hæres*, in virtue of the charter 12th of August 1406, or under the final limitation in that of 1426 may be uncertain, but either way without warrant and against law and justice. Lord Redesdale, as I infer, is fully conscious of this defect in the title of the Crown; and had he not been under the influence of Lord Camden's law, and prepared to overrule the decret of 1626, as the House of Lords did that of 1633 in 1762 and subsequently, he would have accepted the interpretations put upon the charter of 1426 by the decret of 1626, recognising both fief and dignity as in the heirs of Isabella, and would further have recognised the descendibility of the dignity to heirs-general under that of 1633. But as it is, he advises the Committee that the single fact of the Crown having taken possession of the Earldom, justly or unjustly, under the charter of 1426, and the exclusion of the Erskines from the fief and dignity between 1435 and 1565, during which the Crown dealt with both at its pleasure, "must be looked upon as a settlement of the question which it would be very dangerous to disturb"—the fact really being that the disturbance has already taken place, to the sweeping away of all this injustice, all this sophistry, by the judgment of 1626. I do not see how Lord Redesdale's conclusion can be arrived at without conceding the principle that rights to dignities are liable to prescription, and that might makes right, or the principle of determining claims to dignities on ground of expediency as well as law, as laid down by Lord Mansfield—his mere opinion, be it remembered, not judicially pronounced—in 1771.

The result is, that Lord Chelmsford and Lord Redesdale are at variance upon every question affecting the succession to the Earldom of Mar, down to the usurpation by the Crown, initiated in 1435, and completed, as we shall see, in 1457; which usurpation the former assumes to have been matter of ordinary right, and the other of injustice sanctified by power and time.

In closing this letter I may recapitulate what has been stated in the short and simple words by which Lord Hailes summarised these events,¹ and upon which, supported by their proof, Lord Mansfield and Lord Camden were governed in an appreciable degree in their advice to the Committee of Privileges on the Sutherland claim in 1771 :—

“The Countess of Mar died before her husband without issue. Had the obligations by Robert III. to Lord Erskine been remembered, or had the limitations in the charters 9th December 1404 and 26th January 1404-5 been regarded, nothing would have remained in Alexander Stewart but a liferent-right of courtesy to the earldom of Mar. But all this was disregarded.

“It was the aim of the sagacious but too precipitate policy of James I. to unite the ancient earldoms to the Crown, and thus to sap the foundations of a formidable and hated aristocracy. What progress he made, and how he perished in the attempt, is known from history.

“Alexander Stewart, conscious that he had nothing in him but a liferent-right, used the device of resigning the earldom in the hands of James I. Immediately upon this, a charter of the earldom was granted by the King, ‘to his dearly beloved cousins, Sir Alexander Stewart, and Sir Thomas Stewart, his natural son; to Sir Alexander for his life, and after his death to Sir Thomas and the lawful heirs-male of his body; whom failing, to return to the Crown.’

“Thus the earldom, instead of descending to the heirs-general of the ancient Earls, was limited to the heirs-male of the body of Sir Thomas Stewart.

“That event which the sagacity of James I. foresaw, took place in the course of a few years. Sir Thomas Stewart died without issue. Sir Alexander did not survive him long. He died in 1435.”

¹ Additional Sutherland Case, ch. v. p. 47.

LETTER IV.

ROBERT EARL OF MAR AND THE INTERREGNUM,
1435—1565.

WE now enter upon what I call the Interregnum, a period of depression and exclusion lasting from 1435 to 1563, during which, although Robert Lord Erskine established (as we shall find) his right alike to the fief and dignity of Mar by a process which Parliament and the Supreme Civil Court subsequently determined to have been legitimate, that right was disallowed in his person by the existing government, his successors were absolutely denuded of their inheritance, and the Earldom was dealt with according to their pleasure by all the kings of Scotland down to the reign of Queen Mary.

SECTION I.

Policy of James I. and his successors.

I pause at the entrance of this new epoch for the purpose of developing somewhat more fully Lord Hailes's observations quoted at the close of the preceding letter, on the policy of James I., which dictated the part he took in complicity with Alexander Earl of Mar against the heirs-general to that Earldom. The expediency of this survey is justified by Lord Redesdale's remark that in order properly to understand the series of events which terminated in 1565, "it becomes necessary to enter into the history of Scotland at the time, which I am surprised," he added, "was not more referred to than it was by the counsel on either side." After noticing the weakness of Robert III., the capture and long imprisonment of James I., the regency of Albany, his unscrupulous character, the return of

James, the offence and alarm occasioned to the nobles by his acts, and his murder in 1437, the minority of his son James II., and what he describes as "a regency the result of a rising against the late King," Lord Redesdale proceeds to deal with the action of that regency towards Sir Robert Erskine in an argument to which I will call attention in due time. In the meanwhile I propose to exhibit James's policy, and that of his successors, in somewhat broader proportions, in order to enable the reader to appreciate what would otherwise appear to be an unprecedented sequence of injustice and oppression perpetuated for a hundred and thirty years against a single family, the Erskines. It is impossible at any time to understand the events and vicissitudes of family history in the times we are dealing with, apart from an appreciation of the historical background, in front of which they stand out in prominent relief. Such historical retrospect is sanctioned by Scottish legal practice, and is imperative under the conditions of my present remonstrance. My object in the following statement will be to anticipate and obviate the scepticism which may naturally be entertained by men living in the nineteenth century as to the possibility of such cruel and persistent oppression as that of which the heirs-general of Mar, under the dominant charter 9th December 1404, and the royal confirmation 21st January 1404-5—the "veri hæredes" as by Robert III.'s acknowledgment in 1390-1—were the victims from 1435 to 1565. Their case was,—or rather is,—by no means an isolated one in the history of Scotland.

The policy adopted, methodised, and put in practice by James I., and relentlessly followed up *per fas et nefas* by his successors—with the bright exception of James IV.—till the reign of Queen Mary of Scots, was to break up, destroy, or annex to the Crown, the great feudal or feudalised earldoms of Scotland, especially those that were held in association with sovereign authority, or rights of regality, of the nature of palatinates, by devolution from the Crown. It cannot be denied that the power of these earls—and many barons ranked under the same category—was excessive; that they were petty princes rather than vassals of the Crown; that they made war upon each other by almost independent right; that they leagued with each other for common purposes of defence, and even of offence,

against all the world, not always excepting the King himself, while each great chief entered into bonds of manrent (as they were called) with the lower noblesse on terms of mutual assistance and protection in case of need; that when any one of them rose to pre-eminence, he too frequently abused his power, although a counteracting check existed in such cases in the disposition of his brother nobles to reduce such excess once more to the common level; and that in consequence the kingdom, except at rare intervals, was more like the seething "Campi Phlegraei" of Naples than the peaceful champaign of Capua. Terrible prominence was given to these evils and to injustice by the weakness of Robert III.; and although weakness was not the characteristic of his successor, the long minorities which were almost the rule in Scotland furnished too just a ground for Sir David Lindsay's line—

"Woe to the realm that has too young a king!"

And yet it may be said with truth that the scene presented a favourable contrast with that exhibited in the sister country during the corresponding period, when, under the alternate ascendancies of rival dynasties, every weapon of war and every engine of the law was remorselessly put in force against the adherents of opponent factions, it may be said, throughout the fifteenth century; while princely and noble blood flowed like water, not so much in the field as on the scaffold, and proscription followed upon proscription, till by the close of that century the house of Plantagenet was absolutely extirpated in the male line, and the great historical houses of England, wealthier, but less powerful, with rare exception, than those of Scotland, and unsupported by that alliance of the feudal with the clannish system which tempered the rigidity of feudalism, and connected the Scottish nobles with the mass of the people, had almost disappeared from view. Nor can it be affirmed in the interest of impartiality that the great nobles of Scotland, as a rule, abused their power to the oppression of their vassals or sub-vassals, or that justice was banished from the courts where they sat in judgment personally or by their justiciaries. We have no records in Scottish history of those *jacqueries* or popular risings, the result of cruel tyranny, which were so frequent in France.

There were many checks on a power which to modern apprehension appears extravagant. The great nobles governed their fiefs with the aid of councils, or petty parliaments, consisting of the barons holding of their fiefs, with whom potent nobles, their kinsmen or allies, were frequently associated, and their power was tempered and preserved from becoming autocratic by the very machinery of reciprocal obligation and mutual dependence through which that power was exercised. Moreover, the junior branches of every house, which had an expectant interest in succession, had a voice through their representatives in what may be called family councils, which not unfrequently interfered to restrain the chief, if inclined to injustice or impudence. The system, in short, had its lights as well as its shadows, and many constitutional sanctions which imposed salutary restriction upon what on the surface appears to have been lawless independence. On the other hand, that system and monarchy—in the sense of the monarchical system gradually developed during the sixteenth and seventeenth centuries throughout Europe—were hardly compatible; the King was still, practically, but “*primus inter pares* ;” the royal revenues were crippled, the royal prerogatives abridged, by the grants successive Kings found it expedient to make to their powerful vassals; and it was natural that the successive Sovereigns of Scotland should seek to vindicate an independence—I will not say a tyranny, for they could never have aspired to such in Scotland—similar to that enjoyed by kings, their contemporaries, in other countries of Europe, and especially in France, a country always closely associated with Scotland. That they did so with energy and, there is no disguising it, with cruelty and disregard of justice in many instances, cannot be denied; but I have no doubt they believed that they were acting at once under the necessity of self-preservation and in the interest of their country. Upon the whole, in surveying the prolonged struggle between the nobles and the King, it appears to have been viewed by both parties as an inevitable contest for supremacy; and it engendered less bitter feelings than can well be imagined now-a-days—much less bitter, I think, in Scotland than in England. The love and respect of the nobles for their native sovereigns were never extinguished; and when, for example, a monarch like James IV., wiser than his predecessors,

laid himself out to attach his nobles by love as well as rule by power, his efforts were responded to by them with generous readiness; and none among all those nobles were more ready at all times with their blood and treasure—none more consistently loyal through trial and suffering—than the Erskines, to the descendants of their original oppressor, James I.; and none, let me add, more implicitly trusted by them in return.

Of the great earls of regality, as they may be styled, above spoken of, Strathearn, March, Lennox, and Mar were crushed down or absorbed early in the prolonged contest, and all of them by James I. It would be out of place here to enter into details. Suffice it that while the case of March was harsh, that of Strathearn was iniquitous, insomuch so that the Earldom was restored to the Earl's representative in the reign of Charles I., and would have remained in himself and his descendants, had not an imprudent boast, awakening an ancient dread of the superior claim to legitimacy on the part of the descendants of the second marriage of Robert II. over those sprung from the first, intervened to cancel the act of justice just accomplished. Lennox fell, involved in the proscription of the royal house of Albany; and I have little doubt that the severity shown by James towards his kindred of that house was intensified by dread of the continuance of their power. James's dealings with Alexander Earl of Mar were of a piece with the cases just mentioned. Resentment at the injustice perpetrated on the youthful heir of Strathearn occasioned James's murder in 1437, when, remarkably enough, the brother of the injured Earl of March was one of those who defended the unhappy King in that terrible hour of retribution. The sense of common danger and of the necessity of common defence originated the formidable confederacy between three nobles, whose power respectively in the south, in the north, and in the north-east of Scotland was predominant, Douglas, Ross (the Lord of the Isles), and two successive Earls of Crawford, David, the second of that Christian name, and Alexander, nicknamed "Earl Beardie"—a league of mutual defence, from which the King was not excepted, and which was broken up, after several years' duration, by the murder of William Earl of Douglas by the hand of James II. at Stirling, by the defeat of his successor, Earl James, in the south, and by that of Crawford in the north, six

months afterwards, at the battle of Brechin in 1453, followed, however, by the submission and restoration of the latter against an intervening attainder through the intervention of the wise and virtuous Chancellor, Bishop Kennedy, whose influence, while it lasted, restrained both kings and nobles from excess. This league is constantly represented as having originated in the lawless ambition of these families; but it was the direct outcome and consequence of the wholesale proscriptions and forfeitures which Douglas, Ross, and Crawford had witnessed in the instances of Strathearn, March, and Mar. No similar confederacy for defence, at least on so large a scale, took place subsequently among the Earls; and those who survived the days of the two first Jameses were subjugated in detail. Douglas perished towards the end of the fifteenth century, Ross at the beginning of the sixteenth. After the reign of James IV., when King and nobles loved each other like brethren, and almost the whole chivalry of Scotland died with their King at Flodden, the old process was resumed by James V.: Angus and the Red Douglases (the descendants of George Earl of Angus, the son of the Countess Margaret of 1390) were put down by James, who had indeed deep cause of resentment against them, after attaining his majority; Crawford's outlying possessions in the Hebrides were "plucked" from him, as it was reported to Henry VIII., unjustly; and even Argyle's predominance in the west was struck at, and for a time transferred to MacIan, the Highland chief who figures with Crawford and others in Ariosto under the name of Alcabrun:—

"Colori e di più augei bizzarra
Mira l'insegna d'Alcabrun gagliardo
Che non è duca, conte, ne Marchese,
Ma primo del selvatico paese."¹

While almost the latest acts of James's reign were to extort a bond from a later Earl of Crawford to resign the Earldom *ad perpetuam remanentiam* to the Crown, if called upon to do so, under the penalty of one hundred thousand marks, or "tinsal" (loss) of life and heritage, and to compel the aged Earl of Morton actually to resign his earldom to the Crown—a resignation, however, which was annulled by the Court of Session, with marked reprobation of the injustice

¹ Orlando Furioso, Canto viii. 85.

and personal cruelty of the proceedings, after the King's death. On that event Crawford recalled the bond by a formal protest at the altar of St. Francis in the church of St. Giles in Edinburgh, as having been extorted from him unjustly and under peril of his life; and, although he obtained a discharge of acquittance of the obligation from the grasping Regent Arran in the following year on payment of seven thousand marks, the responsibility hung over the family till the year 1564-5, when Queen Mary, ever just and generous, cancelled it by charter within the same twelvemonth during which she intervened in a similar spirit to repair the injustice done, as will be shown, not by one but many generations of her ancestors to the house of Mar during the interval which had elapsed since the death of Alexander Stewart, Earl of Mar, in 1435. It will appear, I think, before this letter is concluded, that the general policy of the Scottish kings in regard to the great feudal aristocracy, as thus illustrated, accounts naturally for the intervention which, commencing in 1435, and elaborately clothed with statutory and diplomatic authority, originated nevertheless in violence and fraud, and was consummated in the grossest injustice—to be disavowed and atoned for, with the concurrence and applause (as will be shown) of all Scotland, by the process of reparation and restitution begun by Queen Mary in 1565 and completed in 1626; which restitution we have been recently called upon by the advisers of the House of Lords to consider as proceeding upon a total misapprehension of the facts by Queen Mary and her advisers, and all that had passed during the *interregnum* as, if not valid in every particular, sanctioned by acquiescence and prescription.

It is beyond my purpose to account for the influences which lent strength to the Scottish kings in effecting this series of revolutions in Scottish feudalism. The personal energy of such men as James I., James II., and James V., and their acknowledged merits in promoting wholesome legislation and repressing violence, was one powerful ingredient. Another more occult influence, though familiar to those versed in Scottish history below the surface, was the personal interest which the barons holding under the great feudatories had in the transfer of their feudal dependence to the Crown, as holding immediately of the Sovereign, a status which became theirs from the moment

when the great earldoms became Crown property. They were thus at once raised from sub-vassals to tenants *in capite* and in permanency, so long as the King retained the earldom in his own hands, or when it was annexed to the Crown by statute. This private interest tended to the support of the kings in their acts of confiscation; and we shall find that the instinct was in full vigour as late as the reigns of James VI. and Charles I., in 1593, 1626, and 1635, when the reintegration of the Earldom of Mar under the Erskines *per modum justitiæ* was in progress. It by no means follows that this interest invariably superseded a generous revolt against injustice; and the Scottish population at large always retained a sentiment of pity for the great houses that successively fell under the whirlwind of ruin, and of indignation against those who brought it about. It is never to be forgotten that the strength of these great Scottish families rested upon the deep foundations of a consanguinity of blood descending through successive grades of descent and subinfeudation to the humblest peasantry, every man of whom considered himself akin to the chief of his name, on a principle of clanship akin to that of the Highlands, and was slow to forget the wrongs of the house from which he claimed his origin. Nor were the descendants of the feudal vassals and followers of the various houses less tenacious of reminiscences which linked them with their glory through the bond of material benefits, though not of blood.

SECTION II.

Sir Robert Erskine's Retours to Countess Isabel.

With the exit of Alexander Stewart Earl of Mar, a new actor comes forward on the stage, in the person of Sir Robert Erskine, otherwise styled Robert Lord Erskine, the son of Janet Keith, the eldest Mar coheir, and Sir Thomas Erskine—the heir of the Countess Isabel under the charter 9th December 1404, as confirmed by the royal charter 21st January 1404-5—and against whom, as father of the youthful Janet Erskine, the affianced bride of Walter, the heir of Albany, the bond or indenture between Earl Alexander and Duke Murdoch, Walter's father, was directed, as shown in the preceding letter. A bold and determined, but at the same time a prudent man,

Sir Robert never dreamed for a moment of submitting tamely to the royal usurpation. During the life of James I. it would have been useless to remonstrate, and impolitic to take action; but after James's assassination in 1437, and the succession of his son as James II., a minor and under tutelage, Sir Robert took the necessary legal steps in the ordinary manner to vindicate his heritage.

Before proceeding with the detailed narrative, I must halt for a moment on the threshold to notice a transaction to which I think that undue importance has been given by Lord Chelmsford, although, not unnaturally, viewing it as from the basis of the nineteenth century. He represents it as an attempt, and a successful attempt, by Sir Robert Erskine to corrupt the fountain of justice. Lord Chelmsford's charge, which I shall deal with more particularly in its proper place, is based upon an indenture which was entered into on the 17th November 1435, three months after the death of Alexander Stewart Earl of Mar, and still during the reign of James I., between Sir Robert Erskine and Sir Alexander Forbes of that ilk, afterwards the first Lord Forbes, by which it is covenanted "that Schir Alexander of Forbes sal do al his bisines and diligent cure to help and to furthir bath with his avis (advice) and consale the forsad Lord, Schir Robert of Erskin, and his sun and ayr forsad" (Sir Thomas Erskine) "til al thar rychtis of the Erldomis of Marr and of Garvioch"—no specification of half only of the Earldom here occurring—"with the pertenance, and bring tham tharto in als fer as his gudli power may streke (stretch), and nothir (neither) spar for cost na (nor) travale: and for his helpe, his consale, his bisines, and his diligent cure don tharto, the forsad Schir Robert and Schir Thomas obლის (obliges) thaim and their ayris to gif to the sad Alexander and his ayris heritably the lordschep of Achindor with the pertinence, the donacioun of the kyrk, the Buk, and the Cabrach, with the half-davach in fre forest annexit to the sad lordschip of Auchindor, lyand within the Erl dome of Mar in the schirradome of Abirden, and charter the forsad Schir Alexander in fee and in heritage tharof, and possess hym in the sad landis within fourty dais nest eftir that the said Schir Robert or Schir Thomas, an or bath sal recovir and gett the sad Erl dom of Marr"—Sir Alexander and his heirs to hold the said lands of the foresaid Sir Robert and his

heirs in free blench ferme,—with further stipulation, that Sir Robert, if unwilling to grant Auchindoir, shall make equivalent provision to the yearly value of a hundred marks in the Earldom of Mar, or of Garioch, or in Buchan. “And gif it happenis our Lord the King to content the foresaid Schir Robert, Schir Thomas, or their airis, with other lands, rents, or possessions than the said Erledom of Mar and Garvioch, the said Robert and Schir Thomas shall give Schir Alexander and his heirs heritably fourtie merkis worth of land liand togidder within the shirradome of Abirdein for his counsall, helpe, and supplie as is forspoken.”¹ There are further subsidiary stipulations unnecessary to particularise. The sting of Lord Chelmsford’s imputation above noticed consists in the fact that Sir Alexander was Sheriff-depute of Aberdeen in 1438, three years after the date of this indenture, and that he presided in that capacity over an inquest of the leading gentlemen of the county, who retoured Sir Robert as lawful heir to the Earldom of Mar. I do not know whether Sir Alexander was Sheriff-depute in 1435; but any one familiar with the history of Scotland, to say nothing of other countries, in the middle of the fifteenth century, is aware that it was usual for men situated as Sir Robert was, with vastly disproportioned forces arrayed against their just rights, to make friends to the right and left by personal sacrifice for the purpose of securing efficient support—by no means necessarily for a bad cause. In Sir Robert’s case, as we know now from the highest authority, namely, that of the Court of Session in 1626, the cause was absolutely righteous and good. Lord Chelmsford was probably unaware that Sir Alexander was a great feudal baron, Sir Robert’s equal in every respect; while he overlooked the fact which transpires from the final clause, as above quoted, that the compensation was to hold equally good whether the Erskines recovered the Earldom, which lay within his jurisdiction as Sheriff-depute, or only an equivalent by way of compensation, which might be in any other part of Scotland, and thus out of his sphere of jurisdiction and influence. This *per se* excludes all idea of corruption. I defer further observation on this very grave charge.

King James I. having been assassinated, as aforesaid, on the 20th February 1437, Sir Robert Erskine took action the

¹ Minutes of Evidence, p. 339.

following year. The legal procedure for establishing a right to succession in heritage was for the heir to take out a brieve from the Royal Chapel or Chancery, styled there "de morte antecessoris," or "of mortancestry," and obtain the verdict of an inquest thereupon, which being duly retoured or returned to Chancery, the Chancellor issued a precept or warrant for infestment in the property claimed, upon execution of which the right of possession was completed. So many questions have been raised respecting the validity of what took place in 1438 and subsequently, that it will be well to place the procedure and the laws affecting it clearly before the reader, as existing in 1438-1457.

The brieve was addressed in early times to the High Justiciary, who alone had cognisance in it, but subsequently to 1400 to the judge ordinary of the district where the fief to which claim was made was situated, that is, to the Sheriff of a Sherifffdom, the Seneschal of a Stewardry, or the Bailie of a Regality. The brieve enjoined the officer it was addressed to, in the King's name, to summon and impanel an inquest or jury, usually of fifteen men—"probos et fideles"—"antiquiores"—"homines patriæ"—men of unspotted fame, of mature age, and vassals of the fief, or tenants *in capite* or otherwise within the Sheriff's jurisdiction—"magis ydoneos et digniores balliæ suæ," as they are qualified in the statute of 1400. To these jurors the brieve orders the following questions to be submitted:—

1. Whether the defunct died last duly vested and seised in the fief, as of fee ("ut de feodo") at the faith and peace of the Sovereign, *i.e.* as the superior or overlord?
2. Who is his lawful and nearest heir? Upon which head Lord Stair observes incidentally that "*in dubio* the presumption is always for the heir of line, so that if it be not sufficiently instructed that the fee was provided to special heirs" (*i.e.* heirs-male), "it will belong to the heirs-general of line or conquest, according to law"—words which I might have added to the series of proofs in my second Letter, were it not that such are like the stars of heaven for multitude.
3. Of whom is the fief held *in capite*?—*i.e.* who is the immediate lawful superior?
4. By what tenure?—that is, by ward, blench, feu, or burgage?
5. What is the fief worth *per annum*, and what was its value in time of peace?—the object of this

query being to ascertain what was the "relief" due to the superior for the entry of the heir, the relief being a year's rent of the fief. 6. Is the claimant heir of lawful age?—this having regard to the right of the Crown to the wardship and marriage of an heir, and the profits of the fief during the minority of the heir. And lastly—7. In whose hands is the fief at present?—including the subsidiary questions, How long has it been so? How came it to be in such condition? By what service? And through whose act? And through what cause?¹

The brieve was published at the market-cross of the chief burgh of the fief fifteen full days before the execution, and before witnesses, that all persons interested might have due premonition or notice. The inquest was held by the Sheriff "in sua plena curia;" the fifteen jurors were sworn upon the Gospels to render honest answers, and severe penalties were enacted against those who should forswear themselves—"temere jurantes in assisa." They proceeded upon evidence—oral as regards matters within their formal knowledge, documentary as regards matters beyond that knowledge. The brief itself, the jurors personally, and the evidence, were all challengeable by those who could show an interest in opposition. The judgment lay with these jurors—not invariably fifteen, but always of an unequal number—each of whom, as Craig expresses it, "*medius inter judicem est et testem et quasi neuter, utriusque tamen plerumque vice fungitur,*" or, in the words of Lord Stair: "Inquests," *i.e.* inquisitors, "are in the middle betwixt judge and witnesses, partaking part of both, . . . and it is like they have been of old sole judges in brieves, the judge ordinary" (represented by Sir Alexander Forbes in 1428) "having no more power but to call and order them. And they are yet with the judge ordinary or delegate as judges, for they must serve, and do sometimes seal the service with him."² The importance of all this with reference to the serious matter

¹ The service here described was called a special service, in contradistinction from a general service, to which I shall afterwards have occasion to advert. The retour of a general service only established propinquity without giving right to a special subject: but it was necessary to confer a title to uncompleted rights like unexecuted precepts of seisin held by the ancestor. A general service also proceeded on a brieve from Chancery, the retour only answering the two questions, Did the ancestor die at the faith and peace of the sovereign? and, Is the claimant his nearest and lawful heir?

² Stair's Institutions, iii. 5, § 30.



of the imputations against Sir Alexander Forbes will appear in due time. If the verdict of the jurors was favourable to the claimant heir, the instrument, duly sealed by the Sheriff and all or the greater number of the jurors, and styled a service affirmative, was retoured, returned, or transmitted to the Royal Chancery, from whence a precept or mandate was issued to the Sheriff to infest the heir in the fief, by which infestment, certified by a notary-public, the possession was completed. If the verdict was against the claimant, the service was styled negative, and no investment followed thereupon.

Retours of service proceeding on erroneous grounds were ordinarily reduced by a "great inquest" of forty-five members, who inquired not only regarding the accuracy of the report, but the ignorance or bad faith of the jurors, with the view of punishment if convicted of wilful perjury. But it was enacted, 6th May 1471, that reduction might be by summons of error before the King's Council, the powers of which were subsequently transferred to the Court of Session. By an Act, 19th June 1496, it was provided that retours of service shall not be reducible except within three years after their date, so as to infer error against the inquest, *i.e.* the inquisitors, this being in order to protect jurors; but subsequently it was provided, in 1617, that the retours themselves might be reduced at any time within twenty years. Assizes of error were declared to be "a grievance" by the Claim of Right in 1689, and have not been prosecuted since the Revolution. All this, however, is posterior to the date at which we have to consider the retour of Sir Robert Erskine in 1438, and the reduction of it accompanied by a service negative in 1457, which must now engage our attention.

Two special retours of service were obtained by Sir Robert Erskine in 1438, and were adduced before the Committee for Privileges in 1875 by the "opposing petitioner," Lord Mar, in opposition to Lord Kellie's claim.

The first of these retours bears date the 22d April 1438. The inquest was summoned and presided over by Sir Alexander Forbes of that ilk, Sheriff-depute (not Sheriff, be it remarked, but acting for the Sheriff) of Aberdeen: and the members of the inquest, or jurors, were as follows:—Sir Alexander Irvine of Drum; Sir John and Sir William Forbes—identical, I presume,

with the contemporary knights of that name, brothers of Sir Alexander, and ancestors respectively of the Lords Pitsligo and the Forbeses of Tulquhon and their cadets; and Sir Gilbert Hay, brother of the Lord High Constable of Scotland—these four being knights; together with Andrew Keith of Inverugie, John de Ogstane, John Cheyne, Alexander Meldrum of Fyvie, Walter Barclay, Gilbert Menzies, John Vaus, William de Cadyow, Andrew de Buchan, Thomas de Allardyce, Thomas de Turyn, William Reid, James de Skene, James Comyn, Gilbert de Sanquhar, and John Mowat. These knights, landed proprietors and other “probi homines,” testify to Chancery, in reply to the usual questions, that Isabel Countess of Mar and Garioch, cousin of Sir Robert Erskine of that ilk, had died in the peace and faith of the King, vested and seised in the lands of the Earldom of Mar and the Lordship of the Regality of Garioch; that Robert was her nearest legitimate heir in half of the said lands and lordship; that he is of lawful age; and that the half of the said Earldom and Lordship is of the value of one thousand marks annually in time of peace; that the lands of the Earldom of Mar are held *in capite* of the Crown, by ward and relief, etc., and the lands of Garioch in free regality; and that the half-lands of Mar are now in the hands of the King through the death of the late Alexander Stewart, Earl of Mar, “qui habuit dictas terras per donacionem dicte Isabelle pro toto tempore vite sue,” which Alexander died on the festival of St. James the Apostle two years previously, *i.e.* on the 25th July 1435; and further, that the regality of Garioch is in the hands of Lady Elizabeth, Countess of Buchan, spouse of the late Sir Thomas Stewart, knight, “causa conjunctæ infeodationis factæ per regem ultimo defunctum,” *i.e.* James I., “dictis domino Thome et Elizabethæ de dicta regalitate, et a tempore obitus dicti domini Alexandri comitis de Mar predicti, habentis liberum tenementum dictæ regalitatæ pro tempore vitæ suæ, qui obiit ut supra.”

On the second retour, dated the 16th October 1438, presided over by Sir Alexander Forbes, Sheriff-depute, the jurors,—headed by the same four noble knights as in the first inquest, but with the names of Keith of Inverugie, John de Ogstane, John Cheyne, Thomas Turyn, and William Reid, replaced by those of Thomas Comyn, John de Scroges, Andrew Broun, Ranald

Cheyne, and William Northbet,—report that the Countess Isabel, Sir Robert's cousin, had died, etc., vested and seised in the lands of the Earldom of Mar, and the said Sir Robert is her lawful and nearest heir in half the said lands, that he is of lawful age, that the said half "*dicti vicecomitatus*" (*sic*) is worth five hundred marks annually now, and was worth as much "*tempore pacis*," that the said half is held of the King by service of ward and relief, etc., and that it is now in the hands of the King "*in warda per mortem quondam domini Alexandri Stewart comitis de Mar, qui totum dictum comitatum habuit per tempus vite sue per donationem dictæ dominæ Isabelle. Qui dominus Alexander obiit duobus annis elapsis et ultra per medietatem anni*," two years and a half previously,—"*et hoc in defectu veri hæredis dictæ dominæ Isabellæ medio tempore non prosequentis jus suum*"—through the true heir, Sir Robert, not having prosecuted his right during the interval.

The originals of these two retours are no longer in the Mar charter-chest,—only copies, which were produced in 1875 by Lord Kellie's able agent, Mr. William Fraser, who stated to the Committee, in reply to the question, "Have you found the originals of these retours?" "No. I have searched the Mar charter-chest, and every other place where I thought they might be found, and I have not found the slightest trace of either of them except these old copies. They are certified in 1624 as if they had been produced in the contest between Lord Mar and Lord Elphinstone."¹ Those copies were received and are printed in the Minutes of Evidence, from which it appears that they are indorsed thus, "*Ultimo Junii 1624. Thir twa extractis*" (*i.e.* certified copies) "*of the twa servicis within writtin being at lenth red and collationit togider in presens of the hail Lordis*" (*i.e.* Lords of Session) "*findis the principalis and copeis agreis togider.*" It is thus clear that the originals were produced in 1626. They are described in the schedule of evidence produced by Lord Mar, as given in the decret in the process *Mar v. Elphinstone*, 1st July 1626, as follows:—

"Ane retour of Robert Lord Erskene as air to Dame Issobell Dowglas of the half of the Erldome of Mar, daitit the twentie day of Apryll 1438 yeiris, with the instrument of seising following thair-upoun, daitit the twentyane day of November 1438 years; ane uther

¹ Minutes of Evidence in *Mar Claim*, p. 336.

retour of the said Robert Lord Erskine to the uther half of the said Erldome of Mar and Lordschipe of Garrioche, daitit in October 1438 yeiris."

It thus appears that the original of the instrument of seisin was also in existence and produced in 1626; but this has also been lost, nor has any copy of it been preserved apparently—which is greatly to be regretted, for a reason that will appear hereafter.

Sir Robert Erskine always took the style of Earl of Mar subsequently to the seisin following upon the preceding retours.

It will be observed that the jurors in these two retours distinctly affirm that Alexander Stewart Earl of Mar's tenure of this Earldom was from first to last as a mere liferent, or in virtue of Isabel's donation, and necessarily through the charter 9th December 1404, and the royal confirmation 21st January 1404-5, which alone could validate that document; while in the first retour the statement that the late King had infest Sir Thomas Stewart and Elizabeth Countess of Buchan, his wife, in the Regality of Garioch, is accompanied by a repetition of the same affirmation that Alexander had no power to resign it to the King for the new charter of 1426, neither the King to settle Garioch on Sir Thomas and Elizabeth in virtue of that charter, to the prejudice of the legitimate heir, Sir Robert Erskine.

Lord Chelmsford and Lord Redesdale, Lord Chelmsford more especially, have taken exception to these retours on several grounds; but as these are mixed up with proceedings in 1457, which purported to reduce or annul them, as well as with other matters characterising the *interregnum*, I shall proceed to narrate what took place between 1438 and 1565, as matter of history in the first instance, and then table and criticise the strictures of the noble and learned Lords as addressed to the Committee, covering the one hundred and thirty years now opening before us. This will be found, I think, the most convenient course.

Whatever may have been the sentiments of the government in 1438, when they sanctioned—as it must be presumed they did—the issue of the brieve of mortancestry and Sir Robert's infestment under the precept following upon his retour to the

comitatus, the whole carried through by the officers of the Royal Chancery, the tone and policy of the ruling ministers were speedily changed to that of determined opposition to the rights then vindicated, and on grounds presently to be stated. But they had to deal, as I have intimated, with an energetic and powerful man, strong in his sense of right, indignant at injustice, and fully prepared to support his remonstrance against that injustice by force, if necessary. Lord Chelmsford states repeatedly that Sir Robert "*obtained*" the two retours—"not improbably," he adds, "by means of the purchased assistance of the Sheriff-depute;" while Lord Redesdale says that "Robert Lord Erskine *got himself served heir* to Isabella in half the comitatus, and . . . got possession of that half." Both expressions are equivocal, but appear to imply that it was not by right, but against law, the retours being peccant in point of formality or effect. But this was not the case. Sir Robert obtained possession, as the evidence shows, by official induction, peacefully and legally, into the chief messuage of the fief; and it is a well-known principle of Scottish law in feudal times, that a man once invested in the possession of heritage, whether it be a fief or a dignity, by legal process, cannot be divested of it except by voluntary resignation to the superior, or by a judicial sentence by a competent tribunal that he has no right. Earl Robert never resigned the fief; nor were the retours of 1438 reduced till after his death in 1457. He was thus legally in possession alike of dignity and fief during the interval; and any disallowance of his rights, or usurpation of the fief during the interval on the part of the Crown, was illegal, independently altogether of the question whether the claim which he had advanced, and which was found good in itself, was well or ill founded. What followed will be more justly appreciated after this observation.

Earl Robert granted various charters to vassals of the Earldom subsequently to his infeftment, always under the intitulation of "Earl of Mar and Lord Erskine," as, for example, to Sir Alexander Irvine of Drum of Davachdore, 10th May 1440; to Andrew Cullen, burgess of Aberdeen, of Knavane, 24th January 1441; and to John Melvil of Harviestoun, of half Westhall, 7th September 1451.¹ The Crown in confirming

¹ Minutes of Evidence in Mar Claim, pp. 706, 365, 495.

these charters did so as granted by "Robert Lord Erskine,"¹ but this was, for the reason given in the preceding paragraph, an illegal withholding of his full and proper style. Lord Redesdale affirms that Earl Robert designated himself Earl of Mar and Lord Erskine, as "evidently knowing that under the latter designation alone he could act legally." But this was the usual style taken by all Earls at the time, their inferior titles being almost always associated with the higher. Were Earl Robert's an exceptional case, Lord Redesdale's inference might be sound; but it has no such basis to start from. I notice these minor criticisms merely on account of the prejudice they are calculated to have on the mind if unrefuted.

That Earl Robert's tenancy was rooted in justice in popular opinion, and that he was at once recognised as Earl of Mar in Aberdeen itself, the emporium of the north of Scotland, and the capital of the county of which Mar was a province, appears from an entry in the records of that burgh, showing that on the 28th December 1439, "*nobilis dominus et potens dominus Robertus de Erskyn comes de Marr ac dominus de Erskyn*"—this being a further illustration of the ancient style of designation—was created a burgess and member of the guild of Aberdeen.

The same popular recognition of Earl Robert's right is indirectly evinced at a much later period, in the remarkable narrative of the circumstances affecting the Earldom of Mar between 1404, 1426, and 1455-6, stated by the Chamberlain Young, a public official in the latter year, as already cited, in the face of the opposition notoriously offered by the ministers of the Crown against his rights, and in reprobation of the injustice perpetrated in 1426. He tells us that Alexander Stewart "*easdem terras de Soynahard in manibus dicti quondam domini regis defuncti ultimo resignavit, licet male, quia feodum dicti comitatus non habuit, aliquis terras dicti comitatus resignare non valuit, et per consequens nec resignatio nec infeodatio supradicta minime valuerunt, quia nemo dat qui non habet.*"²

¹ Minutes of Evidence in Mar Claim, p. 365.

² [See above, p. 215. Are not the designation "assertus comes de Mar," and the averment that Alexander Stewart was not entitled to grant a valid charter of Soynahard, rather to be taken as meaning that the regnant by Albany to himself and his son Thomas had made Thomas the *fiar* and

SECTION III.

Struggle with the Crown.

The events of public and state interest which took place between Earl Robert and the Crown with regard to the Earldom of Mar subsequently to 1438, that is, during the minority of James II., till 1457, are recorded in a series of documents of great interest. All that was done was, from the point of view of the Crown, of a provisional character; but these documents throw light alike upon the historical and the legal aspects of the case; and I shall therefore analyse them briefly, and then sum up the results; the reader remembering all along that they form, properly speaking, an episode or interlude merely between the retours of 1438 and the proceedings of 1457.

The series begins with a remarkable indenture or contract between Earl Robert (under the style of Robert Lord Erskine) and the King, dated at Stirling, 10th August 1440. By this document, "Our Sovereyne Lord the King and his Counsaile" on the one part, and "ane noble Lord, Schir Robert Lord of Erskyne, with deliverance of his Counsaile, on the tothire part," accorded as follows:—"That, for the gude and the quiet of the land," the King shall deliver the castle of Kildrummie to Lord Erskine "richt furthe in al gudely haste, as the Kingis castell, to be kepit be the said Lord of Erskyne to the King's behuve and age," that is, till the King's majority, "and then to be deliverit to the King, but (without) obstacle—the quhilk done, the said Lord of Erskyne or his airis sall cum befor the King and the Thre Estatis, and there propone and schaw for him his clamys, richtis, process, and his entree be vertue of his process; the quhilkis seen and considerit shall be jugeit and admittit als ferre as thai arre of force and of valu, to stand in sik effect as the Thre Estatis thinkis that thai acht to do;

Alexander a mere liferenter, and that the charter was void in consequence of Thomas not having been a consentient party to it? A statement to this effect appears in a charter by James IV. of the same lands of Soynahard to James Scrymgeour in 1508, Reg. Mag. Sig. l. xiv. No. 485. On the other hand, the Exchequer Rolls contain most unquestionable proofs (not included in the Minutes of Evidence) of the continued popular recognition of Lord Erskine as rightful Earl of Mar, his son being designed, *more Scotico*, "Master of Mar," even by the Crown officials. The customars of Aberdeen, in their account audited and engrossed by the officers of Exchequer in July 1446, are allowed £8 for a pipe of Gascon wine, delivered by order of James Livingston, Keeper of Stirling Castle, "Thomæ de Erskine, magistro de Mar."]

and quhare thai be fundin to be refourmyt," that is, if it be found necessary, "the King sall gerr his Chapell be opin" (that is, for issue of fresh brieves of service), "and the law redy, but (without) stopyng the said Lord to pursue his richt als ferre as law will, al things twicheyng the said materies and clamys, standand, remanand, and cessand in the menetye, but (without) prejudice of outhir party, in sik termes and plite as thai stand in now." Further, it was accorded that all the "froytis and revenows belangand half the Erledom of Mar, the quhilk the said Lord of Erskyne clamys as his propre," that is, as already explained, as his actual share of the *dominium utile* of the earldom or comitatus, as eldest coheir, "sal remayne with the said Lord on to the ische (issue) of the said term, and then to be countable, give the castell beis judgit til the King, allowed til him as sufficient fee for the keypyng of the said castell." Further, it was covenanted that so soon as Lord Erskine should be "frely enterit in the castell of Kildrummy," he should deliver up to the King the castle of Dunbarton. The privy seal of the King and Lord Erskine's seal were appended to the respective duplicates of this indenture. It was printed by Mr. Thomas Thomson in the edition of the Acts of the Parliament of Scotland published by the Record Commissioners, from the original, then in the Mar charter-chest; and was admitted as evidence by the Committee for Privileges in 1875, in overruling of opposition on the part of Lord Mar, upon the ground "That as the scope of the Commission by which the volumes" of the Acts of Parliament "had been published extended to all public documents, the copy published by the Commissioners as a true copy of this public document was admissible in evidence."¹ The indenture printed is the counterpart given to Earl Robert; it would be interesting to know whether the seal appended to the duplicate given to the King bore the style of Earl of Mar, or of Lord Erskine, or of both—I suspect of both, and that Earl Robert designated himself by his correct title in his portion of the indenture, although the King, or rather his Council, disallowed it, and styled him simply Lord Erskine in the counterpart before us. The indenture and the whole proceeding indicates

¹ Acts of the Parliaments of Scotland, ii. p. 55; Antiquities of Shires of Aberdeen and Banff, iv. p. 192; Minutes of Evidence, p. 588.

a compromise between Earl Robert and the Crown, postponing the day of reckoning till the King's majority. It will appear that Earl Robert implemented his part of the covenant by surrendering Dumbarton, but the ministers of the Crown, as represented by the Chancellor, played him false with regard to Kildrummie.

The next document in the series of evidence does not appear in the Minutes of 1875. It is primarily known through the schedule of evidence in the decret of 1626, where it is described as "Ane instrument under the note of Richard Kedy, nottar, daitit the secund day of May 1442 yeires, beiring that the said Robert Erle of Mar, compeirit in presens of the counsall being met at Stirling, and complenit of the Lord Creichtoun, Chancellour, for deteneing of his retour and not giving him precepts thereupon." What has become of the original then produced it is impossible to say. Sir Robert Douglas, in his "Peerage of Scotland," published in 1764, and in the article on Mar,—which was written by the accurate antiquary and genealogist, the laird of MacFarlane, from the archives of the family, and which is characterised by Lord Hailes as "the most curious and accurate of any in the voluminous work of Douglas,"¹ describes the document in question as follows:—"There is a protest taken by the said Lord Erskine in the hands of Richard Cadie, notar, in the presence of the King and Council in Stirling Castle, 9th of August 1442, complaining upon the Chancellor for refusing to retour him to the lordship of Garioch, and put him in possession of the Castle of Kildrummie, protesting that he might and shall be free to intromit at his own hand with the haill lands of Mar and Garioch, etc. (Writs of the family of Mar). And accordingly he immediately after besieged and took the castle of Kildrummie, whereupon the King seized the castle of Alloa (*ibidem*)."¹ It is difficult to say whether there is an error in point of date, or whether Earl Robert made two protests, one in May, the other in August, but Douglas's account supplies some additional particulars beyond the meagre notice in the decret. Alloa was a favourite barony held in regality of the Erskines. The inference is direct that Dumbarton Castle had already been

¹ Additional Sutherland Case, ch. v. p. 46 ; Douglas's Peerage, edit. 1764, p. 467.

surrendered by Lord Erskine, and passed into the possession of the Crown under the indenture of 10th August 1440, or that would have been seized in preference to Alloa.

The King's Privy Council or ministers subsequently intervened by passing a decree in the Parliament which met at Perth, 14th of June 1445, enacting "that all and sundry landis and possessiounis unmoveable of the quhilkis of good minde King James, quham Gode assoilze, fadir till our Soverane Lord that now is, in the day of his decess had in peceabil possessioun, sal abide and remayn with our saide Soverane Lorde that now is in siclik possessioun as his fadir broukit thaim, undemandit and unpleyit of ony man before ony juge within the realme, on to the tym of his lauchful age. And gif it happynis ony pursuyt to be made in the menne tyme in the contrary hereof be (by) ony man, thaī determe and declaris all process that may follow therupone to be of na strenth, fors, nor effec." It is obvious that this enactment could not legally affect Earl Robert's rights under the retour and seisin of 1438, inasmuch as Earl Robert had by that seisin been put legally in possession under a right proceeding from Robert III., not proceeding from James I., and consequently not descendible to James's son, James II. It is necessary from time to time to reiterate, in reference to the alleged possession by James I., that by the judgment of 1626 the Crown had but "ane simple and nakit possession, without all right of property" in the Earldom of Mar and Earldom or Lordship of Garioch, between 1435 and 1565; and only "a pretendit possession apprehendit fra the said King James the First," and inherited by his son James II. with the same inherent defect of legal right during his period of minority. The enactment, it will be observed, illegally prohibits the legal proceedings competent to Earl Robert, as to any other subject, for recovery of what the Crown illegally withheld from him. It was, in short, a measure very politic for the Crown, but wholly illegal and unjustifiable, postponing discussion on all claims against the Crown, delaying the term of settlement, and reserving the revenues to the Crown during six years of minority still to run. And this applied not only to the case of the Earldom, as interpreted by the advisers of the Crown, but was also calculated to get rid of claims for restitution, if any such should arise, on behalf of the dispossessed

heirs of March, Lennox, and Strathearn. Lord Hailes refers the enactment to 1437, as the second Act of the Parliament held in that year; but that Act only prohibited any alienation of the King's property except by permission of the Estates till his majority.

Matters appear to have remained in this state during the next three years. When the three years had elapsed, a fresh indenture was entered into between Earl Robert and the King, dated the 20th of June 1448, cited by Sir Robert Douglas from the Mar archives, but which does not appear to be now preserved there. "In the recovery of Alloa," says Sir Robert,¹ "there was an indenture entered into between the King and Council on one part, and Lord Erskine on the other, by which Lord Erskine obliges himself to deliver up the castle of Kildrummie betwixt and the third July next to any the King should appoint, to be kept by them till the King's majority, and then to be delivered up to either of them who should be found to have right to it at the sight of the Three Estates, and to account to the King at his majority for one half of the Earldom of Mar. And the King and Council, on their part, obliged themselves that, so soon as the castle of Kildrummie should be delivered up to those appointed by the King, his Majesty shall deliver up to Lord Erskine his castle of Alloa, and all the warlike stores found therein."

The King's advisers, however, showed no disposition to fulfil the conditions of this contract, but, on the contrary, attempted to infringe conditions previously established by the indenture of 10th August 1440. Earl Robert, therefore, deputed his eldest son, Sir Thomas Erskine, to protest on his behalf for fulfilment of the pledges of the Crown. It appears from the books of Parliament² that Sir Thomas appeared on the 4th April 1449, attended by his prolocutor, or legal counsel, and accompanied by five Bishops, three Earls, and others, as witnesses on behalf of his father, Robert Lord Erskine, in presence of the King and Three Estates assembled in General Council, at Stirling, "in materia et questione comitatus de Mar et castri de Kyndrummy;" and, after various debates ("altercationes") on either side, Sir Thomas, in his father's name and his own, offered himself to

¹ Douglas's Peerage, edit. 1764, p. 467.

² Acts of the Parliaments of Scotland, ii. p. 60.

fulfil in all respects the indentures and evidences which had passed between the King and his Council, his father and himself, “*super terris comitatus et Mar de castro de Kyndrummy,*” according to the arbitrement and judgment (“*arbitrium et deliberationem*”) of the Three Estates—under the proviso that persons “*de jure suspectis,*” viz., “*prelatis et burgorum commissariis, qui*”—as John de Haddington, Sir Thomas’s prolocutor, assumed, “*in quæstione feodi et hæreditatis judicare non deberent aut deliberare.*” He protested further against the unjust detention of the revenues of the Earldom (“*firmis terrarum dicti comitatus*”) since the preceding Martinmas by the King’s officers, “*injuste et contra tenores dictarum indenturarum, ut asseruit, levatis, et preceptis, sibi et patri suo antedicto refusis et refutatis, protestando solemniter idem dominus Thomas quod hiis forsan non perimpletis, protelacio eorundem sibi et patri suo aut successoribus suis non cederet in prejudicium, dampnum, aut dispendium quodcumque quoad feodum et hæreditatem suam temporibus quibuscumque futuris,*” etc.; and took instruments upon this protestation under the hand of a notary-public in the presence of the Bishops of Glasgow, Moray, Dunblane, Argyle, and Caithness, the Earls of Douglas, Orkney, and Crawford, and others, personally called and invited by him (as above said) for this purpose. This notarial instrument was produced before the Committee in 1875 from the Mar charter-chest, as it had been produced long since before the Lords of Session in 1626.¹

Sir Thomas once more appeared in presence of the King in Parliament, on the 26th January 1449-50, on behalf of his father, described not even as Lord Erskine, but simply as Sir Robert Erskine, knight (an illustration of the varying intitulation of these times), to protest for “*justitiam seu remedium eidem patri suo fieri de comitatu de Mar, cum pertinentiis, patri suo jure hereditario pertinente*”—thus claiming the entire fief in virtue necessarily of his status as eldest coheir, inheriting the chief message, by tenure of which the superiority over the whole vested in him—“*et, ut ipse asseruit, per dominum nostrum regem ab eodem minus juste detento*”—thus claiming the entire comitatus in virtue of the superiority devolving on himself as eldest coheir, duly infeft in the chief message,

¹ Acts of the Parliaments of Scotland, ii. p. 60; Minutes of Evidence, p. 92.

Kildrummie. Upon this appeal, William Lord Crichton, the Chancellor, addressed Sir Thomas, by command of the King, stating that it had been determined by a certain Act of the General Council, promulgated by the Three Estates (“*per quoddam actum concilii generalis per tres regni status editum*”)—viz., the statute or enactment of 14th June 1445, “that all lands and lordships of which the late King had died vested and seised shall remain with the Crown till the actual King’s majority,—that the King chose to abide by the benefit of that Act until then—“*et medio tempore ad videndum jura et evidencias dicti domini de Erskine sibi jus ad predictum comitatum vindicare nititur*” (there being no question here on either side as to its being the entire Earldom of Mar, in its feudal sense) “*una cum juribus ipsius domini nostri regis, quibus asseruit et asserit dictum comitatum ad ipsum pertinere per suum secretum concilium quam commode poterit se ipsum obtulit promptum et paratum.*” Upon this pledge and promise—by which, it will be observed, an inquiry before the Secret Council is substituted for the previous engagement that the inquiry should be before the Three Estates of Parliament—Sir Thomas protested “*quod cursus temporis sive justitiæ exhibitionis dilatatio usque ad ætatem Regis legitimam dicto domino de Erskine, patri suo, nec suis hæredibus quantum ad suum feodum et hæreditatem minime redundaret in prejudicium, dampnum, seu gravamen temporibus futuris.*” Upon this, Sir Thomas took instruments in the hands of a notary-public, calling as witnesses the Bishops of St. Andrews, Glasgow, Dunkeld, the Earls of Douglas, Angus, and Huntly, and others. The Bishop of St. Andrews, who appears here in support of Sir Thomas, was the illustrious James Kennedy, so celebrated in history for his ability, wisdom, and justice. The instrument was produced before the Committee in 1875 from the Mar charter-chest.¹

One of the most curious documents of this period, produced in 1875 from the same charter-chest, is a letter or charge by James II. requiring Robert Lord Erskine and his son, Sir Thomas, to deliver up the castle of Kildrummie.² It is dated at Stirling on the 22d day of May, but the year of the King’s reign is injured in the parchment, and appears as “of our reign the x...j year,” which, if the indications of last letters be cor-

¹ Minutes of Evidence, p. 93.

² *Ibid.* p. 93.

rectly given, would be the fourteenth year of his reign, that is, 1451-2. The letter exhibits an amusing transition within its four corners from the style of the lamb to that of the lion. It begins with greetings to the King's "luvidis cosingis, Robert Lord of Erskine and Thomas, youre son, and all utheris oure liegis and subditis being within the castle of Kildrummy," etc.; and proceeds to narrate that "foralsmekle as for the good of peace and tranquillite of oure realm, and justice to be halden in the north partis of our said realme quhare great rapture and transgressiounis has been in tym bigane, and for reformation tharof we address us, God willing, sudanly to visy (visit) the said partis," announcing therefore that he has commissioned Sir David Murray of Tullibardine, and Robert Livingstone our Comptroller, with full power "til ask and ressave the castell of Kildrummy, as the appoyntment be (by) the evidentis made thereupon betwix us and yhou our cosingis forsaidis proports; and the maer sudanly becauss it is a place convenient of soverte (surety), and otherways for our purviaunce to be made at this tym,"—and here, after assigning these good reasons, the tone changes, and the letter closes with a threat that if they oppose any obstacle to the King's demand, they shall be subject to "the hiest paynnis of rebelloun, forffatur, and utheris," which, if they "inrin again oure Majeste," "we think, God willing, til execute aganis yhou, and ilk ane of you foresaid, with al rigore, as afferis."

It did not augur favourably for the heirs-general of Mar and Garioch that about this time James II. made a grant of the "terras comitatus nostri de Garioch" to Mary his Queen, for life, by charter 26th August 1452.

Robert Earl of Mar and of Garioch—for such was his full and proper intitulation—after maintaining his hereditary rights with such constancy against overwhelming power during so many years, died at some date between this date and the 21st March 1452-3, on which day Thomas, his son and heir, appeared once more as a supplicant for justice, but in his own person and on his own behalf, before the King and the Three Estates at Edinburgh. The original instrument recording his remonstrance was produced before the Court of Session in 1626; but we only know it now from an ancient and abbreviated copy preserved in the Mar charter-chest, and printed in the Minutes.¹

¹ Minutes of Evidence, p. 94.

The recent grant of Garioch to the Queen for life, on the footing of its being the King's comitatus or property, appears to have animated the protest no less than the sense of injustice in respect of Mar proper. Lord Erskine protested "pro justitia sibi facienda penes terras comitatum de Mar et de Garviach"—maintaining his ancestral right to the whole of the two Earldoms in question,—which requisition having been heard, the Chancellor, William Lord Crichton, replied to him that "Noster rex proponit, Deo duce, infra breve post festum Penthecostes proxime futurum in partibus borealibus sui regni existens et ipso supremo domino nostro rege ibidem existente, eidem domino Erskyne super quindecim dierum premonicionem faciendam fieri prout incumbit." Upon this Lord Erskine took instruments. The prospect of judicial determination originally stipulated between the King and Earl Robert as to be before the Three Estates of Parliament, but subsequently limited by the King and Crichton to an inquiry by the Secret or Privy Council, was thus reduced to the naked assurance that justice should be done to him, and, as would appear, by the King himself sitting in judgment in his own cause. We shall presently find what sort of justice was actually meted out. It was not till four years afterwards, in 1457, that the question was actually taken up, and *pro tempore* disposed of.

I pause here to summarise the historical and legal results which stand out from the documents thus analysed. Taking the legal results first:—

1. It was distinctly recognised by the Crown and its advisers throughout the period from 1438 to 1457, that the question of right as between the heir-general of Mar and the Crown was not absolutely on the side of the Crown, but debatable and in suspense, to be determined by law upon the King attaining his majority, the *ex post facto* Act of 1445 postponing all discussion till that epoch; for it resolves into this, and this was the point on which the service negative of 1457 went. The question for determination was—Which is the governing instrument determining the succession to the Earldom of Mar and Garioch—the unconfirmed charter of the Countess Isabel, 12th August 1404, upon which the resignation of Alexander Earl of Mar to James I., and

the regrant by James to Alexander in 1426, rested as the basis, with all that had followed (including the grant of Garioch to the Queen for life in 1452); or the charter of Isabel 9th December 1404, as confirmed by Robert III., 21st January 1404-5?

2. Further, there was no dispute that Robert Lord Erskine's claim was not to one half only, but to the entire Earldoms of Mar and Garioch. Earl Robert's protest, 9th August 1442, that if the Chancellor continue to refuse his retour to the Lordship of Garioch, and delay to put him in possession of the castle of Kildrummie, he shall "be free to intromit at his own hand with the hail lands of Mar and Garioch," proves this; while the same unqualified claim to the whole Earldom of Mar, and the whole Earldom of Mar and Garioch, appears in his protests of 1449, 1449-50, and 1452-3. The protest, 9th August 1442, further proves that the retours of April and October 1438 were not (as has been contended) to one and the same half of the Earldom, the October retour being intended to supply a technical error or lapse attaching to the former; but to the two separate halves making up the Earldoms of Mar and Garioch in their integrity. It is admitted (by the indenture of 1440) that Earl Robert had obtained "be (by) virtue of his process"—that is, the seisin following upon the retour—infestment of Kildrummie, the chief messuage of the comitatus of Mar, which carried the superiority and the dignity; and was thus in legal possession till his right should be reduced by legal process before a competent tribunal; although, on the other side, the Crown denied the efficacy of his possession on grounds to be asserted in futurity. The question under which retour Earl Robert obtained seisin of Kildrummie is not so clear thus far. The instrument of seisin which existed in 1626 is not before us either in the original or a copy. In the schedule of evidence produced by Lord Mar in the process decided that year, it is described as having proceeded on the April retour, the retour of Robert Lord Erskine as heir to Dame Isabel Douglas of the half of the Earldom of Mar, 20th

April 1438, with the instrument of seisin following thereupon, dated 21st November 1438,—this article being followed in the schedule by “ane other retour of Robert Lord Erskine to the other half of the Earldom of Mar, October 1438,” without any mention of an instrument of seisin following upon this second document. No light is thrown on the point by the argument in debate or in the judgment as given in the decret of 1626. On the other hand, the complaint of Earl Robert against the Chancellor, 2d May 1442, “for detaining of his retour, and not giving him precepts thereupon,” *i.e.* precept of seisin, and on the 9th August 1442, for refusing to retour him to the Lordship of Garioch, and put him in possession of the castle of Kildrummie, followed by the protest that if this be not done, he shall be at liberty to deal with the haill lands of Mar and Garioch at his pleasure, as above cited, would appear to indicate that the seisin of Kildrummie, of which the Crown withheld the corporal possession, had proceeded on the October retour, which says nothing of Garioch, and that the retour withheld by the Chancellor was that of April, which includes Garioch. The point is absolutely immaterial, inasmuch as if Earl Robert was infeft, as is admitted, in Kildrummie, it matters not a whit under which half and which retour it was included: the possession of Kildrummie, the chief messuage of Mar, carried the whole comitatus, the discrepancy on the one hand between the limited and the unlimited assertion of his rights, and the absence of any question as to the latter fell to be accounted for by the simple fact already insisted upon, that his claim as eldest coheir in right of which he was entitled to one half of the *dominium utile*, or beneficial property, covered at the same time that superiority over the whole Earldom which rendered it indivisible in his person. It is evident that if Earl Robert had not been so retoured in 1438 as to give him a legal status whereupon to assert his right, that exception would have been insisted upon. Once recognised as nearest heir of the Countess Isabel, and seised in the

chief message, Kildrummie, it mattered not whether he claimed half or a sixth part only of the *dominium utile*, he was equally the tenant and responsible representative of the entire and indivisible Earldom in the eyes of the King, the feudal superior, and the law.

In an historical point of view, it is equally clear from the evidence analysed *supra*,

1. That the indentures and other negotiations with Earl Robert, amounting to a temporary compromise, were the result of the sense of legal insecurity on the side of the Crown; while it is inferrible that they were entered into originally with the view of amusing him and disarming his opposition; and yet in bad faith throughout, as all the complaints of breach of covenant proceed from from the Earl and not from the Crown. And finally,
2. That as years rolled on the Crown gradually receded from its engagement that justice should be done by open investigation before the Three Estates of Parliament; while, after Earl Robert's death, Thomas Lord Erskine, his son, was put off with a bare promise of future justice; and, almost in the same breath, the Earldom of Garioch, one of the subjects in dispute, was granted to the Queen for life, a procedure absolutely iniquitous under the circumstances, evidently under the advice of Crichton the Chancellor, who is one of the witnesses to the charter.

It cannot have escaped notice that in these dealings between the Crown and Earl Robert the latter is always treated with as simply "Lord Erskine," and takes that style himself—if not in his counterpart indentures, at least in his protests before Parliament. Such designation was to be expected on the side of the Crown in the sense of its pretensions to the Earldom; and in meeting the Crown before the Estates of Parliament, on the Crown's own acknowledgment that the question was dubious, as being *in pendent*, it was natural and graceful, and certainly prudent on the part of Earl Robert, that he should take only the inferior and undisputed title. This inferred no derogation from the higher, as Lord Redesdale in the Montrose case expressly urged in the instance of the Earl

of Glencairn, who sat in Parliament and acted for many years as Lord Kilmaurs, simply abstaining from prudential motives to take the higher title of Earl.

The further observation presents itself that, while Robert Lord Erskine invariably assumed the style of Earl of Mar, or Earl of Mar and Garioch, in his charters (although disallowed by the officers of the Crown in the charters of confirmation), in virtue, that is to say, of his retour and service in 1438, Thomas Lord Erskine, his son, never took the style of Earl of Mar. The simple reason was, because, unlike his father, he never obtained a retour of service as heir to the Earldom, nor subsequent infeftment in the chief message; and apart from such he was not entitled by feudal usage to assume the dignity. That he was entitled to it *de jure sanguinis* apart from the fief, and by virtue of descent from Earl Gratney, is undeniable according to the law as recognised in the sixteenth century and since; but a bare title apart from the fief must have been of little value, and the *jus sanguinis*, in the comparatively modern sense, was in fact hardly appreciated previously to the close of the fifteenth century.

It may be asked at this point, what had become of the Lyles all this while, the younger coheirs (as they alleged) of the Earldom of Mar? There is much obscurity about their descent and history; and it is not unimportant to remark that they never protested in Parliament or, so far as appears, elsewhere, against the claim of Robert Earl of Mar, or of his son Thomas Lord Erskine, when these latter protested for their right to the entire Earldom of Mar and Garioch. Lord Chelmsford's assertion that "at this time" (1438) "Sir Robert Erskine claimed as coheir or co-parcener with Lord Lyle," rests exclusively, so far as I see, not upon any direct evidence, but upon the fact that the Lyles were coheirs, or reputed coheirs, of the Countess Isabel. Even had it been so, Sir Robert's claim would have been that of "elder coheir to the chief message, which carried the superiority and dignity"—a fact utterly ignored by the advisers of the House of Lords. But Lord Chelmsford's assumption, *ut supra*, is wholly, so far as I perceive, gratuitous. There is a curious indenture between "Robert the Lyle, of Duchal, and Schir Alexander Forbes of that ilk," 26th March 1444, stipulating for an exchange of the

lands of Cluny and Quhitfelde, belonging to Sir Alexander in Strathearn and Angus, for "all and hail" of Lyle's "part of the lands of Stradee (Strathdee) and Kyndrocht, with his part of the castale of the samyn landis," to be held of Robert in blench farm, and Robert to give him charter and possession "als sone as it likis the said Schir Alexander, efter at the said Robert sal recover possession of halffe the landis of Mar liand (lying) in the schirrefdome of Aberdene," with reciprocal obligations,—the indenture adding, "Item, it is accordyt that gyffe it sale happyn in any tyme to cum that our soverane Lord the King recover or take"—that is, recover by process of law, or take by illegal force—"the foresaide landis of Mar fra the said Robert or fra his ayris, it sale be lefule (lawful) to the said Sir Alexander and to his heirs to haffe regress and free entra to his lands" of Cluny and Quhitfelde foresaid, etc.—with a further agreement that the foresaid Robert shall resign in the King's hands "the said landis of Stradee quhat tyme that the saide Schir Alexander sale get consent of the Kyng tharto, and fra thinfurtht (thenceforth) to be haldyn of the Kyng in barony."¹ Lastly, there is a charter by "Robert de Lyle, dominus ejusdem," to the abbey of Paisley, of the third part of the fishery of Crukytshot, 25th September 1452, in acknowledgment of the sum of 112 merks advanced by the convent, as in Lyle's words,—"*Fateor me Robertum prædictum recepisse a dictis abbate et conventu centum et duodecim marcas usualis monete regni Scotiæ in pecunia numerata, in mea urgente necessitate, videlicet ad exponendum in prosecutione fienda terrarum de le Garviach in jure hereditario pertinentium.*"² This confession of poverty is strange, for Robert de Lyle had been created a Lord of Parliament *circa* 1446; and he and his descendants for at least three generations were well off. I may conclude with the observation suggested by the date 25th September 1452, taken in comparison with that of the grant of the comitatus of Garioch by James II. to the Queen, August 1452, that Lord Lyle had probably instituted legal proceedings in defence of his right to Garioch, or a moiety of Garioch, on that occasion.

¹ Minutes of Evidence, p. 338.

² *Ibid.* p. 492.

SECTION IV.

Inquest at Aberdeen and Service negative.

James II. attained his majority on the 16th October 1451, and Robert Earl of Mar ought to have had justice done him without delay before the Estates of Parliament, according to the covenant. But five years and a half elapsed before the case was gone into; and in the meanwhile Earl Robert had died, and his son, possibly a less determined character, had succeeded. The long-projected visit of James II. to the northern parts of his kingdom took place in the early summer of 1457, and—to epitomise what took place in the briefest manner—at a Justiciary Court held at Aberdeen on the 15th May, in the King's presence, the King appearing as prosecutor in his own cause, with the Chancellor as his advocate, Thomas Lord Erskine's demand for a retour of service to his father in the Earldom of Mar, as Earl Robert's right and property in virtue of the retours of 1438 and the infestment thereupon, was rejected, and the retour of 1438 reduced and set aside on the ground that, not Isabel Countess of Mar, but her husband Alexander Earl of Mar, had died last vested and seised in the Earldom, and that the Earldom consequently had devolved upon the late King, and now pertained to the present King, James II., in consequence of the bastardy of Earl Alexander and his son, Sir Thomas Stewart,—the basis of the King's claim being the unconfirmed charter of the 12th August 1404. The seal was thus set on the process of "iniquity"—as it is styled in the Act of 29th July 1587—now for so many years in progress. But the proceedings must be narrated at greater length, in order that the reader may understand them in their true light.

The original record of what took place is preserved, with its seals attached to it, in H. M. General Register House, or Public Record Office, in Edinburgh, and was produced before the Committee for Privileges in 1875, and printed in the Minutes from an "Extract," or office copy, which had been used in the process before the Court of Session in 1624-1626,—the extract having been duly compared with the original. The Extract is indorsed, "Extract of the Testimoniall anent the denial of the retour of Robert Erll of Mar as air to Dame

Issobel Douglas, Countess of Mar, and of the negative service off Thomas Lord Erskin."¹ As already stated, by a "Negative Service" is meant one in which the verdict of the jurors is against the claimant, and no infeftment follows thereupon. I proceed to report the proceedings from this document.

The "Testimoniall," or record, proceeds in the names of John Lord Lindsay of the Byres, High Justiciary of Scotland north of the Forth, who held his court of itinerancy or assize at Aberdeen on the day mentioned during his progress through his judicial circuit, and of Walter Lindsay of Kinblythemont, acting, as it is stated, "pro hac vice," on this special occasion, as Sheriff of Aberdeenshire on behalf of his nephew and ward David Earl of Crawford (afterwards Duke of Montrose), the hereditary Sheriff of the county, who was then a minor. The court was held in the "prætorium," or town-hall, of Aberdeen, in the presence of the King and of a large number of prelates, magnates, proceres, barons, nobles" (*i.e.* gentlemen), "and free holders," of whom the following are subsequently enumerated, viz., George (Schoriswood) Bishop of Brechin, the Lord Chancellor, John Bishop of Moray, Alexander Earl of Huntly, William Earl of Erroll, the hereditary Lord High Constable; William Lord Keith, hereditary Marischal of Scotland; George Lord Leslie; Robert Lord Fleming; Sir John Ogilvie of Lintrathen, Sir Walter Ogilvie of Deskford, Sir William Leslie of Balquhain, Sir William Cranstoun of Corsbie, and Sir Walter Stewart of Strathoun, knights; William Moray of Tullibardine; and Ninian Spot, Comptroller of the household. It may not have been without significance that Ingelram de Lindsay, the venerable and saintly Bishop of Aberdeen, absented himself, or at least was not present, on this occasion. It was thus not properly an assize of error, specially summoned for the purpose, but a single proceeding at a justice-ayre of the High Justiciary, although invested by the presence of the King and his Court—including, as the word "concilium," presently to be noticed, would seem to imply, the members of the King's Secret or Privy Council—with a high solemnity—the fact standing out distinctly that the King sat in judgment himself, as will appear, in his own cause.

The proceedings commenced by the reading of letters of summons issued from the King's chapel, that is, chancery,

¹ Minutes of Evidence, p. 95.

commanding James Skene of that ilk, John Mowat of Loscragy, Andrew Buchan, Thomas Allardice of that ilk, Ranald Cheyne of that ilk, Walter Barclay of Tolly (ancestor of the Barclay de Tolly of modern history), and John Scroggs the elder—all of whom had been jurors on the inquest of 1438,—to appear before the King and his “*consulibus*,” *i.e.* his councillors, to answer for their error and unjust determination and response in reporting to the King’s chapel in favour of the right of the late Robert Lord Erskine to the “*dimidietatem terrarum comitatus de Mar*,” in the sheriffdom of Aberdeen. The inference would be that these were the only survivors of the jury of 1438; but it would be interesting to verify this. It seems very unlikely that no more than these seven should be alive.

The seven men having made their appearance, Thomas Lord Erskine appeared in person for his interest; and after various things alleged by him, and shown in writings “*pro defensione erroris dictarum personarum*”—that is, in proof that they had been guilty of no error in retouring as they did—the particulars of which are not given, although they must be self-evident to the reader—these seven survivors of 1438 were examined separately “*in camera predicti prætorii*,” after taking their corporal oath on the Gospels to speak the truth. The King, as the record informs us, accompanied by all of the personages above enumerated, removed for the examination of these men from the “*magnam domum*,” or great hall of the prætorium, to a separate chamber of the building—the great body of the spectators being left awaiting their return.

The first of the seven called up was John Scroggs senior (in the retour of 1438 he is qualified as John *de* Scroggs), “*quia antiquior inter cæteros*,” as being the eldest of the number. (I tell the story as it is written, without any comments of my own.) After acknowledging that he was on the service and retour, and being asked whether he had any knowledge of the late Isobel Countess of Mar, in whose right Robert Lord Erskine had claimed the half of the comitatus, he replied “that he had no knowledge,” *i.e.* “personal knowledge,” of her. Being asked in what grade of consanguinity Robert stood to Isabel (it will be remembered that Isabel is qualified as “*consanguinea*,” or cousin, of Robert Lord Erskine in both retours) he replied that neither at the time of the inquest, nor at any subsequent period,

had he known the degree of consanguinity, nor indeed whether they were related by consanguinity at all. Being asked whether any persons on the inquest of 1438 had gone against the tenor of the retour, and if so, how many, he replied that five persons had done so, of whom Gilbert Menzies and John Waus were two, but he could not recollect who the other three were. Menzies and Waus must be presumed to have been dead in 1457, as they were not summoned or prosecuted for perjury. John Scroggs then asserted on his oath—no question, it would appear, leading up to the statement—that the late Sir Alexander Forbes, then Sheriff-depute of Aberdeenshire, served the brieve, and that he had the lands of Strathdee from the said Lord Erskine, and that it was the public voice and repute that this was for his support and help, and the serving of the said brieve. And John Scroggs said that he and the other persons with him (“*et dictæ personæ secum*”) on the inquest were seduced into acting as they did by the bland words and feigned lies of John Haddington and other prolocutors, or counsel, of the said Lord Erskine and other persons belonging to him; but that he now clearly knew, on consideration of the letters and rights of our Lord the King, that he and the other jurors had erred and delivered an unjust award on the subject of the half of the said lands of the comitatus of Mar: for which error the said John Scroggs most humbly implored the King’s pardon, throwing himself upon the King’s mercy for the remission of his guilt.

James Skene of Skene, or of that ilk, being next examined on the preceding articles, replied conformably to what Scroggs had deponed, and said that he well knew that the late King James was in possession of the late Earldom of Mar after the death of Earl Alexander, and that after Alexander’s death he received the entire revenues and profits of the Earldom—which was undoubtedly true, although the question, “By what right?” remained in the background. He added on his oath that if he had been aware of the charters, letters, and rights of the King, when he sat upon the inquest, as he knew them now, he would not for anything in the world have decided against the King’s right as he did: and added, that he knew well that he and the other jurors had erred, and rendered an unjust award, for which he placed himself at the King’s mercy, and besought grace and pardon.

Andrew Buchan, interrogated on the articles premised, replied on each point as Skene had done; and added that he knew well that the late Thomas Stewart of Garioch died vested and seised as of fee in the said Earldom of Mar, and that Elizabeth Countess of Buchan, his wife, had the third part of the lands of the Earldom (as terce) through her husband's decease—the fact of possession thus alleged being correct, although (as previously observed) the question of right remained in the background.

Ranald Cheyne, in reply to the same interrogatories, replied as Buchan had done; and Barclay of Tolly, after giving the same testimony as Buchan and Skene, added on his oath, that he had been present and acting as "servitor" to Alexander Lord Gordon when the latter personally delivered state, possession, and hereditary seisin to Thomas Stewart of the lands of the Earldom of Mar; and further, that he had been present at the assize of the terce of the said spouse of Thomas Stewart, when she was served in her terce, or third part of the said lands of the Earldom of Mar. These special depositions, like those of the other deponents, were probably true, although totally irrelevant, except to prove the "simple and nakit possession" by the King, although "without all right of property," of which there was abundant testimony otherwise.

In all important respects the testimony of the four men, Skene, Buchan, Cheyne, and Barclay, tended simply to corroborate that of the hoary scoundrel John Scroggs. That Scroggs himself was perjured, or, if not perjured, was an utterly untrustworthy witness, is evident from the fact that the grant of the lands of Strathdee to Sir Alexander Forbes, which Scroggs swore on the Gospels was by Lord Erskine, was, as has been shown, by Robert de Lyle in exchange for other lands, to their mutual convenience, a prospective arrangement to take effect in case Lyle should succeed in making out his right to one-half of the comitatus of Mar. I shall show hereafter how Scroggs's alleged ignorance as to any consanguinity existing between Robert Lord Erskine and the Countess Isabel was improved upon by the Lord Chancellor. That all the witnesses who succeeded him, the survivors of 1438, should have deponed neither more nor less on every count than Scroggs did, is impossible, unless by collusion.

It is very remarkable that although Thomas Allardyce of that ilk, and James Mowat of Loscragy (styled John in the first retour), were summoned, and appeared in court, no record is given of their examination or deposition.

It is further noteworthy that of the seven jurors summoned as having been on the retour of Robert Lord Erskine in 1438, Mowat was only on the first of the two inquests, John Scroggs and Robert Cheyne on the second, while the others were on both. This appears to offer an additional reason for thinking that the retour upon which Earl Robert's service took place was the second or October retour. The fact that Scroggs was not on the first retour, and Mowat not on the second, would account for Mowat not being examined, and Scroggs being examined—the question at issue being that of the validity of the seisin in the half of the Earldom of Mar which (as already shown) carried the chief message, Kildrummie.

There is no notice in the record that Lord Erskine was present, much less that he was permitted to cross-examine these five men, on whose evidence so much was made to depend. Had he been so, the misrepresentation in regard to the charter of Strathdee would have been corrected, and the actual transaction with Sir Alexander Forbes explained and put upon its right footing. Lord Erskine appears from the record to have been allowed to speak before the examination, but not to cross-examine, nor to reply afterwards. That what took place in the "camera" of the prætorium was out of his presence is pretty clear, indeed, from his not being named along with those who accompanied the King and his "consules" thither.

The examination of these five persons having been thus fully carried through and ended, "the said our Lord the King, together with the said Lords, returned from the said chamber of the prætorium to the 'magnam domum' thereof, for the purpose of doing justice to the said Lord Erskine upon his claim to the said lands of the Earldom of Mar. Lord Erskine was summoned for his pretended interest, and appeared in the said prætorium, in presence of the King and the prelates, magnates, proceres, barons, and of many lords and freeholders of the sheriffdom of Aberdeen and other sheriffdoms in great number assembled," what followed being public to all, as the examination of the five jurors had been privative to the King and his

immediate "consulibus" above mentioned. I cannot say whether this was or was not in conformity with usage at the time.

The Lord Chancellor then opened the proceedings on the part of the King, by addressing Lord Erskine to the effect that inasmuch as he, Lord Erskine, had "repeatedly in Parliament, general councils, and public meetings" demanded justice from the King, and that brieves of inquest should be given him from the chapel-royal, he wished to know what more Lord Erskine asked and sought for in respect of the lands of the Earldom of Mar. To this Lord Erskine replied that he desired nothing more than a brieve of inquest, and execution, and service, as he had repeatedly asked for on former occasions.

The Lord Chancellor then addressed him ("recitando dixit") thus—"I, as Chancellor of our Lord the King here present, and on his part, grant to you the said brieve of inquest and execution thereof, and completion ("complementum") of justice in the said lands, so that you may have no just cause hereafter for complaint against our Lord the King, nor against me as Chancellor, on the ground of failure in the execution of justice. And in testimony of this," he added, addressing Thomas Brown, clerk and notary-public, there present, "I demand instruments."

"Then, indeed," proceeds the record, "the said Lord Erskine left the hall to take counsel and advice whether he should then have the brieve served or no; and, after mature consideration, re-entering, he presented with his own hand the brieve of inquest of the chapel-royal, formerly obtained by him, for its execution without any further delay."

The members of the inquest were then chosen and impanelled, with consent of Lord Erskine, consisting of William Earl of Erroll, Alexander Lord Montgomery, John Lord Lindsay of the Byres, George Lord Leslie, Robert Lord Fleming, Sir William Leslie of Balquhain, Sir Alexander Home of that ilk, Sir Walter Stewart of Strathoun, Sir John Ogilvie of Lintrathen, Sir Walter Ogilvie of Deskford, knights; Walter Barclay of Tolly (the survivor of 1438, whose examination and evidence have been given above), Alexander Fraser of Philorth (ancestor of Lord Saltoun), Alexander de Dunbar, James Skene of that ilk (another of the seven survivors of 1438), Andrew Buchan

(yet another), Andrew Menzies, Ranald Cheyne (another of the jurors of 1438), Richard Vaus, David Dempster of Auchterless, John Scroggs (the coryphæus of the seven penitents of 1438), and Thomas de Allardes or Allardyce, the juror of 1438, but whose examination is not given; while Mowat of Loscragie, though present, was left out and not appointed to sit on the new inquest. These twenty-one jurors deliberated and reported under the official presidency of Walter Lindsay of Kinblythmont, as Sheriff "pro hac vice," in the name and place of David Earl of Crawford as aforesaid.

It falls to be noticed, as matter of fact, that Barclay, Skene, Cheyne, Scroggs, and Allardyce, who thus formed members of the inquest, had just (with the exception of Allardyce) confessed themselves guilty of the very grave offence of perjury, as "temere jurantes in assisa." There is no statement that the royal clemency had been extended to them, nor could that have been effective otherwise than by a formal remission; and yet these men, infamous in the eye of the law, were selected and suffered to sit upon the inquest as "probi homines,"—probity unsuspect being the prime requisite for eligibility. Whether the consent imputed to Lord Erskine, and which I do not doubt he gave, perhaps in the weariness of heart which alone, as it appears to me, could have induced him to press the inquest under the circumstances, could homologate this glaring contradiction, and make a "probus homo," for example, of Scroggs—an ill-omened name in the annals of justice, English and Scottish,—is not for me to determine.

Lord Erskine then, with Archibald Stewart and Alexander Graham as his prolocutors or advocates, asked that the brieve of inquest should be publicly read; which having been done, he asserted—1. That the late Robert Lord Erskine, his father, had died last vested and seised as of fee, at the peace and faith of our Lord the King, of the said half of the Comitatus of Mar; and 2. That Thomas himself was the lawful and nearest heir of his father in the said lands, and that he was of lawful age, and that the said lands were in the hands of the King "legitime," that is, according to law, through the death of the said Robert, in consequence of himself (Thomas) not having prosecuted his right for the space of four years or thereabouts, that is, since his father's death.

The Lord Chancellor replied to this in the name of the King—1. That the contrary of what Lord Erskine asserted in the first of the above points was truth, viz., that Robert Lord Erskine did *not* die vested and seised as aforesaid, because (he affirmed) our Lord the King was vested in the said lands, and in true, lawful, and peaceful possession of them at the time of the death of the said Robert Lord Erskine, through the decease of his father, the late King. And to the second point of inquest he affirmed that, although the said Thomas is lawful and nearest heir to his father, yet this was never the case so far as concerned the lands in question; that, as respects the point, in whose hands the lands now are, the undoubted truth is (continued the Chancellor) that the said lands are in the King's hands as of his property and heritage, and not in default of Thomas in not prosecuting his right, inasmuch as Lord Erskine neither is, nor can be, heir to the said lands, for, he stated, considering that the late King died vested in the lawful and peaceable possession of the said lands as his heritage and property, our Lord the present King received investiture and lawful possession of the same at the moment when he received his royal crown and sceptre, and thus stood possessed by the same right that his father had had,—so that the said brieve sought for by Lord Erskine could in no respect be served. The Chancellor then proceeded to affirm that Lord Erskine stood in no degree of consanguinity whatever to Isabel Countess of Mar; for, he said, it is not known by any now alive that the late Robert Lord Erskine, father of Thomas, was consanguineous with the said Isabel; and it was upon such consanguinity that the said Robert based his right to the half of the comitatus. The Chancellor further added that Thomas Lord Erskine, then present, could never obtain the said lands, nor have lawful entry to them by virtue of brieve of inquest, because after the death of the said Isabel, Thomas Stewart, Earl of Buchan (he seems to have held that earldom in right of his wife, widow of John Earl of Buchan, Albany's son), died vested and seised as of fee, at the peace and in the faith of the King, in the said lands of the Earldom of Mar—in support of which (“*ad quod fortificandum*”) he stated that the widow of Thomas Stewart obtained the third part of the lands of the Earldom as her terce. Next, as respected the

retour of service of 1438, the Chancellor asserted that it could be of no force or validity, on account of the causes above recited ; and that the process and prosecution of the said inquest (that is, the seisin which followed upon the retour) was of no value, because the brieve of inquest had not been served “*ex quadraginta dierum premonitione*”—an allegation on which I shall have to remark in the following section of this letter ; and because Sir Alexander Forbes, the deputy of the Sheriff of Aberdeen, served the said brieve, in spite of the prohibition of the King and his letters, in open court, and refused to defer (“*differre noluit*”) to the royal letters—facts of which we are only apprised by this testimony, and as creditable to Sir Alexander as discreditable to the advisers of the Crown, who issued the letters in the King’s name ; and also because neither the King nor his “*consules*” (his Privy Councillors) for the time were premonished of the day appointed for the serving of the said brieve, so that the King might have his prolocutors and advocates present to defend his right ; and because, finally—and the Chancellor evidently laid great weight on this argument—even under the supposition that all the foresaids had been done according to the desire of the said Lord Erskine, as recited by him (which nevertheless was *not* done), the prosecution of the said inquest was empty, and of no virtue or force, inasmuch as it was enacted during the King’s minority by the Three Estates that the present King should remain with all the lands, revenues, and possessions of which his late father had died vested, until his perfect age, according to the common law. For he affirmed that no baron ought to be ejected (“*ejici aut implicari*”) from his heritage until his perfect age ; and much less should the King be so ejected (“*repelli*”), and thus put in a worse position than the meanest baron in his kingdom. On these grounds, and many others recited and shown in the name of the King, the said Lord Chancellor affirmed that the said Lord Erskine had no right to the said lands of the Earldom of Mar, or any part of them.

Such was this memorable harangue, as recited in the “*Testimoniall*” now before us ; and I shall only notice here that no objection against the competency of the retour of 1438 was based by the Chancellor upon the alleged subornation of justice by Sir Robert Erskine in the case of the late Alexander

Lord Forbes, as Sheriff-depute ; nor was any allusion made to the perjury of the five members of the inquest, as testified to by the men themselves, flush from the confession (true or false), and their sitting among the jury of twenty-one addressed by the Chancellor in the capacity of advocate or counsel for the Crown.

The Chancellor's address being concluded, Lord Erskine, in order to exhibit his pretended right to the said lands, produced a certain charter of the late Isabel of the said lands, offering various reasonings and allegations in respect of it, which, like all his legal defences, are omitted in the record. This, it is clearly evident, was the charter of the Countess Isabel to Alexander Stewart, 9th December 1404, confirmed by Robert III., 21st January 1404-5 ; and there could be no doubt as to the argument based upon it, viz., that the charter of 1426 and all that followed upon it was a *non habente potestatem*. It may have been in simple confidence that the charter of 9th December would be triumphant that Lord Erskine consented to meet the wily Chancellor in the unequal contest.

These reasonings and allegations of Lord Erskine having been heard and understood, the Lord Chancellor then publicly produced on the part of the King a certain charter of entail by Isabel in her pure widowhood, written on parchment, and sealed with her seal, of a date preceding the other charter fore-said, and granted to the late Alexander Earl of Mar, her husband, and the heirs of his body legitimately procreated, or to be procreated, whom failing, to the true and legitimate heirs of the said Alexander whomsoever ; by virtue of which charter the said Lord Chancellor declared that our Lord the King is the true heir and lawful possessor of the said lands, inasmuch as the said Alexander Earl of Mar died a bastard, and died vested and seised as of fee in the said Earldom of Mar, with its pertinents, to which Alexander our Lord the King, James I., was lawful heir by reason of bastardy. This charter, it is equally evident, was that of the 12th August 1404, extorted from Isabel, renounced by Alexander, and never confirmed (as was indispensable) by the King, the overlord, but, on the contrary, superseded by the confirmed charter of the 9th December 1404, upon which Robert Lord Erskine and his son Thomas grounded their right.

It did not escape Lord Chelmsford's notice that the Chancellor founded on the charter of 12th August 1404, and entirely

ignored that of 28th May 1426. We shall hear presently what the noble and learned Lord thought might be the reason of this strange fact.

The production of these two charters brought the respective rights at once into opposition; and the question was then, as it was in 1626, and as it is now, Which charter is valid, which right is to prevail?

The "Testimonial," or report, which furnishes these details, gives no particulars of the counter-contention on either side on this fundamental question, limiting the narrative to the broad propositions for and against Lord Erskine's claim.

The Chancellor's address being concluded, and the two charters tabled in antagonism, the jury retired to consider the verdict, and after long communication and mature deliberation reported that the late Robert Lord Erskine, the father of Thomas Lord Erskine, did not die seised and vested, as of fee, in half the lands of the Earldom of Mar, according to Thomas's claim; but that the said lands are and have been lawfully in the hands of the King, through the death and from the time of the death of his late father, James I. Walter Lindsay, the acting Sheriff, and the jurors then affixed their seals to the testimonial of retour, which was thus a negative service, as being in rejection of the claim of succession; and two notaries-public attested the accuracy of the report of the whole proceedings as above given.

It is difficult to comment calmly upon the prominent features of these proceedings. First to be noticed is the breach of faith, evinced by the simple fact that the inquiry which was to do justice to Lord Erskine was based upon the personal suit of the King in a justice-ayre in the north of Scotland, not, as covenanted with Robert Lord Erskine, before the Estates of Parliament at the seat of Government, in the presence, as it were, of the whole nation—not even before an assize of error specially convened for the purpose of rescinding the retour of 1438; while the inquest—the "grand inquest," as such assizes were styled—which was to reverse the inquest of 1438, actually consisted of the same number of persons, fifteen, raised to twenty-one by the adjunction of the six men, five of whom, by their own confession that same morning, had given deliberately false evidence in 1438, and thrown themselves upon the royal mercy for

pardon as criminals. Next to be noticed is the indecency and, what was worse, the injustice of the King's sitting in judgment on his own cause, to the necessary prejudice of impartiality, and the examination of the wretched Scroggs and his more respectable associates in private, the King equally being present at the inquiry, without any opportunity of cross-examination (as I have already observed) being permitted to Lord Erskine, which might have checked the falsehood, for example, of Scroggs's charge on hearsay, be it remembered, against Sir Alexander Forbes. The part subsequently taken by the Lord Chancellor, with his overwhelming influence, in a suit which, under ordinary circumstances of law, would have been intrusted to the usual advocates of the Crown, can only be accounted for by his acting as the mouthpiece of the King's "Secret Council," his "consulibus," before whom the seven surviving jurors of 1438 had been cited to appear—the process, although held in the Court, and necessarily under the presidency of the High Justiciary, probably to give it greater prestige and semblance of equity, resolving, in fact, into a summary procedure of the Privy Council.

The actual allegations of the Chancellor, as stated by Lord Lindsay of the Byres and Walter Lindsay in the Testimonial, are one and all susceptible of easy answers. He did not disdain to adopt the suggestion of Scroggs, that he was not aware by personal knowledge that Sir Robert Erskine had been akin to the Countess Isabel, and amplifying it into a positive affirmation that Sir Robert was not at all related to her; supporting this by the assertion that no one was alive who was aware of that consanguinity—the objection proceeding on the assumption that proof in such cases was only to be obtained from contemporary witnesses, and not from documentary evidence, which is against law and practice. Passing over the argument from the possession of Thomas Stewart and the terce to his widow as proving nothing, except the fact of possession through force, the objection that the brieve of inquest had not been served with forty days' previous notice, proceeded on an unheard of substitution of forty for the legal period of fifteen days; while the King and his "consules" were entitled to no extension of the usual term in their favour through a privilege beyond that of ordinary suitors. The Chancellor entirely overlooked the

promise made to Lord Erskine on the 21st March 1452-3, that his case should be heard on the King's first progress in the north, "super quindecim dierum præmonitionem faciendam," as recorded in the instrument already analysed.

If again the King, that is, the Secret Council, sent letters under the Privy Seal prohibiting Sir Alexander Forbes to proceed with the service in 1438, the letters having apparently been served upon Sir Alexander in open court, it was an illegal act, and Sir Alexander was fully justified in disregarding it; and if he had not disregarded it, there can be little doubt that his principal, David Earl of Crawford, would have addressed him, as I shall show hereafter he did on a subsequent occasion, in very serious remonstrance. The Lord Chancellor overlooked throughout that Sir Alexander was merely second in command in the administration of the sheriffdom. Again, the Lord Chancellor's allegation that the proceedings of 1438 were null and void because an enactment had passed during the King's minority, to the effect that the King should remain in possession of everything of which his father had died peaceably vested till he should attain his own majority, proceeded on an uncandid misrepresentation, inasmuch as the enactment referred to only passed, as I have shown, in 1445, seven years subsequently to 1438, was not in existence when the inquest sat in 1438, and had, moreover, no retrospective clause; while the verdict of the inquest proved *ipso facto* that the late King had not died peaceably vested in the Earldom of Mar, from the simple fact that he had not a shadow of legal right to it. But all these *gravamina* sink into insignificance in comparison with the effrontery with which the Chancellor based the King's alleged right upon a document utterly valueless in law, and which he must have known to be so, the charter 12th August 1404. On this point a word or two may be permitted to me.

It is evident that Lord Erskine had the best of the argument in law, although not in success. By production of the charter 9th December 1404 duly confirmed by the Crown, he established a criterion by which all that had been alleged and dwelt upon of a secondary nature—such as the right of possession derived from the possession by the late King, the tenancy of Thomas Stewart, the right of his widow to her terce, etc. etc.—fell to be looked upon as legal or illegal; and not only

these, but the charter to Alexander Earl of Mar, proceeding upon his resignation in 1436, which, singularly enough, is not once mentioned by the Chancellor or in the proceedings. To meet the charter 9th December 1404 the Chancellor had nothing to produce on behalf of the King except the extorted charter of the 12th August 1404, which had been renounced in the most formal manner four weeks after it was granted, but which had never received the only warrant which could have given it validity, the royal confirmation,—but which he alleged, and with truth, as Lord Chelmsford similarly did in 1875—although the truth of the allegation was utterly irrelevant to the argument—was anterior in point of date to the confirmed charter of December, the foundation of Lord Erskine's right. There cannot be a doubt that the respective merits of the two charters were gone into and appreciated by every one present in that feudal age, and it is impossible therefore to doubt that the jurors, or the majority of them, did what they did with their eyes open. The main responsibility rests, of course, with the twenty-one jurors; the Chancellor was only less culpable; the King, although acting under his advice, and young, can hardly be exculpated: the remainder of those present were spectators only of the enormous perversion of justice thus perpetrated.

A final observation occurs here. Even if the retours of 1438 had been found to be vicious through any defect of formality, the course of justice would have been to serve Thomas Lord Erskine heir to the Countess Isabel in the Earldom of Mar and Garioch, under the charters 9th December 1404 and 21st January 1404-5. But this was never dreamed of. The object of the Crown was to crush him down, and they succeeded.

Might thus prevailed; and from this time forward Lord Erskine and his descendants maintained a dignified silence, whilst the kings of Scotland dealt with the Earldom of Mar, the dignity and the estates, the rightful heritage of the heirs of Isabel, at their pleasure,—those heirs the while serving the princes who enjoyed their inheritance with unflinching loyalty and devotion. Stress has been laid on this silence to their prejudice, as inferring acquiescence in the justice, or at

least in the formality, of the proceedings of 1457,—an argument out of place in claims to dignities. We shall see in due time the view taken of those proceedings, and judicially affirmed by the Supreme Civil Court, the Court of Session, in 1626. It is enough for the present to state that the Court declared the proceedings of 1457 null and void, and the retours of 1438 valid and good—all on the basis of the ruling force of the confirmed charter 9th December 1404. This judgment settled the entire question once and for ever.

As I stated previously, the confiscation of a great Earldom brought the vassals into immediate connection with the Crown, and the effect was felt throughout the territories of Mar. It is described as follows in a curious narrative preserved in the Mar charter-chest, exhibiting the view of the history of these transactions from the point of view of parties opposed (independently of the Elphinstones) to the Mar family in the great process of 1624-6 :—“The right of the Earledome of Mar being declared so solemnly to aperteine to the King’s Majestie, immediately thereafter may gentlemen who before were vassalls to the Earles of Mar resigned their lands, which before they held of the Earles of Mar, in the King’s Majestie his hands, being then declared to be their superior, for new infeftments of the saids lands to be given them, to be haldin of his Majestie, which made them”—the object of this statement being to excuse their inability, in certain cases, to produce the original charters of their fiefs—“little carefull to keepe their old rights (writs) whilk before they had of the Earles of Mar, as halding them immediately of his Majestie. And this many did within three, others within five, others within twenty days after the said proces led in Aberdene” in 1457.¹ This narrative was admitted as evidence by the Committee for Privileges in 1875, on the ground that “the fact of its being preserved in the charter-chest of the family showed that it had been accepted and recognised by the head of the family,” *i.e.* as authentic and trustworthy, on the same grounds on which they had accepted a pedigree, also in the Mar charter-chest. The narrative is actually the statement of the case against Lord Mar—a virulent attack upon the Erskines by their professional enemy, procured by Lord Mar’s advisers for their use; and this was

¹ Minutes of Evidence, p. 578.

accepted by the Committee, while, on the previous day, the Committee refused, or at least Sir Roundell Palmer (now Lord Selborne), Lord Mar's counsel, found it prudent not to press on their acceptance an "Information," of precisely the same nature, or what we now call a "Case," drawn up by the celebrated Sir John Hope of Craighall, Lord Mar's counsel, for his defence in 1626.

A few words will sufficiently record the fortunes of the Earldom of Mar, while in the "simple and naked possession of the Crown, without any right of property therein" (as affirmed in 1626), between 1457 and the year of restitution, 1565.

Ill-gotten gains never prosper; and misfortune—stating it as a simple historical fact—dogged the heels of every Earl of Mar not of the legitimate blood during this interval.

James III., who succeeded to his father in 1460, bestowed the Earldom of Mar and Garioch on his second youngest brother John; and on 18th November 1475, and 1st March 1477-8, "Jhonne Erll of Mar and Gerwyacht" (this being his signature), executed two charters, of which the latter is preserved in the General Register House.¹ It would seem that some doubt must have been thrown on the right of the King, for during the interval between these charters, on the 26th April 1476 he sent a special mandate to the Keeper of the Great Seal Register, ordering him to inscribe the charter of Isabel Countess of Mar, 12th August 1404, the unconfirmed and superseded charter, but which was the sole foundation of James's "pretendit" right of possession (I quote the decret of 1626) upon the public record; which was done, the fact of the King's command being specially noticed. It is added that the Clerk of the Register demanded a transumpt of the charter, and its contents, to be made by a notary on his own account, with specification of the seal, etc. etc.; and further asked instruments on the part of the King,—all for the same purpose of verifying the charter produced as a genuine one; of which there could be no doubt, whatever defect might attach to its validity. It is hardly necessary to observe that the charter was intruded into the Register—smuggled would not be the word, for the deed was done in the light of the sun—but

¹ Illustrations of Shires of Aberdeen and Banff, iv. p. 736. See *infra*, Letter vii.

irregularly and illegally introduced, no confirmation of the charter having passed the Great Seal, and no private charter such as this of the 12th August, much less an unconfirmed charter, having a right to insertion there. The Clerk Register evidently acted under authority; and the King was equally conscious that the registration required additional notarial testimony to the existence and integrity of the document. It is only from this registration that the charter is now known and in evidence, and how Lord Chelmsford could attach any weight to it under the defect in question passes comprehension.

Three years after this tampering with the Register, John Earl of Mar and Garioch, a most promising young prince, but obnoxious to the King's favourites, was seized, as it is affirmed, by the King's order, imprisoned, and bled to death; whereupon the fief lapsed to the Crown, Earl John having died unmarried.

The statement that James III. gave the Earldom to Cochran the "mason," or, as he should be styled, architect, who was hanged by Archibald Earl of Angus and his associates on the bridge of Lauder in 1481, does not appear to be authenticated; but Alexander Duke of Albany, James's immediate younger brother, to whom James granted a charter of the Earldoms of Mar and Garioch in 1482, was killed by the splinter of a lance while looking on at a tournament in Paris three years afterwards. James then granted the Earldoms of Mar and Garioch, by charter 2d March 1485-6, to his third son John, a mere boy, who died at the age of seventeen. Every one of these three Stewart Earls was cut off either in the bud or the flower of his age. The dignity appeared to revolt against continued existence except in the lawful line.

Whether or not it was thought, in a superstitious age, that a curse hung over the dignity of Mar, neither James III., James IV., nor James V., again regranted it. But neither did they dream of restitution. Various portions and dependencies were granted to favoured vassals of the Crown, but to none on the same scale as to the distinguished house of Elphinstone. James IV. granted considerable portions of the estates to Alexander, eldest son and heir-apparent of Sir John Elphinstone of that Ilk, on his marriage with Elizabeth Berlay (Burley), "servitrix," or maid of honour, to the Princess Margaret of

England, and who accompanied the latter to Scotland when she came thither as affianced wife of James in 1503. These estates, confirmed by charters 8th August and 10th December 1507, 11th September 1509, 14th January 1509-10, and 22d August 1510, and settled in conjunct fee upon the young people and their issue, comprised the lands of Invernochty and others in Strathdon and Cromar, the lands of the town and burgh within the barony of Kildrummie, the King's dominical lands of Kildrummie, and the custody of the King's castle of Kildrummie, the chief messuage of the Earldom of Mar, all within the King's Earldom of Mar. By the last of these charters, granted on occasion of the baptism of Prince Arthur, James created Alexander, who had succeeded his father a year previously, a Lord of Parliament by the title of Lord Elphinstone.

After the grants just mentioned, James IV. and his successor James V. retained the remainder of the Earldom, the territorial Comitatus, in their own hands; and matters thus continued till after the middle of the sixteenth century, and the return of Mary Queen of Scots from France. I am only aware of one independent testimony to the rights of the Erskines during this prolonged period; but that was by the Lord Lyon King, Sir David Lindsay of the Mount, the highest authority in Scottish heraldry as dependent on gentilitial history, and a man of perfect rectitude and dauntless character, in his official *Armorial of Scotland*, compiled in 1542. He therein blazons the arms of "Erskyne umquhile" (late or defunct) "Erll of Mar," as quarterly, first and fourth, Mar; second and third, Erskine, — a clear recognition and judicial affirmation, as by the supreme judge in his special court of arms and chivalry, that Sir Robert Erskine, Earl of Mar in 1438, the only Erskine who had up to Sir David's time actually held the dignity, was lawfully entitled to it, notwithstanding the service negative of 1457 and all that had followed. The *Armorial* in question was confirmed by the Privy Council of Scotland as authoritative, and this blazoning necessarily as inclusive, in 1630. It was not till Queen Mary had been some years in Scotland that she learned the true state of the case as between the Erskines and the Crown; and it is not improbable that she may have learnt it from Sir David Lindsay himself, as he survived till then.

During the interval, while she remained in ignorance of the right of the Erskines, Queen Mary granted the Comitatus of Mar, with all the lands belonging to it which remained in the hands of the Crown, to her illegitimate brother, James Stewart, Commendator of the Priory of St. Andrews and Pittenweem, afterwards the Regent Moray, by charter 7th February 1561-2, with limitation to the heirs-male of his body. But before long the Queen became aware that she had thus in ignorance perpetrated a fresh act of injustice, and she interfered to undo her own work by requiring her brother to resign the Comitatus into her own hands, granting him the Comitatus or Earldom of Moray in compensation, and matters being thus replaced on their former footing, the hour was ripe for the restoration of the legitimate heirs, the heirs-general of Isabel and of Mar. Time and truth work together in the cause of justice. It will be found that Queen and Parliament, peers and people, were all by this time prepared to co-operate in the remedial measures that were requisite to carry through this great process of restitution. I pause upon the threshold of these events—at the commencement of the year 1565—reserving the narrative of what took place in that year and subsequently for the coming Letter. In the meanwhile, I must wind up the present Letter by confronting the preceding narrative of the events occurring during what I have called the “Interregnum” before the death of Earl Alexander in 1435 and the Restoration in 1565, with the views taken of these events by Lord Chelmsford and Lord Redesdale, with concurrence of Lord Cairns, in their speeches in moving the Resolution of the Committee for Privileges upon Lord Kellie’s claim in 1875, and thus enabling the reader to make his election between them.

SECTION V.

The above narrative confronted with the opinions of the Lords in Committee.

What we have now to do is to deal with the objections of the Committee for Privileges in 1875 against the validity of the two retours of Robert Earl of Mar in 1438,—objections based partly upon the traditional doctrines of the House of Lords, partly upon the rescission of those retours by the jurors

of 1457, whom Lord Chelmsford in particular imagines to have been guided by strict justice in their award in favour of the Crown against Thomas Lord Erskine. Lord Redesdale, pre-occupied with the sense of the true distinction between the two charters of 12th August and 9th December 1404, passed over these retours with scarcely an observation; but Lord Chelmsford dwelt upon them with an earnestness proportioned to his imperception of that distinction and his pre-occupation in favour of the earlier charter as having incapacitated the Countess Isabel—self-denuded as she was by it—from granting the later one.

I shall now cite the passages in the speeches of Lord Chelmsford and Lord Redesdale which deal with the period between 1435 and 1565; but I may be permitted to remind the reader in the first instance of the bases from which these criticisms start. According to Lord Redesdale, the territorial earldom, that is, the fief as carrying the dignity, was descendible to heirs-male exclusively, and became extinct in the person of Thomas Earl of Mar, who died in 1377. If any Earl or Countess bore the title of Earl of, or Countess of, Mar by right subsequently thereto, it was in virtue of some *interventus*, the nature of which is not apparent; and Lord Mansfield's presumption and rule holds that the limitation was confined to heirs-male. According to Lord Chelmsford, who takes pains to mark his dissent from the extreme doctrine in favour of heirs-male, the feudal earldom, territory and honour, was perpetuated through Margaret Countess of Mar, in her own right, sister and heir of Earl Thomas, to her son, James Earl of Douglas and Mar, and her daughter Isabel Countess of Mar, and would have been transmitted through her heirs had she not dispossessed herself and them by the charter 12th August 1404, in favour of her husband Alexander Stewart, on whose death without surviving issue in 1435, and not before, the territorial earldom became extinct. Upon these bases respectively the Crown was entitled to deal with the earldom, the fief and dignity, at its discretion, subsequently to 1377 according to Lord Redesdale, and 1435 according to Lord Chelmsford, and no right to the Comitatus of Mar could possibly exist in Sir Robert Erskine, as heir of Isabel, in 1438.

Lord Chelmsford's observations are as follows :—

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

“While the lands of Mar were thus in the hands of the Crown, it dealt with them and also with the dignity. In 1460 King James the Second granted the earldom and the dignity of Earl of Mar and Garioch to his son, Prince John Stewart. The Prince sat in Parliament as Earl of Mar ; and it is worthy of notice that Lord Erskine, the common ancestor of the contending parties, frequently sat with him in the same Parliament. In 1482 King James the Third granted the earldom (*i.e.* the lands) of Mar and Garioch to his brother the Duke of Albany and the heirs whomsoever of his body, the charter being witnessed by Lord Erskine. The Duke was ‘forefaulted’ and escaped to France, upon which the Crown took possession of the lands and retained possession of them till 1562, a period of 80 years. The Duke died in France, and his son Alexander became Duke of Albany and afterwards Regent of Scotland, and was acknowledged by the then Estates of the Realm to possess (amongst other titles) that of Earl of Mar and Garioch. I cannot understand in what right he could have assumed this title. His father is not stated to have had any grant of the dignity, and if it belonged to him as necessarily accompanying the grant of the lands it could not descend to his son, as at the time of his father's death the lands were in the hands of the Crown. Besides thus granting the dignity of Earl of Mar, the Crown from time to time made grants of considerable portions of the Mar lands, thus severing them from the earldom or comitatus, and thereby, as it was contended, breaking it up and preventing the possibility of restoring the territorial dignity in its integrity.

“It is natural to ask what was done by the Lords Erskine (from whom both the petitioner and the opposing petitioner derive title) during the long interval when the Crown was conferring the dignity and dealing with the lands of Mar at its pleasure, to the prejudice of their assumed right to the succession which opened to them, as it is alleged on the death in 1407 of Isabella Countess of Mar without issue. I have already adverted to the fact that in 1466 the Lord Erskine of that day sat in Parliament with an Earl of Mar created by King James the Second, and that he was also a witness to a Royal Charter of the earldom of Mar in prejudice of his hereditary claim. And it appears most conclusively that the Lords Erskine never at any

time claimed the entire earldom or comitatus of Mar, to which alone (if at all) the dignity could be joined, but invariably limited their claim to one half of the earldom or comitatus, and never asserted any right to the dignity itself. In 1390, during the life of Isabella, a supplication was presented to the King in Parliament by Thomas Lord Erskine, stating that if Isabella should die without issue, his wife, formerly Janet Barclay, would be entitled to one half part of the earldom of Mar and lordship of Garioch, and praying the King not to confirm any contract in relation to the lands to the prejudice of the rights of his wife. It is unnecessary to inquire into the nature of the title of Janet Erskine, my object in noticing this proceeding being to show that from the very first the claim of the Erskines was confined to one half of the earldom.

“After the death of Alexander Stewart Earl of Mar in 1435, when, as already observed, the dignity of Earl of Mar practically at least ceased to exist, Sir Robert Erskine in April 1438 obtained a retour of himself as heir of Isabella Countess of Mar and Garioch. The circumstances connected with this and a subsequent return of the same year lay them open to a good deal of observation. Soon after the death of Alexander Stewart, as a preparatory to these judicial proceedings, Sir Robert Erskine and his son entered into an agreement with Sir Alexander Forbes, the sheriff-depute of Aberdeen, before whom the proceeding for a retour would be held, to secure his services in their favour (covered with the decent pretext of his doing all his business and diligent care to help and to further them with his advice and counsel) by a grant to him of certain lands in Mar as soon as they should be recovered out of the King's hands. At this time Sir Robert Erskine claimed as coheir or co-parcener with Lord Lyle. In this retour of April 1438 the jury found that ‘Sir Robert is the lawful nearest heir of the Lady Isabella of one half of the lands of the earldom of Mar and lordship of Garioch, which are in the hands of the King by reason of the death of Alexander Stewart, who held the lands by gift of the Lady Isabella for the term of his life.’ This retour is false in fact, for the lands were not in the hands of the King on the death of Alexander Stewart, who held under the gift of Lady Isabella for his life, but were claimed and possessed by the Crown by reason of the reversion in the charter of 1426 which vested in possession on the death of Alexander.

“In the month of October 1438 Sir Robert Erskine obtained another retour as to one half of the earldom of Mar, upon which some controversy arose. On the part of the opposing petitioner it was asserted that this was a retour of the other half of the earldom, though without explaining why, if Sir Robert Erskine's claim was to the whole of the lands of Mar, there should have been separate retours of the two halves, there not being a shadow of evidence that he had acquired

the other half after the April retour. On the other side, it was urged with great probability that the October retour was obtained to correct the former one, which had erroneously found that Sir Robert had right to half of the lordship of Garioch, which at that time was held by Thomas Stewart's widow. And it was said that infestment not being taken till November, it could not apply to the April retour, because it was beyond six months after the date of the precept of infestment by virtue of that retour, and, by the rule in force at that time, such infestment would have been too late. And notwithstanding this second retour it will be found that many years afterwards Lord Erskine persisted in his claim to only half of the earldom.

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

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

“Nothing was done towards obtaining a judgment upon Lord Erskine's claim to one half of the earldom of Mar until the year 1457, when proceedings were taken against some of the jurors who sat upon the inquest of 1438, for an unjust deliverance of the retour upon such inquest. The delinquent jurors begged pardon of the King, and were

pardoned. Then the following proceeding took place. The King with the Chancellor and Lords passed into the Town Hall (of Aberdeen) for justice to be done to Lord Erskine with respect to his claim of the lands of the Earldom of Mar. An inquest was chosen. Lord Erskine alleged that the deceased Robert Lord Erskine his father had last died vested and seised as of fee of half of the Earldom of Mar, and that he was the heir of his father. Issue was taken upon this allegation, the Chancellor answering that although Lord Erskine was heir of his father he was not heir to the said lands, and that the lands were in the hands of the King, as his own property. Lord Erskine in support of his claim produced the charter of Isabella of the 9th December 1404 granted upon her marriage with Alexander Stewart; in answer to which the Lord Chancellor on behalf of the King 'publicly produced a certain charter of taillie of the deceased Isabella of a date preceding the date of the other charter' (being Isabella's charter of the 12th August 1404) 'made to the deceased Alexander Earl of Mar her husband, and the heirs lawfully begotten or to be begotten of his body' (the true destination being 'to the heirs to be begotten between them) 'whom failing to the lawful heirs of Alexander whomsoever.' By virtue of that charter the Chancellor declared the King the true heir and lawful possessor of the said lands, Alexander having died a bastard vested and seised as of fee of the said Earldom of Mar, and the King being lawful heir by reason of bastardy. The jurors returned that Robert Lord Erskine did not die seised of the half of the lands of the Earldom of Mar claimed by him, and that the said lands were in the hands of the King by reason of the death of the late King.

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

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

Lord Redesdale, as I have remarked, bestows much less

attention on the proceedings in 1438 and 1457 than his learned brother on the woolsack. Some of his observations are very pertinent on the side of truth,—others I must take exception against :—

“He” (*i.e.* Earl Alexander) “died in 1435, and his natural son Thomas having died before him, the comitatus under the settlement of 1426 lapsed to the Crown. In considering what then occurred, we must again refer to the state of Scotland. James the First had so offended and alarmed the nobility by his acts that some of them conspired against him, and he was murdered in 1437. His son was a minor, and there was a regency. In 1438 Robert Lord Erskine got himself served heir to Isabella in half the comitatus, and, notwithstanding the remainder to the Crown in Alexander’s settlement of 1426, got possession of that half, as will be hereafter shown. In 1440 we find him calling himself Earl of Mar, but sitting in Parliament as Lord Erskine. Mr. Hawkins says, ‘the Crown kept him out of the earldom.’ Is it credible that a regency, the result of a rising against the late King, whose acts against the aristocracy the nobles were determined to resist, could have prevented such a man as Lord Erskine from taking a seat in Parliament to which he had lawfully succeeded? If the ancient earldom was in existence as descendible to heirs-general, he had a right to it as heir to Earl Gratney. Every peer had an interest in the question of such a succession, and late events had proved that they were not so weak or the Crown so strong as to render such a refusal possible. Lord Erskine was not the man, nor in the position to be so treated. Look at the agreement in 1440 (p. 588) in which the King, with the advice of his council, delivers the castle of Kildrummy to him, and allows that ‘the revenues of half the earldom of Mar, which Lord Erskine claims as his own, shall remain with them till the Crown allows him a sufficient fee for keeping the castle.’ It is clear from this document that Lord Erskine was, under the retour of 1438, in possession of half the lands of the comitatus which the Crown claimed under Alexander’s charter, but which the regency was unable to get from him, and which probably remained with the Erskines until the retour of 1438 was set aside in 1457. It must also be noticed that the ancient peerage, if in existence, descended to him independently of the comitatus as heir-general of Gratney, and that the claim of the Crown to the comitatus was based on acts done in relation to it by Isabella and her husband, in no way to be affected by Lord Erskine’s possession of the peerage.

“As regards the assumption by him of the title of Earl of Mar, we find that in all the documents in which he so styles himself, he invariably adds Lord Erskine, evidently knowing that under the latter designation alone he could act legally. The charter of James the

Second (p. 364) is conclusive on this point. In it a charter is recited of Robert Earl of Mar Lord Erskine granting certain lands to Andrew Culdane in 1440, which the King confirms in 1449 as a charter of Robert Lord Erskine. In 1460 the ancient earldom was treated by the King as extinct, for he created his son Earl of Mar; and the royal power was similarly exercised on subsequent occasions, and Robert's successors, none of whom ever assumed the title of Earl of Mar, continued to sit as Lords Erskine, sometimes with newly created Earls of Mar, and sometimes without any such bar to their claiming the title.

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

It is evident that Lord Redesdale's observations are of a more general—Lord Chelmsford's of a more special—character, the former meeting the remonstrance of Lord Mar against Lord Kellie's claim on the ground of the question having been the subject of a settlement by authority, which it would be dangerous to disturb, on considerations of expediency, and this apart (upon the whole) from a consideration of its merits; while the latter, Lord Chelmsford, goes minutely into the merits with especial reference to the proceedings of 1438 and 1457. I shall deal with the objections of a general character, Lord Redesdale's, first, and those of a special character, Lord Chelmsford's, last,—including such inadvertent observations of a general character as fell from Lord Chelmsford under the former category, and, *vice versa*, those of a special character which fell from Lord Redesdale, under the latter.

I must observe, in the first place, on the general argument, even at the risk of repetition, that everything that took place in connection with the right to the Earldom of Mar, the territorial earldom carrying the dignity, between 1404-5 and 1565—the validity of the resignation and regrant of the Comitatus in 1426, the validity of the retour of Sir Robert Erskine as heir of Isabel in the Earldom of Mar in 1438, the validity of the service negative in 1457, and that of the subsequent dealings of the Crown with the

earldom, including the grant to Lord Elphinstone—the validity, I say, of each and all of these transactions fell to be tested as legal or illegal by the single question, Was the charter of the 12th August or that of the 9th December 1404 the governing instrument? Everything harks back to this alternative throughout the Mar discussion. And in 1626, when the whole of the proceedings were judicially reviewed by the Supreme Civil Court, pronouncing a final and irrevocable sentence upon them individually and collectively, the debate between the two charters, upon which Lord Elphinstone and Lord Mar stood respectively as James II. and Thomas Lord Erskine had done in 1457, was settled by the *experimentum crucis*,—the question which of the two charters had been disallowed and which recognised by the feudal superior, the King, and as a necessary consequence acted upon; and the answer to this question was in favour of the later charter, 9th December 1404, as recognised by Robert III. in repudiation of the former, and confirmed by the charter 21st January 1404-5, and under which, I may further note, Alexander Stewart, Earl of Mar, succeeded to the life-tenancy of the Earldom of Mar, while he did not succeed to the life-tenancy of Isabel's estates derived from her paternal kin, the Douglasses, which he would have done had the charter 12th August 1404 been the valid and ruling document. Lord Chelmsford, as already shown—but the point is so important that I may repeat it here,—overlooking the distinction thus established, and the incompetency of a feudal vassal to alienate a fief or alter the destination without the authority of the overlord, apparently unaware that the grantee under the charter of 12th August had renounced any right he could have under it, and absolutely ignoring the fact that the question before him had been *res judicata* since 1626—represented the last-named charter as the governing instrument, on the simple, intelligible, but insufficient ground that it was the earlier, inferring that Isabel, having already given away the earldom with a limitation in favour of the heir of her intended husband exclusively, could not regrant it with an altered limitation reserving the ultimate right of her own heirs to the succession; and therefore that the later charter 9th December 1404 proceeded *a non habente potestatem*. From this point of view the resignation and regrant of 1426 was perfectly legal;

the dignity came to an end at the death of Earl Alexander in 1435 ; the retour of 1438 was unjustly made in favour of the Erskines ; the proceedings of 1457 rightly rescinded the retour and vindicated the possession of the Crown ; and the earldom was at the free disposal of the Crown from 1435 to 1565—all, as we shall find, according to the argument of Lord Elphinstone before the Court of Session in 1626, but which the Court repelled and repudiated. I am aware that I am indulging in repetition, but my anxiety to make the point clear may excuse it. Lord Redesdale, better advised, passed over the charter 12th August 1404 as unworthy of notice, recognised the charter 9th December 1404 and its confirmation 21st January 1404-5 as valid, and stigmatised the resignation and regrant of 1426 as fraudulent and illegal ; thus, although viewing the grant of the Comitatus throughout as that of a mere land estate, distinct from any "peerage earldom," implicitly sanctioning the retour of 1438 as valid and unjustly rescinded in 1457, and, in a word, recognising the absolute right of the Erskines to (at all events) the territorial Comitatus: and yet, on the other hand, instead of giving weight to the stringent obligation of the right thus recognised, and to the attendant obligation to rectify the wrong inflicted, in the spirit and after the example of Queen Mary in 1565—even had such restoration extended no further than to the fief of the Comitatus without the dignity,—Lord Redesdale gave superior weight to the consideration that, as matter of fact, the Crown had illegally disallowed the right flowing from the charter 9th December 1404, had accepted a fraudulent resignation in 1426, rewarded the fraud, as matter of probability by the grant of a personal peerage in favour of Alexander Earl of Mar, and after Earl Alexander's death had dealt with the earldom as its own property, although the heritage of others,—basing upon these considerations the conclusion that this action of the Crown, although admittedly illegal and *ultra vires*, coupled with the acquiescence of the Erskines in the usurpation as a settlement of the question, extinguished the dignity—if, that is to say, it still existed, according to the contention of Lord Mar, the opposing petitioner, subsequently to 1377. This is what I have spoken of in a former page as the argument of a Leviathan, based on the maxim "Might makes Right."

It is upon the preceding basis—contradictory in every

respect to that on which Lord Chelmsford argues—that Lord Redesdale came to the conclusion expressed at the end of the preceding quotation, but which I may repeat here: “The undisputed admission of the extinction of the peerage by the Crown under six Sovereigns, and by six Lords Erskine in succession, from the death of Alexander in 1435 to the grant by Queen Mary in 1565, a period of no less than 130 years, must be looked upon as a settlement of the question which it would be very dangerous to disturb. Our decision should be governed in a great degree by that which was held to be the law at the time, which appears to confirm the dictum of Lord Mansfield, and to have considered the ancient Earldom to have become extinct on failure of heirs-male.” The following remarks appear to be called for at this point:—

1. That the admission of the Crown—whatever might be the case in England—could have no effect either for or against the existence of a dignity in Scotland, where all civil rights were under the supervision of the law, which alone judged, as it did by the mouth of the Court of Session in 1626. The personal interest of the Sovereign rendered the Crown incapable of judging in what was its own cause at any time subsequently to 1435; for it was not the question of a mere title but of a dignified feudal fief, the possession of which was coveted as contributing to the revenues, power, and patronage of the Sovereign. Lord Redesdale entirely overlooks the policy of James I. and his successors, as shown in the preceding letter, namely, to absorb the great earldoms and the dignified fiefs into their possession, *per fas et nefas*. The success of that policy in the case of Mar cannot be founded upon as against the rights thus trampled upon.
2. That the admission by the Lords Erskine that they had no right, even had it been the fact, could have had no weight.
3. That Lord Redesdale’s doctrine amounts to this, that a dignity may be extinguished by prescription—which even Lord St. Leonards did not venture to urge in the Montrose case, although he suggested that a rule to that effect ought to be established, in order to preclude

claims to ancient dignities, long dormant and supposed to be extinct, and save the waste of time to the House consequent upon such.

4. That the Erskines cannot with any reason be charged with "acquiescence" in the deprivation of their earldom, even were such acquiescence a bar in law, which it is not. By Scottish law they could not have acquiesced to their own injury, except by formal resignation into the hands of the Crown. They protested before the King and the Estates of Parliament as long as there was an opening for remonstrance. It would almost appear that Lord Redesdale argues against this right because they did not assume the dignity, as Robert Lord Erskine did, although without warrant. But non-assumption of a dignity cannot be construed as against the right to its possession, inasmuch as a man entitled to a higher dignity may sit under a lower, and may "keep his patent" (to use Lord Redesdale's own words in the Montrose case) "in his pocket" till the times become favourable for producing it. It is to be insisted on once more that it was not competent to an earl or peer in feudal times to adopt a title of dignity until he had been duly invested in the fief to which it was annexed, which Earl Robert duly was in 1438, although his right was disallowed in 1457; but none of the later Lords Erskine had the opportunity of such investment, owing to the usurpation. For unless the officers of the King's Chapel granted the brieve of mortancestry, no inquest could be held, and in the absence of a retour no infeftment could follow. Robert Lord Erskine did not "call himself" Earl of Mar, as Lord Redesdale represents it; the law called him so after the retour of 1438, and he designated himself accordingly. If, sitting in Parliament, the Parliament, or rather the clerks of the Parliament, under the influence of the Government, styled him "Lord Erskine," it was involuntary on his part. And these latter considerations equally apply to his descendants between his death and 1565, and to his present representative since 1875. It is, I may observe, rather inconsistent to argue

against the right of these peers to their higher title because they did not assume it, and on the other hand to blame the present Earl for assuming it after it had devolved upon him according to the rules and precedents of Scottish law, as already shown.

5. That Lord Redesdale has entirely overlooked the fact that the supposed "settlement" of 1426-1465 was effectually "disturbed" in 1565 and 1626, and a new "settlement" made in the latter year by a final judgment of the Court of Session, fixing for ever the relative claims of the two charters of 12th August and 9th December 1404, by affixing exclusive validity to the latter,—a determination and settlement protected by the Treaty of Union, and which no human power, short of revolutionary force, of might overruling right, can now "disturb." But for Lord Redesdale's prepossession against the descent of territorial "peerages" to heirs-general grounded upon Lord Mansfield's rule, as laid down in the Cassillis case in 1762, and unmodified by the Sutherland, he would not have thus ignored the decret of 1626, and the testimony repeatedly rendered in that judgment, no less than by an Act of Parliament in 1587, hereafter to be adduced, to the effect that Sir Robert Erskine was lawfully recognised as Earl of Mar, in the quality of heir-general of the Countess Isabella in 1438.

There is one observation of a most important nature, favourable to Lord Mar, upon which Lord Redesdale laid much stress, but which I reserve for the conclusion of this section, inasmuch as it has a far wider scope than any point or period of the *interregnum* with which we are now dealing.

Proceeding to the special objections to the validity of the retours of 1438, as urged more especially by Lord Chelmsford, they resolve into the following propositions: 1. That the retours were obtained through fraud and collusion; 2. That the retours assert what was false in fact; 3. That the effect of the retour of April was vitiated technically by delay in acting upon it; 4. That the retours were both to one and the same half only of the Comitatus, which Lord Redesdale also held;

5. That the Comitatus being thus broken up by partition, the dignity annexed to it must necessarily have ceased to exist ;
6. That the retour of 1438 was annulled and set aside by competent authority in 1457, which settled the question. These objections, easily put into succinct form, cannot be appreciated and refuted except at some cost of trouble and time, which the reader, I am sure, will not grudge.

1. On the question of collusion, Lord Chelmsford remarks that "the circumstances connected with" the two retours "lay them open to a good deal of observation." The reader will recollect the indenture between Sir Robert Erskine and Sir Alexander Forbes, 17th November 1435, which I have already cited. Lord Chelmsford speaks of Sir Robert and his son entering into this agreement with Sir Alexander, "the Sheriff-depute of Aberdeen, before whom the proceeding for a retour would be held," as in order "to secure his services in their favour (covered with the decent pretext of his doing all his business and diligent care to help and further them with his advice and counsel)," etc. Lord Chelmsford speaks subsequently of "the purchased assistance of the Sheriff-depute." I may observe that there was far too much of such injurious imputation indulged in during the inquiry of 1875. Documents and actions should be narrowly scrutinised by the light of attendant circumstances, law and usage, before such insinuations are hazarded, imputing dishonour to men long since passed away, and who can no longer defend their own character and repudiate the disgrace thus cast on their families.

Lord Chelmsford's criticism proceeds on the assumption that Sir Robert Erskine and Sir Alexander Forbes were men prepared to pervert justice for their private interest, and that the retours of 1438 were the result of Sir Alexander's personal corruption. But there is nothing in the known character of either of these powerful barons to warrant this unworthy suspicion, and the character and conditions of the indenture give no warrant for it. Moreover, Forbes had no power to act as is suggested, even had he been willing. As Sheriff-depute of Aberdeen, his office upon an inquest was purely official, as convener and president of the jurors; and the imputation presumes that he induced the four noble knights and barons, and other honourable men who sat upon the inquest, to perjure

themselves for his own personal interest,—the whole facts of the case upon which they had to pass judgment being, it must be remarked, notorious in the district,—while many of them were vassals of the earldom, and necessarily cognisant of those facts through their immediate connection with their overlords. For if the overlord is presumed to know his vassal, the vassal is equally presumed to know his overlord, and the conditions of their relative position. It falls also to be especially observed that Sir Alexander was only depute-Sheriff under the Earl of Crawford, who held the Sherifffdom by hereditary tenure, and Crawford, judging by a letter addressed to Sir Alexander himself, after his creation as Lord Forbes, in 1443, complaining of some remissness and irregularity in the fulfilment of his office, was not likely to pass over anything, had such occurred in 1438, of graver delinquency. I am not sure even whether Sir Alexander held the office of Sheriff-depute in 1435. Apart from his office, there was nothing unusual in the indenture with Erskine,—the words, as admitted by Lord Chelmsford, imply nothing indecent or improper, and such being the case, do not justify the gloss he put upon them; and, as just shown, even had he been sub-Sheriff at the time, the purely ministerial character of his intervention rendered it impossible for him to give the assistance stipulated for except through influence with the King or with the Government, through exposition of the law to the jurors, if so he did (which would in no wise compromise their honest independence although it might enlighten their understanding), or, which was equally likely, by defending the right or claim of the Erskines, either before or after the inquest, by force of arms. I have already stated how common such contracts were at that time. It may appear to modern and especially English eyes as if the Sheriff-depute of a Scottish county was a petty officer, liable to corruption; but Forbes, I repeat, was one of the great barons of Scotland, head of a most ancient house and clan, an approved and veteran soldier, who had fought with distinction in the memorable battle of Baugé in 1421, and husband of a daughter of George Earl of Angus—him whom we have already become familiar with—by his wife, Robert III.'s daughter. The charge against Sir Alexander implicates, be it remembered, the leading members of the inquest just as much as himself—men

equally above the suspicion of complicity. I have already slightly noticed the fact that Sir Alexander's "counsel, help, and supplie," are bespoken in the indenture in regard not only to the lands of Mar in Aberdeenshire, where he was Sheriff-depute, but in regard to other property presumably out of his official jurisdiction, in case the King should compensate Sir Robert for his right by donation of equivalent property elsewhere. In this latter alternative Forbes could have exerted no influence as Sheriff, and yet his aid and counsel are stipulated for and the equivalent acknowledgment guaranteed, independently altogether of any suggested influence of the description suggested by Lord Chelmsford. It has not as yet been appreciated that the interest of the leading members of the inquest in 1438 was distinctly against Sir Robert Erskine's succession, inasmuch as, if his claim was rejected, and the earldom lapsed to the Crown, they would all have become immediate vassals of the Crown, which was a privilege greatly to be coveted. But they acted loyally as men of honour, and reported in favour of the rightful heir, and with courage too as might be expected, indicating with precision the true character of Earl Alexander's status as a mere liferenter, although they must have known that the Crown based pretension to the contrary on the fraudulent resignation and regrant of 1426. These were not men, any more than Sir Alexander Forbes, to be influenced by the corrupt and petty motives imputed directly to Sir Alexander, and which equally reflect against their own character, and against that of Sir Robert Erskine.

2. Lord Chelmsford's allegation that the retour of April 1438 "is false in fact" is grounded on the consideration that "the jury found that 'Sir Robert is the lawful nearest heir of the Lady Isabella of one-half of the lands of the Earldom of Mar and Lordship of Garioch, which are in the hands of the King by reason of the death of Alexander Stewart, who held the lands by gift of the Lady Isabella for the term of his life,'" whereas "the lands were not in the hands of the King on the death of Alexander Stewart, who held under the gift of Lady Isabella for his life, but were claimed and possessed by the Crown by reason of the reversion in the charter of 1426, which vested in possession on the death of Alexander." "It was urged," Lord Chelmsford subjoined, "with great probability,"

by Lord Kellie's counsel, "that the October retour was obtained to correct the former one, which had erroneously found that Sir Robert had right to half the Lordship of Garioch, which at that time was held by Thomas Stewart's widow." All this is easily answered. The April retour asserted nothing but the truth, and that of October reiterates that truth. By the verdict in the first retour, dealing with one-half of the Earldom of Mar and Lordship of Garioch, Alexander Earl of Mar held as a liferenter, or, to use the exact word, *had* ("habuit dictas terras") as a liferenter till his death ("per donationem dicte domine Isabelle pro toto tempore vitæ suæ"); wherefore Sir Robert was entitled to succeed at his death as heir to Isabel; and, although the Lordship of Garioch had been dealt with by James I., it had been—such is the inference unmistakably pointed at—without warrant. By the verdict of the second retour, dealing with the other half of the Earldom of Mar, not associated with Garioch, the same fundamental reply is asserted, grounded on the fact that Alexander lived and died a mere liferenter—as in the first retour. There was neither false assertion in the April or first retour, nor discrepancy between it and the second or October retour—the second is not a correction of the first, but reasserts the fundamental point on which it proceeded, viz., Alexander's life tenancy, and (as its necessary consequence) his incompetency to resign what was not his own to deal with, and the incompetency of James I. to accept such resignation and act upon it by issuing the charter of 1426. Lord Chelmsford proceeds first on the assumption that the charter of 1426 was a valid conveyance; and, secondly, on a misapprehension of Sir Robert Erskine's claim, as if it was only to one-half of the "Comitatus," as to which I will speak presently. As regards the validity of the conveyance of 1426, the judgment of the Court of Session in their final decret of 1626, which Lord Chelmsford ignores, was that "James the First . . . be the deceis of the said umquhile Alexander Erle of Mar, or of the said umquhill Thomas Stewart, his son, acyurit na richt of propertie of the saidis landis . . . but only . . . ane simple and nakit possessioun, without all richt of propertie," thus rendering him incapable of dealing with them to the prejudice of the rightful heirs, Sir Robert Erskine and his descendants. After this there is nothing more to be said on the point of law and obligation.

3. Lord Chelmsford's technical objection "that infeftment not having been taken till November, it could not apply to the April retour, because it was beyond six months after the date of the precept of infeftment by virtue of that retour, and, by the rule in force at that time, such infeftment would have been too late"—is, as he himself intimates, adopted from the argument on Lord Kellie's side. Lord Kellie urged in his case that "it is incredible that if the retour of April had been considered a sufficient retour on which a precept of seisin could be demanded or asked for, a delay of six months would have been allowed to intervene before seisin was taken" (p. 134). But "the rule in force at that time," alleged by Lord Chelmsford, exists only in the development which the argument in the case obtained while passing from inference into conviction in the Lord Chancellor's mind. There was no such rule as that referred to in Scottish law.

4. An objection more formidable in appearance, but not in the least so in reality, was that laid stress on by Lord Chelmsford—also in echo of Lord Kellie's argument, and which Lord Redesdale equally adheres to—namely, that the retours are both to one-half only of the Comitatus, and that Sir Robert Erskine never claimed more. "It appears most conclusively," says Lord Chelmsford, "that the Lords Erskine never at any time claimed the entire Earldom or Comitatus of Mar, to which alone (if at all) the dignity could be joined" (a point I reserve for the succeeding or fifth point of objection), "but invariably limited their claim to one-half of the Earldom or Comitatus, and never asserted any right to the dignity itself. In 1390, during the life of Isabella, a supplication was presented to the King in Parliament by Thomas Lord Erskine, stating that if Isabella should die without issue, his wife, formerly Janet Berclay, would be entitled to one-half of the Earldom of Mar and Lordship of Garioch, and praying the King not to confirm any contract in relation to the lands to the prejudice of the rights of his wife. It is unnecessary to inquire into the nature of the title of Janet Erskine—my object in noticing this proceeding being to show that from the very first the claim of the Erskines was confined to one-half of the Earldom." These remarks form part of Lord Chelmsford's answer to the question proposed by himself, "What was done by the Lords Erskine during the

long interval when the Crown was conferring the dignity, and dealing with the lands at its pleasure?" *i.e.* between 1435 and 1565. In proceeding to deal with the retours of 1438, he states, "At this time Sir Robert Erskine claimed as coheir or co-parcener with Lord Lyle." He then asks, with Lord Kellie, "Why, if Sir Robert Erskine's claim was to the whole of the lands of Mar, should there have been separate retours of the two halves, there not being a shadow of evidence that he had acquired the other half after the April retour?" "Notwithstanding the second retour, it will be found," continued Lord Chelmsford, "that many years afterwards Lord Erskine persisted in his claim to only half of the Earldom." "It was . . . agreed" between the young King and Sir Robert Erskine in August 1440, "that the fruits and revenues of one-half of the Earldom of Mar, which Lord Erskine claimed as his property," that, *viz.*, including Kildrummie, "should be received by him until the judgment were had" before the Three Estates, "he being accountable for these in case judgment should be given against him and for the King. This agreement proves that the claim of Lord Erskine continued to be to one-half of the Earldom only, notwithstanding the two retours of 1438, by which it was assumed he obtained service as heir to the whole." The practical inference drawn by Lord Chelmsford from this supposed disintegration of the Earldom of Mar after the death of the Countess Isabel and her husband Alexander will appear presently.

I cannot but regret the incaution and inaccuracy with which Lord Chelmsford expressed himself in the first paragraph above cited, and indeed throughout his criticism on the present point. His eye is shut against half the evidence before him, while he appears to be entirely ignorant of the law affecting the devolution of dignified fiefs upon heirs of line, coheirs. While Sir Thomas Erskine claimed one-half of the earldom in Parliament in 1390-1—that being the half which carried the superiority over the whole—as the emergent right of his wife as elder coheir in the event of the Countess Isabel's death without issue, there is no such limitation, but on the contrary, it is the whole Comitatus which is the subject of his claim, and of Robert III.'s engagement in the charter of 1395; nor again is there any limitation to a half in the indenture between Sir Thomas

Erskine and David Earl of Crawford in 1400. Robert Lord Erskine did not "claim," to speak with precision, as coheir with Lord Lyle either in 1438 or at any other time—it is a mere inference of Lord Chelmsford's that he did so. It was impossible that any such supposed claims could clash, whatever rights Lord Lyle may have possessed to the *dominium utile* of half the Comitatus being necessarily subordinate to those of Lord Erskine as senior coheir, and thus superior over the whole. The fact that the Chancellor Lord Crichton in 1457 refused to grant precept of seisin upon the October retour, while it is not disputed that Earl Robert had obtained seisin and took possession of Kildrummie, is a clear proof that he claimed both halves, the half including Kildrummie in April, and the other in October. Sir Thomas Erskine once more protested, on behalf of his father, in the presence of James II. in Parliament, in 1449-50, "justitiam seu remedium eidem patri suo fieri de comitatu de Mar cum pertinentiis patri meo jure hereditario pertinente," but unjustly withheld by the King; and again, on the 21st March 1452-3, when Thomas Lord Erskine, his father being dead, protested before the King and General Council in Edinburgh, "pro justitia sibi facienda penes terras comitatum de Mar et de Garviach." All this evidence, with the exception of the charter of 1395, was before Lord Chelmsford when he asserted that the Lords Erskine never asserted any right to the earldom in its integrity, but only to one-half of it, and never asserted any right to the dignity itself. To this last observation Lord Chelmsford opposed a sufficient answer in the statement that "after the retour of 1438, Robert Lord Erskine in two or three private charters styled himself Earl of Mar," etc. etc.; while, as I have already observed, it was impossible for his son or his descendants to assume the title of a feudal dignity till after infeftment, which could not take place unless on a precept of seisin, which they could not obtain from the Crown under the circumstances till Queen Mary's time. Lord Chelmsford overlooks the fact that subsequently to 1565 Robert Lord Erskine was fully recognised by Parliament and the Court of Session as having been legally Earl of Mar, and that all the Lords Erskine between him and John Lord Erskine, the Earl restored in 1565 *per modum justitiæ*, would have been equally

so but for the injustice which was then acknowledged and remedied.

I have again to remark that discussion upon the two retours is practically superfluous after the judgment of the Court of Session in 1626, which determined that they were not, each of them, to one and the same half, but to two distinct halves of the Comitatus. Any rights that the Lyles may have possessed would not, I repeat, be affected by a retour which touched only on the superiority over such right as they possessed, the Crown only having cognisance of the younger coheir through the elder, as already explained. In the charter of Queen Mary in 1565, the Act of Parliament in 1587, and the decret of the Court of Session in 1626, with all of which we shall have to deal in course of time, Robert Lord Erskine and Earl of Mar is held to have been immediate heir of the Countess Isabel in the entire Comitatus, without any notice of subordinate rights.

But even if all had been as Lord Chelmsford alleges, and the Erskines had never claimed more than one-half of the Earldom, and both retours of 1438 had been to that half, assuming this *pro argumento*, it would not matter a jot as regards the right of the dignity or title of Earl of Mar as in Robert Earl of Mar. The simple answer to the whole of Lord Chelmsford's elaborate argument will appear on recollection of what I have shown in my second Letter, that by Scottish law and feudal usages, where a comitatus or earldom was partitioned between coheirs, the eldest coheir took the chief message as her *præcipuum*, in addition to her own half, or third, or fourth, as the number of coheiresses might be, and that the chief message carried the feudal superiority over the whole fief, and the title of dignity. This last provision rules still in regard to Scottish peerages descendible to heirs-general, as stated by Lord Stair, and constantly illustrated when such cases occur—there being no abeyance in Scottish dignities. Lord Stair's words, quoted in my second Letter, cover the entire range of Scottish legal succession.

In the Mar case there were two coheirs, representing Elyne of Mar and her sister, the ancestress of the Lyles. The claim of the Erskines to one-half of the Comitatus, when specially dwelt upon, was to that half where the chief message, Kildrummie, was situated, comprising not only the *dominium utile*,

or revenues, but the superiority over the whole fief. The claim of the Lyles, the representatives of the younger coheir, must have been to the inferior half, that is, of the *dominium utile*, or profitable revenue, subject to the superiority carried by the chief messuage, and responsible to the Crown, and known to the Crown only through the representatives of the elder coheir. The Sovereign, as overlord, knew nothing of the Comitatus of Mar except through the muster at Kildrummie, and the homage rendered and relief paid for the whole by the tenant in possession. The distinction thus established meets the whole of the preceding objections. When the Erskines claimed one-half, it was that half the possession of which implied the whole, and the sense in which Earldoms were indivisible; when they asserted their right to the whole Earldom it was as an indivisible fief, of which the superiority and the intitulation belonged to themselves as eldest coheirs, although half of it—or it might have been five-sixths—belonged, as matter of ordinary possession, or property, to others.

The dignity was inherent in the succession of the eldest coheir; and thus the question whether Earl Robert and the Erskines possessed the whole of the Comitatus, or only half, or whether the two retours of 1438 covered the two halves, or both referred to one-half only, is wholly immaterial, and might be solved either way without the slightest effect on the question of the transmission of the dignity. We have nothing in the slightest degree approaching to the doctrine of abeyance and its incidents in Scotland.

5. It will now be evident, in reply to Lord Chelmsford's penultimate objection, that the noble and learned Lord fell into very grave error when he inferred from the supposed disintegration of the Comitatus of Mar, as proved by the limited character of the retour of 1438, and by the dealings of the Crown with the Earldom afterwards, that the original dignity or title of honour could no longer exist under such circumstances, but must have been extinguished. He adopted this opinion, like many others, from the counsel for Lord Kellie. He introduces it by the observation that "besides thus granting the dignity of Earl of Mar, the Crown from time to time made grants of considerable portions of the Mar lands, thus severing them from the Earldom or Comitatus, and thereby, as it was

contended, breaking it up, and preventing the possibility of restoring the territorial dignity in its integrity,"—to which he subjoined, in the passage already quoted, "It appears most conclusively that the Lords Erskine never at any time claimed the entire Earldom or Comitatus of Mar, to which alone (if at all) the dignity could be joined," etc. Lord Chelmsford afterwards stated more definitely, in reference to the charter of the Comitatus of Mar to John Lord Erskine in 1565, "it is clear that this could not have been the ancient Earldom or Comitatus, with which the dignity was originally connected, because it no longer existed in its integrity, parts of the Comitatus having been severed from it, and vested in strangers, and other parts having been annexed to the Crown by Act of Parliament." This error, the fruitful parent of error, arose simply from ignorance of or inadvertence to the rule and usage explained in a former page, that the fief was parcel of the chief messuage, and that the chief messuage carried the dignity, and went to the eldest coheir; and inadvertence must be presumed, inasmuch as, at the beginning of his address to the Committee, Lord Chelmsford cites the judgment of the Commissioners in the competition between Baliol, Bruce, and Hastings in 1292, to the effect that "earldoms in the kingdom of Scotland were not divisible; and that if an earldom devolved on two daughters, the eldest born carried off the whole in entirety,"—that is, as I have explained, the superiority over the whole, the fief itself being indivisible, with the corresponding obligation of homage and service to the overlord, the Sovereign. Illustrations of the descent of the dignity along with the chief messuage to the eldest coheir and his representatives have been already given. Lord Chelmsford must have been predisposed to this unfortunate blunder by the English doctrine of abeyance, through which dignities become practically extinguished through absorption into the Crown till the Sovereign prefers, if he so pleases, but not otherwise or of right, one of the coheirs, the eldest or the youngest at his option, to the enjoyment of the dignity.

6. Lastly, to Lord Chelmsford's objection—for such it is, although expressed in the form of an observation—that the retours of 1438 were annulled and set aside by the service negative in 1457, I have simply to reply that the proceedings

of 1457 were illegal in themselves, and subsequently annulled by the Court of Session in 1626. This, however, is matter for the future. I may observe, however, that Lord Chelmsford's words, "Nothing was done towards obtaining a judgment upon Lord Erskine's claim to one-half of the Earldom of Mar till 1457," can hardly have been written with a recollection of the evidence which proves that Sir Robert Erskine and his son repeatedly pressed for a settlement of the dispute between themselves and the Crown, and acknowledgment of their rights on the score of justice, and that the delay and postponement was entirely on the side of the Crown. Lord Chelmsford remarks that "no mention is made" in the Testimonial, "of the charter of the 28th May 1426," and adds, "Whether this arose from any doubt as to the validity of this charter, or whether, Lord Erskine having relied upon the charter of Isabella of December 1404, it was thought sufficient to show that she had disabled herself from making it by her having granted the earlier charter of August 1404, I am unable to form an opinion." The fact is clear that the charter of 1426 was ignored; and this could only have been through the doubt suggested by Lord Chelmsford. But if that doubt existed, doubt must equally have attended the charter 12th August 1404. Which was its basis? The result follows that the proceedings of 1457 awarded the Earldom to the King in virtue of a charter—I will not now say of doubtful validity, but which they must have known to be invalid as not possessing the royal authority, and against the charter, that of 9th December 1404, duly confirmed by the Sovereign, upon which Lord Erskine stood. Lord Chelmsford's inability to form an opinion arose simply from his ignorance of the distinction between a non-confirmed and a confirmed charter by a vassal, alienating property held of that vassal's superior, and which could not be dealt with without his consent.

I have given these answers out of respect to Lord Chelmsford's criticism, and in order to preclude any idea that I wish to press the judgment of 1626 against the Report of the Committee in blind affiance upon its authority, apart from conviction and proof of its soundness and justice.

On Lord Redesdale's special observations on the proceedings of 1438 and 1457 I have only to notice that the expression

“Sir Robert got himself served heir” does but scant justice to the fact that the service proceeded on a brieve proceeding in the first instance from the royal Chapel, and on a precept of seisin proceeding upon the retour of the inquest from the same fountain of authority, the officials of which must be presumed to have acted with integrity throughout, while the leading and influential members of the inquest were men of unimpeached honour. The natural presumption in favour of all the persons concerned is converted into certainty by the judgment of 1626, which vindicates all that was then done as just and legal against the proceedings of 1457. But I have stronger objection to make to the description of the Government in 1438 as “a regency, the result of a rising against the late King, whose acts against the aristocracy the nobles were determined to resist,” and of whom Lord Redesdale asks, “Is it credible that” a regency so constituted “could have prevented such a man as Lord Erskine from taking a seat in Parliament to which he had lawfully succeeded?”—this argument in the form of question being in reply to the assertion by Mr. Hawkins, Lord Mar’s counsel, that “the Crown kept him (Sir Robert Erskine) out of the Earldom.” Lord Redesdale (if I understand him rightly) believes the “regency”—that is, the Government—to have consisted of those nobles who had conspired against and murdered the King, James I., or who, at least, were devoted to the cause of the great feudal aristocracy. But there had been no rising, no conspiracy except that of the family of the disinherited Earl of Strathearn and of Walter Earl of Athole, the representative of the second marriage of Robert II. The indignation of the feudal aristocracy against the perpetration of the murder was as intense as that of the meanest peasantry; and the men in power in 1438 were all of them members of what might be called the lesser nobles, as distinguished from the heads of the great feudal houses. There was no sympathy between such men and Sir Robert Erskine. Their object was to depress the great nobles; and Sir Robert, one of the most powerful and wealthy among these nobles, independently altogether of his claims upon Mar, would in that character be especially obnoxious to them. Mr Hawkins’s statement was thus fully warranted. It was not merely the question of a seat in Parliament under a particular title, a peerage in the

modern sense, but that of the right to a great feudal principality, and the additional power its possession would confer. If, I may add, the "regency" had been so favourable to the aristocracy, the great houses of Strathearn, Albany, etc., would have been restored, and Sir Robert Erskine viewed with favour and his right recognised. Lord Redesdale cites in proof of Sir Robert's power the fact of the compromise into which the Crown entered with him in 1440, by which Kildrummie was delivered to him, and he was allowed the revenues of half the Earldom, etc., *till* judgment should be pronounced as to his right—as proof "that Lord Erskine was, under the retour of 1438, in possession of half the lands of the Comitatus, which the Crown claimed under Alexander's charter, but which the regency was unable to get from him, and which probably remained with the Erskines until the retour of 1438 was set aside in 1457." This last is the only reference in Lord Redesdale's speech to the proceedings in the latter year; and it is interesting to observe that Lord Redesdale recognises the fact that the retour of 1438 which he refers to was to the half of the Earldom which included Kildrummie, the chief messuage of the Earldom, and the possession of which conferred the superiority and the title of dignity, and justified Earl Robert in using it in his charters affecting the Comitatus; while the Crown was not justified, but, on the contrary, acted illegally, in withholding recognition, and styling him simply "Lord Erskine" in the confirmations of these charters, and in their designation of him otherwise, as founded upon both by Lord Redesdale and Lord Chelmsford.

It can excite no wonder, after the sketch of the royal policy already given, that the rights of Robert Earl of Mar under the retours of 1438 were so strenuously resisted, and ultimately set aside by those in power during and after the minority of James II. I may now—having established the legal view of the case, as always recognised by the orthodox school of Scottish lawyers—recapitulate the episode of 1457 in the words of Scotland's distinguished historian, Mr. Fraser Tytler, written long before the Report of the Committee of Privileges in 1875:—

"It was about this time that the Crown received a valuable addition to its political strength, in the annexation of the Earldom of Mar

to the royal domains. Since the period of the failure of the heir-male in 1435, in the person of Alexander Stewart, natural son of the Earl of Buchan, brother of Robert the Third, this wide and wealthy earldom had been made the subject of litigation, being claimed by the Crown as *ultimus hæres*, by Robert Lord Erskine, the descendant of Lady Ellen Mar, sister of Donald, twelfth Earl of Mar, and by Sir Robert Lyle of Duchal, who asserted his descent from a coheirress. There can be no doubt that the claim of Erskine was just and legal. So completely indeed had this been established, that, in 1438, he had been served heir to Isabel Countess of Mar; and in the due course of law, he assumed the title of Earl of Mar, and exercised the rights attached to this dignity. In consequence, however, of the Act of the Legislature already alluded to, which declared that no lands belonging to the King should be disposed of previous to his majority without consent of the Three Estates, the Earl was prevented from attaining possession of his undoubted right; and now that no such plea could be maintained, an assize of error was assembled in presence of the King, and, by a verdict which appears flagrantly unjust, founded upon perversions of the facts and misconstructions of the ancient law of the country, the service of the jury was reduced; and the earldom, being wrested from the hands of its hereditary lord, was declared to have devolved upon the King. The transaction, in which the rights of a private individual were sacrificed to the desire of aggrandising the Crown, casts a severe reflection upon the character of the King and his ministers, and reminds us too strongly of his father's conduct in appropriating the Earldom of March. It was fortunate, however, for the monarch, that the house of Erskine was distinguished as much by private virtue as by hereditary loyalty; and that, although not insensible to the injustice with which they had been treated, they were willing rather to submit to the wrong than endanger the country by redressing it. In the meantime James, apparently unvisited by any compunction, settled the noble territory which he had thus acquired upon his third son, John, whom he created Earl of Mar."¹

Finally, before concluding this section of criticism upon criticism, I have to notice, not an objection, but an admission on the part of Lord Redesdale, which may be held to neutralise any weight attachable to Lord Chelmsford's argument from the alleged disintegration of the Comitatus as necessarily extinguishing the dignity, or title of honour. Lord Redesdale supports his argument against the statement of Mr. Hawkins, that "the Crown kept" Sir Robert Erskine "out of the Earldom," on the ground that he was too powerful to be excluded from

¹ Tytler's History of Scotland, iv. p. 131; ed. 1841.



his seat in Parliament as Earl of Mar, by the observation, "If the ancient Earldom was in existence, as descendible to heirs general, he had a right to it as heir of Earl Gratney." "Every peer," he adds, "had an interest in the question of such a succession, and late events had proved that they were not so weak, or the Crown so strong, as to render such a refusal possible." I may venture to interpose a doubt whether the Scottish peers in 1438, any more than in 1875, felt so warm an interest in the maintenance of ancient dignities as Lord Redesdale's fond imagination suggests. But passing this by, he proceeds, "Look at the agreement in 1440," from which "it is clear . . . that Lord Erskine was, under the retour of 1438, in possession of half the lands of the Comitatus," etc. "It must also be observed that the ancient peerage, if in existence, descended to him independently of the Comitatus as heir-general of Gartney," *i.e.* Gratney: "and that the claim of the Crown to the Comitatus was based on acts done in relation to it by Isabella and her husband in no way to be affected by Lord Erskine's possession of the peerage." Lord Redesdale thus, with his usual frankness, admits that nothing done by the Crown affecting the lands could affect the right of Sir Robert Erskine to the dignity or title of honour—what he calls by a word which I maintain to be wholly inappropriate to the fifteenth century, the "peerage"—as accruing to him *de jure sanguinis* as eldest coheir and representative of his ancestor Gratney Earl of Mar, *if* only (the necessary postulate from his point of view) an exception could be established in favour of the heir-general against Lord Mansfield's law of presumptibility to heirs-male of the body—a presumption which, in fact, he appears here to overlook or dispense with. I shall show presently that the Scottish Parliament expressly recognised Earl Robert's descendants in 1587 as Earl of Mar in virtue of the right of blood through this very descent; and, if so, there is nothing but Lord Mansfield's unfortunate *dictum*, already I think conclusively disposed of, to stand between Lord Redesdale's admission here in question, and his absolute recognition of the present heir-general as Earl of Mar, by precisely the same right of blood as Earl Robert, through direct descent from Earl Gratney.

While I have thus vindicated the retour of 1438 so vehemently attacked by Lord Chelmsford in 1875, as previously by

Lord Elphinstone in 1626, and by the Government of James II. in 1457, the character of the proceedings in 1457 has been sufficiently exposed by the evidence of the Testimonial drawn up in the names of Lord Lindsay of the Byres, the Justiciary, and of Walter Lindsay, and by my observations in the course of the narrative based upon it, under the authority of the judgment of 1626. I need only enforce once more the fact that, while, on Lord Chelmsford's premises, grounded on the charter 12th August 1404, those proceedings were justifiable, Lord Redesdale's recognition of the charter 9th December 1404 as the only conveyance good in law, and his qualification of the charter of 1426, grounded on that charter, as having been obtained by fraudulent collusion with James I., left him no alternative but to found, as he does, on the tongue of fraud, the arm of violence, and the submission of the victims—not, of course, through any approval of such "iniquity" (the word it is characterised by in the Act of 1587),—iniquity which, as a bold Bertram and a manly Mitford, would be abhorrent to his mind, but as establishing "a settlement" decisive as to the construction to be placed on the claims of Robert Earl of Mar, and of his successors as heirs-general of the Countess Isabel to the present time. It is on these grounds exclusively—apart from the favourable admission noted in the preceding paragraph—that Lord Redesdale comes to the same conclusion as Lord Chelmsford: Lord Chelmsford reaching it by the direct road from the charter 12th August 1404—namely, that the original Earldom, the fief and dignity conjointly, was extinguished previously to 1565—Lord Redesdale by the circuitous process above noticed. Lord Chelmsford indeed weakened the effect of his previous exclusive dependence on the charter 12th August 1404, by grasping at shadows when he summed up his opinion in the most comprehensive terms at the conclusion of his address, viz. "that whether the original dignity was territorial or not, or was or was not descendible to females, is wholly immaterial, inasmuch as it had *in some way or other* come to an end more than a century before Queen Mary's time."

To conclude thus far:—Arriving by distinct roads from opposite points of the compass at the same door, the door of the Council Chamber of Mary Queen of Scots, the noble and

learned Lord, and the noble Lord the Chairman of Committees, pause, shake hands, and enter together,—the Chancellor, Lord Cairns, stating that he has had the advantage of reading the opinions, or, as they are styled and printed by the House of Lords, “judgments” of the two noble Lords—I must add, their contradictory opinions up at least to 1457 and 1565,—gives us no clue to his own opinion on the facts at issue between them, but drops down, I may say, from the clouds at the self-same door of 1565, lifts the latch which they have dropped behind them, and follows them in. What these noble and learned Lords see, hear, and understand therein we shall discover anon. Meanwhile I must say that nothing struck me more in reading the reports of the proceedings in Committee, or in listening to them during the few occasions when I was present, than the acuteness and earnestness with which Lord Cairns repeatedly supported the true and Scottish view of argument on evidence adduced by Lord Mar’s counsel against the pleadings of those opposed to it, Lord Kellie’s counsel—desisting only when at fault, as it appeared to me, through that non-familiarity with the law and practice of Scotland, which inevitably attends upon the ablest heads and subtlest instincts of English lawyers when brought face to face with a foreign law and judicature such as that of Scotland; while it must be added that the advocates of the genuine Scotch law were paralysed by the consciousness that these doctrines would not be listened to in the House of Lords, and by a dread of setting the House against them if insisted upon. Native sagacity and honest intention are no match for such disadvantage.

LETTER V.

RESTITUTION AND PARLIAMENTARY RATIFICATION.

ONE hundred and thirty years having thus passed away, during which the successive Jameses dealt with the Earldom of Mar, the fief and the dignity, in the manner exhibited in the preceding Letter, and an age having arrived in which, with abundance of public and private disallowance of right, the sense of justice became more and more pronounced in the minds of men—the hour, in a word, having struck on the clock of time—the conscience of Scotland awoke (as I think I may say) to the conviction that a great wrong had been done to the house of Mar; and Mary Queen of Scots, ever anxious to redress injustice, having become fully aware how gross had been the injury inflicted on the heirs-general of the Countess Isabella, intervened for the purpose of restitution—with the concurrence and applause of both the rival factions which distracted Scotland in the memorable year 1565.

The process of restitution, commencing in that year, was not completed, so far as regarded the territorial fiefs, till nearly seventy years afterwards—a delay owing to impediments, the natural consequences of the action taken by the Crown during the period intervening since 1438. But the restoration of the dignity, in connection with the “Comitatus” was, I shall show, immediate. I propose in the present and two following Letters to set forth, first, the charter of the Earldom of Mar by Queen Mary, 23d June 1565, to John Lord Erskine, in express acknowledgment of his right, *per modum justitiæ*, with the proceedings upon which the charter itself was based, as its warrant, and to which it gave formal and practical expression; secondly, the intervention of Parliament, in the reign of

James VI., in recognition of his rights and those of his son, towards the recovery of the portions of the fief which had been alienated by the Crown; thirdly, the ranking of the Earldom of Mar in 1606, but which I shall deal with subsequently in a distinct Letter; and fourthly, the great process of law, or rather series of processes, between the Earl of Mar—still the son of the John Lord Erskine restored in 1565—and Lord Elphinstone and others, which was determined finally in 1626 upon a review of all that had passed since the 12th August 1404. I shall narrate the successive developments of the drama, as I have hitherto done, and table the objections raised by the Committee for Privileges in 1875, point by point, as I proceed, meeting them by the overruling principles of Scottish law, which I have already abundantly vindicated.

I shall devote the present Letter to the consideration of the charter of restitution in 1565, upon the construction of which so much turned in the Report of the Committee in 1875.

SECTION I.

General Retour, and Charter of 1565.

As the first and fundamental step to the proposed restitution, it was requisite that Lord Erskine's status as heir and representative of Robert Earl of Mar, the last legitimate tenant of the Earldom and dignity of Mar, should be legally established. This, as in other cases, as for example in that of Earl Robert himself in 1438, fell to be accomplished by a retour of service following upon a brieve of inquest issued from the Royal Chapel or Chancery. The brieve was addressed to the Sheriffs of the shires of Aberdeen, Stirling, and Clackmannan, assembled in the *prætorium* or town-hall of Edinburgh. The inquest was held under the presidency of these Sheriffs on the 5th May 1565; and the jurors, fifteen in number, who pronounced the verdict, were the following nobles and landed gentlemen: David Earl of Crawford, Patrick Lord Lindsay of the Byres, Sir James Douglas of Drumlanrig, James Stirling of Keir, John Grant of Freuchie, John Home of Blackadder, James Cockburn of Skirling, Simon Preston of that ilk, James Somerville of Cambusnethan, Laurence Mercer of Meikleour, William Livingstone of Kilsyth, Alexander Bruce of Airth, John Blackadder of

Tulyallan, Charles Murray of Cockpool, and Robert Drummond of Carnock. Their verdict was to the effect that Robert, late Earl of Mar and Garioch, and Lord Erskine, grandfather of Alexander Lord Erskine, "proavus" (great-grandfather) of John, now Lord Erskine, the bearer of the brieve, had died in the peace and faith of the King, James II., and that the said John, now Lord Erskine, was legitimate and nearest heir of the said late Robert, "comitis et domini," Earl and Lord aforesaid.¹ This was a general service establishing his *jus sanguinis* as in John Lord Erskine, the descendant and representative of Robert Earl of Mar and Garioch, his ancestor, thus connecting the last lawful tenant of the fiefs and dignities of Mar and Garioch with Lord Erskine in the concatenation of feudal succession. A general service was the established and indispensable legal process through which such propinquity was established, apart from which no claim could be prosecuted or vindicated to any right derivable from the ancestor ("antecessor" or predecessor) by lineal or hereditary succession. It is noteworthy that this jury in 1565 was headed by the representatives of the two men who had presided officially over the inquest of 1457, by Patrick the descendant of John Lord Lindsay of the Byres, the Justiciary in 1457, and by David Earl of Crawford, the representative of that Earl David, then a minor, whose uncle and guardian Walter Lindsay acted for him as Sheriff of Aberdeen on that occasion. But the concurrence of these two men as jurors in 1565 is much more interesting as illustrating the awakening of the national conscience in this great Mar question, inasmuch as they were diametrically opposed in the politics of the time, Crawford being a Roman Catholic and a devoted supporter of Queen Mary, while Lord Lindsay of the Byres was the fiercest and most bigoted of the Lords of the Congregation or partisans of the Reformation.

It is not impossible that the issue of this service of 1565 may have been preceded by an assize of error, and inquiry into and reversal of the proceedings of 1457. A document existed formerly in the Mar charter-chest, and is quoted by Sir Robert Douglas, in which reasons are assigned (according to Sir Robert's report) why the grounds of these proceedings were erroneous. But the document, whatever was its character, does

¹ Minutes of Evidence, p. 121.

not now, it would appear, exist, and consequently has not been available as evidence. The invalidity however of the service negative of 1457, based on the charter 12th August 1404, is in no need of any independent vindication.

Lord Erskine's status being thus established as heir of Earl Robert, while Earl Robert's had been previously vindicated by the retour of 1438, Queen Mary, on the 23d June 1565, executed a charter under the Great Seal, by which, after recital of the descent of John Lord Erskine from "Robert Lord Erskine" (correctly so designated, as will be shown in the following section), while Robert was nearest and lawful heir to Isabel Countess of Mar in the estates of Mar and lordship and regality of Garioch, and acknowledgment that the said fiefs had been unjustly withheld from John Lord Erskine's ancestors, and that she was moved by conscience to restore them to the lawful heir—she grants by way of restitution to the said Lord Erskine, his heirs and assignees, the entire Earldom of Mar and lordship of Garioch as possessed from ancient times by the Countess Isabel—thus replacing Lord Erskine absolutely (to use a quaint legal phrase) "in Isabel's shoes," precisely as Isabel had the fiefs after the execution of the ruling conveyance, the charter of 9th December 1404, confirmed by Robert III. on the 21st January 1404-5. The dispositive clause specifying the subject of the grant is expressed in two sentences or paragraphs. The first conveys the entire Earldom of Mar, specified as comprising the lands of Strathdon, Braemar, Cromar, and Strathdee, these being the portions of the Earldom of Mar proper in actual possession of the Crown, and which had been recently resigned by James Stewart, Earl of Mar, and now of Moray. The second paragraph conveys the Earldom of Mar, and the lordship and regality of Garioch, making up the complement of Isabel's inheritance, and which had also been resigned by James Stewart, together with all other lands and other rights and claims pertaining to the Earldom, which the Crown either has had in possession or may hereafter claim,—thus renouncing all right of opposition on the part of the Crown to the full vindication in the courts of law of the right of the grantee to the portions of the Earldom which had been granted away by the Crown to others during the period of usurpation. The most important of these alienated portions was, as already mentioned, the barony and castle of Kildrummie,

the ancient chief message and capital of the Earldom, which, as already stated, had been granted to the Elphinstones. In consequence of this alienation—unwarranted, but which fell to be rescinded by legal process, the Elphinstones having been duly inducted by infeftment—the manor of Migvie was declared by the charter to be a sufficient place for infeftment or seisin in the entire Earldom of Mar, while the castle of Dunnydeer was similarly to serve for Garioch. It is impossible for words to convey a more frank and ample disavowal of wrong and acknowledgment of right by the one personage in Scotland who was competent, in virtue of actual possession, although illegally obtained, to effect that great act of restitution. The words used are, “*conscientia motæ ut nobis decet, legitimos hæredes ad suas justas hæreditates restituere*”—words implying restoration *per modum justitiæ*, not as an act of grace or indulgence, however graciously and gracefully the intervention might have been carried through.

This charter is of such importance—or, at least, such importance has been attributed to it—that I shall here cite the original words so far as to vindicate the analysis of it just given:¹—

“*Maria Dei gratia regina Scotorum . . . Sciatis quod nobis . . . intellectum est quod quondam Issobella Dowglas comitissa de Mar, hereditaria proprietaria pro tempore comitatus de Mar ac domini et regalitatis de Gareache, infeofamentum confecit quondam Alexandro Stewart in libero matrimonio inter illum et ipsam contrahendo, de totis et integris dictis comitatu, dominio, et regalitate, Tenendis ipsis eorumque alteri diutius viventi, et hæredibus inter ipsos procreatis, quibus deficientibus hæredibus dictæ Issobellæ quibuscunque de nostris nobilissimis progenitoribus optimæ memoriæ*” (*i.e.* by the charter 9th December 1404) “*qui confirmationem desuper concessunt*” (*i.e.* on the 21st January 1404-5) “*prout in dictis infeofamento et confirmatione respective late continetur; Et quod postea dicti Alexander et Issobella absque legitimis heredibus inter ipsos procreatis obierunt: Quibus sic decedentibus quondam Robertus dominus Erskin per debitum ordinem legitimus et propinquior hæres dicte quondam Isobellæ de prefatis comitatu, dominio, et regalitate retornatus fuit*” (*i.e.* by the services of 1438). “*Sic quod dilectus noster consanguineus*

¹ Reg. Mag. Sig., l. xxxii. No. 501; Minutes of Evidence, p. 122.

Johannes nunc dominus Erskin, qui retornatus est legitimus et propinquior heres dicto quondam Roberto domino Erskin” (*i.e.* by the service of 5th May 1565), “hæredi dictæ quondam Issobellæ indubitatum hereditarium jus dictorum comitatus, domini et regalitatis habet, non obstante quod sui prædecessores ab eisdem detento erant et a possessione eorundem, partim occasione jurgiorum pro tempore occurrentium, et partim injusta refutatione et impedimentis per obstinatos et partiales gubernatores et officarios factis, rationabiles supplicationes et petitiones per dicti nostri consanguinei prædecessores factas refutantes ipsis frequens et intente introitum ad hereditariam possessionem earundem petentibus et desiderantibus: Quibus præmissis per nos nunc diligenter consideratis et avisatis, nos non solum ob eadem et ob bonum, fidele, et gratuitum servitium tan nostris prædecessoribus per dictum nostrum consanguineum et suos prædecessores factum, presertim per dicti nostri consanguinei quondam patrem et seipsum nostris charissimis patri et matri nobilissimæ memoriæ, ac per ipsum nobis a decessu dicte quondam nostræ charissimæ matris: Sed etiam conscientia motæ, ut nobis decet, legitimos hæredes ad suas justas hæreditates restituere; Dedimus, concessimus, ac tenore presentis carte nostre damus et concedimus dicto nostro consanguineo Johanni domino Erskin, suis heredibus et assignatis hereditarie; Totum et integrum dictum comitatum de Mar, continentem terras subsequentes, videlicet Strathdone, Bramar, Crowmar, et Strathde, cum omnibus et singulis aliis terris ejusdem ex antiquo eidem pertinentibus, necnon omnes et singulas terras dicti domini et regalitatis de Gareach, cum omnibus et singulis castris, turribus, fortaliciis, maneriebus, silvis, molendinis, piscariis, partibus, pendiculis, feudifirme firmis, annexis, connexis, tenentibus, tenandriis, liberetentium servitiis, advocacione, donatione, et jure patronatus ecclesiarum, capellaniarum, ac beneficiorum, ac pertinentiis quibuscunque dictorum comitatus, domini et regalitatis respective, ipsis ex antiquo et eorum alicui respective pertinentibus, jacentem infra vicecomitatum nostrum de Abirdene. Insuper, pro bono, fideli et gratuito servitio nobis et prædecessoribus per dictum nostrum consanguineum et suos prædecessores, ut premissum est, impensis, damus, concedimus et disponimus dicto nostro consanguineo, suis hæredibus et

assignatis ; Totum et integrum predictum comitatum, dominium, et regalitatem respective, cum terris superius specificatis dicti comitatus ; Ac cum omnibus aliis terris, castris, turribus, fortalitiis, maneriebus, silvis, molendinis, piscariis, partibus, pendiculis, feudifirme firmis, annexis, connexis, lie outsettis, tenentibus, tenandriis, liberetenentium servitiis, advocatione, donatione, et jure patronatus ecclesiarum, capellaniarum et beneficiorum, ac pertinentiis quibuscunque dictorum comitatus, domini, et regalitatis respective ; Ac totum jus, clameum, proprietatem, et possessionem, tam petitorium quam possessorium quæ et quas nostri prædecessores aut successores habuimus, habemus, seu habere vel clamare poterimus aut poterint ad easdem aut aliquam earundem partem, aut, ad firmas, proficua, et devoria earundem ratione eschaete, forisfacturæ, recognitionis, ultimi hæredis, totius aut majoris partis alienationis, purpresuræ, disclamationis, bastardiæ, wardæ, seu non introitus ex annis et terminis preteritis, aut ob quamcunque aliam actionem seu causam retroactam : Renunciando, quiete clamando, et exonerando eisdem dicto nostro consanguineo suis hæredibus et assignatis ; cum pacto de non petendo ; ac cum supplemento omnium defectuum tam non nominatorum quam nominatorum, quos tanquam pro expressis in carta nostra habere volumus.”

After which follows the provision for seisin at the manor of Migvie for the Earldom of Mar, and at the castle of Dunnydeer for the lordship and regality of Garioch,—the whole to be held, “Johanni domino Erskine, suis hæredibus et assignatis . . . in libero comitatu, feodo, et hæreditate imperpetuum.”

The question was raised by the Committee for Privileges in 1875, whether the wording of this charter was sufficient to convey the dignity of Earl of Mar along with the “Comitatus,” or, as Lords Chelmsford and Redesdale interpret the word, “territorial earldom,” or simple landed estate. And the question was no sooner asked than decided in the negative, opening the way for the presumption that the “peerage” must have been created by an independent charter or patent, apart from lands, as a personal honour ; and, there being not a shadow of evidence extant regarding the charter, its terms or its limitation, the ulterior presumption must be that it was limited to the heirs-male of the body of John Lord Erskine, the supposed grantee,

and thus descendible to Lord Kellie. There is an old Arabic tale, in which an eunuch gifted with a preternaturally large nose, has a second and smaller nose, but still out of proportion, engrafted on it by a magician. I can only compare the latter presumption built upon the former to the nasal protuberance in question. Perhaps I ought to have said that the noble and learned Lords took it for granted from the first that the charter of 1565 had nothing to do with the dignity,—it was simply the application of Lord Camden's rule of 1771, with which the reader is familiar. I shall deal with the objection presently, and in the meanwhile I may observe that the grant of the "Comitatus" is precisely in the same form as similar grants innumerable, which up to that date, and later still, carried the dignity or title of honour without special mention of it, as shadow follows substance. It did so necessarily in the present instance. The hypothesis of a lost charter conferring a personal peerage apart from the fief is purely gratuitous and unwarranted; it was stated by Sir Robert Gordon in 1771 in order to disprove the hereditary transmission of the Earldom of Sutherland, but rejected by the House of Lords. The limitation "*hæredibus*" carried the dignity as well as the estate to heirs-general, under which character the Countess Isabel herself held the feudal dignity to which Lord Erskine was thus restored, as in her person and that of Earl Robert, without break. No one ever doubted that such was the rule of succession, and such the tenure of the dignity, till 1875. No one, I venture to anticipate, outside of the House of Lords, will persist in this doubt after reading the proofs in the affirmative given in these pages. The honours of Mar are obscured by a passing cloud, but it will pass away as the sun of truth resumes its strength.

The charter having passed the seals, the precept or warrant for infeftment or seisin was issued on the following day, the 24th June 1565. The infeftment necessarily took place on the spot—or, rather, on the two spots, Migvie and Dunnydeer—specified in the charter, and those spots being in remote parts of the sheriffdom of Aberdeen, some delay was inevitable. It was not the day of railroads, or even of stage-coaches, but of slow travelling on horseback over miserable roads and across mountain passes, by difficult tracks not unfrequently beset by broken men who had taken to the hills as caterans, or

through the "countries" of unfriendly tribes; while the influence of the Elphinstones and their "allies" in Mar was especially to be dreaded, as the officers of the law neared and departed from the scene of the investiture—an influence, however, which there is no reason to believe was ungenerously exerted on the occasion in question, however injurious in its results might be the issues of the Mar restoration to that powerful and distinguished family. The instrument of infeftment for Mar proper is missing, but that for Garioch is preserved, and bears date the 24th July, and the sister instrument was probably executed within a few days of that time. The instruments having been returned to Edinburgh, and verified by the officers of the Crown in the usual form, Lord Erskine entered for the first time into possession of the fief and the dignity under the charter. He had continued to bear the style of Lord Erskine during the interval, according to invariable custom, already illustrated, up to the 24th July 1565, but appears as Earl of Mar among the members of a council held on the 1st August 1565. The first stage of the restitution was thus completed—absolutely as regarded the title of dignity and the Comitatus of Mar, so far as it remained in the hands of the Crown, and potentially as regarded the portions which had been unwarrantably alienated by the Crown.

SECTION II.

Objections raised to the Charter as conveying the dignity, and conveying it to heirs-general.

We must now grapple with the objections raised in the Committee for Privileges against the effect of the charter of 23d June 1565 as carrying the dignity, and carrying it to the heirs-general of the grantee, upon which objections the report to the Crown in favour of Lord Kellie proceeded.

I have already remarked that while Lord Chelmsford and Lord Redesdale arrived by opposite roads at a common conclusion, to the effect that the original Earldom of Mar was absolutely extinguished before 1565, they agree in the inference that the Earldom of Mar which has existed subsequently to 1565 must have been a new creation in that year, Lord Cairns, I may now add, who expressed no personal opinion on the earlier points, concurs in this inference. The three noble

and learned Lords are, in a word, in complete accordance in all that follows upon the period of usurpation from 1435 to 1565. Their view, I may now state, is that the charter of 1565 conveyed the lands merely, and not the dignity; and that the destination to heirs in the charter cannot therefore be extended to infer the limitation of the dignity; the dignity must therefore have been created by an independent instrument now lost, and of which there is no registration, record, or evidence; and, being lost, the limitation in that instrument must be controlled by the presumption of law in similar cases, as established and enforced by the House of Lords in and since 1762 and 1771, to heirs-male of the body. The importance attached to that charter of 1565 is so great, that the reader will not, I trust, grudge the time necessary for appreciating the objections raised against the construction of it above exhibited alike as a conveyance of the dignity and as defining its descendibility, and for the disproof of those objections, which I propose to place before him. I shall state these objections successively in the words of the noble and learned Lords, but without preceding them by insertion of the entire portions of each speech bearing upon the charter, as I have done up to the present Letter. This was expedient when the views of the noble and learned Lords were frequently in antagonism, as upon the various points hitherto considered; but from 1565 downwards they are all in substantial agreement, although sometimes more or less stress is laid by them on particular points, and each notices certain matters which the other overlooks.

These objections may be briefly summarised as follows:— (1.) That the “Comitatus,” or ancient feudal Earldom, having been broken up, the original dignity of Earl of Mar had ceased to exist in 1565, and could not be set up again,—very much on the principle of “Humpty-dumpty;” (2.) That the service and retour of John Lord Erskine, upon which the charter of 1565 proceeded, had been obtained through undue influence and misrepresentation to Queen Mary; (3.) That the charter 1565 asserted what was false; (4.) That the charter exhibits discrepancy with the retour of service in the designation of Robert Lord Erskine, who flourished in 1438; (5.) That the charter of 1565 was a mere conveyance of the landed estate, the Comi-

tatus, not of the dignity; and (6.) That the dignity at present existing was therefore created by an independent charter, or an instrument which, being lost, (7) the presumption, as laid down by Lord Mansfield, is in favour of the limitation having been to heirs-male of the body of the grantee. There are some subordinate objections and remarks which will be noticed before closing this section.

(1.) The first of these objections is one of a retrospective character, already in part dealt with, namely, that the original Comitatus of Mar having been broken up by grants to the Elphinstones and others during the interval between 1438 and 1565, the dignity of Earl, inseparably attached to the Comitatus in its integrity, must have ceased to exist. The objection is Lord Chelmsford's, and his words are,—“It is clear this,” *i.e.* the Earldom granted in 1565, “could not have been the ancient Earldom or Comitatus, with which the dignity was originally connected, because it no longer existed in its entirety, part of the lands having been severed from it and vested in strangers, and other parts having been annexed to the Crown by Act of Parliament.” I need not reiterate the proof that Scottish dignities descended in the line of the eldest coheir irrespectively of any amount of disintegration of the fiefs to which they were annexed. But in the Mar case—even had there been weight in the objection on general grounds, which there is not—all these disintegrations had been the work of those “non habentes potestatem,” and thus illegal, as by the decret of 1626, and as has been shown independently of that decret, which is a conclusive answer to the objection; while Queen Mary's charter of 1565 restores the integral or entire Comitatus of Mar, as possessed by the Countess Isabel, to John Lord Erskine, as her rightful and legitimate heir, repudiating and making amends for the illegal acts of her predecessors, and practically investing the grantee with the power of recovering the property that those predecessors had granted away by process of law. In the result, as will be seen, the whole of the original inheritance was recovered during the time of the son and successor of John Lord Erskine.

(2.) The second objection urged by Lord Chelmsford, and still antecedent to the charter, is that the service and retour of John Lord Erskine, 5th April 1565, was obtained by undue

influence on the part of Lord Erskine. He speaks of him as "having procured himself by a general service to be served heir to his ancestor Robert," etc., and of Queen Mary as having been "prevailed upon to believe" that "the lands of Mar had been unjustly withheld from Lord Erskine and his predecessors," which was not the case. This is in faint but substantial echo of the much stronger asseveration to the same effect of Lord Kellie's pleading. But it is not likely, and is not even to be presumed, that the jurors of the inquest, headed by Crawford and Lindsay of the Byres, would have lent themselves to any such influence as this suggestion imputes; and it would be ludicrous to suggest such softness on the part of Lindsay of

"the iron eye,

That saw fair Mary weep in vain."

And Queen Mary's intervention on behalf of the Crawford family in renouncing in their favour the onerous liability laid upon them by her father, James v. (noticed in the preceding Letter), on the same ground of remedy for injustice, was of precisely the same character as the intervention we are now dealing with in behalf of the house of Mar. The fact was, that not a single act of Mary's reign evoked such general concurrence and approval from the better feelings of every class of her subjects as this restoration of the heir-general of Mar to his ancient inheritance. Moreover, if Mary was deceived or unduly influenced, so must (it would be equally reasonable to argue) the Three Estates of Parliament in 1587, and the Court of Session in 1626, have been deceived, or unduly influenced, when the latter, in particular, passed their judgment upon the question, condemning in the strongest terms the injustice which had been perpetrated between 1438 and 1565, and vindicating Mary's expression of vicarious contrition in the charter of 1565 as genuine, just, and true. The objection thus raised, and which proceeds, be it remembered, on the assumption that no injustice had been committed, is thus finally disposed of.

(3.) Lord Chelmsford's third objection is, that "the charter" of 1565 "contains recitals which, if the slightest inquiry had been made, would have been ascertained to be false." This is a very grave charge, striking right and left at all connected with it at the time. He gives two instances, as follows:—

1. "It is stated that John Lord Erskine was retoured as lawful heir of Robert Lord Erskine, the heir of Isabella in respect of the Earldom; whereas his service was a general service as heir, and, of course, without application to the lands; and if it had been a special service, he could not have been found heir to more than half the Earldom, which was all that Robert Lord Erskine ever claimed." This last assertion, that the Erskines never claimed more than half the Earldom, has been sufficiently refuted already; and the former, that the charter of 1565 affirms that John Lord Erskine had been retoured to Isabel "in respect of the lands," has arisen from an oversight, the result of a hasty reading of the charter, which simply states, first, that Robert Lord Erskine had been served, in regular course, lawful and nearest heir to Isabel in the Earldom of Mar, *i.e.* by the retour of 1438; secondly, that John, now Lord Erskine, had been served lawful and nearest heir to Robert, the heir of Isabel; and, thirdly, that therefore John Lord Erskine has an undoubted hereditary right to the Earldom, notwithstanding the unjust withholding of it by the Crown. There is thus no such false recital in this respect, as Lord Chelmsford asserts in the charter of 1565.

2. The second instance alleged of false recital is included in the clause just cited: "Again, the charter recites in strong terms that John Lord Erskine had the undoubted hereditary right to the Earldom, lordship and regality, notwithstanding his predecessors were unjustly kept out of possession of the same. Now," observes Lord Chelmsford, "in addition to the fact of the claim of the Erskines having been invariably confined to half of the Earldom, if either the charter of the 12th August 1404 or that of the 28th May 1426 was valid (and there is nothing apparently to impeach either of them), the possession of the Crown was by title, and not by usurpation. At this time also the solemn adjudication against the claim of Lord Erskine to one-half of the Earldom upon the inquest held in 1457 had not been in any degree impeached; and the 'undoubted hereditary right' had been allowed to slumber during the whole of the long period of the Crown's possession of the lands." As Touchstone says, "There is much virtue in *if*;" and *if* the charters 12th August 1404 and 28th May 1426 had been indeed valid, all Lord Chelmsford's reasoning would be sound, and the state-

ment in the charter of 1565 false ; but not otherwise. As matter of fact, the charter 23d June 1565 proceeds on the service 5th May 1565 ; the service of 5th May 1565 on that of 1438 ; that of 1438 on the charter 9th December 1404, confirmed on the 21st January 1404-5, ignoring the charter 12th August 1404, which was not confirmed, and everything which rested on that sandy basis, the charter of 1426 and the proceedings of 1457 included. The "solemn adjudication" of 1457 had thus not only been "impeached," but set aside previously to the charter of 1565, which proceeds fundamentally on the last valid conveyance of the Comitatus, as sanctioned by the confirmation of the feudal superior, in 1404-5. This was fully recognised in 1626, when the Court of Session pronounced its final judgment—not on the right of John Earl of Mar to the Comitatus as held under the service and charter of 1565, which no one disputed, but on his right to the portion of the Comitatus which had been alienated by the Crown. The judgment affirms that all power of dealing with the Comitatus had passed away from the Crown after confirmation of Isabel's second charter, the earlier one being invalid, and that of 1526 not proceeding on due authority ; while the proceedings of 1457 were simply null and void for the same reason. Lord Chelmsford ought to have had his eye open to these dominant facts, which affect, not the dignity only but the fief, with which Lord Chelmsford exclusively deals in the passage quoted. The charter of 1565 spoke the truth therefore, and not falsehood, in the particulars thus commented upon. Against the restricted objection of non-claim and non-assumption I protest, on the broad ground that such have never been allowed weight as against a peerage right. It is only as an Etruscan "mantissa," or make-weight, that, valueless as argument, they are thus heaped upon more plausible objection. To the vulgar eye only can they appear of importance.

Lord Chelmsford also endeavours to show that the charter of 1565 betrays a latent doubt of its own premises. "The charter, singularly enough, contains two distinct and separate grants of the Earldom or Comitatus,—one founded upon the restoration of an inheritance of which the grantee's predecessors had been unjustly deprived, and also upon their good services to the Queen's predecessors ; the other expressed to be 'for good and faithful services' without more. An explanation of

this double grant was suggested in argument, founded upon what Lord Mansfield said in the Cassillis case (Maidment, p. 53), viz. "Charters pass *periculo petentis*. Many lands are inserted in charters to which the grantee has no title; nothing can pass by such right. Therefore it was said that as the first grant in the charter was founded upon an allegation of a title which the grantee never possessed, it was liable to challenge on that ground, and out of abundant caution the grant on account of services alone was added." In this, as in other cases, Lord Chelmsford quotes the argument of Lord Kellie's counsel in support of his own general argument, but without committing himself to adoption of it. I take strong exception to such citation, as creating unwarrantable prejudice. The Court has a right to know whether a judge, or one advising in a quasi-judicial capacity, believes in the arguments he arrays against a cause upon which he is delivering his opinion.

I must deal first with the words attributed to Lord Mansfield. They occur in his speech on the Cassillis claim in 1762, in which stress was laid by the competing heir of line upon a conveyance of the honours in 1671, by what was called an Exchequer charter—one of a class issued by the Barons of the Exchequer, acting under authority deputed from the Crown, and which was acknowledged to be valid in respect of landed interests, but did not extend to the conveyance or regrant of titles of dignity. Such, however, were frequently inserted by the clerks who drew up these charters, and, so far, they may be said to have been granted *periculo petentis*; but the custom has always been to check such charters by the royal signatures upon which they proceeded as their warrants, and if the honours are not expressly specified therein, they are considered as not granted. The system of Exchequer charters only grew up after the union of the two Crowns in 1603; and Lord Mansfield's observation, however applicable to a charter of 1671, is inapplicable to a charter of 1565. Lord Marchmont, in fact, in his speech in 1762, emphatically contradicted Lord Mansfield's proposition. Every royal charter, doubtless, must be controlled by its warrant, viz., the preceding royal signature when preserved; but the signature itself falls to be controlled, in certain cases, by the original authority enabling the Crown to act at all in the matter; and in the case of the charter of 1565, the ulti-

mate warrant of the Crown, 5th May 1565, which legally declares the right to which the charter gives consequent and dependent expression.

Further, there is nothing in the wording of the charter, in the repetition of the acknowledgment of service, to justify Lord Chelmsford's observation that it contains "two distinct and separate grants" of the same identical subject, "founded" upon the consideration of services expressed in longer and shorter formulæ; for, if Lord Chelmsford's words imply a distinction between these services and those who rendered them, the words "ut premissum est" in the second clause, referring to the preceding one, disprove the supposition. The first of the two clauses conveys, as may have been already perceived in the preceding abstract, the lands of the Earldom of Mar, as comprising the lands of Strathdon, Braemar, Cromar, and Strathdee, with their dependencies, and the lands of the Lordship and Regality of Garioch, that is, the whole of the Earldom which stood in the hands of the Crown unalienated when the charter was granted, being, in fact, the lands which had been erected into a new and distinct Earldom of Mar in favour of James Stewart, in 1565, although subsequently resigned by him; while the second, merely referring to the good services of Lord Erskine and his predecessors, as already expressed—"ut premissum est"—grants the entire "Earldom, Lordship, and Regality foresaid," *with* all the lands previously named, and *with* all the rights of the Crown which the Crown could lawfully make in regard to it. Disclaiming every right arising from escheat, forfeiture, resignation, and "ultimus hæres," benefit from bastardy, ward, or non-entry from bypast times; in a word, it sweeps away every pretext for interference on the part of the Queen or her successors, with the ancient and acknowledged right of the heirs of Isabel, as recognised in Lord Erskine, removing all objections on the part of the Crown to the prosecution of claims at law for the recovery of the portions of the Earldom which had been illegally granted by the Crown to vassals, such as the Elphinstones and others, whose rights would thus come into conflict, as imperfect, with those of Lord Erskine, perfect under the sanction of original right and prior obligation.

It will thus, I think, be clear that the second of the clauses, the "insuper" clause, as I may call it, in the charter of 1565,

upon which Lord Kellie's argument, quoted by Lord Chelmsford, without formal adhesion to it, founds a charge of "abundant caution" on the part of the Queen's advisers, in consequence of a latent doubt (as I understand it) of the validity of the premises on which the charter proceeds, is not susceptible of such interpretation.

(4.) Lord Chelmsford grounds a further objection on a supposed discrepancy between the language of the charter of 23d June 1565 and that of the service of the 5th May 1565 which preceded it. In the service John Lord Erskine is retoured as nearest and lawful heir to Robert Earl of Mar and Garioch and Lord Erskine. In the charter he is spoken of as Robert Lord Erskine. "It has been already shown," observes Lord Chelmsford, "that although Robert the first Lord Erskine in some private deeds called himself Earl of Mar, he never publicly assumed that title. And it is a significant fact that, although Queen Mary acted upon this retour, and recited it in her charter, she did not adopt the description of Robert as Earl of Mar, but changed it to Robert Lord Erskine, as if refusing to recognise his right to the higher dignity." But, independently of the judgment of 1626, which puts the final *quietus* upon all such criticism, and merely suggesting that such a refusal to recognise Robert Lord Erskine's higher title would have been to stultify herself under the circumstances, the recital in the charter is, as might have been expected, formally correct. It states that Robert Lord Erskine was retoured as lawful and nearest heir of the Countess Isabel, and that John Lord Erskine had been subsequently retoured as lawful and nearest heir to the last Lord Erskine,—in both cases referring to the original status of Robert before his right to the higher dignity—or rather to the fief carrying the higher dignity—had been recognised by the retour of 1438. But even if Robert was formally entitled to be styled by that higher title in the charter, and was not so entitled, it could amount to nothing but a misnomer, in which, according to a well-known principle, the charter would fall to be corrected by its warrant, viz., so far as concerns the intitulation in question, the service 5th May 1565. But I do not believe that such a misnomer was committed.

(5.) Passing from these minuter but searching criticisms, Lord Chelmsford and Lord Redesdale—who now comes forward

with a more trenchant onslaught—represent the charter of 1565 as utterly valueless in respect of the dignity of Earl of Mar, on the ground that the charter contains no special words conferring the dignity; this being (as I have repeatedly had to notice) in application of the private rule traditional in the House of Lords since the enforcement by Lord Camden in his speech on the Sutherland case—although giving the credit of it apparently to Lord Mansfield—in words already cited:—"It will be understood as an established point that no charter of the Earldom or Lordship, without specially mentioning the dignity, shall be understood to carry the title of honour."

Lord Chelmsford's words are as follows:—"In examining Queen Mary's charter, it must be borne in mind that it does not relate in any way to the dignity of Earl of Mar, but only to the Earldom or Comitatus, which is described as containing the lands of Strathdon, Braemar, Cromar, and Strathdee, and is granted, together with the Lordship of Garioch, to John Lord Erskine, his heirs and assigns." And again: "As already observed, Queen Mary's charter contains nothing with respect to the dignity of Mar. This, I think," observed Lord Chelmsford, "was not disputed in the argument," an observation which I take exception to on the grounds already stated; "and it is proved by the fact that the charter being of the date of the 23d June, the grantee sat almost daily in the Council from the 8th to the 28th July as Lord Erskine, and appeared at the board for the first time as Earl of Mar on the 1st August." The "proof," however, thus alleged in supplement to this particular proposition is open to an explanation, which I reserve for the objection next to follow in this concatenation of criticism. The fact is undisputed, but bears against Lord Chelmsford's argument.

Lord Redesdale's views, to the same effect as the preceding, are expressed in continuity to repeated denials that the grant or transmission of a comitatus *simpliciter* without specification of the dignity or independent grant could confer a "peerage," and in accordance with the words with which he commenced his address to the Committee, namely:—"The ancient Earldom of Mar was probably held by tenure of the comitatus. The Earldom we have to decide on is the peerage independent of the comitatus; and it is important and necessary in this case to treat the peerage and the comitatus

separately." Lord Camden's observation in his speech on the Sutherland claims may be held in mind here: "They endeavour to make a distinction between lands and dignities. I can find no distinction,"¹ and such is, in fact, the genuine Scottish law. Lord Redesdale distinguishes accordingly the Comitatus and the "peerage earldom" throughout as distinct entities. The charter 9th December 1404, and the confirmation 21st January 1404-5, "related," Lord Redesdale asserts, "to the territorial comitatus only." Alexander Stewart's assumption of the title of Earl of Mar after seisin of the comitatus in 1404-5 was without right or warrant; but it is possible that Robert Duke of Albany may have connived at the usurpation, and that James I. may have granted a "peerage earldom" in 1426 as the price of Alexander's fraudulently resigning the comitatus, and accepting it back with an altered limitation, excluding the heirs under the charter 9th December 1404, and with ultimate remainder to the Crown. Starting from this basis, Lord Redesdale enters upon the subject of the charter now in question by the following observations:—"The argument in support of the grant of the Earldom by Queen Mary in 1565 being a restoration and not a new creation must be next considered. The last preceding grant of the comitatus was by that Queen to her natural brother James, by charter in 1562, in which a right to a seat in Parliament was specially provided, thereby proving (if it were necessary to do so) that the comitatus did not then confer a peerage. James surrendered both in the same year, sitting as Earl of Mar on the 10th September, and as Earl of Moray on 15th October."

It is evident that if these views as to the distinction between the comitatus and the title of honour, and as to the non-capacity of a charter of comitatus to convey the dignity without special words, are correct, the way would be at once open for the suggestion of a separate patent or grant of the dignity, and for the interpretation of the Committee for Privileges put upon the presumed limitation of such patent or grant, in accordance with their private rule so frequently spoken of,—an interpretation upon a presumption diametrically opposed to that of Scottish law, by which the present case falls exclusively to be governed.

¹ Maidment's Report of Sutherland Peerage Case, p. 25.

It is wearisome to have to reiterate truths; and I will therefore merely refer the reader to the proof given in my second Letter of the fact that a charter of a comitatus, and especially of an ancient feudal earldom, conveyed the dignity or title of honour along with the fief without special grant of the title. The long series of instances cited leaves no doubt on the subject. Among these I may notice, as a recent example, the two charters of the Comitatus of Crawford in 1541 and 1546, by both of which the dignity or title was transferred along with the comitatus, or comital fief, from one branch of the family to the other—as was in fact fully recognised by the House of Lords in the Crawford claim in 1848. But the very case Lord Redesdale specifies, of James Stewart Earl of Mar and Earl of Moray in succession, supplies a sufficient illustration. If the charter of the Comitatus of Mar, 7th February 1561-2, in which there is a special grant of the dignity of Earl and of a seat in Parliament—or rather, to be correct, of a seat among the Earls in Parliament—affords proof, as Lord Redesdale holds, that a charter of comitatus simply, such as the Mar charter of 1565, did not then confer a “peerage,” how comes it, it may be asked, that the charter of the Comitatus of Moray, granted to the same individual on the 30th January 1561-2, a few months previously, and which Lord Redesdale has overlooked, although printed on the preceding page of the Minutes of Evidence, actually conveyed the dignity, although without the slightest specification of it, or of the seat in Parliament, or any other privilege? Yet such is the fact; and it is conclusive on the question. James Stewart was created Earl of Moray, to him and the heirs-male of his body, by the charter 30th January 1561-2, and he was “maid,” or inaugurated as Earl, the next day. But the Queen, for political reasons connected with claims on the part of the Earl of Huntly, was unwilling that James should assume the dignity, and granted him the Earldom of Mar, *i.e.* the lands of Strathdee, Braemar, and Cromar (not Strathdon), erecting them into a new comitatus or earldom, with limitation to the heirs-male of his body, the same as in the preceding charter, and specially granting him the dignity of Earl—the Comitatus of Mar thus bestowed being not, it will be remembered, the ancient Earldom, but only a portion of it, and thus pro-

bably requiring a distinct creation as a dignity. The claims of the Erskines having however intervened, James, at Mary's instance, resigned the new Comitatus of Mar; and after the fall of Huntly, whose opposition had been dreaded, at the battle of Corrichie, 28th October 1562, all difficulty in assumption being removed, he assumed the dignity and style of Earl of Moray under the original charter of the simple comitatus, 30th January 1561-2. Nor is this all. Moray resigned the "Comitatus" of Moray for a regrant to himself and the heirs-male of his body, by charter 22d January 1563-4, there being no mention of the dignity and title; and so once more, on the 1st June 1566, when another charter, with a more extended limitation, including females, and under which the present Earl of Moray holds the dignity, was executed, but also of the simple comitatus. The comitatus was once more resigned and re-granted by charter 17th April 1611, without any specification of the dignity. It is among these charters exclusively, beginning with what may be called the foundation charter of 1561-2, that the existing Earldom of Moray must search for its origin and limitation; and in none of them was the dignity conferred separately in the style of a modern patent, or of such a new creation as in the Mar charter of 7th February 1561-2, but attached, as I have repeatedly said, like shadow to substance, to the comitatus, the ancient feudal dignity, the subject of the successive grants enumerated. It is a curious fact that Lord Rosslyn (or Loughborough), in his speech on the Moray Peerage question in 1797, while refusing, on Lord Redesdale's principle, to acknowledge that the charter of 30th January 1561-2 and others carried the title of honour, recognises the charter of the Earldom of Mar to John Lord Erskine, 23d June 1565, as doing so, although simply of the comitatus—his words being that Lord Erskine "got the ancient dignity of his family and became Earl of Mar by a charter" (*i.e.* this now in question) "from the Crown passed in his favour, and that was ratified in Parliament in 1567." It may be truly said of every one of the parents of the "peerage law" of the House of Lords, "Aliquando bonus dormitat Homerus."

(6.) The charter of restitution of the Earldom of Mar, 23d June 1565, being thus held by Lord Chelmsford and Lord Redesdale to have been simply a grant of the estate, and the

dignity falling to have been granted by a separate and distinct creation, according to the established theory of the House of Lords, the two noble Lords, whose objection we are now dealing with, proceeded to fix the approximate date of that creation. Their words are as follows:—

Lord Chelmsford states, in words which I have partially quoted *supra*:—"As already observed, Queen Mary's charter contains nothing with respect to the dignity of Mar. This, I think, was not disputed in the argument; and it is proved by the fact that the charter being of the date of the 23d June, the grantee sat almost daily in the Council from the 8th to the 28th July as Lord Erskine, and appeared at the board for the first time as Earl of Mar on the 1st August. He must therefore have obtained the dignity by creation in some way or other before this day. The question arises, When and how did this creation take place? There is no writing or evidence of any kind to assist us." (I may be permitted to interpose,—a very remarkable admission.) "It was suggested, with great probability, that Queen Mary's marriage with Darnley having taken place on the 30th July, and Lord Erskine having sat in the Council by his old title of Erskine on the 28th July, and as Earl of Mar on the 1st of August, he must have been created an Earl on the occasion of the marriage, and probably by a ceremony well known in those days called 'belting.' . . . Whether Lord Erskine's creation was in this particular form and manner, seems to me not to be very material. It is certain that he must have been created Earl of Mar about the time of the Queen's marriage, and as no record of the creation is in existence, the limitation of the dignity must be left to the ordinary presumption of law," etc. etc.

Lord Redesdale spoke as follows:—"On the 23d June, nearly three years afterwards" (*i.e.* after the creation and resignation of James Stewart), "the Queen granted the comitatus to Lord Erskine in a charter, in which he acknowledged him to be heir to Isabella, and that he and his predecessors had been unlawfully deprived of the comitatus. Still he continued to sit as Lord Erskine, as is proved by the records of Sederunt in the Privy Council, in which he is found as Lord Erskine on the 28th July, more than a month after he had been declared by the Crown heir to Isabella. Stronger proof cannot be

required to show that there was no Earldom for him to succeed to through her. On the 1st August he is at the Council as Earl of Mar. Between those days the Queen's marriage took place, and without accepting Randolph's letter as evidence"—an observation calling for explanation which I shall give in due time—"common sense tells us that he was created Earl of Mar on that occasion. If it was thought necessary that some course should be taken to prevent any idea of the restoration of the old peerage, none could be devised more decided than insisting on time being allowed to intervene between the restoration of the comitatus to him as heir to Isabella, and his recognition as Earl. Taking all these circumstances into consideration, I am of opinion that the Earldom which John Lord Erskine of 28th July is recorded to have enjoyed on the 1st August 1565 was a new creation, and probably by charter. Why that instrument is not now forthcoming I will discuss hereafter—Lord Redesdale's suggestion being that it was fraudulently destroyed for the purpose of obtaining higher precedency at the ranking of the nobility in 1606—under which head I shall myself deal with the suggestion in question. Lord Redesdale concludes by observing that, while the non-assumption of the dignity by the Erskines, and "the fact of the Crown during that long period having treated it as extinct by new creation, are fatal blows to the claim"—as he qualifies the contention of Lord Mar against the attempt of Lord Kellie to encroach upon his hereditary rights—"the interval of more than a month after the public acknowledgment by the Crown of Lord Erskine as heir to Isabella—which gave him" (a frank acknowledgment by Lord Redesdale, to which I have already drawn attention) "the ancient Earldom, if it was held to descend to heirs-female—before he became Earl at the time of the Queen's marriage, is the final and conclusive blow to it. No other Earldom but that could be in Isabella," etc.

Lord Cairns, in fine, after stating that he had perused the opinions of Lord Chelmsford and Lord Redesdale, and that he had considered the case, as his brethren had done, with very great anxiety, pronounced his adhesion to the preceding views as follows:—"I am of opinion that it is clearly made out that the title of Mar which now exists was created by Queen Mary sometime between the 28th of July and the 1st of August in

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

The objection thus so forcibly pointed against and driven home, as has been supposed, to the heart of the argument for the heir-general—not as a claimant, but in defence against Lord Kellie, is the result, I must be allowed to say, with all respect, of either simple ignorance of or unaccountable inadvertence to a fact abundantly proved by Lord Hailes in the Additional Sutherland Case, and upon recognition of which the repudiation by the House of Lords of the plea of the Sutherland heir-male, grounded on precisely the same theory as Lord Kellie's, necessarily, in part, depended. This fact is, that as regards feudal or territorial earldoms, whether in the case of the original grants or of succession by an heir to one previously holding the dignity, the title of honour could not be, and practically never was, assumed by the grantee in the former, or the heir in the latter case, till the formal investiture or seisin in the fief had been completed, or the heir had been duly served and retoured heir to his predecessor, with concurrent payment of livery and fees to the Royal Exchequer. The ceremony of infestment or seisin took place, except when specially dispensed with, at the chief messuage of the fief,—often, as in the case of Mar, at a great distance from the seat of government. Thus a delay of days and weeks and even months must occur before the party dignified was allowed to use his title. I can give a pointed illustration of the former alternative in the case of my own family. David Earl of Crawford was created by James III. Duke of Montrose, by erection of the comitatus of Crawford, with the addition of certain other lands then bestowed, into a free and hereditary dukedom of that name, descendible in the succession to the earldom, by charter 18th May 1488. Alexander Lord Kilmaurs was created Earl of Glencairn by the same monarch by charter 28th May 1488. The newly created Duke had been duly invested in the fiefs granted by the charter before the death of his royal master on the 11th June 1488. But he appears only as Earl of Crawford when witnessing a charter of James III. to William Douglas of Cavers regranting his fief on the 24th May 1488, and again in

the charter creating Lord Kilmaurs Earl of Glencairn on the 28th May, that is, six and ten days after the date of his own charter. The simple reason of this is, that not having been infeft, it was not correct or in order that he should assume or be known by the higher title. The case is identical with that of John Lord Erskine subsequently to the charter restoring the Earldom of Mar and previously to the 1st August 1565, at which time, the notarial instrument testifying to the infeftments in Mar and Garioch having arrived from Aberdeenshire, he took his seat at the council board for the first time as Earl of Mar. That the sons and heirs of defunct earls and barons—turning to the second alternative above stated—were designated as simple commoners, by Christian name and surname, subsequently to their father's death, and up to the time of their investiture by infeftment after due service and retour, was abundantly proved by Lord Hailes, and is familiar to every one conversant with Scottish charter-chests. This cardinal objection, therefore, founded on with concentrated emphasis alike by Lords Chelmsford, Redesdale, and Cairns, falls to the ground, as well as Lord Redesdale's argument from common sense, always a questionable court of appeal; and from the supposed intention of the Crown to prevent confusion of the new with the ancient dignity, by postponing the grant of the new dignity for a month after the restoration of what is fully admitted to be the ancient comitatus as held by Isabel, and to which it is also admitted that Lord Erskine was fully recognised by the Queen as heir.

It may have been remarked that Lord Chelmsford suggests that the new Earldom of Mar may have been created by the ceremony of belting, and that this may have taken place on the occasion of the marriage of Mary and Darnley. But the idea that belting was more than a mere ceremonial, subsequent to or dependent upon a formal writ creative of a dignity, was repudiated in the Cassillis claim, and although countenanced by Lord Loughborough in the Spynie and Glencairn claims in 1785 and 1797, has never since been listened to. Lord Redesdale, better acquainted with feudal usage, describes the grant of the "peerage" in 1565 as "probably by charter." The difficulty here is, that no such charter exists, or is known to have existed in the archives of the house of Mar; no such

charter is to be found on record in the Great Seal or Privy Seal Registers; and there is, in short, as the noble and learned Lords candidly acknowledged, no evidence of it ever having existed. I have already observed that not one of the innumerable patents of dignities as personal honours, which have been suggested at different times in the House of Lords in support of heirs-male has ever been discovered, either in the originals or on record; and the inference from this non-existence is conclusive against any argument founded upon such speculation. The general rule applicable here is, "De non apparentibus et de non existentibus eadem est ratio," modified by an exception presently to be mentioned. The position, in fact, of Lord Kellie and the House of Lords is that of the Earl of Eglinton in 1648, when affirming that the ancestor of his antagonist, the Earl of Glencairn, must have been created by a patent posterior to that in the archives of the Glencairn family, namely, the charter 28th May 1488, lately mentioned, the Court of Session demanded production of the alleged patent, or that Eglinton should refer its existence to Glencairn's oath, and Eglinton being unable to do the one, and unwilling to do the other, dismissed the averment as untenable. The Sutherland heir-male, Sir Robert Gordon, made the same assertion in opposition to the heir-general in the claim in 1771, and it was equally disregarded. Lord Kellie was more fortunate in obtaining the suffrage of the noble and learned Lords on this point in 1875. Lord Redesdale's attempt to account for the disappearance of the supposed charter by—I may now add—charging the son of the grantee with having destroyed it is based solely upon hypothesis, and is utterly untenable, as I shall show hereafter.

(7.) The seventh and final objection, or, I should rather say induction, pressed against the remonstrance of the heir-general, of Mar as against the claim of the heir-male, Lord Kellie, is based upon the private rule, so often referred to, of the House of Lords, traditional from the Cassillis claim, viz., that when the limitation of a charter or patent creative of a title of honour does not appear, the presumption is in favour of heirs-male of the body,—a presumption based upon a presumption, both negatived by the law of Scotland. Lord Chelmsford, Lord Redesdale, and Lord Cairns are unanimous in the affirmation of this presumption, and its application in favour of Lord

Kellie as claiming under the imaginary lost patent of 1565. I give their own words, as previously :—

“It is certain,” said Lord Chelmsford, “that he” (John Lord Erskine) “must have been created Earl of Mar about the time of the Queen’s marriage ; and as no record of the creation is in existence, the limitation of the dignity must be left to the ordinary presumption of law, unless where there is something in the case to rebut this presumption.” Lord Mansfield, in the Sutherland case, said, ‘I take it to be settled, and well settled, that where no instrument of creation or limitation of the honour appears, the presumption of law is in favour of the heir-male, always open to be contradicted by the heir-female upon evidence shown to the contrary,’—in other words, by proof of a special provision in favour of heirs-general, which special provision must, it is held by the House (or at least as we shall see by Lord Chelmsford), be established by positive proof. “And a similar statement of the presumption in favour of the heir-male was made by Lord Loughborough in the Glencairn case,” *i.e.* in 1797. “The *prima facie* presumption therefore is, that the dignity of Mar created by Queen Mary is descendible to heirs-male.

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

“What was chiefly relied upon as indicating the intention of the Queen either to restore the old dignity of Mar, which was said to be descendible to females, or that if she created a new dignity she meant it to descend in the same channel of limitation,” and that, I may interrupt, was urged in behalf of the Crown against Lord Kellie no less than by the opposing petitioner, “is the language of the part of the charter in which the Queen states that she was moved by conscience to restore the earldom to the rightful heirs from whom it had been unjustly detained, and that, acting from this motive, she restored the lands to the grantee, his heirs and assigns. And it was argued that, the dignity being revived about the same time as the charter, the Queen must have intended to create the dignity with similar limitations, in order that it might never be

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

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

Lord Chelmsford then adverts to the argument of the opposing petitioner in support of his remonstrance grounded on an Act of Parliament which passed in 1587, on the decret of ranking in 1606, and on the Act of Parliament in 1824, restorative of the Earldom against the attainder of 1715—but these I reserve for future discussion.

"My Lords," concluded Lord Chelmsford, "upon a review of all the circumstances of the case, I have arrived at the conclusion," 1. "That the determination of it must depend solely on the effect of the creation of the dignity by Queen Mary, and on that alone;" 2. "That whether the original dignity was territorial or not, or was or was not descendible to females, is wholly immaterial, inasmuch as it had in some way or other come to an end more than a century before Queen Mary's time;" 3. "That

the creation of the dignity by her was an entirely new creation; and there being no charter or instrument of creation in existence, and nothing to show what was to be the course of descent of this dignity, the *prima facie* presumption of law is, that it is descendible to heirs-male, which presumption has not in this case been rebutted by any evidence to the contrary. I am, therefore, of opinion that the dignity of Earl of Mar created by Queen Mary is descendible to the heirs-male of the person ennobled, and that the Earl of Kellie, having proved his descent as such heir-male, has established his right to the dignity."

Lord Redesdale's views as to the descendibility of the dignity under the alleged lost charter of 1565 are thus expressed in his speech. After accounting for the fact that the alleged charter or patent of the dignity as a personal honour in 1565 is "not forthcoming" by a theory of wholesale destruction of documents hereafter to be dealt with, and enforcing the non-assumption and withholding of the dignity as conclusive against the rights of the heirs-general, in words which I have already quoted, Lord Redesdale proceeded, "The only point remaining to be considered is, What shall be held to be the remainder under Queen Mary's creation? The presumption is in favour of heirs-male. What is there in the evidence before us to contradict that presumption? The only points urged are the charter restoring the comitatus to heirs-general, and the fact of the person to whom the Earldom was restored after the attainder being called in the Act" (*i.e.* the Act of Parliament 17th June 1824, 5 George IV. c. 249), the consideration of which I reserve—"the 'grandson and lineal representative' of the attainted Earl, he being grandson only through a female. The charter being a restoration to the heirs of Isabella before the new peerage was created, naturally left the comitatus to the old limitation; and the words quoted from the Act of Parliament" (of 1824, I may as well conclude the sentence, reserving comment for hereafter), "cannot be held to determine a matter not then inquired into, when the person obtaining the Earldom was heir-male as well as grandson through an heir-female. There cannot be any doubt of the barony of Erskine going to heirs-male under the presumption before mentioned; and the same presumption leads me to consider that when John Lord Erskine was created Earl

of Mar, that Earldom must be held to go with the barony to heirs-male.

“Under these circumstances, my Lords,” Lord Redesdale then concluded, “I consider that the Earl of Kellie has made good his claim to the Earldom of Mar created by Queen Mary in 1565, and that there is not any other Earldom of Mar now existing. As for the title of Baron Garioch assumed by the opposing petitioner, there is not,” added Lord Redesdale, winding up his speech, “any evidence before the Committee showing that the territorial Lordship of Garioch was ever recognised as a peerage barony.” I shall have something to say on this point too in its proper place.

Lord Cairns wound up the few words he addressed to the Committee by stating:—“It appears to me that the only question in the case . . . is—whether that peerage so created by Queen Mary should be taken to be, according to the ordinary rule, a peerage descendible to male heirs only, or whether by reason of any surrounding circumstances that *prima facie* presumption should be held to be excluded, and it should be taken to be a peerage descendible to heirs-general. Now, the *prima facie* presumption being that which I have mentioned, it appears to me beyond doubt that the burden is thrown upon those who assert that the peerage was descendible to heirs-general to make out their case; and it appears to me that in the case, in order to discharge that burden, the opposing petitioner is able to do nothing more than to make suggestions and to put forward surmises; but that there is absolutely nothing which can be taken to be evidence in any way countervailing the *prima facie* presumption with regard to the ordinary descent of title created as this title was created. My Lords, the burden of proof lies upon the opposing petitioner, and, it not having been in any way discharged, I am compelled to arrive at the conclusion at which my noble friends who have already addressed the Committee have arrived, viz., that this must be taken to be a dignity descendible to heirs-male, and therefore that it is now vested in the Earl of Kellie.”

Lord Cairns thereupon proposed the Resolution which was carried in Committee; but this is not the place for its discussion.

The affirmation of what is known as “Mansfield’s law,” and

its application to the questions arising upon the charter of 23d June 1565, as exhibited in the preceding extracts, are so simple and intelligible, that I hesitated at first whether I should do more than state the general result arrived at by the noble and learned triumvirate of 1875, subjoining the *ipsissima verba* in a note. But some of the arguments employed in repudiation of the charter as a conveyance of dignity, and in support of the special application of the law and presumption of 1762-76 to the case of Mar, appeared to me to require an answer; and upon the whole I think I have adopted the safest course in giving the criticisms entire and consecutively in the text.

The three noble Lords are of one mind as to the conclusion with which Lord Chelmsford sums up his criticism—1. That the existing Earldom of Mar, claimed by Lord Kellie, is a creation dating from 1565, the original Earldom having somehow or other become extinct; 2. That the charter of 23d June 1565 was a conveyance of lands only; and 3. That there being no evidence of the creation of the dignity in 1565, which nevertheless then came into existence, a new charter must be presumed, conveying the title apart from the dignity, the limitation of which must be understood, according to the established presumption in such cases, to have been to heirs-male of the body of the grantee, John Lord Erskine. Lord Chelmsford approaches the citadel and reaches this conclusion by sap and mine; Lord Redesdale, in this case at least, with battering-ram and assault; and both argue admirably, as usual, on premises which, were they tenable in Scottish law, would insure them victory and triumph. I commence, therefore, with Lord Chelmsford's criticism; and will notice Lord Redesdale's special objection at the point where he mounts the breach under the advantage of Lord Chelmsford's previous explosion.

In the first place, striking at the root of the matter, I must remind the reader that the doctrine, the rule and presumption, of Lord Mansfield, founded on by the three noble Lords, in the hackneyed *dictum*, "I take it to be settled, and well settled," etc., sprang up like Jonah's gourd—but not alas! to wither as quickly—under the inspiration primarily (I suspect) of Lord Hardwicke, in the Cassillis claim in 1762. The "settlement" in question was that of a point supposed to be doubtful in Scottish law, which it was admitted ought to rule in such

cases; but which a single reference to Lord Stair (to name no other Scottish authority) would have convinced the House of Lords required no "settlement," was indeed unsusceptible of any "settlement," simply because there existed no doubt on the question—the Scottish rule and presumption in such cases being in diametrical opposition to that initiated in 1762, viz., in favour of the heir-general, the burden of disproof resting with the heir-male. This *per se* disposes of Lord Cairns's observation as to the burden of proof lying on the heir-general; while it forcibly illustrates the false position in which Lord Mar has been placed from the first in his defence of his rights, not by any act of his own, but by the action of the House of Lords. To cite Lord Loughborough's reiteration of the newly established principle in 1797 is simply to illustrate the process by which a series of compliments paid retrospectively to Lord Mansfield has induced the world and the House of Lords itself to believe that the law of Scotland was doubtful as to the point in question, and that the sagacity of the House of Lords has supplied the deficiency. Lord Camden, Mansfield's bitter opponent in other departments of law and policy, led the way in this process by informing the House of Lords, in his speech on the Sutherland case, that they were "much obliged" to Lord Mansfield "for the great attention he has given, and the great trouble he has taken to establish the legal rules to govern the descent of peerages" (the House, be it remembered, having no legislative power whatever), rules among which Lord Loughborough included the doctrine which he took under his special protection in 1771, viz., the non-competency of a charter conveying a comitatus to convey the dignity without special mention,—“rules” which, he added, “if they are adopted, the decision will be clear whenever the case occurs again.” But more than this, Lord Loughborough, in 1797, threw over the question of Scottish authority altogether, and introduced his application of the rule in question by the words, “It has been fixed by repeated determinations of this House” (*i.e.* in the Cassillis, the Borthwick, and the Sutherland cases, in 1762, 1762, and 1771), “and I know of no other authority competent to decide in matters of this nature,” etc., adding, “If there be anything certain in the law of peerage, it is the presumption in favour of heirs-male.” And he

actually referred to Lord Hailes's Additional Case as follows —“Though there be many ingenious arguments in favour of the heirs-general in that elaborate paper, the Additional Case in the peerage of Sutherland, it is remarkable that in the speech of Lord Mansfield in giving judgment upon that claim of peerage, his Lordship brought the greater part of the instances stated in the Sutherland case in aid of the doctrine laid down by this House in the case of Cassillis.” The truth is, that whereas the doctrine “laid down in the case of Cassillis” left no opening (so far as it went) for succession to an heir-female, the original limitation being unknown, and Lord Hailes's case proved beyond controversy, not only that Sutherland was a dignity descendible to heirs-female, but that all the ancient earldoms, including Mar, of which the history could be traced, were so, he and the House supplemented the Cassillis doctrine by admitting proof of an exception as adducible by an heir-female, throwing the *onus probandi* on the heir-female, instead of frankly acknowledging their error, and recognising the truth that the presumption of Scottish law, as established no less by the examples than by the institutional and other authorities cited by Lord Hailes, is with the heirs-female, and the burden of disproof on the heirs-male. The reader will now see how erroneous is the view presented in the speech of Lord Loughborough as referred to by Lord Chelmsford. The House of Lords has no legislative power, and a private rule of the House like this of Lord Mansfield's is impotent in law against the right of the heir-general when no special exception and provision can be adduced on behalf of the heir-male—as in the present case of Mar.

Of Lord Chelmsford's special objections (*ut supra*) against the argument for the heir-general, as grounded on the language of the charter of 1565, the first, viz., that there is nothing in the charter to indicate an intention on Queen Mary's part to revive the ancient dignity, because, “moved by conscience,” she proposed to restore the fief to the lawful heir, I reply, that there is everything in the charter to prove the proposition, inasmuch as the grant of the “Comitatus” carried the dignity, as already shown. Lord Camden's law, *i.e.* “rule,” cannot counteract the force of the law and practice of Scotland any more than Lord Mansfield's. The law and practice in question

is in both cases under the protection of the Treaty of Union.

To Lord Chelmsford's second objection, that it is "not at all a necessary conclusion that because the Queen was desirous of giving back the lands of Mar, she therefore contemplated reviving a dignity which had not been practically in existence for nearly 140 years," I reply that the conclusion is inevitable on the plain testimony of the charter, viz., that Lord Erskine was to be replaced in his rights as the immediate heir of the Countess Isabel, the whole intervening period of injustice and usurpation being annihilated. The restitution was broad, the apology ample as between gentlemen. There was no petty jealousy of words or actions in Mary's conduct when she used the word "restituere,"—she restored everything. And in restoring the "Comitatus" she could not, even had she wished it, but restore the title of honour, the Comitatus carrying the dignity by the technical form of conveyance already illustrated, unless it had been specially reserved and excluded. This reply is on the premises, the basis assumed by Lord Chelmsford, namely, that the Queen's "intention" is an element of consideration towards the interpretation of the charter of 1565; but Mary's "intention" is, in truth, irrelevant to the construction of the charter, for a reason which I shall state before concluding this Letter.

Lord Chelmsford's further and third objection, that "there was no necessity to make the limitations" of the fief in the charter, viz., to heirs-general, "correspond" with the limitation contemplated in the supposed separate grant of the dignity, viz., to heirs-male of the body, "because by giving the lands to the person ennobled, his heirs and assigns, he would have the power of directing the succession to the lands in the same line as the descent of the dignity," can hardly be treated with the respect to which its author was personally entitled. Independently of the roundabout process thus contemplated, it was not, strictly speaking, in the power of a grantee to alter the destination of a fief held *in capite* of the Crown, without the express sanction and concurrence of the superior, which, the King being that superior, depended on the King's recognition of the equity of the proposed alteration, which could not always be calculated upon, as well as on the grantee being of the same

party in politics, to say nothing of other conceivable circumstances. Feudal were not modern times, nor the sixteenth the nineteenth century,—a truism perhaps, but one not always kept in recollection. Lord Redesdale's observation that "the charter, being a restoration to the heirs of Isabella before the new peerage was created, naturally left the Comitatus to the old limitation," is much to the same effect as Lord Chelmsford's, and to be met with by the same answer. The practical difficulty in the way of accepting these two suggestions of Lord Chelmsford and Lord Redesdale is this, that in the event of the Sovereign, the superior or overlord, being unwilling to carry out the wishes of the grantee, the fief, which is admittedly limited to heirs-general, and the dignity, which is presumed to descend to heirs-male, might descend in separate channels of succession, the dignity becoming a barren title, unsupported by the fief requisite to support it—a thing abhorrent to the conception of feudal times. It was thus Lord Mansfield argued in his speech on the Cassillis claim: "It appears that most frequently there was a charter of erection of the lands at the time the title of honour was conferred. If the lands were limited to heirs-male, the title of honour cannot be supposed—there being no evidence of the limitation—to descend in a different channel from the lands in the charter."¹ The argument and the presumption is of necessity the same conversely, if the lands are limited to heirs-general, as in the Mar charter of 1565.

Lord Chelmsford's inference against the descendibility of the dignity of Earl of Mar, "created," as he and the House of Lords describe it, in 1565, to heirs-general, grounded on the fact "that only four years before the charter in question" (that of 23d June 1565) "the Queen, when giving the same dignity of Mar to her brother, limited it strictly to his heirs-male," proceeds on two assumptions, neither of which will (in the common phrase) carry water,—first, that the dignity of Mar created in 1561 was the same dignity as that restored in 1565, and that the conditions under which the two dignities were conferred were parallel; secondly, that it was optional for the Queen to limit the charter of 1565 to heirs-male, as it was optional with her to do in the case of the charter of 1561.

¹ Maudment's Report of the Cassillis Claim, p. 48.

As regards the first assumption,—the Comitatus of Mar conferred on James Stewart by Queen Mary by charter 7th February 1561-2 was an erection of certain lands, part of the ancient patrimony of the house of Mar, and which are expressly stated to be the property of the Crown, the words being, “*totas et integras terras nostras et comitatum de Mar, videlicet, terras de Straithdee, Bramar et Cromar . . . insuper nos . . . annectimus, creamus et incorporamus totas et integras prenomintas terras de Strathdee, Bramar, et Cromar . . . in unum integrum liberum comitatum omni tempore futuro comitatum de Mar nuncupandum,*”—thus an entirely new creation—into a comitatus. But the Comitatus of Mar, conferred on John Lord Erskine by the charter of restitution 23d June 1565, consisting of the same lands indeed, but with others, and potential right to all that had once belonged to the Earls of Mar, is no longer described as property of the Crown, but property vested legally in the heirs of Isabel Countess of Mar, and which had been unjustly withheld from the ancestors of the recipient, and was now restored to him *per modum justitiæ* as the rightful owner. The two dignities—the Earldom of 1561, and the Earldom of 1404-1438-1565—were therefore quite distinct; and the conditions under which James Stewart and John Lord Erskine became invested in them in 1561 and 1565 were absolutely different. In reply to the second assumption, it is clear that after Queen Mary, “moved by conscience,” and anxious to repair the injustice of past times, had placed the question of the right of John Lord Erskine to the inheritance of Isabel Countess of Mar in the hands of an inquest, and accepted its verdict, as rendered on the 5th May 1565, the Crown, as represented by herself, was *functus officio*, so far as any dispensing power was concerned, the duty before it being to give due execution to the verdict of 5th May, which was its warrant for action: in other words, it was Mary’s duty, as it doubtless was her pleasure, to carry out that verdict by the charter of restitution 23d June 1565, now before us: her “intention” thenceforward counted for nothing; it was no longer within her option to affix any limitation to the descent of the Comitatus, the fief and dignity in combination, other than that to which the service testified: and that was to heirs-general, on the principle that

if Robert Lord Erskine was legally Earl of Mar in virtue of the inquest of 1438, grounded on the charter of 9th December 1404, John Lord Erskine was equally *de jure* Earl of Mar in 1565, as direct descendant and representative of Earl Robert.

I have still to notice Lord Redesdale's argument from the supposed descendibility of the title of "Lord Erskine," as necessarily to heirs-male upon Lord Mansfield's principle, the limitation being unknown; and the inference he grounds upon it, viz., that such must be the descendibility of the Earldom of Mar under the supposed lost charter; that, in his words, already quoted, "the Earldom must be held to go with the barony to the heir-male." My reply is, first, that by Scottish law the presumption with respect to the barony, or, properly speaking, the lordship, of Erskine is, that it goes to the heirs-general under the circumstances, and thus to the present Lord Mar, unless it can be proved that it was destined by special provisions, against the ordinary course of law, to heirs-male, the *onus* resting on the heir-male (Lord Kellie) to establish this exception. The decision, in the absence of direct evidence, falls by Scottish law to be guarded by the destination of the fiefs, that is, of the principal fief of the Erskine family, as nearly to the time when the dignity first appears as possible, and as distinguished on the one hand from their inferior fiefs, and on the other from their accessory succession to Mar. If the principal fief, the barony of Erskine, was limited in or near the middle of the fifteenth century to heirs-male, then the dignity of Lord Erskine is a dignity descendible by presumption to heirs-male; if the fief was then descendible to heirs-general, then the dignity descends to heirs-general. But, secondly, it is impossible in the present Mar case to argue from the Lordship to the Earldom. In the Cassillis claim, where the argument above applied by Lord Redesdale was correctly employed, as from the Lordship of Kennedy to the Earldom of Cassillis, both dignities, as well as the contingent fiefs, belonged to one and the same family, and the argument was relevant. Lord Mansfield's words were, "If therefore this charter"—the one under discussion—"was to operate as a new grant, the title of Lord Kennedy must go one way and that of Earl of Cassillis be separated, and go in a different channel: but it is not possible to believe that this could ever be intended." But the Lordship of Erskine and the

Earldom of Mar, although *united* for a long series of years in one and the same succession, were derived from distinct lines of heirs not necessarily holding by the same rules of succession; and no argument from the Lordship to the Earldom can be relevant which fails to discriminate between, or tends to confound, those rules in the case of Mar. The principle "*reddendo singula singulis*" obtains here.

But I must now ask, after discussing these objections, What if the presumption of a lost charter or patent, upon which the Report of the House of Lords proceeds, be not only unsupported by, but contradictory to, that Scottish law by which the House is bound to guide itself in advising the Crown? Such is indeed the fact, although it is necessary to step back some distance, in order to contemplate the position in its length and breadth, and escape from the difficulty indicated in the old saying, "You cannot see the wood for trees." The law of Scotland does not permit the allegation of a lost patent or instrument, unless its former existence can be legally substantiated, and a cause shown for its loss and disappearance—the general rule, to which this is an exception, being "*De non apparentibus et de non existentibus eadem est ratio.*" A precedent precisely analogous to the present case illustrates the law and practice in question. In the adjudged case of *Glencairn contra Eglinton*, before the Court of Session in 1648, Eglinton having alleged, on hypothetical grounds, that a new patent of the Earldom of Glencairn must have been granted to Glencairn's ancestors subsequently to one which he contended had been annulled by a general act of revocation, but which contention the Court repudiated, the Lords refused to entertain the allegation unless instantly verified by production of the patent, or by reference to Glencairn's oath, as that of the party in whose custody, if existent, it must be presumed to be—the rule being that if the party thus appealed to swore it was not in his possession, the award was necessarily in his favour. The allegation of a lost patent is equally hypothetical in the present case of Mar, the presumption of its having existed being grounded simply on the error as to the signification and value of the word "*comitatus*" as carrying the dignity in charters previously to, in, and for some years after, 1565. The presumption in favour of heirs-male of the body, grounded upon the

erroneous supposition that the Lombard law ruled in Scotland and piled, like Ossa upon Olympus, on the previous presumption of a lost patent, is thus like a house of cards, without foundation, cohesion, or consistency, and falls to the ground at the slightest touch of criticism. The reader will note the consequence that follows from this non-admissibility of the presumption of a lost patent. If a lost patent cannot be presumed in 1565, then as the dignity only then reappears, it can only be attributable to the effect of the existing charter of 1565; and when we recollect that the Comitatus carried the dignity, all difficulty is done away with. This test from the law of Scotland applies to scores of cases where in Scottish peerage claims, that of Sutherland in particular, the House of Lords have been invited to presume lost patents of creation in cases where the daughter of an Earl and her husband appear as bearing the title previously borne by the wife's father,—the assumption being that the title, distinguished from the comitatus, or territorial fief, must have expired with the male line of the original grantee, and been regranted to the husband and the heirs of their bodies, still in the exclusive male line. The House of Lords repudiated the suggestion of a lost patent in 1771; they have recognised it in 1875. Meanwhile, although the allegation of such patent has been uninterrupted since the Sutherland case, it is remarkable that not in one instance has such a lost patent been discovered in any one of the Scottish charter-chests that have been searched subsequently; nor has any one of them been ever recorded in the Great Seal or Privy Seal Registers; nor has any reference (even) to such a patent been discovered. The hypothesis is untenable *per se*, inasmuch as it presumes the existence of dignities apart from territory, and from the service and responsibility attached to territory, and through territory to dignities, as well as the contingent possibility (already touched upon) of dignities separating (through their exclusive descendibility to heirs-male according to the hypothesis), and descending in lines of paupers as barren titles apart from the revenues required to support them and protect the independence of hereditary counsellors of the Crown—the possibility of which was repudiated (as I have shown) in the Cassillis case, but which, as I have also pointed out, might

perfectly well have happened in the case of Mar in 1565 on the views held by Lord Chelmsford. The historical fact is that patents of honour apart from lands, modern peerages practically, although always (in Scotland), retaining a certain savour of the soil out of which they sprang, were first introduced in the reign of James VI., and not till nearly the close of the century, and thus long after 1565; so that it is an anachronism to speak of an Earldom created in 1565, and *a fortiori* of older dignities, as "peerage earldoms," or "peerages."

The result is, that the Report of 1875 proceeds on an assumption, viz. that a charter or patent was granted in 1565, for the existence of which there is no proof admissible by Scottish law; while I have further to add, that even were such alleged charter or patent admissible by that law, the presumption as to the limitation of the dignity supposed to be conferred by it would *not* be in favour of the heir-male according to Lord Mansfield's rule, applied *ut supra* by Lords Chelmsford, Redesdale, and Cairns in Lord Kellie's favour, but in favour of the heir-general, Lord Mar. Lord Kellie has not a leg to stand upon, by Scottish law, with regard to the alleged creation of 1565.

I must notice here once more that this exposure of the untenableness of the general argument of the noble and learned Lords against the heir-general and in favour of the heir-male, as connected with Queen Mary's charter, 23d June 1565, is to the same effect as that which the officers of the Crown addressed to the Committee for Privileges on the 16th June 1874, in deprecation of a report in favour of Lord Kellie, and which well deserves consideration:—"It seems difficult for me, therefore, to imagine, that when all these reasons are assigned for the restoration of the lands upon a particular footing, and so that the dignity should go in a particular direction, there was an intention that the dignity that was restored or re-created (I care not for the purpose of what I am at present saying whether it was restored or re-created) should go in a different direction to that in which the lands were to go." "Having regard to all the surrounding circumstances, it becomes immaterial to consider whether there was a re-creation or a restoration to the dignity of Earl of Mar in 1565, inasmuch as if it was a re-creation the surrounding circum-

stances are sufficient to indicate the intention that the dignity so created should descend to heirs-general, and that it should not be limited to heirs-male. On the other hand, if it was a restoration of the previous dignity, there is sufficient evidence in the case to show that that previous dignity had been in like manner descendible to heirs-general." The learned advocates for the Crown were thus contending in defence of Queen Mary's accuracy, wisdom, and justice, and anticipating what must most certainly be the judgment of the Scottish Themis should the question of the Report of 1875 ever come before her for consideration. In the meanwhile it may be more confidently presumed that the views held by the officers of the Crown in 1875 would have been those of the Crown itself, as ultimate judge according to the English theory, if an opportunity had been allowed it of considering the Report of 1875 before it was acted upon and enforced in favour of Lord Kellie and against Lord Mar by the order of the 25th February 1875. The keeping of the Royal conscience cannot in such a case be supposed to be in the guardianship of a Lord Chancellor, against whose opinion, or "judgment," the appeal would have been addressed. If this presumption be not recognised, then it must be supposed that the Crown can blow hot and cold, if not in the same, in successive breaths, upon a Scottish peerage. But what avails such speculation, except to exhibit the miserably deficient provisions as at present in practice for the administration of justice in regard to the peerage of Scotland?

It is hardly necessary to observe that except in so far as antiquity and what the French term "illustration" is concerned, it matters in fact little to the heir-general, the Earl of Mar, whether the Earldom, the title of dignity, dates from 1565 under the supposed lost charter, or from the days beyond the flood. In either case he is in possession by the law of Scotland.

It is not without significance that the restoration of the dignity or title of honour as incidental to the fief of Mar, and carried by the charter 23d June 1565, was universally accepted as an undubitable fact up to the year 1875. It will be shown that the Earl of Mar claimed precedency over all the Earls of Scotland in virtue of it. It is true

that Sir Robert Gordon, the Sutherland heir-male, alleged that it conveyed only the lands, and that the dignity was granted by a separate instrument, precisely as Lord Kellie has done in the present day,—this being part of his argument to prove that the ancient earldoms were all descendible to heirs-male of the body, and that when a female appears as holding the dignity, it was by a distinct grant—the allegation and the lack of proof in support of it being precisely the same as in Lord Kellie's case. But Lord Hailes refuted this in his Additional Case, and both Lord Mansfield and Lord Camden admitted the cogency of the proof, and founded, among others, on the descent of the original Earldom of Mar to heirs-general as a *ratio* for recognising the Earldom of Sutherland in the same category, viz. as descendible to heirs-general. I have already pointed out that the Mar Report of 1875 is in direct contradiction to the Sutherland Report of 1771, so far as the latter Report proceeds on the uninterrupted legal continuity and preservation of the Earldom of Mar by virtue of the grant of the Comitatus of 1565, and the limitation “*hæredibus*” or to heirs generally. The report of the officers of the Crown upon which the Act of Parliament reversing the attainder of the Earldom of Mar in 1824 proceeded, went on the same grounds; but of this Act (although alluded to, as we have seen, by Lord Chelmsford, in reference to this present charter of 1565), and the interpretation put upon it in 1875, I shall speak hereafter. It was in virtue of the same universally admitted rule of succession in the Mar case—I mean, by established recognition, as well as under the presumption of Scottish law—that the present Earl of Mar, the heir-general, succeeded to the dignity in 1824, and holds it now. The Report of the Committee for Privileges in 1875 might well therefore astonish Scotland, seeing that there was, I think I may say, nothing in the argument used by Lord Kellie which had not been previously urged, in fact or in principle, by Sir Robert Gordon, and refuted by Lord Hailes, and acknowledged to be erroneous by the House of Lords itself in 1771. But it matters little whether Lord Mansfield and Lord Camden were right or wrong as regards Mar, and the particular charter of 1565, in 1771. The decret of the Court of Session in 1626 laid down the law as affecting all the facts and principles involved in the recent claim of Lord Kellie, in full recog-

dition of the rights of the heir-general, so as to render the question *res judicata* from that date; and that decret is the criterion by which the justice of recent Reports behove to stand or fall, as I shall set forth in due time.

It may appear as if I had met the objections of the noble and learned Lords which I have dealt with in this section, as well as others previously, by too minute a criticism, taking notice of matters which are, in fact, overruled by dominant considerations. But none but superficial inquirers will think so. The statements made in the speeches of noble and learned Lords in peerage claims, although invested with no official authority, and mere *obiter dicta*, not judgments, live from generation to generation; their verbal accuracy, although frequently very questionable, is taken for granted; and argument and supposed precedent are based upon them, as if they were judicial utterances, in peerage-claim after peerage-claim in the House of Lords, the pleadings of claimants, alike in their cases and at the bar of the House, being lost sight of and forgotten, as we have now seen in the very Additional Sutherland Case of Lord Hailes, to the endless propagation of error and accumulation of injustice. Hence the necessity of checking and correcting such statements in the interests of truth and right, even in *minutiae*. I did so in the case of the speeches of Lord Cranworth and Lord St. Leonards in my report of the Montrose claim; and, although this is not a report, strictly speaking, but a remonstrance, I have done the same, neither more nor less, now.

I would remark, in closing the present section, that it is important that we should not attach more than its due weight to the charter 25th June 1565. As the document by which restitution was made, and under which, after due infeftment, the Lords Erskine thenceforward appeared as possessors of the fief and the dignity of Mar, we are inclined to view it in the light of a quasi-grant of the dignity. But it was, and it was not so. It was an act of grace, doubtless, in manner, but an act of restitution in the matter of its execution. The object and effect of the charter was to remove a let or hindrance which had prevented Lord Erskine and his ancestors from the enjoyment of a right inherent in them, and which hindrance had been unjustly interposed between them and that enjoyment. The charter removed the impediment, and recognised both fief and

dignity as in John Lord Erskine by hereditary right. When the Queen granted that charter, it was no longer, as I have shown, optional with her to withhold or grant the fief and the dignity, or to prescribe any limit to their descendibility. If Lord Erskine was heir of Isabel, and entitled to hold the Comitatus in her right, the Crown had no power to alter the destination, as under the charter 9th December 1404, except upon resignation by Lord Erskine as that heir. And so with the dignity inherent in the fief. There is nothing more certain than the law that no one can be deprived of a right (save in cases of forfeiture) except by resignation. All therefore that the Queen did, or could do, by the charter 25th June 1565, was to declare and recognise a right which a moment's reflection will show it was not in her power to disallow. She became *functio officio*, after granting the brieve of mortancestry upon which Lord John Erskine was retoured on the 5th May 1565; and the retour being in his favour, it became the warrant in a legal sense for the charter, prescribing its effect and limitation. We must, in a word, look beyond the charter to the retour as the ground of the recognising of Lord Erskine's right; and this carries us directly to the root of the dignity no less than the fief. The retour of John Lord Erskine as nearest heir of Robert Earl of Mar, who had been retoured as nearest heir of Isabel Countess of Mar in 1438, at once established the continuity of right and succession, as if John Lord Erskine had been own son of Earl Robert, and Earl Robert own son of the Countess Isabel, admitting of no legal break whatever between the three. This could only be rendered effective by formal acknowledgment of wrong and transference of the fief, carrying the dignity, and which was in the actual although not legal possession of the Crown, to the rightful owner; and this was carried out by the charter 25th June 1565. The effect of the charter therefore, as grounded upon the retour, is to recognise retrospectively all the intervening Lords Erskine as legally Earls of Mar, and to stigmatise all the intervening Earls of Mar, created between 1457 and 1565, as having possessed no right either with the fief or dignity. In a word, and to give a practical illustration of the position, if it could be proved that a lineal descent existed of any one of these pseudo-Earls, he would possess no right of inheritance in the dignity, owing to the fact that the Crown

had no right or legal authority to dispose of either fief or dignity—" quia nemo dat quod non habet."

SECTION III.

Parliamentary Ratification of 1567.

It remains for me only to add, before concluding this Letter, that the charter 23d June 1565 was ratified by Act of Parliament on 19th April 1567, on the recitation that " Hir Hienes, be certificatioun of evidentis and utherwys, that ane noble and nichtie Lord, John Erle of Mar, Lord Erskyn, etc., was lauchfullie descendit of the ancient heretouris of the said erledom, and had the undoubtit right thereof, and of the regaltie of Gareach, our said Soverane upoune that consideratioune, and for gud and thankfull service done be him and his predecessouris to hir Hienes and her Grace predecessouris, disponit efter her Majesteis lauchful age of xxi yeiris compleit, to the said erle, his airis and assignais, the foirsaid erledome of Mar and regaltie of Gareach, proprietie and tenandrie," etc. etc., and " thairfor, . . . willing that the infestmentis and giftes maid to the said Erle, his airis and assignais specifit thairin, . . . be sufficient and suir to him and thaim in tyme cuming;" has now " with awys and consent of the Three Estaitis of this realme, . . . ratifiit, apprevit, and confirmit " the same, renouncing " ony revocatioun, contradictioun, or impediment, . . . thairin in ony wise in tyme cuming," on her part or that of her successors. " And forthir, our said Soverane and Three Estaitis of Parliament foirsaid, has interponit and interponis thair auctorite," and " that lettretz be directed to mak publicatioun heiroy, gif neid beis, in forme as effeiris."¹

Lord Redesdale takes no notice of this Parliamentary confirmation and warrant ; nor does Lord Chelmsford, unless, as I suspect, he confounded a subsequent Act of Parliament in 1587 with the formal ratification of 1567. His words are as follows : " In adverting to the case of the opposing petitioner, where it relies upon matters which occurred after Queen Mary's charter, I cannot see in any of them evidence in support of the descent of the dignity for which he contends," viz., to heirs-general. " Great stress was laid upon an Act of Parliament

¹ Acts of the Parliaments of Scotland, ii. p. 549.

passed in 1587, which ratified the charter. This Act, however, has no greater force and effect than the charter itself. Erskine, writing upon Parliamentary ratification of grants made by the Crown in favour of particular persons, says in his Institute, Book I. Title i. sect. 39, 'Ratifications by their nature carry no new right; they barely confirm that which was formerly granted, without adding any new strength to it by their interposition.' The Act, therefore, cannot give any efficacy to the charter which it did not previously possess; and it does not, any more than the charter, affect or pretend to affect the dignity."

The Act of 1587, to which these observations are addressed, is not a ratification of the charter of 1565, although it proceeds upon that charter in ratifying and granting the prayer of a "Supplication" or petition presented by John Earl of Mar, the son of the grantee of 1565. The observations are therefore not applicable to that Act, but only to the ratification of 1567; which, I may here add, ratifies in the same breath other grants by the Queen, of a very important public character, such as the keeping of the Royal Castle of Stirling, previously made to Lord Mar. I have to observe here, that while too much stress must not be laid upon Parliamentary ratifications, it is an error in the opposite direction to lay too little. Their importance varies with the nature of the subject, and with circumstances. The Act of Ratification here in question imported recognition—not of a gift or grant proceeding from the grace of the Crown in the ordinary sense, but of a right acknowledged by the Crown, and by the Three Estates, to be inherent in an individual and his family, restored to them *per modum justitiæ*, and in relation to which the Sovereign and the legislature guarantee the parties from any future action in disturbance of the right so recognised, except in the ordinary course of law, by process before the Supreme Civil Court, the Court of Session, to whose authority all such ratifications were finally subject. Deprivation or interference through the arbitrary intervention of the Sovereign or the Parliament was thus disclaimed and precluded. Erskine's words, and similar ones that may be cited from other institutional writers, only apply to the ordinary class of Parliamentary ratifications, and have here, I venture to submit, been applied in too unqualified a sense. Even with

respect to ordinary ratifications of royal charters or other documents, this at least is certain, that they formed part of the progress of feudal rights, always specified and laid stress upon in processes, even when the mere object of their passage through Parliament was to obtain a public registration against the risk of loss of the original documents ; while, if wanting, the right not thus confirmed was liable to the imputation of deficiency and imperfection. They did not add to the inherent validity of the original charter, but they gave that validity a protection which was not always unneeded in the times we are dealing with, long before the days of Erskine.

John Earl of Mar, the restored heir of the Countess Isabel, and of Robert Earl of Mar, was chosen Regent of Scotland, as is well known, on the death of the Regent Lennox in 1571, and died on the 29th October 1572. He was succeeded by his son John, distinguishable in the family annals as the Treasurer, he having held that high office from 1615 to 1630. The efforts of this able and worthy man to recover the entire inheritance of his ancestors, crowned with complete success three months after his death, will form the subject of the ensuing Letter.

LETTER VI.

PROCESS FOR THE RECOVERY OF THE INHERITANCE.

JOHN EARL OF MAR, the Treasurer, the son and heir of John Lord Erskine, restored in 1565, and who died Regent of Scotland, had been bred up with James VI., who was about seven years younger than himself, under the care of the Countess of Mar, the Regent's widow, and of Sir Alexander Erskine of Gogar, the Regent's younger brother. He grew up to be a bold and resolute man, ready with his sword, although well cultured in letters under George Buchanan, a combination very common then in Scotland. He took active part in the struggle for the possession of the King's person during the minority of the latter, at first as an ally of Morton, afterwards in opposition to the Duke of Lennox and Sir James Stewart, the ephemeral Earl of Arran; he was forfeited in 1584, but restored the following year; and after Queen Mary's execution he took open part with the "Catholic Lords," Huntly, Bothwell, Crawford, and others, then confederates, and in correspondence with the Duke of Parma and Philip of Spain. But the warmth of early attachment between him and the King outlived all those divergences of interest; and after James's succession to the throne of England, Mar continued to be his trusted friend, and James confided to him the important office of Lord Treasurer of Scotland, which he held, as I have stated, from 1615 to 1630. He died on the 17th December 1635, aged seventy-seven—a long and eventful lifetime, covering the period of transition from the feudal age of Scotland to a period much more near in many respects to the tone of thought and the habits of life prevalent at the present day than is usually supposed.

The recovery of the heritage of his family in its integrity, under the warrant of the service of 5th May 1565 and the

ensuing charter, was kept by Earl John, the Treasurer, steadily before his eyes through life: but long intervals intervened, during which political troubles and the ups and downs of feudal influence necessitated inaction. He accomplished it, however, although the final seal of success was not stamped upon his work till three months after his death. I shall narrate the progress of this legal conquest in the present Letter.

It is important here that we should take note of and remember what the charter of restoration 23d June 1565 could and what it could not do. It was sufficient to restore at once *per modum justitie* all the lands pertaining to the Earldom of Mar which remained in the hands of the Crown; while it was equally effective to replace Lord Erskine in the superiority over the entire Comitatus in the character of Comes or Earl of Mar, precisely as the Countess Isabel had held it; but in cases where portions of the Comitatus had been alienated as property to vassals by charter and infeftment from the Crown during the period of usurpation, the charter of 1565 could not take effect till these charters and infeftments had been reduced by process before the Supreme Civil Court, the Court of Session, and the right declared to be in the heirs of Isabel, the Earls of Mar. For by the law of Scotland an infeftment by a superior held good even although proceeding on erroneous grounds, till the error and injustice were proved and the charter and infeftment reduced, or till the tenant voluntarily resigned the subject of the grant into the hands of the lawful superior according to the due formalities of such renunciation. It was thus necessary for Earl John to proceed by legal process against those to whose ancestors the Scottish kings had alienated considerable portions of the Earldom subsequently to 1435; and the difficulties and opposition he had to contend with may be estimated when I state that the Lords Elphinstone in the first instance, and next to them the Earls of Huntly, then the most powerful family in the north, and numerous other earls, barons, and freeholders, were all arrayed against him in the forensic warfare, which lasted, as we shall see, from 1593 to 1635, a period of above forty years.

It was during the life of this Earl John, in 1606, that the celebrated "Decreet of Ranking," in settlement of the precedence of the Scottish peers, was pronounced; by which a

precedency was assigned to the Earldom of Mar above several earldoms created previously to 1565, and dating, as will be seen, from the charter of 9th December 1404, and its confirmation on 21st January 1404-5. But I shall defer notice of it, and of the controversy which has arisen upon it, to a future page, with the view of avoiding confusion, by confining the present Letter to the history of the recovery of the alienated portions of the Comitatus; with the exception merely of a few words on the subject of certain retours obtained by Earl John, a step in the progress of the right to the feudal Earldom of Mar upon which Lord Chelmsford made observations with reference to the Decreet of Ranking, and which require explanation.

SECTION I.

Act of 1587 and Retours of 1588.

John Earl of Mar was served his father's heir on the 3d March 1572-3, in "toto et integro comitatu de Mar," containing the lands of Strathdon, Braemar, Cromar, and Strathdee, etc., as conferred by the charter of 1565. Some years afterwards, on the 13th July 1577, Robert Lord Elphinstone—the son of that Lord Elphinstone who fell at the battle of Pinkie in 1547, and who was son of Alexander, the first Lord Elphinstone, the grantee of Kildrummie, had seisin as his father's heir in the "tota et integra villa et burgo in baronia de Kildrummy" upon due previous retour. Robert Lord Elphinstone died in 1602, and it was with his son Alexander, fourth Lord Elphinstone, Treasurer of Scotland in 1599-1601, and who survived till 1648, that John Earl of Mar pursued the great process for recovery of Kildrummie in 1624-6.

The first important step taken by Earl John towards the assertion of his rights was in 1587; and Lord Elphinstone and other parties interested showed themselves fully alive to its significance, and prepared for resistance. On the 29th July 1587 an Act of Parliament was passed in favour of John Earl of Mar, protecting his right of regress on proper legal warrant against prescription, on the narrative of the rights recognised in the service and charter of restoration of 1565. This Act is

important on grounds which I shall presently specify; and, although technically a private Act, it must not be confounded with the ordinary run of such Acts, which passed through Parliament almost without notice or opposition.

The Act in question, 29th July 1587,¹ proceeds upon the narrative of a supplication or petition by Lord Mar to the King and the Three Estates of Parliament, duly supported by evidence; and then declares their deliverance upon its merits. Both the supplication and the deliverance require and will reward attention. The supplication sets forth that Dame Isabel Douglas, Countess of Mar, having been lawfully infest in the Earldom of Mar and Lordship and Regality of Garioch; and Robert Earl of Mar, Lord Erskine, having been subsequently lawfully retoured as her heir in the said Earldom and Lordship; and John Lord Erskine and Earl of Mar, the supplicant's father, having been in due sequence retoured as heir to Earl Robert, John, now Earl of Mar, the supplicant, is heir by progress to Dame Isabel, and entitled to the like possession of the Earldom and its dependencies; but that his ancestors had been "wraguslie debarrit from the possessioun of the saidis landis, erldome, and lordschip, pairtlie be the occasioun of the trubles occurrand and interveneand, and pairtlie be the iniquitie of tyme and staying of the ordiner course of justice to thame be the partiall dailling of sic personis as had the government of our Soverane Lordis predicessouris and realme and thair officiaris for the tyme;" and this notwithstanding the frequent protestations of his said ancestors in Parliament and Council, "the quhilk," the supplication states, "being advisitlie considerit be our Soverane Lordis dearest mother efter hir perfite age, and hir Hienes movit of conscience, as became of hir princely dewetie, to restoire the lauchfull aires unto thair just heretage and possessioun, efter mature deliberatioun, diligent tryall and inquisitioun taen of the premissis" (*i.e.* as prominently in the service and retour of the 5th May 1565), "gaif, grantit, and disponit heritably, to umquhile John Erle of Mar, Lord Erskin, the said complenaris fader, the said erldome of Mar, with the lands of the lordschip and regality of Gareauche," etc. etc.; that is, by the charter 23d June 1565. The suppli-

¹ Acts of the Parliaments of Scotland, iii. p. 475; Minutes of Evidence, p. 436.

cation then grounds its prayer upon these premises as follows : " Seing for the said erlis better securitie, and that his Hienes derrest moderis gude intention may tak the better effect toward the possessioun of the saidis landis, necessar it is that he be servit air to his predecessouris quha deit last vest and seisit in the said erldome, lordschip, and regalitie, and that ane sufficient rycht and actioun be establischt in his persone and his airis for recovering of the saidis landis and possessioun thairof" (*i.e.* all which had not already been given up to him as actually in possession of the Crown in 1565), " notwithstanding the diurnitie and lenth of tyme that hes intervenit ;" and " considering that be the lawes and custume of the realme the richt of blood nor yit ony heretable title fallis under prescriptione, nor is taen away be quhatsumevir lenth of tyme or laik (lack) of possessioun" (this being long before the statute of prescription for forty years passed in 1617), therefore the Earl prays the King and the Estates to examine and consider the rights and evidence under which the Countess Isabel, Robert Earl of Mar, and his father, John Earl of Mar, held the Earldom, so that he may " haif full richt thairby as air be progres to his saidis predecessouris to all and hail the saidis landis quhairin the saidis umquhile Dame Issobel Dowglas, Countesse of Mar, or umquhile Robert Erle of Mar, hir air, died vest, seisit and retourit, notwithstanding the lenth and diurnitie of tyme quhilk hes intervenit sensyne, . . . and to declair be ane Act of Parliament that his richt to the said erldome, lordschip, and regalitie, and action for recovering thairof, . . . hes not nor sall not prescribe, . . . bot that the said erle and his airis hes and sal have als guid richt, entres, title, and actioun in and to the saidis erledom," etc., " as gif he wer immediat air to the said Dame Issobell Dowglas, or to umquhile Robert Earl of Mar, Lord Erskin, hir air, or had pursewit for the samyn within yeir and day efter thair deceis, . . . without prejudice alwayes of all uther lauchfull defens competent to the pairties haveand interes," *i.e.* of the Elphinstones and others. The prayer of the supplication having been thus recited, the Act of Parliament concludes by stating that the King and the Three Estates, having examined " the richtis and infestmentis quilkis the said umquhile Dame Issobell Dowglas had of the said Erldom of Mar," etc., " and of the retouris

grantit to the said umquhile Robert Earl of Mar and John Earl of Mar of the samyn *successivè*, and infestment grantit to the said Erle's fadir of the samin Erldom and lordschip," etc., "upon being ryplie advisit . . . findand the richtis above specifit to be lauchfull, valide, and sufficient to preif and verifie the pointis of the said supplicatioun, ratifies and appreis and confirmis the samyn, and decernis and declairis the foirsaidis richtis to have als grite force, strenth, and effect in the persoun of the said Johnne Erle of Mar as the samin had or mycht haif in the persone of the said umquhile Dame Isobell Dowglas, or umquhile Robert Erle of Mar, Lord Erskine, hir air, and he to have full richt thairby as heir be progres to his saidis predecessouris to all and hail the saidis landis quhairin the said umquhile Dame Issobell Dowglas, Countesse, or umquhile Robert Erle of Mar, hir air, deit vest, seisit and retourit, notwithstanding the length and diurnitie of tyme quhilk hes intervenit sensyne during the quhilk space the said Erle and his predecessouris be the iniquitie of the tyme hes bene wranguslie debarrit from the saidis landis and possessioun thairof. And als decernis and declairis that the said complenairis richt to the said erldome, lordschip, and regalitie, and actioun for recovering thairof and possessioun of the samin, hes not nor sall not prescribe be the course of the said tyme, bot that he and his airis hes and sal haif als gude richt, interes, title, and actioun in and to the saidis erldome, lordschip, and regalitie, as gif the said Erle were immediat air to the said Dame Issobell Dowglas, or to umquhile Robert Erle of Mar, Lord Erskin, hir air, or had perseiout for the samin within yeir and day efter thair deceis, notwithstanding ony exceptioun of prescriptioun or laik of possessioun that may be alledgeit in the contrair; but prejudice alwayes of all uther lauchfull defens competent to the pairties haveand interes." It is hardly necessary to repeat that the rights thus examined and confirmed, and exempted from prescription (which is the special point of the supplication and the deliverance), were necessarily the charter of 9th December 1404, with its confirmation 21st January 1404-5, the retour of Robert Earl of Mar in 1438, and the retour and charter of 1565. I have given this remarkable document at very full length, inasmuch as it was one of the foundation-stones of what followed.

This Act of 1587 was fiercely assailed by the Elphinstones in 1624-6, on various grounds, which I shall hereafter specify. But the Court (it is sufficient to state here) overruled all the points founded upon as in no respect militating against Lord Mar's rights. The importance attached to the Act is manifest at every stage of the subsequent proceedings.

Lord Elphinstone and the Earl of Huntly, and others interested, fully comprehended what was being done at the time, and what was in ulterior contemplation in virtue of this Act, and they protested in Parliament on the same day, the 19th July 1587, in their respective interests. These protests also demand notice. Master James Elphinstone of Invernaughty appeared on behalf of his father, Alexander Lord Elphinstone, and protested "that the Act of Parliament past this present day in favour of John Erle of Mar, Lord Erskin, anent the erledom of Mar and lordship and regalitie of Gareauch, should be na hurt nor prejudice to the said Lord Elphinstoun anent his right and title of the lands and lordschip of Kildrumie, and that he nicht be hard to propone his ressonis and defenss quhensaevir he or his successouris should happin to be callit upoun thair richt of the foirsaidis landis and lordschip;" and thereupon "askit actis and instrumentis." The Earl of Huntly, "Lieutenant in the North," followed by a similar protest on behalf of himself "and his friendis" "anent their richtis and titles of quhatsumevir landis and possessionis within the said erldome and regalitie," taking instruments—notarial instruments, in the presence of Parliament and chosen witnesses—in the same manner. And John Wishart, laird of Pittarrow, describing himself as "heretable fewar and immediat tenent to our said soverane Lord of the landis of Strathdie and Bra of Mar" (his right originating in a disposition granted by James Stewart, Earl of Moray, the Regent Moray, during the brief period of his tenancy of the Earldom of Mar as Earl of Mar) "lamentit," by a similar protest, which precedes those just given on the books of Parliament, "that John Erle of Mar, Lord Erskin, had procurit a privilege in this Parliament, that na lang prescriptioun suld be proponit contrair him and his pretendit richt of the landis of the erledom of Mar," of which he, Pitarrow, alleged that the lands of Strathdee and Braemar formed part. He represented

that this was "verie dischargeable to the commoun law and lawis of the realme, specialle the samen being propertie to our soverane Lord and his predecessouris of a lang tyme bipast." He complained further that "his Hienes' Advocat and Comp-trollair for his interest, nather having been callit thairto," *i.e.* summoned to report upon the question, "nather yit the said Johnne Wischert of Pittarro having speciall interes, being certifiēt of the samin that he micht have prepared his alle-giances and rychtis competent to him be the law for sustening of his richt. And becaus he wes not wairnit to the effect foirsaid, nor yit wes now sufferit to propone aganis the said article quhairupon the foirsaid privilege was grantit at the voiting thairof, he solempnitlie protestit for remeid," etc. etc. I do not see these two counter-protests by Huntly and Pitarrow in the minutes of the Mar evidence; but they are upon public and officially published record,¹ and are thus independent of such sanction. The latter more especially is important as proving that the question of the Act of 1587 was duly considered in Parliament; that the Act was not a thing done in a corner or smuggled through Parliament, but that it passed after examination of evidence, and after discussion, upon the votes of the legislature.

Stress was laid on Lord Elphinstone's protest in the proceedings of 1622-6; but the Court of Session decided by a special interlocutor that it "derogated nothing from the weight of the Act here in question."

No notice was taken of this important Act in the speeches of 1875, except by Lord Chelmsford, who mistook it for the Act of formal ratification of 1567, as I have already pointed out.

Earl John's rights having been thus secured from prescription—and it may be remarked that no objection was urged against the competency of the Act on that particular point at any later period, and especially in 1622-6 by the Elphinstones or others—the next step was that he should vindicate his propinquity in blood to the Countess Isabel, with the ulterior view of establishing his right of heirship, in terms of the charter 9th December 1404 and of the royal confirmation 21st January 1404-5. This was effected by a general

¹ Acts of the Parliaments of Scotland, iii. pp. 477, 476.

service to Isabel, "expede" (to use the technical word) on the 20th March 1588-9,¹ before a jury consisting of William Earl of Morton, Alexander Lord Home, Thomas Master of Glamis the Lord Treasurer, James Commendator of Melrose, Adam Commendator of Cambuskenneth, Walter Prior of Blantyre Keeper of the Privy Seal, James Scrymgeour of Dudhope hereditary Constable of Dundee, John Hadden (Haldane) of Gleneagles, Sir James Home of Cowdenknowes, James Seyton of Tullibody, Alexander Home of Northberwick, Andrew Wood of Largo, William Scott of Abbotshall, John Livingstone, fiar of Donypace, and James Lumsden of Airdrie—all of these latter names being those of lesser barons or lairds, the representatives of ancient and distinguished families. Their report was "that Isabel Countess of Mar, kinswoman ("consanguinea") of John, now Earl of Mar, Lord Erskine and Alloa, had died in the faith and peace of the King, and that Earl John was her lawful and nearest heir "*respectu habitu quod ipsa erat neptis quondam Donaldi comitis de Mar, ejus avi, fratris quondam domine Helene de Mar, proavie quondam Roberti comitis de Mar, avi quondam Alexandri domini Erskine, qui erat proavus quondam Joannis comitis de Mar qui ultime decessit, patris dicti Joannis nunc comitis de Mar,*" or, to give it in more familiar English, "granddaughter of Donald Earl of Mar, the brother of Lady Helen de Mar, who was the great-grandmother of Robert Earl of Mar, the grandfather of Alexander Lord Erskine, great-grandfather of John late Earl of Mar, the father of Earl John," the subject of the retour. On the same day with this general service establishing the right of blood and representation by deduction from the common ancestor of the Countess Isabel and Earl John, all intermediate links being presumed to be extinguished through no exception being taken to the allegation that they were so (and, I may add, no one ever ventured to throw doubt upon that extinction), Earl John was served heir to Isabel by a special service by the same jurors to the lands of Strathdee and Braemar; and he was infeft therein by a precept of seisin from Chancery on the 7th November 1589—more than seven months afterwards. The necessary preliminaries were thus completed for taking action by legal process before the Court of Session

¹ Minutes of Evidence in Mar Claim, p. 520.

for the recovery of the lands in question. The general retour, it will be observed, establishing the right of blood, constituted a basis for any number of processes which might radiate from it, as from a common centre, for the recovery of all the various alienated dependencies of the great fiefs of Mar and Garioch. A more formidable, yet more strictly legitimate, lever for action cannot be imagined. Its importance was fully appreciated by Earl John's opponents; and a determined yet unsuccessful attempt to annul it was made in 1622, at the commencement of the proceedings between Earl John and Lord Elphinstone, as I shall show in due time.

I must pause at this point and remark at some length upon these retours, and especially the general retour, inasmuch as the latter has been the subject of much misapprehension on the part of the noble and learned Lord who took the lead in addressing the Committee for Privileges in 1875. I grieve for the delay, but it is most essential to clear the ground step by step as we advance.

Among the documents produced by Earl John before the Royal Commissioners who pronounced the decret of ranking in 1606, as recorded in an inventory or schedule of the evidence then put in (known by the title "De Jure Prælationis Nobilium Scotiæ)," "ane extract," or official copy, is enumerated "of ane retour of the date the 20 of March 1588" (*i.e.* 1588-9), "quhairby Thomas" (another ms. says correctly "John") "Earl of Mar is servit nearest and lawful heir to Dame Isobel Douglas, Countess of Mar." This was the general, not the special retour above spoken of, or the lands would have been mentioned, as they invariably are when lands are in question throughout the inventory.

I have to remark here that Lord Chelmsford, in commenting upon the action of the Commissioners of 1606, in respect to this retour, attributes to them what can only apply to the jurors of 1588-9. He adds some further criticism on the general subject of the class of retours to which that of 1588-9 belongs, which I cannot pass over without pointing out the contrast between his view and that of the Scottish law on the subject. Lord Redesdale took no notice whatever of the Mar retours or of the general retour of 1588-9 in particular. After mentioning the production of this retour of 1588-9, Lord

Chelmsford proceeded as follows, taking the retours in connection with the question of precedency and the Decreet of Ranking, from which I shall be under the necessity of disengaging them:—

“The finding of the Commissioners that John Earl of Mar was heir to Isabella through Helen of Mar was erroneous in a double sense. He could not have been heir to Isabella, who was heir to Margaret, the law of Scotland not allowing heirship to be traced through the mother, and he could not legally claim by heirship of blood to Helen, as by the same law there is no succession to land upwards through females (Erskine’s Institutes, Book III. Title vii. sections 9 and 10).

“By the Decreet” of Ranking, continues Lord Chelmsford, in 1606, “the remedy of reduction was reserved to all who should find themselves prejudiced by their ranking, and in 1622 an action for reduction of the retour of the 20th March 1588 was brought by six earls who, under the decreet, were ranked below the Earl of Mar. In searching through the voluminous evidence I have not been able to find any account of the result of this action of reduction, which, however, shows that the claim of precedence by the Earl of Mar founded upon the retour of 1588 was not suffered to go unchallenged.”

All this proceeds on a misapprehension, which I shall illustrate more fully hereafter. There was no such process of reduction as Lord Chelmsford supposes. The six earls brought forward no separate action for reduction of the retour grounded on in the decreet of ranking; nor did they employ any independent counsel in 1622. They merely associated themselves with the Elphinstones and the King in a summons to Mar to produce the retour of 1588-9 for the purpose of annulment, alleging their grievance as to precedence, but in such a manner as to show that the Earldom of Mar held by Earl John was the ancient one inherited from Isabel.

I resume Lord Chelmsford’s criticism. “The proceedings of the six earls to reduce the retour of 1588, by which the Earl of Mar was served heir to Isabella Douglas, Countess of Mar, seem to have stimulated his activity to obtain some further support to his claim of precedence.” This being, as observed, the especial point to which Lord Chelmsford directs his observations, but to which I do not address myself here.

“ On the 22d January 1628, he procured no fewer than five retours, finding him heir respectively to Donald Earl of Mar, to Gratney Earl of Mar, to Donald Earl of Mar, the son of Gratney, to Thomas Earl of Mar, the son of Donald, and to Margaret, the sister of Thomas and mother of Isabella. If these retours prove nothing else, they show how easily in those days retours could be procured, and consequently how little reliance can be placed upon them. Retour jurors are usually chosen on account of their supposed knowledge of the facts upon which the service as heir to the person last feudally vested depends. But these five retours were taken in respect of alleged heirship to persons who had died feudally vested from 250 to 350 years before. Whatever value may be supposed to belong to retours, which of course found only the fact of heirship generally, and determined nothing more than the existence of that relation with the several persons named, they can have no effect whatever upon the question whether the succession to the dignity of Earl of Mar was open to an heir-female. It may be observed that the judicial proceeding of service of heirs does not apply to honours and dignities. And it may fairly be asked why, in his claim of precedence before the Commissioners, founded upon his title to the ancient dignity, the Earl of Mar did not bring forward the proof of his heirship to the predecessors of Isabella upon which he afterwards obtained these retours.”

All this is argued plausibly, but upon erroneous grounds, and with the disadvantage of looking at the law and customs of the past through the spectacles and prejudices of the present. I cannot go into details here; but the broad answer is, that the five retours treated with such *disprezzo*, in common with that of 1588-9, by Lord Chelmsford, had nothing to do with the claim to precedence. As the retour of 1589 was obtained with a view to and as the basis of a process for the recovery of the lands of the comitatus, to which the Earl was heir through the immediate representation of the Countess Isabel, and which culminated in the decret against Lord Elphinstone in 1626, so the retours of 1628 were procured with a view to, and as the basis of a final process extending to the recovery of lands, the titles to which extended beyond the Countess Isabel, which was determined in Earl John's favour in 1635.

I am sorry to be obliged to anticipate the due march of events so far as these citations from Lord Chelmsford's speech have that effect; but it is evident that the noble and learned Lord's observations on the retours of 1628 apply equally to that of 1588-9, and that the whole form one group of little value in his eyes. It is very important that we should form a right judgment as to their value.

Fixing our attention on the retours of 1588-9, it is evident that in the preceding passages Lord Chelmsford confuses, in the first instance, the general retour of 20th March 1588-9 with the special one of that date; and secondly, as already remarked, the action of the Commissioners in 1606 with that of the jurors in 1588-9.

It was not land, but blood, the *jus sanguinis*, which was in question in the general retour of Earl John, which was adduced by him before the Commissioners.

Again, the Commissioners did not find "that John Earl of Mar was heir to Isabella through Helen of Mar,"—it was the jurors of 1588-9 who did so. Their verdict was legal evidence of the fact, and the Commissioners of 1606 had no call to re-examine the question. The *onus* lay on any one who disputed the consanguinity established by the retour to reduce it by proper proof before the Court of Session. But no one had questioned or disputed it up to 1606, and there is no evidence, as I shall show hereafter, that any process was attempted to that effect in 1622; while, if such was prosecuted—taking Lord Chelmsford's assertion as fact—it was unsuccessful. The retour stood, stands, and its authority and weight are unimpeachable.

The two grounds, the "double sense," upon which Lord Chelmsford assumes that "the finding of the Commissioners" (*lege* the jurors of 1588-9) "was erroneous"—a bold assertion for an English judge to venture upon under such circumstances—demand a word of comment. If heirship could not be traced through the mother by Scottish law, it is difficult to understand how Baliol could have succeeded as of right to the throne of Scotland, or Bruce after him, on Baliol's forfeiture; while Erskine's affirmation to the effect that the rule "*paterna paternis, materna maternis*," by which heritage derived from the father goes to the father's kin, and heritage derived from

the mother to the mother's kin, is excluded by the law of Scotland when the succession opens to collaterals, does not touch a question of propinquity of blood, which is all that is involved in the general retour of 1588-9. Lord Chelmsford had evidently the special retour for Strathdee and Braemar in his eye, the retour which, as we shall see, was not produced in 1606, when he thus expressed himself; but it so happens that, by special provision or tailzie in the ruling charter 9th December 1404, and the confirmation 21st January 1404-5, the principle and rule "paterna paternis," etc., by special provision, in exception to the general rule at common law, is enforced practically, so that any objection to the special retour grounded on the supposed error in point of Scottish law is done away with. The exclusion of the rule "paterna paternis," etc., only obtained at common law when no provision existed to the contrary; and it was legal to make such a provision just as it was legal to entail a fief on heirs-male to the exclusion of females, though against the ordinary course of law. I shall have to speak of the interesting question of "paterna paternis" in a more appropriate place.

Lord Chelmsford's strictures on general retours such as that of 1588-9, and those which followed in 1628, proceed apparently upon the assumption that evidence in matters of such antiquity would not be forthcoming, that the jurors were incompetent to estimate the value of the evidence offered, that jurors could, in fact, only judge of what they personally knew (which was the gist of the Chancellor Crichton's objection to the retour of 1438), that retours passed as a matter of course, that they are unworthy of credit in the present day, and that they could determine nothing more in the present case than the relationship of the parties. But if they did even this much, and if, as was the fact, the verdicts were judgments upon which rights depended, and apart from which (be it never forgotten) no process could proceed, the presumption must be in favour of their substantive accuracy, and against the justice of Lord Chelmsford's criticism. No one can, in fact, disregard such retours without undervaluing and superseding the law of the land, which recognised their validity. They were open to reduction before the Court of Session, the Supreme Civil Court; and when they have stood unchallenged

and unreduced from first to last, great territorial rights depending ultimately upon their accuracy with respect to pedigree and extinctions, as in the present instance, it is too late in the day to challenge that accuracy now.

The observation that "the judicial proceeding of service of heirs does not apply to honours and dignities," although correct with reference to mere modern peerage practice, is too absolute with reference to that of past times. General retours were prerequisite, for example, to royal recognitions of dignities descending by inheritance; and in the early time we are dealing with, special retours to dignified fiefs—as in the Mar case—necessarily carried the dignities inherent in the fiefs. The six Earls in 1622 avowedly considered that the retour of 1588-9 did affect their dignity and precedence, and thus Lord Chelmsford suggests a valuable corrective to his own criticism.

It is remarkable how the unhappy preconception that a distinct grant of peerage must have accompanied every grant of a "comitatus," as embodied in Lord Camden's law, perverts the views taken by the noble and learned Lords who spoke in 1875 upon every point and the entire bearings of the question in the Mar case.

In fine, and to conclude this vindication of the general retours here in question, and of the retour of Earl John 26th March 1588-9 in particular, we have a special reason for affirming that the jurors in 1588-9 understood what they were about, that full evidence of the propinquity of John Earl of Mar to Isabel, as her nearest lawful heir, through the deduction of descents above specified, was laid before them, and that no possible question therefore can be raised as to the accuracy of the verdict. Sir Thomas Craig, who was a contemporary, and actually counsel for Earl John in 1593, speaking in his great work, "De Jure Feudali," of collateral succession as opening as far as the seventh degree in ordinary cases before the feu lapses to the superior, allows that in cases where the evidence is clear, it may be extended further, and cites two examples in point from his own knowledge—one in the case of Lord Seton (with which I need not concern myself), the other in that of this actual retour of Earl John in 1588-9:—"Si modo," so his preceding exposition ends, "de eo constet et legitime probari pos-

sit ; quod nuper in duabus actionibus vidi decisum ; una, quæ ad dominum Marrium pertinebat, cujus pater ultra decem gradus de Elizabetha ” (*i.e.* Isabella, the two names being continually used interchangeably in Scotland) “Douglas comite (*lege* ‘comitissa’) hereditaria comitatus Marriæ aberat ; et tamen ei in hæredem dicti comitatus deservitus ex legitima inquisitione facta ”—that is, by the retour of 1588-9 now before us. Whereupon, he adds, as if in anticipation of the objection or doubt above suggested by Lord Chelmsford, “Sed ille”—*i.e.* Earl John—“totam propaginem ab ipsa stirpe adeò legitime et solenniter demonstravit, ut nemini de successione quæstionem reliquerit. Altera erat domini Setoun,” etc. And Craig ends the passage with these words, “In jure feudali regula hæc servatur ; si semel feudum descenderit, in infinitum ad collaterales pertinebit ; si vero fuerit feudum novum, usque ad septimum gradum tantum inclusivè ut antea dixi. Apud nos utrumque in infinitum extendi puto.”¹

There can be no doubt, I think, that the documents produced in evidence before the jurors in 1588-9 must have been the writs and infeftments produced before and examined by the King and the Three Estates of Parliament in 1587, as testified by the Act of Parliament 29th July of that year ; and those also, in part, produced before the jurors in the inquest of 1438. On the other hand, these same documents and their import must have been perfectly familiar to the Commissioners of Ranking in 1606, and must have been reproduced with additional evidence before the jurors on the general services of 1628. The proof thus afforded of the continued preservation of the documents will be found to be valuable hereafter.

SECTION II.

Process against Forbes of Corse, and position of the Elphinstones.

Resuming the thread of narrative, Earl John commenced proceedings in 1593 before the Court of Session against William Forbes of Corse, the representative of his great-grandfather, Patrick Forbes, a younger son of the second Lord Forbes, to whom the lands of Oneil, Corse, Kincragie, Muretown, and others, had been granted by charter of feu-farm to be holden of

¹ Craig, *Jus Feudale*, L. ii. Dieg. 17, § 11.

the King, by James III., 10th October 1482, which charter he (Earl John) called for to be reduced and annulled, with all that had followed upon it, and the right to the property declared to be in his own person. He qualified his interest as lawful heir to the Countess Isabel in the lands of Strathdee and Braemar, within which the lands in question lay, and as "haifing undoubtit right to succed as narrest and apperand air to hir in the rest of the said erledom of Mar and lordschip of Garreoch, conforme to ane Act of Parliament maid in our Soverane Lord's perfyt age," etc., viz., the Act of 1587, already before the reader. "Litiscontestation" (*i.e.* the judicial act by which the Court, after the parties had stated their pleas, granted a warrant for proving the conflicting statements) was "made," or constituted, on the 28th January 1593, Mr. John Preston of Fentonbarns, who the following year became Lord President of the Court of Session, Mr. Thomas Craig, the author of the treatise "De Jure Feudali," and Mr. John Nicolson, appearing as counsel for Lord Mar; and Mr. John Russell and Mr. John Skene (afterwards Sir John Skene of Curriehill, a very distinguished lawyer and judge of the Court of Session, well known for his connection with the "Regiam Majestatem" and his treatise "De Verborum Significatione") for Corse. The question was fully entered into, and the Court proceeded so far as to "repel" or disallow Corse's defences, and "admit" Earl John's "reasons" and argument: but Earl John himself appears to have desisted from active prosecution when the case was ripe for decision; and, in the words of the decret ultimately given in his favour, it is stated that after a term had been assigned to him for further proof and discussion, "the said actioun lay over continewalle thairefter uncallit, and na forder proceidit thairin efter the said act of litiscontestation quhill (until) laityly, that the said John Erle of Mar, pursuewar (*i.e.* prosecutor), upon the 10th day of April 1620 yeiris, raisit letters at his instance aganis Patrik Forbes, now of Corss," for the purpose of bringing the question to final decision; which it received by a solemn decret in his favour, 23d June 1621.¹ I postpone notice of the grounds of the action and the judgment to this latter date, as more convenient chronologically.

Alexander Master of Elphinstone, eldest son of Lord Elphin-

¹ Minutes of Evidence, p. 699.

stone, had charters on his father's resignation of the lands of the Kirktown of Kildrummie, 15th December 1593; of the lands of the town and burgh of Kildrummie, 25th January 1593-4; and of the lands and baronies of Elphinstone and Kildrummy, to him and his wife, Elizabeth Drummond, 5th June 1608. Alexander, the Master, thus figures conjointly with his father as defender against the process of John Earl of Mar in 1622-1626, for the recovery of Kildrummie, which all this while, it will be remembered, remained legally in the possession of the Elphinstone family under the grant from James IV., as yet standing unreduced. It will be remarked that the first and second of these charters are granted very shortly after the establishment of "litiscontestation" in the process against Forbes of Corse just spoken of. The Elphinstones added much to the value of Kildrummie by purchase of adjacent lands and of the patronage of kirks during their occupancy between 1510 and 1626.

As I stated a few pages back, the question of the connection in blood between Earl John and the Countess Isabel, together with several of the documents lately spoken of, came forward for examination and consideration at the time of the ranking of the nobles in 1606. Reserving the results of that examination for their distinct place, I may state here, as matter of fact, that the documents produced by Earl John before the Commissioners were Isabel's charter 9th December 1404 and the charter by Robert III., 21st January 1404-5; the letters passed by Robert III. under the Quarter Seal, 22d November 1395, in favour of Sir Thomas Erskine, pledging himself not to accept any resignation of the Earldom of Mar to the prejudice of the hereditary right of himself and his heirs; the Act of Parliament 29th July 1587, and the general (not special) retour 29th March 1588-9—and that, with the exception of the retour, which simply vindicated the *jus sanguinis* upon which the right ultimately depended, no documents were produced which did not refer to the feudal or territorial "Comitatus" of Mar, which the noble and learned Lords who addressed the Committee of Privileges in 1875 consider to denote the lands only, unconnected with the dignity or title of Earl of Mar. It stands to reason, I think, that if such had been the case, had the fief not carried the dignity (as I have shown it did), and had the

dignity been granted by a separate patent, Earl John would not have produced the writs above mentioned as the grounds of his claim to precedence, nor would the Commissioners have accepted them and allowed procedure on their basis, but on the contrary, would have treated them as no wise affecting the question of precedence, and asked for the patent, supposed on the hypothesis of 1875 to have been lost, and ranked him according to its terms. But no such patent was produced; and I may anticipate Lord Redesdale's theory (subsequently to be dealt with) that Earl John wilfully destroyed it, by the expression of my disbelief that such a thing was possible, either in the view of Earl John's personal character or of the experience and honour of the Commissioners. It will have been observed that Queen Mary's charter 23d June 1565, the retour of 5th May 1565, and the retours of 1438, were not produced; and nothing can show more forcibly how completely these transactions were looked upon as links merely, connecting links transmitting the feudal heritage, fief, and dignity from Isabel to the tenant *pro tempore* in 1606, Earl John. As I have already observed, we naturally lose sight of the legal value and character of the charter of 1565, strictly a subordinate and transitional value, in the lustre thrown upon it by the generous and disinterested action of Queen Mary and her advisers in restoring the rich and vast fief of Mar to the lawful heirs by removing the impediment which injustice had raised against them.

It may excite surprise that Earl John should have abstained from prosecuting his action at law for recovery of the alienated portions of his heritage during the interval of twenty-seven years between 1593 and 1620. But it is not wonderful, when we reflect that the establishment of his rights implied the diminution of the rank of many of the most distinguished families of Aberdeenshire and the neighbouring counties, from that of immediate vassals of the King to that of vassals of a subject, even although of so illustrious a subject as an Earl of Mar. Up to the end of the sixteenth century, the assertion of such a right would probably have occasioned private feuds, warfare, and bloodshed; but the personal influence of James VI. in great measure, and the growth of a milder civilisation of which he was an eminent pioneer, gradually prevailed over the feudal polity and manners, as the seventeenth century



advanced ; and, although “ *illi robur et æs triplex* ” might still have been applied to a man who, like Earl John, committed himself to such a sea of trouble, such a voyage of litigation, as he did, although in the bark of justice, still the voyage was in his case made with safety, the port was reached, the sails furled in triumph ; and if daggers were used during the encounters by the way, they were spoken ones only, in the warfare of Themis. The change that passed over the spirit of Scotland between 1593 and 1620, although that merely of a single generation, was incalculable—far more than in England, where the feudal system had been, I may almost say, extirpated under the Tudors. It is impossible, I may add, not to sympathise profoundly with all the parties in this great question of right and justice. That the Elphinstones, who had received their grant of Kildrummie by direct gift from a king presumably competent to bestow it on a faithful vassal, and had enjoyed it for nearly a hundred years, should in the event be called upon to resign it to one whom they must have looked upon as a stranger and an enemy—that numbers of the most eminent gentlemen of the north-east of Scotland, who had ever since 1457 held their fiefs or particular portions of their property direct from the Sovereign, as possessor of the Comitatus of Mar, should be called on by the descendants of the ancient Earls to forego their immediate dependence on the Crown and renew their homage as vassals under the Earl of Mar as overlord—it is impossible not to feel that this was very grievous, and that the amount of prejudice and opposition which Earl John had to contend against was absolutely enormous—of prejudice more particularly ; for, however strong was the feeling of justice and sympathy entertained for the Erskines in 1565, it was impossible but that sympathy should pass over to the opposite side in the course of generations when the consequences of the restoration came to be practically felt. But, on the other hand, the Earls of Mar might say with the representatives of a race equally the victims of royal oppression, the French Courtenays, “ *Ubi lapsus ; quid feci ?* ” It was in their despite and to their injury that the Crown usurped their rights, extruded them from their principality, and distributed the spoils, their castles and lands, among the ancient vassals of the Earldom or among tenants *in capite* of the Crown, as in the case of



the Elphinstones, who must all have known at the time how fundamentally precarious the right of the Crown was thus to deal with them, and how possible it was that a counter-revolution might restore them to their original and rightful owners. For the protestations of Robert Earl of Mar, and Thomas Lord Erskine, were standing evidence on the Books of Parliament, never cancelled, always recognised as within their competence of remonstrance—handing down the tradition of their complaint and reserving the right of their heirs from generation to generation, till the Nemesis of righteous retribution should assert herself. Still, the prejudice doubtless was against the Erskines in 1622;—at all events much sympathy must have been warmly felt for those who long enjoyed immunities thus threatened by the arm of the law; and I dwell on this natural sentiment the rather, inasmuch as it enhanced the difficulties which the venerable Earl John had to contend against and overcome in the prosecution of the various suits which form the subject of this Letter, and rendered the triumph of justice, however hard upon the defendants, more conspicuous in the conclusion.

While John Earl of Mar stood forward in assertion of his ancestral rights from 1587 to 1635, the date when the long struggle was finally ended, a period of nearly fifty years, he saw almost every one of those he had contemplated as opponents in 1593 drop into the grave, and their sons or grandsons step into their places. Such was the case in the family of Corse, when, in 1620, he revived the process which had been allowed to slumber since 1593. William Forbes of Corse, the defender in that year, had died, and the suit was renewed against Patrick, his son and heir, the well-known theologian and Bishop of Aberdeen—a man of exemplary character, and universally respected and beloved—the father of a no less distinguished son, John Forbes—both of them, I may add, staunch loyalists. The counsel were now Sir Thomas Hope of Craighall, the distinguished author of the “Minor Practicks,” and Mr. Thomas Nicolson (the son, I presume, of Mr. John Nicolson, the counsel in 1593), on Earl John’s side, and Mr. Robert Learmonth on the Bishop’s,—the Lord Advocate and Treasurer-depute appearing for the King’s interest; but the pleadings upon which the judgment went

were those of the former counsel in 1593. The charter called for by Earl John to be annulled was, as I have stated, a charter of the lands of Corse, part of the Earldom of Mar, by James III. to Corse's ancestor, 10th October 1482, with all that had followed upon it. Earl John's plea was that Isabel Countess of Mar having been lawfully infest in the Earldom, and neither she nor her heirs having done or incurred anything "nather be foirfaltour, recognitioun, disclamatioun, apprysing, resignatioun, or onie manner of way quhairby the vassalis landis nicht cum in the superioris handis," that is the King's, James III. had therefore no power to grant and dispone the lands of Corse, etc., being part of the lands of the Earldom, to the ancestor of the defender Forbes; but these lands remained the property of Isabel's heirs, and now pertained to Earl John in that character, and ought to be declared so to do. To this general "reason," or plea, Corse's advocates opposed—as the Chancellor had done in 1457—Isabel's charter, 12th August 1404, the extorted, renounced and unconfirmed charter, by which the Earldom was settled on Isabel and Alexander Stewart, and their issue, and failing such issue, on Alexander's heirs excluding those of Isabel; and by granting which Isabel, they argued, became "denudit" of all right to the said lands before her decease, Alexander Stewart, her husband, being duly infest as possessor in the same, upon whose death without issue, King James I. succeeded as heir in consequence of Alexander's bastardy; and James III., James I.'s heir, was consequently within his right when he granted the charter of 1482 to Forbes. To this Earl John's counsel, in their turn, opposed the renunciation by Alexander Stewart in September 1404 of the charter 12th August 1404,¹ and his acceptance in December 1404 of a new infestment, reserving the right of Isabel's heirs, and which was duly confirmed by the King in January 1404-5,—this last, as bearing the authority of the Sovereign superior, being the dominant deed. The continuity of right flowing through and from Isabel was thus, Earl John showed, never interrupted; and on this basis Robert Earl of Mar, his (Earl John's) predecessor, was served and retoured heir to Isabel in the two halves of the Earldom of Mar and Lordship of Garioch in 1438, from whom, his (Earl John's) right was clear through the

¹ *Vile supra*, p. 205.

service of 5th May 1565. It was the old battle of the charters—the exchange of lances as between Thomas Lord Erskine and the Chancellor Bishop of Brechin in 1457—between Earl John and Lord Elphinstone, as we shall see in 1622-6—and between the present heir-general, Earl John's representative, and Lord Kellie, at the present day. But what appears to have created especial discussion was the instrument of renunciation, bearing date the 9th September 1404, above mentioned; and on the 21st June 1621, two days before the final judgment in Earl John's favour, a special decret was passed by the Lords of Session, recognising its genuineness and validity, with a minute description of the condition of its seals, which I give in a note, as an interesting illustration of the Scottish rule of evidence at that time.¹ The original document no longer, so far as we know, exists; it was also produced in the decret against Lord Elphinstone to be noticed below: and it is described as in the Mar charter-chest, in the article on Mar, written by the laird of Macfarlane for the original edition of Sir Robert Douglas's Peerage.

¹ "At Edinburgh the 21 day of Junii 1621, the quhilk day in the actioun and cause persewit at the instance of John Erle of Mar Lord Erskyne and Garroche against Patrick Forbes now of Corse and present Bischope of Abirdein, for reductioun of the said Patrik Forbes and his predecessoris infetmentis of all and hail the landis of Oneill, Corse, Kinbraigie and Muretoun, with the myln and ailhous thairof, lyand within the schirefdom of Aberdene, Maister Thomas Hope, procurator for the said Erle of Mar for probatioun of the ressonne of the said summondis of reductioun, answer, and reply, admittit to the said Erle his probatioun for elyding of ane exceptioun proponit for the said Bischope of Aberdene contraire the samyn ressonne of reductioun, all at lenth contenit in ane act made be the Lordis of Counsall thairupone dated 21 Februar 1621 yearis,—Haifing producit diverse writtis and utheris probatiouns and in speciall producit in presens of the saidis Lordis ane renunciatioun in forme of instrument gevin under the signe and subscriptioun manuall of William Coyne, notere publict, of the date the nynt day of September 1404 yeiris berand umquhile Alexander Stewart sone to umquhile Alexander Stewart, Erle of Buchane to have renuncit the erledom of Mar with all infetmentis quhilk he had thairof to and in favouris of umquhile Dame Issobell Dowglas Countess of Mar, and bearing that immediatlie thairefter the said Dame Issobell disponit the said erledom to the said Alexander and to his airs to be gotten betwix thame, quhilkis failzeing to return to the said dame Issobell hir lawchfull airis, quharupone the said Alexander asked instrumentis, haifing thrie sealis appendit thairto quahairof the tag of the forrest seall, albeit ane pairt thairof be worne, yit ane other pairt of the samyn tag is hail and sound, haifing the said forrest seall close joynit at that pairt with the parchment quhairon the seall does hing. Quhilk instrument of renunciatioun and seallis being sene and considerit be the saidis Lordis and thet in presens of Master Robert Lermonth,

The final judgment in Corse's case was pronounced on the 23d June 1621, by which the Lords "retreittit, rescindit, decernit, and declairit in maner foirsaid."

SECTION III.

Preparations for recovery of Kildrummie.

This judgment of 1593-1621 in the case of Corse, being *in foro contentioso*, was final so far as the property in dispute was concerned; and it established the principle that James III., his predecessors and successors, had no right of property in the Earldom of Mar subsequently to the charter of Robert III., 21st January 1404-5, confirming Isabel's charter of the 9th December 1404. But the *crux* had to be applied to each several case of similar perplexity.

Earl John now concentrated his attention upon the recovery of Kildrummie, originally the chief message of the Earldom, and apart from which—notwithstanding the substitution of Migvie for Kildrummie by Queen Mary in the exercise of her power as superior in 1565—it is conceivable that he might hardly consider himself, nor would the world in that feudal age consider him, as actually sitting in the seat of Isabel and the ancient Earls of Mar. The proceedings against the Elphinstones were commenced by the usual summons, issued (I presume) in 1620 or 1621; and point after point bearing on the merits was decided by solemn interlocutors, until the final judgment upon the whole case was delivered on the 1st June 1626. But before noticing these, some subsidiary matters require a moment's attention.

While alarm was general throughout the north-east of Scotland, the fact of Earl John having been retoured heir to Isabel procurator for the said Bischope of Aberdene, they declaire all the saidis thrie scallis to be joynit to the bodie of the said instrument, and specialie that ane pairt of the tag of the said forrest seall is sene be ocular inspection of the saidis Lordis to be hail and sound and joynit to the parchement of the said instrument, and the saidis Lordis gavis power to the saidis persewaris procurator foirsaid to sew the said tag in that pairt thair of quhair it was worne and revin, and that for the better preservatioun of the said first seal. Quhairupone the said Master Thomas Hope, in name of the said persewar, askit instrumentis in presens of the saidis hail Lordis, and reppetit the samyn renunciatioun for ane pairt of his probatioun of his said reply and ressonne of reductioun in the said cause."—Minutes of Evidence, p. 632.

simpliciter by the service of 1587, awoke apprehension on the part of those who derived rights from the old unentailed Douglas succession to which Isabel was heir through her brother James Earl of Douglas and Mar, who fell without legitimate issue at Otterburn in 1388. Earl John's claim was for the Earldom of Mar; but the general service might, it was apprehended, be made the basis for proceedings for recovery of the Douglas property also—unless indeed the provisions of the charter 9th December 1404, and the confirmation 21st January 1404-5 restricted the succession of the Erskines to the Mar property only, and not the Douglas, which was at that time undecided. Such, at least, are the only grounds—and I think they are the correct ones—upon which I can account for the interposition of the Marquess of Hamilton and of the Earls of Angus, Nithsdale, and Annandale, all of them more or less connected with the Douglas interest, who applied to the King, James VI., to interfere for their protection by obtaining renunciations on the part of Earl John of all ulterior purpose of attacking their rights. There are several letters extant from James VI. and Charles I., addressed to the Lords of Session during 1626,¹ urging them not to proceed in Lord Mar's cause till these apprehensions on the part of the noblemen in question had been satisfied; and Earl John, who was no less prudent (I might have said just-minded) than determined, made little scruple apparently in granting the requisite securities. This we learn by the final letter from Charles I., 5th May 1626, as also that Mar had given a formal declaration in judgment "that no interloquitor or decretit that shall happen to be given in the said action shall prejudice us in our . . . revocation" (*i.e.* in the customary revocation of all grants prejudicial to the Crown made on the Sovereign attaining the age of twenty-five), a point the King had expressed himself anxiously about previously. These points being settled, King Charles bids the judges "proceed to putt a final end to the said action as you shall find the equitie thereof in justice to requyre."

Of Earl John's personal feelings on the score of these interpositions, and of what was passing behind the scenes during this early stage of his process with Lord Elphinstone, we have an

¹ [Printed in *Antiquities of Shires of Aberdeen and Banff*, vol. iv. pp. 250, 251, from Secretary Sir William Alexander's Register of Royal Letters.]

interesting glimpse in a familiar letter from himself to one whom he addresses as "good gossup," and "loving cusing," then in London in attendance upon the Court. The letter is dated from Holyrood-house, the 20th June 1622; and the perusal may be welcome as any spirit of life amid these dry and adust details:—

"GOOD GOSSUP,—Althoh I haive wryttin this other letter quhilk according to your own discession (gif ye think it good) ye may shaw unto His Majestie, yitt have I wryttin this letter particularlie for yourself, to latt you know somequhat of the procedings betwixt my Lord Elphinston and me in this actiou we have in hand. On Setterday last our action was called, and his Majesties letter to the Lords red, in that grett mater that they maed all the world to startt att concerning the Erldom of Douglas and his lands. I have given the Lords satisfaction, and hes ondir my hand befor the Lords renunced itt; quhilk is incertt in the beuks of the Session; and thair is no honest man that is nott satisfied with itt, bott I houp to give him satisfaction. For yourself, I see my onfreinds hes nott spared (give thay could) to have stired up ye eivin my best freinds, against me; bott they are disceved. I have spokin both with my Lord Precedentt and Mr. Thamass Houp, and ye shall be satisfied in anything ye or thay shall think good. So no more of this att this tym.

"Upon the xviii of this instantt it was called agane. Thair they named aine advocatt, and the man was my Lord of Durie, Mr. Alexander Gibsoun, a thing thoct so strange be all men heir as the lyk was never hard; for it is aine ordinarie thing to my Lord Advocatt to mak substitution of aine in his place to any advocatt the partie will choose, and in any causs quhaer he may not compeir himself; bot to naem a Lord of the Cession, itt was never hard befor. Bott this is nott all. They have moved His Majestie to wrytt a particular letter to him to acceptt itt. Upon this my partie givith furth that His Majestie doth favor thair causs better than myn; and although I know itt is aine ontreuth, yitt itt grives me not a lytil that many peipill here talks of itt. I will pray you and all my freinds thair to move His Majestie to be indifferent, and latt the comun causs of justice go on, and lat thaem mak thaer chois of any advocatt thay can, and latt the Lords be our judges, and nott to suffer thaer triks to have place. The treu reson that they wald have my Lord of Durie advocatt is, that he may be sett and nott have a vott in that causs, because he is ane ondirstanding honest man, and they know any man of ondirstanding will never be on thaer syd.

"This packett of letters I have directed in my Lord of Kelleis absens to be delyvered unto you, fering he should bee absentt from Courtt for his aun particular efaers,—therefore, give so be, streh (?)

up my letters to him, and give he be thaer, I desyr every one of you to see others letters, for I wrytt everiething to any of you as itt did cum in my mynd. I am loth to fashe the Prince with contiual wrytting to him; bott I will pray both you and my Lord of Kellie to remember my service unto him, and withall in all humilitie to desyr him to hauld hand, that no nouasion may be brocht in in my causs; for then the world will think that my Lord Elphistoun has mor favor of my master than I haive, quhilk will doo me mor herm than all the land is worth.

“I have wryttin two lynes (of creditt to my Lord of Kellie or yourself) to my Lord Deuk,—and thaerfor I pray you inform him particularlie as I have wryttin unto you.

“This is all I can say for the presentt, and so I will rest your loving cusing,

J. E. MAR.

“As for your aun particular, it is done.

“Ye shall receive enclosed in this letter your letter of the ii bak agaan, according to your desyr; and I will pray you to send me bak thir tway letters in this packett with this berar; for I haive only sentt him up for expeditioun, because the ordinar pakket rins so sloulie; and I pray you hest him bak to me, for my partie seiks nothing bott delay. My Lord of Sanctandross ondirstanding of this packett, desyred me to send this enclosed unto you, quhilk ye shall receive.—Your loving gossup,

J. E. Mar.¹

“Holyroud houss, xx of Junii 1622.”

The recital of Earl John's summons, as given in subsequent decreets, does not specify the date. As already stated, it was probably issued in 1620 or 1621. But the Elphinstones, whether after receiving the summons or before, were as determined as the Erskines. Like seamen who, perceiving a water-spout advancing, endeavour to dissipate its volume by firing into it, so they—taking the “first word,” as we say, “in flyting,”—anticipated Earl John's more cumbrous march by bringing an action for reducing the retour of the 20th March 1588-9, and thus subverting the technical basis or fulcrum (if I may change the metaphor) upon which his action proceeded.

All the parties primarily interested in opposition to Earl John's claim associated themselves with the Elphinstones in this action. The summons proceeded at the instance of the

¹ From Sir James Balfour's mss. in Advocates' Library; Minutes of Evidence, p. 604.

King himself, put prominently in the van, as represented by Sir William Oliphant of Newton, the Lord Advocate, and Mr. James Oliphant of Murehouse, his depute, and of John Earl of Mar—Earl John being thus marshalled against himself in his official capacity as the King's Treasurer and Comptroller—the royal interest being that accruing to the King in the Earldom of Mar through the inquest and service negative of 1457. Lord Elphinstone, his son Alexander Lord Kildrummie, and Dame Elizabeth Drummond, Lady Kildrummie, appeared in the second rank as pursuers or prosecutors,—thirdly, the Earls of Menteith, Morton, Montrose, Eglinton, Glencairn, and Cassillis, “quha be the service undermentionat, be the quhilkis the said John Erle of Mar is servit as narrest and lauful heir to the said umquhile Dame Issobell Douglas of Mar, ar hurt and prejudgeit in their honours and digniteis in our soverane Lord's Parliamentis and publict conventiounis,”—this being the general retour, not the special one of 1588-9; while fourthly, the names of the prosecutors are concluded by those of “George Marquis of Huntly, Francis Earl of Erroll, Hay of Ury, Walter Lord Deskford, Gordon of Abergeldie, Irvine of Drum, Forbes of Pitsligo, Fraser of Staniwood, Leslie of Balquhain, Urquhart of Craigstane, Forbes of Brux, Arthur Lord Forbes, Strachan of Glenkindie, “who are infest in the particular lands, baronies, and others,” specified; as, for example, Huntly in the ‘Cabrach,’ Erroll in the lands of Creichmond, Irvine of Drum in those of Coull and Tarland in Cromar, Pitsligo in those of Cauldstane, Balquhain in those of Whitecross, etc. etc. “quhilkis landis, baronyes, and utheris foirsaidis, ar estemit to have pertentit to the said umquhile Dame Issobell Douglas heritably, and consequentlie the foirsaidis persones may be prejudgeit in the propertie and joising (enjoyment) of the foresaidis landis and baronyes be the foirsaid services deducit in favour of the said John Earl of Mar.” The brunt of this storm of legal indignation was directed against—not, as might have been expected, Earl John, the real defender, but against the devoted head of Andrew Wood, elder, of Largo, who is stated to have been the sole survivor, the “only now on life,” of those who sat upon the service of the brieves of inquest in 1588-9; and on whom the summons called on the Court to inflict the punishment due to those convicted of the crime of “temere

jurantium super assisam." John Earl of Mar, John Lord Erskine his son, Sir John Scott of Scotstarvit, Director of Chancery, author of "The Staggering State of Scottish Statesmen," and Richard Cass, who had acted as clerk to the service of 1588-9, and was still alive, were called on, along with the laird of Largo, to produce the "pretendit" services, to be reduced and annulled.

The King appeared by Oliphant, the Lord Advocate, and his depute; Lord Elphinstone, his son Lord Kildrummie, and the "hail remanent pursuers," including the six Earls—a goodly train of clients, by Sir Thomas Nicolson and Lewis Stewart; but the laird of Largo, Earl John, and John his son, made no appearance, and the Lords continued "the said matter," without prejudice of parties, to the 2d December next to come, with certification to them that if they failed to appear, the service will be rescindit and annullit,—ordering them meanwhile to summon Andrew Wood, "who is presently furth of this country," at the market-cross and shore of Leith, on fifteen days' warning, in the usual form.¹

Nothing more was heard of this "counterblast"—or rather, for such it proved, this tumid cloud of impotent aggression. It fell through; and the services, general and special, of John Earl of Mar, 20th March 1588-9, stood unimpeached, and so stand at the present day.

SECTION IV.

Process against the Elphinstones. Earl John's First Reason.

There was nothing now to divert attention from the main process of Earl John against the Elphinstones. The summons, the substance of which is narrated in the final decret, 1st July 1626,² is directed by Earl John, as heir to the Countess Isabel in the Earldom of Mar, of which Kildrummie is a portion, through the progress of writs with which the reader is familiar, against Lord Elphinstone, as successor *in rem* and by progress to Alexander Stewart Earl of Mar and Thomas Stewart, his son, "stylit" Earl of Buchan, in right (as in his

¹ Minutes of Evidence, pp. 691-693.

² Minutes of Evidence, pp. 453-476; Antiquities of Shires of Aberdeen and Banff, iv. p. 252.

father's case) of his wife Elizabeth Countess of Buchan, and the officers of the Crown and other parties in the background,—the sons of the two competitors, Lord Erskine and Lord Kildrummie, being associated with their fathers, as having been put in fee of the respective fiefs during their fathers' lifetime. The King's interest is alleged upon five points, viz. :

1. Any right that he may pretend to the lands of Kildrummie, as part of the earldom of Mar and lordship of Garioch ;
2. His character as apparent heir of blood to Alexander Stewart Earl of Mar, or his son Thomas ;
3. As heir of blood to any of the Kings his predecessors ;
4. As pretending right as heir of provision to Alexander Earl of Mar and his son ; or,
5. As having right thereto by bastardy, last heir, or otherwise.

Sir Archibald Napier of Merchiston, the King's Treasurer and Comptroller-depute ; Sir William Oliphant of Newton, the Lord Advocate ; and Mr. James Oliphant of Murehouse, the Advocate-depute, are cited as defenders in the royal interest ; and Sir John Hamilton of Magdilands, Clerk of Register, and Sir John Scott of Scotstarvit, Director of Chancery, in their capacity of keepers of the public records. The summons calls upon these persons to produce :—

1. The charter 12th August 1404, alleged to have been produced and acted upon in 1457, and which had been registered by special command of King James III. in 1476 ;
2. Any alleged confirmation by Robert III. or James I. of the charter in question, in favour of Alexander Earl of Mar and Thomas his son, either original, or on the resignation of Isabel or of Alexander,—a requisition, I may remark, which struck at the very root of the matter, as no such confirmation ever took place ;
3. The charter 28th June 1426 ;
4. The "decreit and doome" of the Justiciary Court, given in the letters patent and testimonial by John Lord Lindsay of the Byres, 1457, with the negative service of Thomas Lord Erskine ; and,
5. All infeftments, charters, or instruments of whatever kind granted to the defender Lord Elphinstone, or his ancestors, or any other to whom they succeeded *jure sanguinis*, by James VI. or his ancestors, kings of Scotland, since the charter of confirmation and infeftment 21st January 1404-5,—the whole of these charters and instruments thus called for to be reduced and cassed, as null and void as far as regards the right to Kildrummie and its de-

pendencies: with declaration of the right in the same as existing in Earl John and his son as heirs of Isabel. The process based upon this summons lasted for four years, and the parties were represented, Earl John by Mr. Thomas Hope, Mr. Andrew Ayton, and Mr. Thomas Nicolson; Lord Elphinstone by Mr. Lewis Stewart, a host in himself; and the King by Mr. James Oliphant, advocate-depute, with his Majesty's special warrant and direction, for his Majesty's interest in the said matter, and as procurator for the Lord Advocate and other officers of the Crown. It thus appears that Earl John's remonstrance against the employment of Lord Durie, a Lord of Session, as advocate for the Crown against him, on the grounds stated in the letter above given of the 20th June 1622, had proved successful.

The "reasons" or pleas, in support of Earl John's claim, as stated in the summons and upon which the judgment went, are three in number,—I give their substance in the first instance. They affirm,—

1. That James IV. had no power to grant the Lordship of Kildrummie to the Elphinstones, because the kings of Scotland, his ancestors, had been denuded of all property in the Earldom of Mar, of which Kildrummie is a part, by, and subsequently to, the charter of Robert III., 21st January 1404-5, confirming the Countess Isabel's charter 9th December 1404, under which Earl John claims.
2. That the Countess Isabel's charter 12th August 1404, being unconfirmed, and thus a mere inchoate and imperfect right, was no warrant for the resignation of the earldom by Alexander Earl of Mar, her husband, to James I., and for James I.'s new charter and infeftment, 28th May 1426, in favour of Alexander Earl of Mar and his son Thomas,—the right being veritably in Robert Earl of Mar, Earl John's ancestor, who was lawfully retoured heir to Isabel in the Earldom of Mar in 1438; although his right was disallowed by the decret of inquest and service negative in 1457, proceeding on the basis of the unconfirmed charter 12th August 1404 being the governing instrument. But that charter being invalid, the charter 1426 and the inquest and service negative of 1457, which are ex-

clusively founded upon the charter, fall to the ground in consequence, and ought to be declared null and void, with all that has followed upon them; with declaration of Earl John's right,—so far as the King is concerned.

3. That it should be declared by the Lords that the retours 1438 stand valid and effectual, unreduced and non-annulled, because by special Act of Parliament in 1587 it is found and declared that the Countess Isabel was lawfully infest in the Earldom of Mar and Lordship of Garioch; that Robert Earl of Mar was served and retoured heir to her in the said Earldom and Lordship; and that John, now Earl of Mar, is heir by progress to Dame Isabel, and, as rightful heir of blood to her, hath right to the Earldom and Lordship in question, notwithstanding the decret of inquest and service negative of 1457. This therefore ought to be declared null and void and rescinded, with all that has followed or may follow thereupon; and it should be declared by decret of the Lords that the said retour of Earl Robert stands and remains a valid and effectual retour not reduced or annulled, and that the undoubted heritable right of the said lands and lordship of Kildrummie, etc., pertained to Dame Isabel Douglas Countess of Mar, and to Robert Earl of Mar, as served and retoured heir to her, and consequently to John, now Earl of Mar, as heir served and retoured immediately and by progress *respectivè* to the said Dame Isabel and Robert Earl of Mar.

It may be sufficiently evident that the question upon which the whole depended was this,—Is a charter to a stranger by a vassal granting a fief held of the superior valid without the previous consent or subsequent confirmation of the superior? Such was the charter of the 12th August 1404, upon which the alleged right of the Kings of Scotland, and of the Elphinstones as depending upon that alleged right, depended. Earl John opposed to the charter of 12th August the subsequent charter of 9th December 1404, not on its own merits, but as having received the sanction of the superior, Robert III., as expressed in the charter 21st January 1404-5, on which last therefore he

mainly founded throughout the process. When a vassal resigned his fief to the superior, it became once more the property of the superior *pro tempore*, even although immediately, in the very next breath, regranted,—the denudation of the vassal being so absolute, although momentary, that, when the superior was the sovereign, the resigner was styled by him by his single Christian name and surname, and not by his title of dignity (annexed to the fief) during the interval. This was *a fortiori* the case when a vassal alienated his fief without the warrant of the superior, as Isabel had done. Such alienation constituted an act of feudal dereliction, rendering the vassal subject to escheat, and which could only be salved by subsequent confirmation, which was sometimes refused, as we have seen in the case of Isabel herself in respect of Cavers. But when the superior had either sanctioned a resignation *in favorem*, as it was called, or confirmed such a charter as that of the 9th December 1404, he became *functus*; he had bestowed the fief; it had passed from himself, as property, to the grantee and his heirs; and he could no longer exercise any right of property over it till the fief should revert to him through escheat, or forfeiture, or by resignation on the part of the vassal. The reader will thus appreciate the principle of Earl John's plea *ut supra*, viz., that no such reversion to the King, the superior, having taken place in regard to the Earldom of Mar since the charter of confirmation, 21st January 1404-5, that charter continued to regulate the succession to the fief; and any dealing with it, on the part of James I. or later Sovereigns, on the ground of its being Crown property, was without warrant and illegal.

The "evidents" or writs, relied upon by Earl John, twenty-three in number, in support of his three "Reasons," were duly lodged before the Court, the series being based on the letters-patent of Robert III., acknowledging the right of Sir Thomas Erskine and his heirs to Isabel, as may be seen in the subjoined note.¹ On the other hand Lord Elphinstone produced the

¹ The writs are described as—(1.) "The lettres patentis under the Great Seill grantit be King Robert the Thrid the yeir of his regne quhairby the said King Robert faythfullie promittit that he sould not confirme nor ressave ony alienaciounis or resignaciounis to be made be Dame Isobell Dowglas Countes of Mar of the erldome of Mar and lordschipe of Garriochie in prejudice of the aires of Sir Thonias Erskene knycht, quha war to succed

charters 12th August 1404 and 18th May 1426 from the Great Seal Register; the Act of Parliament of James II. regarding the Crown lands, and an extract or office copy of the testimonial and retour negative of 1457, the original charter of Kildrummie to his ancestor in 1507, and the progress of writs based upon that charter to his own time.

thairto, and give ony sould be grantit, the same to be null." (2.) "Ane renuntiatioun vnder forme of instrument with thrie seallis appendit thairto of the dait the nynt day of September 1404 yeires, quhairby vmquhill Alexander Stewart sone to the Erle of Buchane, compeirand at the castell of Kildrummie in presens of ane number of noble men and of Alexander Bischope of Ross, delyverit to the said Dame Issobell Dowglas hir castell of Kildrummie with the hail writtis and evidentis being within the castell, to the effect scho nicht dispone vpoun the said castell and hir hail landis with hir persone at hir plesour, and immediatlie thairefter acceptit fra the said Dame Issobell ane donacioun of the said castell with the Erldome of Mar lordschipe of Garrioche and certane vther landis and barroneis specifeit thairin to the said vmquhill Alexander Stewart in frie marriage with the said Dame Issobell, and to the aires to be gottin betuix thame, quhilkis failyeinge to returne to the lauchfull aires of the said vmquhill Dame Issobell, reserveant to the saidis Dame Issobell and Alexander thair lyfrentis in the samyne, quhairvpoun the said Alexander Stewart took instrumentis in the handis of Williame Creyne, notter publict." (3.) "Togidder with the authentik double of the foirsaid instrument transमित befor the Lordis of Counsall vpoun the day of yeires." (4.) "Togidder with ane instrument of the dait the nynt day of December 1404 vnder the hand of the said William Creyne, nottar, agreing in tennour with the said former instrument in all poyntis except that it wantis the seills." (5.) "Togidder also with the chartour and donatioun conforme to the said instrument, maid and grantit be the said Dame Issobell Dowglas Countes of Mar vnder hir seall, of the said erldome of Mar and lordschipe of Garrioche and vtheris landis thairin contentit, to the quhilkis scho had richt vpoun hir fatheris and motheris syde, to the said umquhill Alexander Stewart in frie mariage with the Dame Issobell, and to the aires to be gottin betwix thame, quhilkis failyeinge to hir lauchfull aires *ub utraque parte*, daitit the nynt day of December 1404 yeires." (6.) "And als ane chartour of confirmatioun and donatioun grantit be King Robert the Thrid in the fyfteine yeir of his regne, daitit the twentie ane day of Januar 1404 yeires, quhairby be confirmes the said chartour maid and grantit be the said Dame Issobell of the saidis landis and erldome of Mar, Lordschipe of Garrioche and utheris thairin mentionat to the said Dame Issobell and Alexander in conjunct fie, quhilkis failyeinge to returne to the said Dame Issobellis lauchfull aires of the saidis landis." (7.) "Ane retour of Robert lord Erskene as air to Dame Issobell Dowglas of the half of the Erldome of Mar, daitit the twentie day of Apryll 1438 yeires, with the instrument of seising following thairupoun, daitit the twentie ane day of November 1438 yeires." (8.) "Ane uther retour of the said Robert Lord Erskene to the uther half of the said Erldome of Mar and lordschipe of Garrioche, daittit in October 1438 yeires." (9.) "Ane instrument under the note of Richard Kedy, nottar, daitit the secund day of Maii 1442 yeires, beireing that the said Robert erle of Mar compeirit in presens of counsall being met at Stirling, and complenit of the Lord Creichtoun, Chancellor, for deteneing of his retour and not geving him preceptis thairupoun." (10.) "Ane instrument takin be Thomas lord Erskene in name of Robert Erle

Such was the basis upon which this great process was grounded, the most important as affecting Scottish dignities which took place during the seventeenth century—with the sole exception of that for precedency between the Earls of Eglinton and Glencairn, decided in 1648. Every qualification requisite to render a trial fair and a judgment final was attendant upon

of Mar, his father, in plaine Parliament, desyreing justice to be done to him for the Erlome of Mar (and Lordschipe of Garreoch) perteneinge to his father in heretage, and quihilk war unjustlie detenit be the King, to quihilk Williame Lord Creichtoun, Chancellor, answerit, that thair was ane Act of Parliament ordaneing the King to bruk all the landis quihilk war in possessioun of King James the First quhill he war of perfyte yeires, daittit the twentie sevint day of Januar 1449 yeires, nottar thairto David Kay." (11.) "Ane uther instrument taine be Thomas Lord Erskene in Parliament, upone ane supplicatiounn gevin in be him to King James the Secund and Thrie Esteatis, desyreinge justice to be done to him for the Erlome of Mar and Lordschipe of Garreoch, to the quihilk Williame Lord Creichtoun, Chancellor, answerit that the King was to be in the northe, and he sould have justice done to him upoun fyfteine dayes warninge, daitit the tuentie ane day of Marche 1452 yeires, nottar thairto, Thomas Broune." (12.) "Ane infetment under the Great Seall grantit be Queine Marie of the erldome of Mar in favouris of vmquhill Johne Erle of Mar regent, daitit the twentie thrid day of Junii 1565 yeires." (13.) "Ane Act of Parliament ratefeand the said infetment, daitit the sextene day of Apryll 1567 yeiris." (14.) "Ane Act of Parliament maid in favouris of the said Johne Erle of Mar, daitit the twentie nynt day of Julii 1587 yeiris." (15.) "Ane retour of the said Johne now Erle of Mar as air to the said umquhill Dame Issobell Dowglas, serveing him generall to hir, of the dait the twentie day of March 1588 yeires." (16.) "Ane uther retour of the said Johne Erle of Mar serveinge him in speciall as air to the said umquhill Dame Issobell Dowglas in that pairt of the Erlome of Mar callit Stradie and Braymar, of the dait the said twentie day of March 1588 yeires, with the instrument of seising following thairupoun vnder the signe and subscriptioun of Johne Muschet, notter publict, of the dait the sevint day of November 1589 yeires." (17.) "Item ane instrument of seising of the Erlome of Mar grantit to Johne now erle of Mar as air to vmquhill Johne Erle of Mar his father, of the dait the tent day of Apryll 1573 yeires." (18.) "Ane new infetment of the Erlome of Mar *etc.* to Johne now erle of Mar, with the gift *de novo damus* from his Majesteis umquhill darrest fader, daitit 1621 yeires, with the precept and instrument of seising following thairupoun." (19.) "Ane dispositioun of the dait the twentie fourt day of Januar 1622 yeires, maid be the said Johne erle of Mar to the said Johne lord Erskene his sone, of the foirsaidis landis and barronie of Kildrymmie, with the vther landis thairinspecifeit, lyand within the Erlome of Mar and Lordschipe of Garreoch." (20.) "Ane act of interloquitour betuix the Erle of Mar and the laird of Cors daitit the twentie aucht day of Januar 1593 yeires." (21.) "Ane uther interloquitour betwix the Erle of Mar and the Bischope of Abirdeine, daitit the twentie thrid day of Junii 1621 yeires." (22.) "Ane decret of reductioun obtenuit be the Erle of Mar aganes the Bischope of Abirdeine of the samyne daitt." (23.) "Ane act of interloquitour upoun the objectionis maid aganes the probatioun and writtis productit be the Erle of Mar aganes the said Bischope of Abirdeine for preivinge of his resone of reductioun and reply, of the daitt the twentie ane day of Junii 1621 yeires."

the proceedings,—all the parties interested were present, and the ablest counsel in Scotland—at a time when Scotland was rich in able juriconsults—contended for the respective interests of Earl John and Lord Elphinstone. The question was thoroughly gone into, argument was pushed through every stage of answer, reply, duply, triply, quadruply. All the leading documents above enumerated were put in, read, and considered—the very documents, I may interpose, which, with the sole exception of the imaginary patent of 1565, were held in 1875 to have been destroyed by Earl John after the decret of ranking in 1606, and which Lord Chelmsford imagines to have been withheld from the Commissioners on that occasion. The Court passed all these under review, discussing each on its merits, as well as the entire series of events and circumstances of which these documents were the utterance and legal expression, from the 12th August and 9th December 1404 to the moment when the process was instituted; and placed the legal construction upon these documents and circumstances, particularising the documents as legal or illegal, valid or invalid, accordingly. All this appears from the successive interlocutors, and especially from the final decret of the 1st July 1626, in which the minutes of process are embodied, so as to place the merits of the entire pleadings before us with a fullness and precision beyond conception by those who have not carefully perused and analysed them. I have in a former work expressed my admiration of those models of forensic exactness, the decreets of the Scottish Supreme Court during the seventeenth century.

In order to render the report of the proceedings more intelligible, I should here state that the reasons or leading pleas set forth by Earl John, the “pursuer” or prosecutor,—each reason divided into fewer or more articles technically called “members,”—are met point by point by Lord Elphinstone, the “defender,” or defendant, in exceptions, technically called “defences.” Earl John replies to these defences by “answers,” Lord Elphinstone meets these by “duplies,” Earl John by “tripplies,” and Lord Elphinstone, the defender having the last word, finally winds up by “quadruplies,” which exhausts the contention. It is only on a few points that the controversy is carried so far as the quadruply. Logic is frequently

mixed up with law in the argument, but subordinately. I shall now exhibit as briefly as possible the leading points of argument on both sides. The pleadings throw much light on old Scottish law in what were still essentially feudal times; and it must be remarked all through that the question in dispute was the right to a great fief which carried the dignity of Earl, as already shown.

The first reason, as already stated, specially directed against the validity of the grant of Kildrummie to the Elphinstones by James IV., and all other writs which had followed upon it, was maintained by Hope, and sustained by the Court as sound in law on the following grounds. (I shall repeat the reasons more fully as each of them comes before us):—

1. That James VI. and his predecessors, including James IV., “had na power to grant the samyne, in sa far as it is of veritie that lang befor the dait of the saidis pretendit infestments our said umquhile Sovereign Lord King James the Sext and his Majesteis predecessors were denudit of the heritable richt and propertie of the saidis landis and Erldome of Mar and Lordschip of Garroch, with the said castell of Kildrymme,” etc., “contentit in the saidis pretendit infestments grantit to the said Alexander Lord Elphinstone and his said sone, and their saidis predecessoris, . . . in favoris of the said umquhile Dame Issobel Douglas, Countess of Mar, and of the said umquhile Alexander Erle of Mar, her spous, and of the langest leiver of thame twa, and of the aires to have bene gottin betwix thame, quhilkis failyeing, to the said umquhile Dame Issobel Douglas her aires; as the infestment maid to thame be the said umquhile King Robert the Third, our Soverane Lordis predecessor . . . under his Majesties Great Seill, of the date the said 21 day of Januar, the said yeir of God 1404 years, at mair length proportis.”
2. That Robert Earl of Mar, to whom the said John Earl of Mar, the pursuer, is heir by progress, was “servit and retourit air to the said umquhill Dame Issobell Douglas, Countess of Mar,” *i.e.* in 1438, “in the quhilk retour it is fand that the said umquhill Dame Issobell diet last vest and seisit as of fie in the said Erldom and Lordschip.”

3. That by special Act of Parliament, made by "his umquhile Majestie" (Charles I. had succeeded at the date of the interlocutor) "and his Heines Esteatis in the moneth of July the yeir of God 1587 forsaid, . . . it is fundin and declarit that the said umquhile Dame Issobell Douglas, Countes of Mar, was lauchfullie infeft in the said Erledom of Mar and Lordschip of Garioch; and that the said umquhile Robert Earl of Mar was servit and retourit air to hir in the said Erlodom and Lordschip, and that the said John, now Earl of Mar, is richteous and undoubtit air of bluid to the said umquhile Dame Issobell Douglas in all landis and heretages quharein sche diet infeft." And,
4. That "the said John Earl of Mar is servit and retourit as air to the said umquhile Dame Issobell, in the moneth of _____, the year of God 1588 years," *i.e.* 20th March 1588-9.

—On these grounds, it was concluded, the whole of the above pretended infestments, charters, and precepts, granted to the Elphinstones *ut supra*, ought and should be "reducit, retreitit (repealed), rescindit, cassit, annullit, decernit, and declarit to have been from the beginning, and to be now, and in all time coming, null and of nane avaiill, force, nor effect, with all that has followit, or may follow thereupon."

The various questions arising under this first "Reason," or plea, were determined by four interlocutors of the Court, pronounced, the first on the 23d July 1624, the second on the 26th July 1625, and the third and fourth on the 23d March 1626,—the first of these having reference to the dubious point already mentioned in the interpretation of the charters of December and January 1404 and 1404-5, which form the basis of the first member or article of Reason I., and the three last to the third article, based on the Act of Parliament of 1587.

As I have already stated, the general retour of Earl John to the Countess Isabel in 1588-9 seems to have suggested the possibility that he might pursue the heirs and representatives of the old Douglas succession for recovery of the lands which had descended to Isabel on her father's side as well as those of the Earldom of Mar, her maternal heritage. Earl John had

certainly no such intention; but the Elphinstones appear to have contended—on a construction of the “tenendas” clause in the charter 9th December 1404, subsequently found to be erroneous—that, if the question of succession was reopened, the Earldom of Mar as well as the Douglas estates would actually go to the heirs of Isabel on the father’s (the Douglas) side, and not, under any circumstances, to Earl John as claiming through her from her mother and maternal ancestors. This argument depended on the fact (already touched upon) that the rule “*Paterna paternis, materna maternis*,” familiar to English law, was not recognised by the law of Scotland. It was dangerous ground to tread upon, and Lord Elphinstone’s “defence” on this point was limited to a negation of Earl John’s claim to succeed; but if sustained, the effect would have been, first, that the entire succession to Isabel’s property would vest of right in Lord Torphichen as heir-general of the original house of Douglas, unless in so far as his ancestor Sir James Sandilands might have legally surrendered his rights to the Earls of Angus; and, secondly, that the Erskines would be absolutely excluded from the succession to Mar, although recognised as the “*veri hæredes*” to that succession by Robert III. himself in 1395.

Before stating the grounds on which this contention was based, and the interlocutor pronounced upon it, I may be permitted a few words of explanation. By the rule “*Paterna paternis*,” etc., as accepted in England, and when the succession opened to collaterals on the death of a party without direct heirs, the estate derived from the father’s side was understood to go to the agnates, or paternal heirs, and those deriving from the mother’s side to cognates, or maternal kin. But this rule was not affirmed either by statute or custom in the law of Scotland, was considered a dubious point, and had been disallowed, and the contrary affirmed by the Court of Session in the case of John Gilbert, as reported by Craig from his own knowledge, “*ubi senatus, neglecto unde venerat feudum, solùm id attendit, quis defuncto proximus hæres ex linea paterna erat, licet postea*,” . . . he adds, “*cum ea res ad majores causas possit derivari, sententiam plerique mutarunt*.”¹ These last words have reference, I suspect, to the important and em-

¹ Craig, *Jus Feudale*, ii. Dieg. 17, § 19.

barrassing question which arose in 1567, when the infant James VI., Darnley's son, having been feudally invested and seised in the kingdom by his coronation, the possibility presented itself that, in the event of his dying unmarried without issue, the kingdom might devolve, in default of the rule "*Paterna paternis*," upon his next male heir on the father's side, of the house of Lennox—thus cutting out the Hamiltons, who were (as is well known) the next heirs to the royal family and the throne of Scotland on the side of Queen Mary, the young king's mother. The question created most anxious attention on political grounds both in Scotland and England at the time, although hardly noticed by historians, and but obscurely hinted at *ut supra* by Craig. Lord Stair adds to his reference to Craig's testimony, that "though there be equity in it, yet no law nor practise since hath favoured the maternal line; but the father was found heir to his son even in the lands where the son was infeft as heir to his mother, and did exclude his son's brother uterine by that mother." Even in 1681, however, when Lord Stair published his great work, he remarks, "Yet this point remaineth more dark;" and he pleads earnestly for the succession of the mother's kin under the circumstances in question, on the ground of "two grounds of presumption joined, propinquity of blood and gratitude, or remuneration to that lineage by whom such things by succession came; so that '*paterna paternis, materna maternis*,' ought to take place in equity as the presumed will of the defunct, that is, according to the law of nature, unless the express will or the law and custom of the place be to the contrary."¹ The exception thus allowed is important, and may illustrate the judgment of the Court of Session on the limitation in the charters of 9th December 1404 and 21st January 1404-5 now in question.

With this explanation, I may state that the words in Isabel's charter of the 9th December 1404 are as follows:—"Tenenda et habenda prædicto Alexandro et hæredibus inter ipsum et nos procreandis, quibus forte deficientibus, hæredibus nostris legitimis ex utraque parte;" while those in the charter of Robert III. 21st January 1404-5 (which is not, as I have remarked, a confirmation in the ordinary sense, engrossing and

¹ Stair, iii. 4, § 34, and § 8.

ratifying the charter, but a distinct grant from the Crown, proceeding upon the charter), are, "Tenenda et habenda prædicto Alexandro ac Isabellæ prædictæ, et eorum diutius viventi, ac hæredibus inter ipsos legitime procreandis, quibus forsan deficientibus, legitimis hæredibus dictæ Isabellæ;" and in the reddendo clause, "legitimi hæredes dictæ Isabellæ quicumque." A reference to "terris a nobis injustè detentis tam ex parte patris quam ex parte matris," precedes the tenendas clause in both charters—"a nobis" changed to "ab ipsa" in that of Robert III.¹

The debate began on the production by Hope, on Earl John's behalf, of the charter 9th December 1404, and the confirmation of it by Robert III. 21st January 1404-5, as superseding the earlier charter 12th August 1404, the foundation and warrant for James I.'s charter of 1426. The elder Nicolson, supported by Lewis Stewart, on Lord Elphinstone's behalf, objected that Earl John could not "quarrel" the two charters last named, "because na person can querrell any infestment but he that may succeed to the landis gif the infestment sould fall;" whereas it was the fact that the Earl of Mar cannot succeed to the said Earldom of Mar and lordship of Garioch because the infestment "produceit be himselff for his tytle, daittit the nynt day of December 1404, beares to thè airis to be gottin betwix the saidis Alexander and Dame Issobel, quhilkis failying to her heirs 'ex utraque parte,' quhilk the Earl of Mar is not, nor cannot be; and therefore, he being not 'heres ex utraque parte,' quha only may succeed, he cannot quarrel the foresaid infestment made to the saidis Alexander and Thomas;" *i.e.* Alexander Earl of Mar and his son Thomas, namely the charter 1426. It appears from Hope's "triplly," later on in the discussion, that Nicolson's position on behalf of Lord Elphinstone was, that the words "ex utraque parte" imported either "that the lands shall pertain to the heirs of the said Dame Isabel attingent to her both of her father and mother side;" *i.e.* that Isabel's heirs were to inherit both the Mar and Douglas heritage,—which heirs, in the absence of the rule "paterna paternis," etc., and in presence of the decision in Gilbert's case, would be her heirs on the Douglas side, excluding the Erskines, as aforesaid; or, "that the ane half of the lands disponit

¹ *Vide supra*, Letter III. p. 207.

sould cum to the aires on the father side, and the uther half to the aires on the mother syde," the result of which would have been to equalise the two halves by taking largely from the Mar heritage in order to supply the deficiency in the other—the Douglas inheritance being, it will be remembered, only the unentailed lands of the Earls of Douglas. Against these alternative propositions Hope opposed his own construction, viz., that the words in the two charters must be understood *respectivè reddendo singula singulis*, viz., that the lands that may fall to the mother side shall pertain to her heirs on the mother side, and the lands that pertain to the father may succeed to the heirs on the father side, and "sua the aires ar weill distinguischit in King Robert his chartour, beand 'legitimis hæredibus dicte Issobelle terrarum antedictarum.'" There was much contention between the two great advocates whether the words in Isabel's charter were open to interpretation by those in the charter of King Robert, whether the latter was a bare and naked confirmation, or a donation as well as a confirmation, etc. etc., with which I need not trouble the reader, nor detain him from the final interlocutor, which sustained Earl John's argument, and is given as follows:—"The Lords of Counsall, be sentence interloquitor, findis and declairis the clause underwritin contenit in the chartour maid be Dame Issobell Douglas to Alexander, son to Alexander Erle of Buchan, dated the nynt day of December 1404, 'tenenda et habenda predicto Alexandro et hæredibus inter ipsum et nos procreandis, quibus forte deficientibus, hæredibus nostris legitimis ex utraque parte,'" to import and meane cleirlye that Dame Issobell Douglas, granter of the said chartour, "ordaneit the landis quhilkis fallis to her upon her father syde in caise of her deceise without children of her awne body should perteane to hir narrest and richteous aires upon hir father syde, and that the landis quhilk fell to hir be hir mother sould in caice foirsaid perteane to hir narrest and richteous aires upone her mother syde." The effect of this was, that an exception was established against the rule at common law and the Gilbert precedent repudiating the rule "paterna paternis," etc., through the speciality of the provision in the tenendas clause of the charter, amounting to an entail, and having the same effect in suspending the common law in the particular point here involved which an entail in favour of

heirs-male has in suspending the common law, which presumes always for heirs-general. This final interlocutor, determining the present question, was pronounced on the 23d July 1624.¹

The extreme importance of this decision may be my apology for having devoted so much space to the elucidation of this preliminary objection and its refutation. Lord Kellie employed much the same argument in his claim before the House of Lords in 1875; and Lord Chelmsford remarks as follows, in his address to the Committee for Privileges:—"A good deal of controversy arose as to the proper translation of the habendum in this charter of December. . . . The petitioner," the Earl of Kellie, "contended that the words 'ex utraque parte' are applicable not to the heirs but to the lands on both sides, which it was said was clear from a former part of the charter in which Isabella confirmed to Alexander Stewart 'all right and claim which we have in any lands soever unjustly detained from us "tam ex parte patris quam ex parte matris."'" Lord Chelmsford then cited the interlocutor above given, adding, "This construction of the words (which appears to me to be correct) is necessary to be maintained by the opposing petitioner, as he derives his title from Isabella, who, as he alleges, took by descent from her mother Margaret." This is the only notice of the proceedings of 1624-6 which occurs in the speeches of the noble and learned Lords who addressed the Committee in 1875. Lord Chelmsford's discernment led him right so far, on this occasion; but I need scarcely observe that there was no opening for "controversy" on the subject when controversy had been closed, and the exact sense of the words under dispute determined, against Lord Kellie's view, by this final decision in 1624.

This preliminary but fundamental objection raised by Lord Elphinstone against Earl John's first "Reason" of reduction having been thus disposed of by the interlocutor of 23d July 1624, Lord Elphinstone's counsel directed their attack against Earl John's assertion that James IV. had granted Kildrummie to the Elphinstones without any power to do so, and against the efficacy of the Act of James VI. and the Three Estates of Parliament, 29th July 1587, which affirmed that the Countess

¹ Minutes of Evidence, p. 451; Antiquities of Shires of Aberdeen and Banff, iv. p. 246.

Isabel had been lawfully infeft in her Earldom, that Robert Earl of Mar had been duly served therein, and that Earl John was rightful and undoubted heir of blood to Isabel "in all lands and heritages wherein she died infeft." These form the first and third articles or members of Earl John's first Reason now in question. The debate and the interlocutor upon the first Reason was concentrated upon these points,¹ and the documents produced and founded on by Earl John in support of them were — 1. The charter of Robert III., 21st January 1404-5; 2. Earl Robert's retour, October 1438; 3. John Earl of Mar's retour as heir to Isabel, 20th March 1588-9; 4. The Act of Parliament, 29th July 1587; 5. Queen Mary's charter of 1565, with the Act of ratification, 19th April 1567; and 6. John Lord Erskine's retour as heir to Robert Earl of Mar, 5th May 1565. Lewis Stewart and Mr. James Oliphant appeared on this occasion (and not Nicolson) for Lord Elphinstone; but Oliphant in the additional character of advocate-depute in the King's interest, as already stated; and in this capacity he took the lead in the ensuing discussion. Lord Elphinstone, as we shall see, stood as holding by infeftment from James IV., under warrant of the charters 12th August 1404, and 28th May 1426; but these charters were impugned by Earl John on the ground that the first charter, the warrant for the second, had never been confirmed, and that the Kings of Scotland had been denuded of all right and interest in the Earldom of Mar (except, of course, as superiors over hereditary vassals), subsequently to the charter 21st January 1404-5.

The first and preliminary point urged by Oliphant was that the fact of Earl John's father having accepted a grant of the Earldom from James VI. and Queen Mary inferred an acknowledgment of their Majesties' right to dispose of it, and consequently precluded him from the allegation that James IV., in whose shoes (so to speak) Mary and James VI. stood, had no power to grant Kildrummie to Lord Elphinstone's ancestor. The reply to this is palpable,—that if a man who has inherited stolen goods restores them to the representative of the original and rightful owner, that representative accepting them, the fact of the restoration and acceptance cannot invest the original thief retrospectively with lawful possession. But the main point of challenge

¹ Minutes of Evidence, p. 661.

was directed against the Act of 1587,¹ on the following grounds: 1. Because it is *salvo jure cujuslibet*, and therefore cannot prejudice the King or any one having right from him. 2. Secondly, that it bears exception of all other rights and defences except prescription and possession. 3. Thirdly, that Lord Elphinstone, one of the defenders, protested against the Act when passed, and thus the Act cannot prejudice him. 4. Fourthly, that it is *contra naturam et rei veritatem*; inasmuch as it represents the pursuer (Earl John) to be lawful heir to Isabel in all lands wherein she died vested, and by the very evidence of the charter founded on by Earl John she was infeft in the lands of Jedburgh Forest and others—(here we have the lands of the Douglas succession)—whereunto the pursuer *per rerum naturam* cannot succeed. 5. Fifthly, the King cannot be thus prejudiced, inasmuch as it is provided by an Act of Parliament 1600, cap. 14, that if any omission be made by any of the King's officers in defence of his cause, the next officer succeeding may "opponne the samen be way of exceptioun," and thus the king may *quocunque tempore* opponne against the Act of 1587 in question; while, by another Act, 1597, cap. 243, it is enacted, that ratifications and dispositions in Parliament shall in no way derogate from the King's right of property except they be made through express dispensation of the general laws made in favour the King's property. And, therefore, seeing the entire Earldom of Mar was a part of the King's property,—that is, be it remembered, in virtue of the charters 12th August 1404, and 28th May 1426—"and as the Act of 1587 expresses no such dispensation, the King's right must be maintained as regards the Earldom, else the King will be hurt in his property, in his honour, and in his conscience by the Act in question, as, namely, thus—i. In his profit, because the King must warrant the Lordship of Kildrummie to the defender *tanquam privatus*, having so dispoined the same, and will only have one vassal therein, viz., the Earl of Mar, where now he has many; ii. In his honour, because by the terms of the Act the King confesses his noble progenitors to have been unjust, usurpers, and detainers of the Earldom from its lawful owners; and iii. In his conscience, "that he suld have causit the said Lord Elphinstoun to have

¹ Minutes of Evidence, p. 664.

maryit ane stranger, and to have given to him certaine lands in tocher guid" (dowry), "quhilk sall now be takin from him be the said Act"—the reference here being to the marriage of Lord Elphinstone's ancestor to Elizabeth Berlay, his English wife, maid of honour to the English princess, James IV.'s bride, and James's grant of Kildrummie to the young couple in conjunct fee—the actual King and the actual Lord Elphinstone being spoken of as one and the same persons, through the continuity of succession, on the principle (which was not indeed applicable in earlier feudal times) "the King never dies." 6. Sixthly, the Act is inconsistent with Earl John's retour, bearing that Robert Lord Erskine was "retourit to ane half" of the Earldom—of course, one half only. And, 7. Seventhly, and lastly, that the Act "is direct aganis the King's Majesties richt standing, viz., ane service negative deducit in favouris of umquhill King James the Secund of good memorie aganis umquhill Thomas Lord Erskyne, sone to the said umquhill Robert, quharin it is fundin that the said Robert diet not vestit and seasit in the said Erledome"—that is, by the inquest and service negative of 1457.

The sentence of the Court was pronounced upon the preceding "allegances" in exception to Earl John's first Reason, in the form of the three interlocutors, of the 26th July 1625, and the 13th and 23d March 1626, already mentioned, and which are as follows:—

- I. "The quhilkis alledgeances . . . with the answeris maid thairto for the pairt of the saidis purseweris, . . . being hard, sein, understood, and the saidis Lordis therewith being ryplie advisiet, the Lords of Counsall be sentence interloquitor findis and declairis That the Kingis Majestie his umquhill darrest father," that is, James VI., "and Queene Marie, his mother, hes prejudgit themselves of all their defens in this actioun, in respect of their ratifications and Actis of Parliament maid in thair majorities in favour of the said Earl of Mar, pursewer, and his said umquhile father; and swa the King is excludit to propone any defence in the said cause." It will be observed that the charter of 23d May 1565 is here described as a ratification, *i.e.* of a pre-existing right existing in John Earl of Mar, the restored Earl, in conformity with

what I have shown, viz., that that charter proceeded upon a previous and existing right warranted by the retour of the 5th May 1565.

- II. (After the same preamble.) "That the protestation maid for the Lord Elphingstoun in the Parliament *anno* 1587 derogatis nothing from the said Erle of Mar his Act made in the samen Parliament *anno eodem* 1587." And,
- III. "That the Actis of Parliament anent *salvo jure cujuslibet*, and specially that Act maid *in anno* 1621 cap. [sic], nor that Act maid twiching the Kingis property in the Parliament 1597, cap. 243, cannot derogat onything expresslie set down in that Act of Parliament maid in favouris of the Erle of Mar in the moneth of July 1587; and lykewayis the saidis Lordis findis and declairis, That the Act of Parliament maid against the King's officers *in anno* 1600, cap. 14, militates not against the Act of Parliament maid in favouris of the Erle of Mar *in anno* 1587."

It is noticeable that, while the objections of Lord Elphinstone are given in full in the preceding decreets, the answers or replies, of Earl John (referred to in the opening words of the interlocutor, but probably only as in the usual formula), are omitted; and, this being the case, and no allusion to duplies, triplies, etc. occurring, my impression is that Earl John abstained from pressing his arguments against the King's interest, thus forcibly arrayed against him, except in the most superficial manner—this being out of respect, and anxiety not to offend the royal susceptibility—leaving the vindication of his cause to the discernment and justice of the Court. The decision of the Lords was precisely what was to have been anticipated from the dignity and independence of the tribunal; and Earl John's claim was thus disencumbered from all special opposition on the part of the Crown, and the validity of the restoration of the Earldom by Queen Mary established and justified.

SECTION V.

Process against the Elphinstones. Final Decreet.

I now proceed to the Second and Third Reasons as developed in Earl John's summons, and will state the pleadings, which

are very interesting. I shall give them in modern language, except where particular passages appear to call for verbal criticism. The third Reason is so intimately connected with the second that it is difficult to distinguish them, and I shall merely state, as if in a parenthesis, where the one flows into the other. These two Reasons form the principal subject of the decret 1st July 1626; but the judgment then delivered covers and includes the preceding interlocutor on the First Reasons, and winds up the whole question of Earl John's claim.

Earl John's general proposition, as I have already stated, was, that the charters 12th August 1404 and 28th May 1426 were null and void, because the heritable right to the Earldom of Mar remained in the Countess Isabel and her heirs, and James I. and the kings his descendants only held the Earldom by simple possession without any right of property subsequently to the death of Alexander Earl of Mar, who held it in liferent only, under Isabel's charter 9th December 1404 and the royal charter of confirmation 21st January 1404-5. Hence the service negative of 1457 was without warrant in law, and necessarily fell in consequence; and all these documents, with everything which followed upon them, or might follow, ought (he contended) to be reduced, so far as Kildrummie was concerned, and the right declared to be in himself, the pursuer, John Earl of Mar, and his heirs. This general proposition, with its special allegation, was supported and vindicated by Earl John and his counsel on the following special grounds:—

- I. The charter, 12th August 1404, ought to be reduced
 - 1. Because it was never confirmed by Robert III., the superior, but remained an imperfect right, and as such could be discharged and disallowed by Alexander Stewart, the grantee, without any necessity of resignation into the hands of the King, the superior, or any new infeftment to follow in Isabel's favour.
 2. The charter 12th August 1404 was actually so discharged and renounced by Alexander either on the 9th September or 9th December 1404, when he accepted a new right by charter from Isabel—that of the 9th December—but only for his lifetime. This fact of renunciation is testified by the seals of Isabel, of the

Bishop of Ross, and others, appended to the notarial instrument recording the renunciation of the former, and acceptance of the second charter. 3. Robert III., by charter 21st January 1404-5, confirmed the charter and infeftment, 9th December 1404, of the Earldom of Mar and lands pertaining to her, as well on her father's as her mother's side, the ultimate remainder being to Isabel's heirs.

- II. The charter by James I., 28th May 1426, should be reduced, with all its consequences—1. Because it proceeds on the resignation of the Earldom by Alexander Earl of Mar and his son Thomas, who had no power to resign either then or before, being mere liferenters; whence it follows, that although James I. took possession of the Earldom after Alexander's death (whether as *ultimus heres*, or under pretext of Alexander's bastardy, is immaterial), and although his successors maintained that possession, "yett be the said pretendit possessioun thair was no lauchfull nor just richt of propertie acquyrit" in the person of James I., and continued to his successors, "but the samyne was allenarlie" (only) "ane cullorit" (plausible) "richt in respect of the saidis pretendit infestmentis particularlie above specifiet" (viz., those of August 1404 and May 1426) "standing unreducit or declared null," *i.e.* not yet reduced or declared null. 2. The Act of Parliament in James II.'s minority, providing that he should continue in possession of all lands and heritage wherein his father had died in possession till his majority, and which Act was pressed against Lord Erskine by the Chancellor in 1457, could not salve the King's defective right. That right depended simply on possession, in virtue of a charter standing unreduced, clad with possession, "and cullorit with the said pretendit Act of Parliament for continuatioun of the samyne possessioun."
- III. The testimonial and service negative of 1457 ought to be reduced as void, having "na uther ground or fundament quhairupon to subsist bot allenarlie the saidis pretendit infestmentis, together with the possession apprehendit" (taken) by James I. and James II. and

Act of Parliament aforesaid. And conversely—and it is at this point that the Third Reason or plea commences—the retour of Robert Earl of Mar of 1438, which the inquest of 1457 negatived, must stand as valid, effective, and unreduced, inasmuch as it is found and declared by special Act of Parliament 1587, that Robert Earl of Mar was served and retoured nearest lawful heir to the Countess Isabel in the Earldom of Mar, etc.; wherefore the testimonial and service negative of 1457 must be reduced, with all that has followed upon it, including the reduction of the retour 1438, and so far as it may prejudice John, now Earl of Mar, in his right to the Lordship of Kildrummie; with consequent declaration of the validity of the retour 1438, and of the right of Earl John to the said lands, etc. etc.

Wherefore—the conclusion bearing upon each claim for reduction and declarator—the undoubted heritable right to Kildrummie and its dependencies ought to be declared to be in the pursuer.

In opposition to these pleas and arguments Lord Elphinstone offered the following defences, each of which formed a platform of discussion. The battle may be said to have been fought and won on the question which of the two charters of 1404 was to rule. To Lord Mar's objection that the earlier—that of the 12th August—had not been confirmed, a defect which evidently occasioned great searchings of heart in the Elphinstone camp, Stewart "excepted" or replied, first, that after such length of time, and having peaceably enjoyed the Earldom in virtue of the charter during the interval, the King—of course as superior, in which character he continued to be put forward, although the right of property was acknowledged to have passed from him—was not bound to prove when the charter was confirmed, and was secured by prescription. But, secondly, James I. had confirmed it in effect—or constructively, I presume—by accepting the resignation of the Earldom from Alexander Earl of Mar in 1426, and regranting it to him; to which Hope rejoined, on behalf of Earl John, that James had no power to do so unless the charter 12th August had been confirmed before the 21st January 1404-5, the date of the actual confirmation or ratification of Isabel's second charter.

Stewart insisted that the charter 12th August being clad with possession, which included the king's right, the declaration of his will is sufficient *quocunque tempore*, and especially against Isabel's "pretendit chartour and confirmatioun, which is null for the causes foresaid," and specially because the charter confirmed wants witnesses, and no seisin followed upon it, whereas Alexander Stewart was seised by virtue of the first charter, and eleven score years' possession followed. Stewart then took the exception that, as the plea of non-confirmation had not been urged by Lord Erskine in 1457, when it would have been effective to avoid the service negative, Earl John was now precluded from urging it, the service negative having been a decret *in foro contradictorio*, and thus irreversible. This objection was raised in respect to every one of the charters sought to be reduced; and Earl John's answer, I may say at once, was fundamentally the same in each, viz., that, while the charters 12th August 1404 and 28th May 1426 stood unreduced, the plea was not available. Lastly, Stewart urged that, as Earl John was heir to Isabel, who granted the charter 12th August 1404, he was bound to warrant her charter, or, at least, he could not quarrel, that is, take exception to it; to which Hope replied, on behalf of the Earl, that he not only quarrelled (or insisted upon) the lack of confirmation, but alleged the ineptness of the charter, because it had been renounced by Alexander Stewart, and a new charter accepted by him, *i.e.* the charter subsequently recognised and confirmed by Robert III. of the 9th December 1404.

The question of the renunciation, as testified by the notarial instrument, formed the subject of Lord Elphinstone's second defence. He represented that, although not confirmed, Alexander Stewart had, it was admitted, been infeft under the charter of 12th August 1404, and he could not therefore divest himself of the property by "a naked renunciation" in the hands of Isabel, who was not superior, but could only do so by resignation into the king's hands, of whom the charter ordered him to hold the fief as superior; while, even had Isabel been superior, such act of resignation behoved to be by a procuratory of resignation and before a judge, not under form of instrument in the hands of a private notary. Further, the instrument only stated that

Alexander delivered the castle and the keys into Isabel's hands that she might dispose of them at her pleasure, "quhilk is na resignatioun of landis, quhilk man be maid *in forma specifica*, and contain the haill landis quhilkis ar contenit in the chartour quhilk sould be resignit." To this Hope replied, as might have been expected, that no resignation was necessary or possible, "because Alexander Stewart was never the King's vassall, nor the King his superiour at the tyme of the renunciatioun,"—the transaction, I may add as a gloss, being simply between equals, one of whom had stolen the property of the other, and then restored it. Also that, "Albeit Issobell Douglas was not superior, yet scho was maker and gever of the said chartour," *i.e.* of 12th August, "and sua maist capable of ane renunciatioun" (that is, of receiving such), "and there could be no procuratorie nor instrument of resignatioun usit, becaus it was not betwix the vassall and the superior; and ane renunciatioun maid under forme of instrument in presens of ane publict" (*i.e.* in contradiction to what Stewart styled a private) "notter and witnessis the tyme of the said renunciatioun, was als formall, lauchfull, and authentik than as now, subscriptioun and seall, and it needed not to be done befor ane judge, because there was nather law nor custome to urge the samyn." Further, the lands of the Earldom of Mar were included under the "generalitie" of the castle, charters, etc., as shown by the clause bearing that she gave Alexander in free marriage the castle of Kildrummie and rest of the lands, on which Alexander asked instruments,—the castle, I may remind the reader, carrying the superiority over the whole fief in those days, which Stewart took for granted. Stewart repeated his former statement, insisting on the alleged informality of the proceeding, and characterising it as "against all resson that ane informall richt sall now be mentenit to denude the King and his vassallis of thair lauchfull richtis, clad with ellevin scoir yeiris possessioun." The plea that there was neither law nor custom in 1404 necessitating a different form of renunciation or resignation was met by qualifying it as an attempt "thairby to big (build) up ane new richt quhilk has not bene hard of these ellevin scoir yeiris bygane." On the subject of the delivery of the castle, etc., the charter 12th August, a formal charter of alienation and disposition, particu-

larly set down, "makes na mentioun nather of castillis, kingis, nor chartouris." On which he argued that whatever else is specified in the charter must either have been lawfully resigned by Alexander, or must remain with him; whereas the delivery of the keys can never infer a renunciation of the Earldom of Mar, "for under the name of castle of Kildrummie cannot be comprehendit the Earldom of Mar and Lordship of Garioch, *quia in minori non inest majus, sed e contra*" (Stewart, I may remark, overlooking here, or passing over, the fact that the Earldom was parcel of the castle, or chief messuage, and not *vice versâ*), while, moreover, the lands which the instrument says Alexander resigned that Isabel might dispose of them could not be the Earldom of Mar and lands contained in the charter 12th August, because they were not her lands at that time, but Alexander's, and not resigned. But, he added, in arguing that Isabel gave back the Earldom to Alexander, *ergo* Alexander Stewart had formerly renounced the same, you fall into a *non sequitur*; for he neither received it, nor is the said instrument produced by him or any having right from him; but, on the contrary, he retained his former right. All this was subtle and ingenious; but Hope, Earl John's counsel, very seldom allowed himself to be seduced into such semi-legal, semi-logical argument. He usually, in each case, "repeated," or insisted on his first answer, and eschewed triplies and quadruples. He stood in the centre and defended the citadel, while Stewart attacked him, like Kehama, from all the eight quarters of the universe at once.

Proceeding to Lord Elphinstone's third defence, in exception to Earl John's argument founded on the second charter, that of the 9th December 1404, confirmed by Robert III. 21st January 1404-5, Stewart found himself reduced to the desperate shift of denying that it had ever been acted upon. "You cannot prove," he said, "that Alexander accepted this new charter,—it remained in Isabel's custody: it was sealed by herself, confirmed by herself, and never used by Alexander, who, on the contrary, adhered to the original charter, possessed the Earldom in virtue of it, and resigned it as proprietor to James I. in 1426, and the Kings of Scotland have enjoyed it in right of that charter 1426 ever since." To this Hope rejoined, for Lord Mar, if I may for once put the words of

the record into personal address, "What would you have? Alexander Stewart not only relinquished the old but 'asked instruments on the new gift,'—that is, required the attestation of a notary and witnesses to the fact of its having been made, and which proves acceptance; and the charter 9th December was *idem actus*, executed on the same day, and granted in order to give effect at once to the renunciation and the new donation; and this gift by the new charter 9th December 1404 was confirmed by the King within forty days, which makes it public, and this subsequently to the marriage, which proves that the grant was confirmed by his authority, and therefore accepted by him. It is no argument that he resigned the Earldom to James I. in 1426, because in so doing he did what he might not do, having renuncit the first chartour and acceptit ane secund and new richt," under which he was but a liferenter. And thus it is that the charter must be reduced, as Alexander had no power to resign; and, Hope might have added, the King no power to receive and regrant with a limitation cutting out the "legitimos hæredes" of Isabel. To this Stewart retorted by accusing Hope of a *petitio principii*, for my exception, he said, bears not only negatively, that Alexander never accepted the said charter nor confirmed the same, but "positive infallable ground preving the contrair," viz. that Isabel "maid the chartour herself, keepit it herself, confirmit it herself, the said Alexander never usit it, never tuik seising thairupon, never possessed by virteu thair of, and used contrair deidis, preiving cleirlie that he adherit to his former chartour, viz. that as proprietar he resigned the landis in the Kingis hands for new infestment" in 1426, which infestment is clothed with "twa hundreth yeiris possessioun. Thir deidis are so violent and pregnant agains the pursewer as he can mak no answer thairto bot presumptiones, viz. that it is presumet that Alexander, being of blud to the King, hes confirmit the charter himself, as gif Alexander Stewart wald prejudge himself." But the contrary, he proceeded, is the true presumption; and here Stewart's zeal seems to have carried him beyond all bounds—the presumption is "that all hes been done and forgit by the said Dame Issobell herself, and the confirmatioun quyetlie conveyed through by" (*i.e.* apart from) "the Kingis knowledge, as is notourly knawin to be

done by daylie experience;" and here, it will be observed, he admitted at last that the charter had really received the royal confirmation, and thus stood on the same footing as any other confirmed charter recorded, as this is, in the Great Seal Register—this, moreover, being in contradiction to his former assertion that Isabel had confirmed it herself. As to the argument that the charter and instrument are *unicus actus*, that, he said, "is mere cavillation; nor is the chartour relative to the instrument; moreover, the instrument hes witnesses, the chartour nane. Item," starting a new point, "the instrument is vitiate in the dait, and that laitlie as appares by ocular inspection." "Bot to take away all subterfuge," Stewart continued, "if the instrument had been trew and valid, and Alexander hes really renuncit the said chartour and had delyverit all writtis and evidentis," as the instrument states, why did not Alexander deliver up the charter 12th August, which is alleged to have been renounced, and why, if he accepted a new charter, was not the old one cancelled, which he would willingly have done if the renunciation and acceptance had been of verity? But these reasons are so clear—Stewart adopting here, as on a former occasion, that air of injured innocence which betrays an ill-concealed doubt of the justice of a cause—so clear against the renunciation and new charter, and acceptance thereof, urged against me, that "the samyn neidis na farder enlairing." Hope, in his "triply" (so far, at least, as it is reported in the decret), left this flow of forensic rhetoric unanswered, except in its practical aspect. To the question, Why was the charter 12th August not "cancelled"? *i.e.* destroyed, he observed that no one had ever seen the "principal," or original charter,—that produced was only an "extract" or official copy, taken from the Great Seal Register, wherein (as I have elsewhere shown) it was registered, although never confirmed, by the special command of James III. in 1476; while, "if extant," he pointed out, it were a weak argument to make it good because extant, and specially because Alexander had all the Mar writs in his power, and might keep or cancel them at pleasure. As regarded the alleged vitiation, he replied, "there are two instruments produced, one with seals and the other without seals, and I do not understand which of the two you call vitiate, for there is no appearance of vitiation in either of them; one of

them is dated the 9th September, the other the 9th of December, both dates posterior to the 12th of August, so that if there were any vitiation, which is not admitted, yet it is not *inter substantialia*, unless it can be shown that it is from a date preceding the charter renounced to a date posterior to the same. And my clients," he added, "having produced two instruments, which both or each of them is sufficient for his proof, the defender cannot impugn both, or else the reason must stand; and it is at his option to take both instruments or one of them at his pleasure." Stewart "quadruplied," that *vitium in data est vitium in substantialibus*; and if Mar take it up, he shall have an answer. The discussion then dropped.

I may add that, as previously, Stewart objected that the "reason" founded on the renunciation was competent in 1457, and not being urged, the service being a final judgment *in foro contradictorio*, could not be urged now. To which Hope, having answered once, made no further answer.

Stewart's fourth defence on behalf of Lord Elphinstone was directed against the second principal head of the second and crowning reason alleged by Earl John. Hope, for Earl John, had affirmed that the king, *i.e.* the succession of kings from James II. to James VI. and Charles I., had "na richt bot ane cullorit richt," depending on the naked fact of possession of the lands whereof James I. had died in possession, and on the Act of Parliament passed in the minority of James II., providing that all lands which his father had died possessed of should remain in the possession of the young King till his majority. This part of the reason, Stewart urged, is only a negative, in nowise relevant to take away the King's right; while the King *affirmative* opposes the charters 12th August 1404 and 28th May 1426, as the ground of the King's right and continual possession. As to the Act of Parliament referred to regarding the lands possessed by James I., it could have had no effect in maintaining the King in possession at the time of the service negative, *viz.* 1457, nor could it have excluded Thomas Lord Erskine's right, James II. being twenty-seven years of age at the time of the service, so that the said Act and all benefit competent to him thereby was expired. On the contrary, the service was sustained in respect of Alexander's charter tailzie (28th May 1426) and first infeftment (12th

August 1404). Upon these premises, he contends, not only is the original charter (12th August 1404) unreduceible, but the service negative depending upon it must stand in full force and effect. To Stewart's objection to the relevancy of the reason, because only a negative, to which the defender opposes *affirmative* the charters 12th August and 1426, Hope replied, "that is no good defence, because it is *petitio principii*," inasmuch as "the chartouris opponed ar craveit to be reduceit." And whereas the defender alleges that the Act of James II. could not be "opponit" in 1457, because it was only to endure during the King's minority, this allegation is "contrair to the process" (*i.e.* at variance with the testimonial of Lord Lindsay of the Byres, the High Justiciary in 1457) "quhilk beires that the samyne was opponit *de facto*:"—And I am not obliged, he concluded, to maintain the relevancy and lawfulness of all that was "opponit" in the said service. Stewart duplied, that his defence was no *petitio principii*, "bot ane valide affirmatioun opponit to ane infirm negative," viz. that the King had a right proceeding from Alexander Stewart; and "farder of our law, the king, as king, hes richt to all landis within this realm *tanquam dominus proprietarius*, except the samyne be lauchfullie disponit to ane uther." Moreover, the king had right to one half of the said Earldom *jure sanguinis*, as said in the former duplies. As to the answer that it is *petitio principii*, because these charters are craved to be reduced, it is duplied that it is not *petitio principii*, they cannot be reduced for the reasons foresaid. As to Hope's answer, "that the Act of Parliament reserving the lands till the majority of James II. was opponed in the service negative, thus inferring the defence to be contrary to the said service; "the contrair," he said, "is of veritie; and here you of purpose misken" (misunderstand) "the exceptioun; for the exceptioun beires not that the Act of Parliament was not opponit in the service;" but bears that it could not avail the King at the time of the service, for seeing it did only maintain the King in the possession of the lands wherein his father died in possession, during his minority, and at the time of the service James II. was major, then it follows that the Act was expired, and could not maintain his possession; and if the said Act *was* opponed by the King's advocate or any other in his

name, then it was the part of Thomas Lord Erskine and his "preloquitours" to have replied upon (*i.e.* in representation of) the expiry thereof; and, if they omitted a lawful reply, and thereby suffered a decret to be given *in foro contradictorio*, let it be imputed to themselves, and for this negligence the said decret must stand. Hope confined his "triply" to a simple reference to his reply, but with this "eik" or addition, which he seems to have thought necessary on this reiterated persistence in the objection, "that, geving" (granting) "Thomas Lord Erskine had replied upon" (*i.e.* represented) "the expyryng of King James the Secund his minoritie, yet the said negative service could not have been stayit be the said answer, in respect of the richtis and infestmentis standing in the kingis person clad with possession, quhilk," he added, "is the trew caus of the foirsaid service negative, and quhilkis richtis was not only the said chartour tailzie" (of the 12th August 1404), "bot also the infestment to the said Alexander and Thomas" (1426) "baith standing clad with possession." Stewart closed the discussion with the quadruply, that whereas the libel bears that the King had no right but a coloured right and his Act of Parliament, *i.e.* that of reservation during his minority, that part of the reason is false, seeing the Act of Parliament gave the King only right to "bruik" (enjoy or possess) during his minority, and the King was major at the time of the service; and so the Act of Parliament died. Neither in the said service is there any mention made of Alexander and Thomas's possession, "bot the samyne dippis baithe upoun the affirmative and negative, viz., that the King had richt and that Robert Lord Erskene had na richt."

We now arrive at the fifth and last defence directed by Lewis Stewart against the third principal head of Earl John's concluding reason, in which, in the words of the decret, "it is alledgit that the retour and service negative" of 1457, "aucht to be reducit and sould fall *per consequentiam*, in respect the samyne hes na uther warrand bot the chartour" 12th August 1404, "and the chartour tailzie" 28th May 1426; and the same being taken away by the reasons foresaid, the said service must fall *per consequentiam*. Stewart excepted against this—1. That the same contains no relevant cause wherefore the said retour and service should fall or be reduced; neither can the King be now

compelled to reason upon the causes and grounds of a decret given in his predecessor's favour, the same being clad with nine score years' possession, and perpetual taciturnity of the party against whom the same is given—this, it will be remembered, being equally Lord Redesdale's argument from acquiescence, which, being joined together, makes the said decret and service negative altogether to be irreducible. 2. Because the decret and service negative is given *in foro contradictorio, parte comparente*, and proponing all his exceptions; and so the same is now irreducible. And 3. Because the same is prescribed by the Act of prescription anent services and retours, the same not being pursued *debito tempore*; specially, in respect the same is given *in foro contradictorio*, and clad with perpetual possession. Hope, on behalf of Earl John, answered—First, That Stewart's exception was contrary to the rules of logic, because it denies the conclusion which of necessity must follow if the proposition and assumption of the reasons be relevant and proven; but so it is, that notwithstanding of all the prior defences proponed against the said second reason, the same stands relevant and proven, and therefore the conclusion must follow necessarily. Secondly, with respect to the allegation that the King cannot after so long a time be compelled to show the cause and ground of the decret 1457, Hope answered—(1.) There is no prescription in heritable rights. (2.) The King's name and interest has been “*wranguslie pretendit*,” wrongfully put forward, in the case, because he and Queen Mary have by the two Acts of Parliament produced in process, viz., *i.e.* the Act of Parliament confirming Queen Mary's charter, 23d June 1567, and the Act 1587, renounced all right to the Earldom of Mar in favour of the pursuer's father, and have acknowledged the undoubted right to stand in the person of the pursuer—reserving all other defences to the parties having interest. And, (3.) The defenders (Lord Elphinstone and his son) “cannot pretend his Majesty's privilege, because of the law *Princeps in re privata utitur jure privati*”; and therefore if the reason of reduction be relevant of the law (as is both relevant and proven for the causes foresaid) the conclusion of necessity must follow, except the defenders in his Majesty's name, or in their own name will propose a relevant defence to exclude the same; and it cannot be a

relevant defence of the law to allege that after so long a time they cannot be compelled to reason. As respected Stewart's second and third point, the allegation that the service negative being given *parte comparente*, is prescribed and so irreducible, Hope answered—"That the 'allegiance' might have some appearance if the service negative were craved to be reduced *principaliter*, but here it is not craved to be reduced *principaliter*, but *in consequentiam*; and so the prescription cannot be 'opponit.'"

A charge of bad logic seems to have aroused legal susceptibilities more than a charge of bad law in the seventeenth century—at least Stewart retorted vigorously upon Hope the aspersion cast upon his logical reasoning. "The exception," he said, "is verie relevant and conceavit in guid termes of law, and aggregable with guid logick; for the exception denyis not the conclusion, quhilk is mistakin by the said pursewer himself, for the conclusion of the resson is onlie ane reduction of umquhill Alexander Stewartis first infestment" (12th August 1404), "quhairupon this sequell is inferrit that consequentlie the service negative should be reducit becaus it has na uther ground. Aganst the quhilk," he continued, "it was verie pertinentlie exceptit that, geveand" (granting) "all war trew, yet the decret and service negative cannot fall *in consequentiam*, becaus the Kingis Majestie cannot be compellit to resson upoun the causis and groundis of a decret gevin in his predecesouris favouris *in foro contradictorio*, cled with nyne scoir yeires possessioun and perpetuall taciturnitie of the pairtie aganst quhom the samyne is gevin; quhilk," he insisted, "is verie guid logick in forme if the substance be guid—as it is!"

Stewart then met Hope's three special positions as follows:—

1. To the answer that there is no prescription in heritable rights, "it is duplyit that the pairtie being considerit, quho is the Kingis Majestie, he cannot be compellit efter sa long ane tyme to produce or alledge the warrandis of his richtis, quhilk remaine not in his awin handis, as is notour" (notorious). "Nixt the said decret and service negative, is ane decret, and thairfoir fallis under prescriptioun." Let your Lordships, he urged, advert to the danger of the country and of the Estates thereof if this "preparative" (precedent) shall be sustained, and that the successors of any person that has obtained a decret

some two or three hundred years since shall be compelled to dispute upon the validity and invalidity of the said decret or grounds thereof, the same being given *in foro contradictorio*, "and never quarrellit by the pairtie."

To the second answer, that the King's name and interest is "wranguslie pretendit in this caice" on the grounds alleged, Stewart duplied that it is very justly pretended in this case, because it concerns his honour and profit to maintain those deeds which his predecessors have formerly done to the defenders for a private cause, and which his Majesty is bound to warrant, as said is; neither can these Acts of Parliament, so often repealed, be obtruded to his Majesty, seeing by the same both the favour and good name of his progenitors is hurt, and his Majesty's interest in his honour, conscience, and profit, as is duplied of before at great length; and the King's name must only be pretended in the maintenance and defence of the said decret and service negative, and no other man's, because the same was only given at the instance of James II., whom his Majesty represents; and no subject in his realm had interest in the said matter at that time but the King. Thirdly, in duply to Hope's answer that *princeps in re privata utitur jure privati*, and that the defender cannot therefore be heard to use his Majesty's privilege, because he has none,—this answer, Stewart urged, meets not the exception; for in this case *princeps agit partes rei pro suo patrimonio*, which was the Earldom of Mar, and for defence of the good name of his progenitors, to vindicate them from the unjust imputation of oppression, and to maintain the gifts and dispositions which they have made *ex causa onerosa*; and albeit *princeps in re privata utitur jure privati*, yet he will not be restrained to the strict privileges whereunto a private person would be restricted, viz., to produce grounds of decreets of such antiquity. Stewart ended by affirming the contrary to Hope's answer, which was that the decret and service negative cannot prescribe because the same are not craved to be reduced *principaliter*, but only *in consequentiam*,—for, he said, the same being a decret *in foro contradictorio*, and a service negative *parte comparante*, cannot be called in question *principaliter*, *multo magis in consequentiam*,—for that were a way to elude all prescription.

Hope's triply to the preceding duply touched first upon

Stewart's appeal to the judges as to the danger of compelling parties to dispute upon the validity or invalidity of a decret given *in foro contradictorio* after so many years, on the ground that it were a far more dangerous "preparative," if decreets given *in judicio possessorio* (*i.e.* in a judgment which entitles the party in possession of a subject in dispute to continue his possession till the question be decided at law), in respect of "infestmentis standing," *i.e.* which have never been legally reduced so as to destroy their efficacy, should become irreducible by prescription of time, and exclude a petitory judgment. "In this case," he proceeded, "the pursuer 'quarrelis' not the said decreets upon the defect of any intrinsic form or solemnity, which it were hard to call in question after so long a time; but pursuers reduction of the rights and infestments," *viz.* (the charters 12th August 1404 and 28th May 1426), "which were the cause of the giving of the sentence in the possessory judgment; which being reduced, the pretended decreets fall *in consequentiam*. As to the allegation that if the decret cannot be reduced *principaliter, multo minus in consequentiam*, it is an assertion, Hope affirmed, "direct repugnant both to law and practique; for there was, he pointed out, a law of prescription which makes services and retours after three years irreducible *principaliter et immediate*; but there is no law which makes them irreducible *in consequentiam*." Stewart quadrupled in rejoinder on the appeal to the Lords by calling upon them to consider thereof *in omni judicio*, whether the decree was petitory or possessory, and if the latter, the pursuer and his predecessors might have the more easily brought their reduction in time. "And quhair, in the end, it is allegit the saidis retours may be reducit *per consequentiam*, the contrair is of veritie, seing they are gevin *in foro contradictorio* after the taciturnitie of the pairtie for the space of sua money hundreth yeirs, quha hes acknowledged the richt of the landis to have been in the Kingis Majesteis person be acceptatioun of ane new richt of ane pairt thairof," *i.e.* by the charter of 1565, granting the lands of a part of the Earldom which Stewart thus distinguishes from the entire Earldom—"fra him and his predecessors."

Thus, after Lord Elphinstone, defended by Stewart, had met Earl John's reasons in support of his claim, as asserted

on his behalf by Hope in the fullest manner—Hope vindicating his position in his answer—Stewart attacking that vindication in his duply—Hope in his turn defending it in triply—and Stewart having the last word in quadruply—these prolonged pleadings were brought to a close; and the reader, whether lay or legal, will, I think, agree with me that they exhibit a most interesting picture of the proceedings of a great court of justice, the Court of Session of Scotland, at the time when it possessed supreme jurisdiction, and when kings and subjects were accustomed to resort to its tribunal and to defer to its judgments implicitly, without dreaming of appeals, which were, in fact, forbidden by law in the interests of justice. Amidst a tendency to intermix logic and law, especially on the part of Stewart, the younger man, we see ability and acuteness exhibited on both sides, and a noble disdain of petty quirks and quibbles; and if the argument on Hope's side was more weighty, and that on Stewart's more ingenious—if Hope kept his temper while Stewart occasionally appeared to lose it, it was simply because the cause of Earl John was good and that of Lord Elphinstone untenable in law, as has been already shown, on grounds which would be equally valid now if the decret of 1626 had never passed. Stewart, in his anxiety to do the best for his client, occasionally exceeded bounds, as we should now think, in affirming the King's independence of common rules; but when we remember that the Star Chamber was in full development in England at the time, one is astonished alike at Stewart's moderation in this argument, and at the firmness of Hope's repudiation of it. The singularity of the case is enhanced by the fact that while Lord Elphinstone's defence obliged him to lay stress on the prerogative and to identify the King's supposed interest with his own, the King himself, Charles I., like his predecessors James VI. and Queen Mary, was personally on the contrary side, sympathising, not with Stewart, but with Hope—not with Elphinstone, but with Mar, and disowning in his private capacity any enforcement of that prerogative and those supposed immunities of the Crown which he availed himself of in public matters without scruple as expedient and just. It will be allowed, I think, that the debate was most creditable to the Scottish bar at that time; and we shall now see that the judges—of whom it has been shown

that Lord Durie was one—were equally clear-headed and honest in deciding in favour of the rightful claimant, John Earl of Mar.

I must premise, in reminder to the reader, that the judgment upon the first reason or plea in Lord Mar's summons had been pronounced on the 23d July 1624 in the words already given, and which I need not repeat. The judgment on the second and third (the final) reasons was pronounced on the 1st July 1626, and wound up the entire process. I shall give it in the original words, omitting only those which are—I must not say superfluous, but—unnecessary to its comprehension by the readers to whom I address myself. After narrating the presence of all the parties, the production and examination of the evidence, the giving in by the parties of "the haill defences, answers, duplies, triplies, and quadruples in writ," the parties being heard to reason thereupon divers times *viva voce* in the presence of the whole Lords, and the Lords having considered the respective arguments and being wisely advised thereupon—the decret proceeds as follows:—

I. (*As to the charter 28th May 1426.*—"The Lords of Counsal reduceis . . . and annullis the foirsaidis haill pretendit chartouris, infestmentis, confirmationnes, decreittis, testimoniallis, services, retoures, and utheris generallie and particularlie above specifeit, callit for to be productit . . . and speciallie the saidis pretendit chartouris and infestmentis grantit to the said umquhille Alexander Erle of Mar and to the said umquhill . . . Thomas Stewart, his son, of the daittis, tenouris, and contentis foirsaidis" (*i.e.* the 28th May 1426); "and decernis and declaires the samyne to have bene from the beginninge and to be now and in all tyme cuming null and of nane avail, force, nor effect, with all that has followit or may follow thairupoun; and that in sa far as the samyne may be extendit to the lands and lordshipe of Kildrymmie, castell of Kildrymmie, and the haill utheris particular landis abovespecifeit containit in the infestmentis foirsaidis, grantit to the said Alexander Lord Elphingstoun, Alexander Lord Kildrymmie, his sone, and thair predecessouris above mentionat. . . . And als findis and declaires that, notwithstanding

thairof, the indoubtit heretable richt of the said landis and lordschipe . . . quhilkis ar propper pairtis and pertinentis of the said Erldome of Mar and Lordschip of Garrioche, remanet in the person of the said umquhill Dame Issobell Douglas, Countes of Mar," etc.

II. (*As to the alleged possession of the Crown before 1438 and 1457.*)—"And consequentlie findis and declaires that . . . King James I. of worthie memorie, be the decease of . . . Alexander Erle of Mar, or of . . . Thomas Stewart his son, acqyurit na richt of propertie of the saidis landis and lordschip, . . . bot onlie ane simple and nakit possessioun upoun ane pretendit richt or title of last air or bastardrie of . . . Alexander Erle of Mar, or upoun the pretendit richt and title of the pretendit provisioun of tailzie contenit in the infestmentis grantit to the said umquhill Thomas Stewart: And," (2), "that efter the deceis of the said umquhill King James I., the possessioun apprehendit or continewit be . . . King James II. . . be his coronatioun or be ordinance and Act of Parliament ordeininge the said King James II. to remaine and continew in possessioun of all landis and heretages quhilkis the said umquhill King James I., his father, had in his possessioun the tyme of his deceis till his lauchfull aige, wes of the nature and qualitie of the samyne possessioun apprehendit be the said umquhill King James I., his father, and sua ane simple and nakit possessioun, without all richt of propertie."

III. (*The Service Negative 1457.*)—"And thairfoire the saidis Lordis of Counsall decernes and declaires the said pretendit service negative, quhairby it is alledgit to be fund that the said unquhill Robert Erle of Mar died not last vest and seasit in the said Erldome of Mar and Lordschip of Garreoche, but that the samyne was lauchfullie in the handis of . . . King James II. be decease of . . . King James I., his father, and continiallie fra the tyme thairof, as having no uther ground nor fundament bot the saidis pretendit infestmentis grantit to . . . Alexander Erle of Mar and the said umquhill Thomas Stewart, his sone, with the pretendit possessioun apprehendit be . . . King James I., or, efter his deceis, be . . . King James

II., . . . with the said pretendit Act of Parliament maid for continuatioun of his possessioun to his perfytt age, to be null and of nane avall, with all that hes followit or may follow thairupon, *in consequentiam*:—

“And that” (the decret proceeding to assign the grounds of the preceding judgment), “in respect of the first resson of reducioun above writtin,” as urged by Earl John, “foundit” (1) “upoun the said infestment grantit” 21st January 1404-5, “be King Robert the Third to the said Dame Issobell Douglas and the said Alexander Stewart her spous in conjunct fie, and the aires to be gottin betwix thame, quhilkis failzeing, to the aires of the said umquhill Dame Issobell”—this being the charter confirming and giving effect to Isabella’s second charter, 9th December 1404; and “foundit” (2) “upoun the Act of Parliament maid in favouris of the said pursewer *in anno* 1587 yeires and utheris Acts of Parliament, retoures, and writtis productit and repeatit for the pairt of the saidis purseweris for preiving thairof; quhilk first resson of reducioun the saidis Lordis find relevant and sufficientlie provin by the foirsaidis writtis, notwithstanding of all the exceptionis, duplyis, and quadruplyis proponit for the pairt of the saidis defenderis in the contrair, quhilkis the said Lordis repellit:—And als in respect of the foirsaid third resson of reducioun, groundit on the samyne Act of Parliament 1587 yeires, quhilk thrid resson the saidis Lordis findis relevand to infer the conclusioun thairof, and sufficientlie provin be the forsaid Act of Parliament and utheris writtis thairin mentionat, notwithstanding of the haill defenssis, duplyis, and quadruplyis proponit for the pairt of the saidis defenderis in the contrair:—And als becaus it was alledgit be the said Mr. Lues Stewart for the pairt of the said Alexander Lord Elphingstoun, . . . aganst the secund resson, quhilk is foundit upoun the invaliditie of the chartour maid be the said Dame Issobel Douglas to the said Alexander Stewart, hir spous, and his aires quhatsumever, in the moneth of August 1404.” The decret then enumerates the whole of the pleadings on the second and third reasons, from which I have derived the preceding narrative; and concludes as follows:—“The quhilkis haill defenssis, answeiris, duplyis, triplyis, and quadruplyis imediatlie above writtin, proponit *hinc inde* upon the foirsaid secund resson of reduction, with the haill writis quhairupoun

the samyne is foundit, being all at lenthe red, hard, sene, and considerit be the saidis Lordis, and thay thairwith being ryplie advysit, the saidis Lordis findis the foirsaid second ressonne of reducioun, as it is in ane conjoined ressonne, with the foirsaidis answeris and triplyis groundit upoun the Actis of Parliament, interloquitouris, and hail writtis, producit, lyand in proces, to be relevant and sufficientlie provin notwithstanding of all the saidis defenssis, duplyis, and quadruplyis proponit for the pairt of the saidis defenderis in the contrair, quhilkis the saidis Lordis hes repellit, lyk as was cleirlye understand to thame. And thairfoir they reducit, decernit, and declarit in maner above writtin, and ordanis lettres to be direct upoun the premissis in forme, as effeires."

Through the antique form and phraseology of this judgment the leading points are sufficiently apparent, as follows:—1. The original charter of the Countess Isabel, 12th August 1404, is invalid, as never confirmed, and declared null and void. 2. The charter of Robert III., 21st January 1404-5, confirming Isabel's second charter 9th December 1404, and itself a donation as well as confirmation, is the ruling grant, subsequently to which Robert III. and his successors, including James I., James II., and James IV. were denuded of all property in the Earldom of Mar and Lordship of Garioch, retaining, of course, the superiority as overlords. 3. Sir Robert Erskine, Isabel's heir under the charter 9th December 1404, and the royal charter 21st January 1404-5, and direct ancestor of the pursuer, John Earl of Mar, was lawfully retoured heir to Isabel in the entire Earldom and Lordship in 1438. 4. The resignation of the Earldom and Lordship by Alexander Earl of Mar, Isabel's surviving husband, and merely a liferenter, to James I., and James's acceptance of the resignation and regrant by charter 28th May 1426, were, in the case of each of the parties, *a non habente potestatem*. 5. The possession of the Earldom and Lordship by James I., James II., and the subsequent kings of Scotland down to Queen Mary, whether founded on the charter 1426 or on the fact of bastardy, was merely by usurpation, without any right of property, naked possession without legal warrant. 6. The decreet or testimonial of the justice ayre held at Aberdeen, and the service negative of 1457, which rescinded Earl Robert's retours 1438 on the basis of Isabel's original

unconfirmed charter 12th August 1404, proceeded on an erroneous basis, and falls *in consequentiam*, while the retour 1438 stands. 7. The grant of Kildrummie, part of the Earldom of Mar and Lordship of Garioch, to Alexander Elphinstone by James IV. in 1507 was equally *a non habente potestatem*. Everything, therefore, that had proceeded on the basis of the unconfirmed charter 12th August 1404 is declared null and void, including the charter of 1507 and others to the Elphinstones—everything that has proceeded on the basis of the charter 9th December 1404, and the charter of confirmation 21st January 1404-5, is declared valid and in force; and the right to the property in dispute, being part of the Earldom of Mar, is not in Lord Elphinstone, but in Earl John as possessor of the Earldom of Mar and Lordship of Garioch by lawful inheritance and recognition of the legislature.

This decret of 1624-6 took immediate effect, and has stood and stands unchallenged ever since it was pronounced, and is operative at the present day, its influence permeating all the channels of succession to the property carried by its deliverance.

It is hardly necessary to insist on the dominant force of this decret, pronounced by a court of supreme jurisdiction *in foro contentiosissimo*, and from which there was no appeal, and thus stamped with finality. No subsequent court of law or committee of inquiry can legally ignore such a judgment, or decide or advise otherwise than in accordance with the views of fact laid down therein, and the legal determination to which it gives utterance, in all respects. And, finally, the rights vindicated by it for John Earl of Mar and his descendants, including the tenure of the dignity of Earl of Mar *de jure sanguinis* as heir of Isabel Countess of Mar, through the immediate line of Robert Earl of Mar, expressly so recognised and designated throughout, are protected, as in all similar cases, under the article of the Treaty of Union which reserves the laws affecting private rights of Scottish subjects, and the rights determined by those laws as existing at the date of the Union, inviolate. I do not think any one will venture to impugn this general assertion; although the special question how far the decret of 1626 affects the dignity of Earl of Mar will be immediately objected, with correspondent denial that

the decret of 1626 has anything to do with the dignity. I shall deal with this presently.

Whatever were the personal feelings of the Elphinstones at the result of the process of 1622-1626, they behaved with a dignity which it is impossible not to recognise, while Earl John was equally disposed to meet them in conciliation. By mutual consent the settlement of various matters emerging from the judgment was referred to friends as arbiters, including Thomas Earl of Melrose, better known as Earl of Haddington, a very learned and distinguished lawyer, President of the Court of Session, and popularly remembered as "Tam o' the Cowgate;" Sir David Livingstone of Dunypace, Sir John Foulis of Colinton, and John Erskine of Balgonie, any two of them to act on Mar's part; and Sir William Seton of Kylesmuir, Innes of that ilk, Sir James Elphinstone of Barras, and William Forbes of Craigievar, or any two of them, in Lord Elphinstone's interest; with a provision of reference to Sir George Hay of Kinfauns, the Lord Chancellor, as "oddisman and overisman," *i.e.* umpire, in case of difference upon any point. The questions for settlement arose out of acquisitions made by the Elphinstones during their occupation of Kildrummie, including the purchase of adjacent lands, the right of advocacy of or presentation to churches, and the erection of the barony of Kildrummie into a regality as by the charter already mentioned. The arrangement, as settled, was sanctioned by a solemn agreement between Earl John and his son Lord Erskine, Alexander Lord Elphinstone and his son, now styled, not Lord Kildrummie, but Master of Elphinstone, dated in 1626 (the month and day being left blank), but subsequently to the decret, proceeding on the remembrance alleged by Earl John and his son of the strict bond of blood and consanguinity standing between themselves and the said Alexander Lord Elphinstone and his son, the latter being "laitlie come and descendit of the said hous of Mar," and his and his son's wish "that they may obtain regress to their lands without plea or question, and to the effect that they may 'bruk the samen with the gudewill, benevolence, blissing, and benedictioun of the saidis Alexander Lord Elphinstone and Alexander Maister of Elphinstoune.'" It was therefore appointed, contracted, and agreed by Lord Elphinstone and his son that on payment by Earl John of forty-

eight thousand merks on the above considerations, and “for thair kyndnes and possession of the saidis lands and barony of Kildrummie,” the Elphinstones should ratify and approve the said decreet of reduction, and renounce all right and title to the lands to the incoming parties engaging to “flit and remove,” etc., before the 15th September 1626 following, and commissioning these procurators “to resign the said lands into the King’s hands by staff and baton, as use is,” for heritable infeftment and seisin to be made to John Earl of Mar therein—reserving certain infeftments to vassals, but without prejudice to the right of John Earl of Mar to quarrel the same by law, and engaging also to give up all charters, etc., necessary for denuding the Elphinstones of their former rights.¹

This transaction must be considered honourable to all the parties concerned.

SECTION VI.

Process against vassals of the Earldom.

But there were many rights of superiority and property less important than Kildrummie, which had been alienated from the Earldom of Mar and Lordship of Garioch by former kings of Scotland, and by the Crown vassals thus unwarrantably created, with no better right than the “naked” one of possession which had proved sufficient to warrant the grant to the Elphinstones. It is beyond doubt that Earl John was entitled on every principle of justice to the recovery of all that Isabel Countess of Mar had been possessed of in right of her maternal ancestors at the moment when the rights of her ancestor Robert Earl of Mar emerged on the death of the liferenter Earl her husband, Alexander Stewart. Earl John now addressed himself to the establishment of his claims upon these superiorities and properties.

In order to establish his status on the broadest legal basis, Earl John procured the five general retours, of which mention has been already made, and their value indicated, by which he was served nearest and lawful heir, etc., on the 22d July 1628, to Donald, Gratney, Donald and Thomas, Earls of Mar, and to Margaret Countess of Mar. The greater part of the evidence

¹ Minutes of Evidence, p. 182.

necessary to establish these propinquities had been already adduced in 1587, as we learn from the testimony of Craig, which I have already quoted; and the other links necessary to complete the chain were either deducible from that evidence or could easily be supplied from public and private record in the case of personages of such eminence. It was for a very practical purpose, one of strict legal obligation, that these retours were obtained, and not with the object of fortifying an empty and unwarranted claim to precedence, as suggested by Lord Chelmsford.

The process which ensued, and which was determined in favour of Earl John's son and successor by a final decret on the 26th March 1635,¹ three months after the Earl's death, was prosecuted against more than 150 proprietors in the north, in possession of lands or superiority within the Earldom of Mar and Lordship of Garioch, among whom I may mention the Earls of Marischal, Crawford, and Kinghorn, Lord Forbes, the Master of Forbes, Lord Deskford, Lord Wemyss, Irvine of Drum, Burnet of Leys, Leslie of Balquhain, Scrymgeour of Dudhope, the hereditary constable of Dundee, besides Forbeses, Gordons, Leslies, Leiths innumerable, the leading barons of the country, not to speak of individuals of lesser note resident in Holland, France, Germany, Denmark, Sweden, Poland, and Ireland (but, a remarkable fact, none in England),—a formidable array, calling upon them to produce their charters of possession as derived either from the Erskines, Lord Erskine, or Earl of Mar, up to Robert Earl of Mar; or from the Countess Isabel, or Margaret Countess of Mar, or Thomas Earl of Mar, or Donald II. Earl of Mar, or Gratney Earl of Mar, or Donald Earl of Mar, grandfather to Gratney; or from James VI. and the ascending line of kings up to Robert III., or his predecessors. The charter of James I. to Alexander Earl of Mar on his resignation, 28th May 1426, was specially called for, as the basis of the action. All these were to be reduced in so far as they might be extended to the lands specified, being parts and dependencies of the Earldom, and declarator to be made in favour of Earl John. Never was there such a stirring up of rights and claims, such a search made in the massive iron chests, with their inner or secret drawers, and their vast

¹ Minutes of Evidence, p. 671.

and complicated locks, which were the repositories of muniments in the old Scottish castles; and although, I repeat, there cannot be a question that justice was on Earl John's side, and that the "wyte" must be laid on the "iniquitie of the tyme," which permitted the kings of Scotland to usurp the Earldom, and deal with it to the injury of so many noble gentlemen, by putting them in a false position with reference to their lawful owners—it is impossible not to sympathise with the burden of a paper printed in the Minutes of Evidence in the recent claim, from the Mar charter-chest, and which has evidently been obtained by Earl John's counsel at the time, in which the writer exclaims against a process which is "to take from them, against all law and conscience" (from their own point of view), "their lands and heritages, which they and their predecessors hes brooked and possessed, some their two hundreth yeares, some three, some fower hundreth yeares bygane, but (without) any interruption or opposition whatsoever. And what crueltie is it," he adds, "to require that all men produce their old rights and evidences of the lands after so long time, otherwayes that they losse their lands, where it is so notoriously knowen that fire and sword has passed oft since through the hail corners of Scotland, and hes destroyit the maist part of the hail evidents and monuments of Scotland!"¹ It is but fair, however, to remember that, according to the testimony of this very document already cited, numbers of the vassals of the Earldom had rushed into the Royal Chancery immediately after the inquest of 1457 to obtain new charters derived from the Crown—thus bringing upon their descendants the penalty so eloquently deprecated *ut supra* in 1635. But the writer over-estimated the destruction of charters and evidence through the wars of Scotland, as the result of the process proved. Those who held exclusively under writs emanating from the alleged authority of the charter 28th May 1426 were unsuccessful in their defence, but many succeeded in vindicating their right by sufficient evidence either to the property or the superiority, or to the property and superiority both, of the lands specified. In the majority of cases, the superiority, as might be expected, was found to be in Earl John. In several instances Earl John "passed from,"

¹ Minutes of Evidence, p. 597.

or withdrew, his claim. With the exception of these instances, every case was gone into and determined on its merits, Earl John being rigidly checked by the obligation resting upon him to warrant the acts of those of whom he was legally the representative, the charters being all through specified, with names of the granter and grantee, and date. Sir Lewis Stewart, Sir Thomas Nicolson—both of whom had now attained the rank of knighthood,—and Mr. David Primrose, acted for Lord Mar, and the defenders appeared singly, or in groups, with their several procurators. Sir Thomas Hope, Lord Advocate, acted on behalf of the Crown. I need not recite the pleadings, which were substantially the same as in the process against the Elphinstones in 1622-6, and attended by the same result. The interest of the pleadings and judgment consists, not in the pleadings in vindication of Earl John's general right, which could not be impugned after the decret of 1626, but in the application of the laws of feudal tenure in the separate cases. What is especially noteworthy is the recognition of the charters of Robert Earl of Mar as valid documents in the character of heir and successor of Isabel, alike in the fief and dignity of Earl of Mar and of Garioch, this being in virtue of the retours of 1438 and the seisin which followed upon them, and furnishing a complete refutation of the criticisms of Lord Chelmsford and Lord Redesdale, that those were but private documents behind the back of the Crown, and unworthy of regard. Earl Robert, it will be remembered, was the direct ancestor of John Lord Erskine who was restored in 1565, and the latter was thus, according to the *jus sanguinis*, entitled to the personal dignity of Earl of Mar and of Garioch, independently altogether of the tenure of the feudal dignities which, accordingly, were recognised in Earl John, although the Earldom of Garioch is spoken of as a dominium or lordship.

Earl John lived to see his long and arduous task all but completed: three months after his death, the coping-stone was laid upon the restoration, of which Queen Mary had laid the foundation, just seventy years after the retour and charter of 1565, James I. and Charles I., Mary's son and grandson, favouring the work throughout, and Earl John's thought and purpose having been bent upon its accomplishment, from boyhood to old age, during a long lifetime, although with prolonged intervals of suspense during political struggles.

SECTION VII.

Bearing of Decree of 1626 on present question.

I now revert, in terminating this Letter, to the decree of 1626, and its bearing upon the question of the dignity or title of Earl of Mar as existing then and at the present day.

Except in a reference by Lord Chelmsford to the decision upon the signification of the words "ex utraque parte" in the charter 9th December 1404, there is no allusion to the decree throughout the speech of that noble and learned Lord, and of Lord Redesdale's address to the Committee for Privileges in 1875. This can only be accounted for—and it is sufficiently accounted for—by their belief, distinctly asserted, that the "Comitatus" or Earldom restored in 1565 was simply the landed property of the Earldom, and that the dignity was created as a new title by a lost charter shortly afterwards—these views being grounded on the private rule of the House of Lords, so unfortunately emphasised by Lord Camden in 1771, and bequeathed to the House as a legacy—of very evil augury,—the consequence of this belief being that the noble and learned Lord looked upon the proceedings that culminated in 1626 as having no reference whatever to the dignity. But the fact is, as I have already proved, that the grant of the Comitatus in the charter 23d May 1565, proceeding upon the warrant of the retour of service of that year, carried the title of honour as in other cases at the period and previously; and, this once recognised, the enormous importance of the decree of 1626, in this question of the Mar dignity, becomes at once apparent. Even apart from this, the simple fact that the charters 12th August 1404 and 1426, upon which Lord Kellie's claim rests,—charters which Lord Chelmsford considers to have been legal and valid, and which Lord Redesdale, condoning their illegality, holds nevertheless to amount, through the practical effect given to them, to a "settlement of the question which it would be dangerous to disturb"—were actually "disturbed" and declared null and void in 1626, with counter affirmation of the charter 9th December 1404, and the confirmation 21st January 1404-5, the foundation of Lord Mar's right as heir-general—this fact, *per se*, shows that the

Resolution of 1875 in favour of Lord Kellie proceeds upon a wholly vicious basis. But when we perceive that the judgment of 1626 is directed specially to these and other instruments as affecting the right to a fief which carried the dignity and title of Earl as by unbroken inheritance, it stands out that the judgment is upon the right to the dignity concurrently with the fief, the two being inseparable, and that the right to the fief being in the heirs-general, the right to the dignity was equally so. The result is that the noble and learned Lords, giving voice and application to the traditional doctrine of the House of Lords, committed a grievous oversight in ignoring the effect of the decret of 1626 as a decision on every point of controversy which came before them in 1875; with that decret before their eyes, it was incumbent upon them to report to the House, and the House to the Sovereign, against Lord Kellie's claim, identified as it was in every essential point with that of Lord Elphinstone in 1626, and to leave Lord Mar "undisturbed" in the peaceable possession of his right secured to him by the judgment of the Court of Session. But the House, in accepting and affirming the Report of the Committee did more than simply affirm and act upon Lord Camden's rule; it was betrayed into overruling a solemn judgment of the Supreme Civil Court, precisely as the House did in the Montrose case in 1853, and (as respects the Oliphant decret) in the Cassillis case in 1762, and ever since—in each case imposing its own construction upon *res judicata*, to the subversion of the rights established by these judgments, and in the teeth of the Treaty and Act of Union, which protects both the authority of the Court of Session and the rights in question.

The evidence of the decret of 1626 may, in fine, be briefly set forth as follows:—

1. The right to the Comitatus of Mar was continued in the heirs of the Countess Isabel through Robert Earl of Mar, the first of the Erskine line, who was retoured her heir in 1438, and through John Lord Erskine, Earl Robert's direct descendant, retoured as Isabel's heir to the Comitatus in 1565, to Earl John, the successful litigant in 1626.
2. The Comitatus carried the dignity or title of honour in 1565, as in other cases, as shown moreover in the case of

Sir Robert Erskine, who became Earl of Mar at once on his retour as heir to the Countess Isabel, by the retours of 1438, and is also so qualified in the Act 1587.

3. Therefore all that the decret 1626 affirms with respect to the fief, it affirms implicitly in respect to the title, —the fief and the title going together, and not a suspicion even existing at that time that they could be separated.
4. The decret proceeds upon the unquestioned descent of the Comitatus to heirs-general, the Comitatus carrying the dignity; and that descent must stand at the present day, unless it can be shown that the dignity has been validly resigned for a regrant in favour of heirs-male exclusively, the *onus probandi* resting of course with heirs-male exclusively. But no such resignation or regrant has taken place.
5. The decret therefore negatives the possibility of a new charter of the dignity in 1565.

It is thus evident that the Resolution of 1875 in favour of the heir-male, Lord Kellie, on the theory of a regrant by a lost charter with that limitation in 1565—that theory being based on the supposed validity and efficacy of the charters 12th August 1404, 28th May 1426, and the service negative of 1457—falls to the ground *in consequentia* in terms of the decree of 1626, which declares those acts and documents to be null and void, “with all that has followed or may follow thereupon.”

The House was in the position, on this present score, as otherwise, of one “non habens potestatem,” the question and right having been already finally determined by a competent tribunal, from which there is no appeal to King or Parliament. It is almost unnecessary to repeat that, independently of this dominant consideration, the opinions expressed by Lords Chelmsford and Redesdale in their addresses to the Committee for Privileges, are not of a judicial character, and therefore count for nothing. Moreover, if it be incompetent for the House to express an opinion of a Resolution on a dignity not claimed by petition to the Sovereign, and not referred to the House of Lords for advice, still less consideration can be attached to opinions not embodied in a Resolution. Those opinions there-

fore count for nothing as against the heir-general, Lord Mar. The heir-general, Lord Mar, as lineal representative of John Earl of Mar in 1626, and of Robert Earl of Mar in 1438, is therefore Earl of Mar at the present moment—the *onus* lying on the heir-male to prove a resignation and regrant in favour of heirs-male, which he has not offered to prove, and cannot prove. Lord Mar succeeded *de jure sanguinis* as Earl of Mar on his uncle's death, and needs no recognition either by the House of Lords or the Sovereign—a maternal nephew succeeding to his uncle as a matter of course, by Scottish law, if no paternal nephew exists to succeed by a preferable right in the same degree, and so with remote heirs-male, the *onus* lying on an opponent to prove such preferable right, whereas Lord Kellie is three degrees more remote. The disallowance of Lord Mar by the House of Lords was therefore from the first *ultra vires*. It follows that Lord Mar is entitled to vote as Earl of Mar at elections. The Order issued by the House of Lords in favour of Lord Kellie impedes his free exercise of his vote, and is thus against the liberty of the subject and the independence of the Scottish peerage, and ought to be rescinded; the more especially as it was issued before the sanction of the Crown was given to the Report in favour of Lord Kellie. The Order falls *per consequentiam* as founded upon and dependent upon the Resolution, which itself is null and void *per consequentiam*, under the decret of 1626, as above shown.

The following observations further present themselves upon the decret of 1626:—

1. The decret 1626 fully recognises Earl John as representing Gratney Earl of Mar, the common ancestor of the Countess Isabel and of Sir Robert Erskine, Earl of Mar in 1438, *de jure sanguinis*; and the present Lord Mar is thus Earl of Mar as heir of Earl Gratney's body, independently altogether of the fief, and is entitled to the dignity in terms of Lord Redesdale's observation, elsewhere cited, independently altogether of the transaction of 1404, although in no manner called upon to prove his right before the House of Lords, the descent being continuous till the death of Lord Mar's uncle, the late Lord Mar, in 1866.
2. The decret proves retrospectively that the ranking

adjudged to Earl John in 1606 above seven Earls created previously to 1565 was owing to his inheritance of the ancient Earldom, the dignified fief, and not in virtue of a new dignity created in 1565. But I shall have to deal with this question in another Letter.

3. The decret of 1626, coupled with that of 1635, proves that the entire Comitatus reunited in Earl John's favour, and that the right thereto had been continuous and unbroken, ascending through Earl John, flourishing in 1565, and Robert Earl of Mar in 1438, to the Countess Isabel, and to Gratney Earl of Mar, the common ancestor, flourishing under Robert Bruce, precisely as if they had been son, grandson, great-grandson, and so on. This disposes of Lord Chelmsford's objection from the disintegration of the ancient Comitatus or dignified fief as inferring the necessary extinction of the title of dignity. The fief had never been legally disintegrated, and practically it was reintegrated, as if never broken, in the person of the representative of the ancient Earls of Mar, Earl John, who died in 1635. Such therefore being the case, Earl John became, and his present representative is, Earl of Mar by tenure of the Comitatus according to Lord Chelmsford's argument at the present moment. It will, of course, be remembered that the possession of the chief message by the elder heir-general carried the superiority and the title of dignity in feudal times, and that Lord Chelmsford's idea of a feudal comitatus ceasing to be a dignified one when partitioned among coheirs is utterly without foundation.
4. The decret 1626, and all other contemporary documents qualify Earl John as "Earl of Mar, Lord Garioch," or "Lord Erskine and Garioch," or "Lord Alloa and Garioch." The present Earl of Mar is thus equally "Lord Garioch." Lord Redesdale's statement that "as for the title of Baron Garioch, assumed by the opposing petitioner, there is not any evidence before the Committee showing that the territorial lordship of Garioch was ever recognised as a peerage-barony," is thus contradicted, while it will be remarked that no claim to that barony any more than to the ancient Earldom of

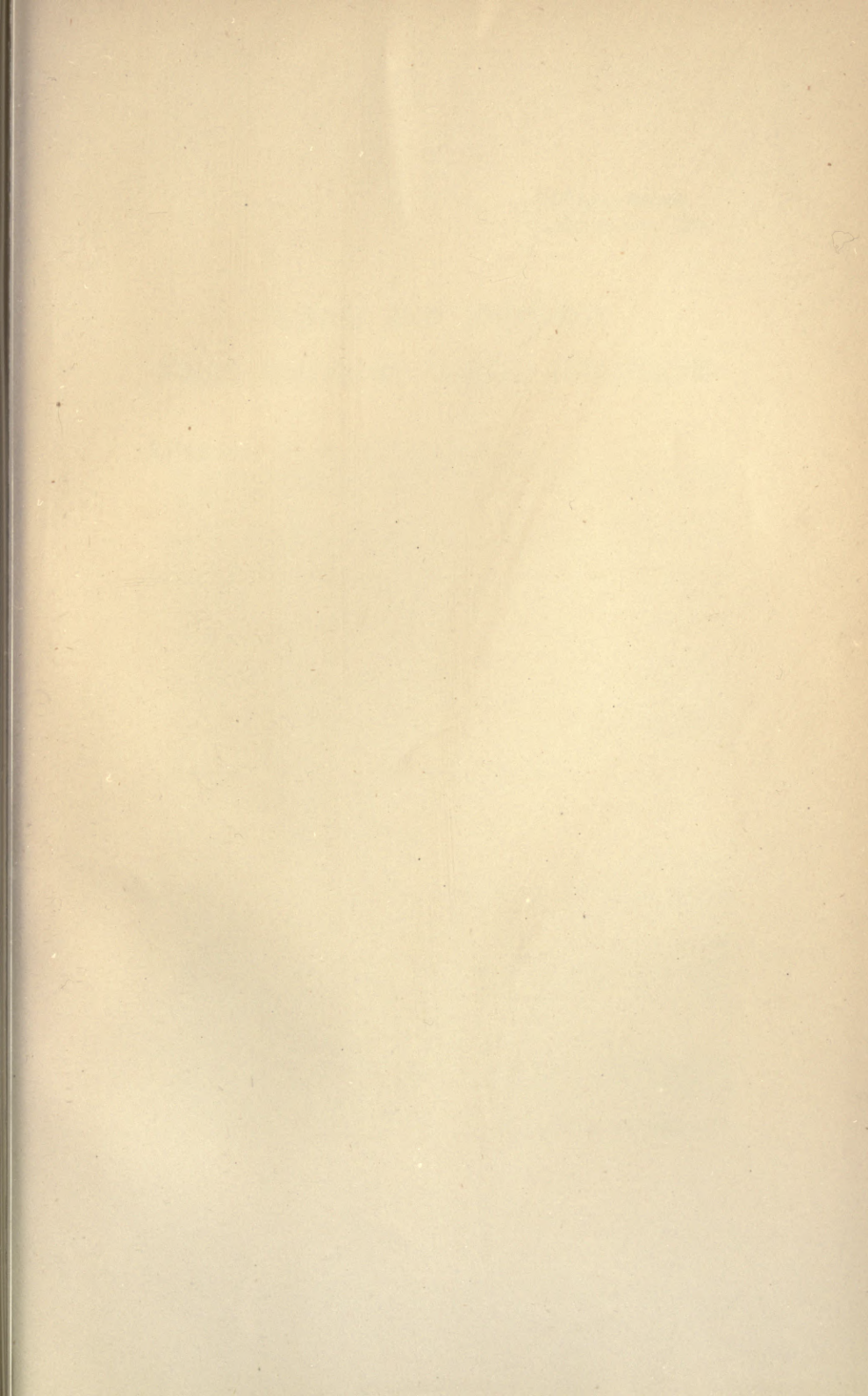
Mar was before the House of Lords in 1875. I venture even to submit that although the title of Earl of Garioch was not assumed by John Lord Erskine, restored in 1565, the fact that Isabel Countess of Mar was also Countess of Garioch, that her husband, Alexander Stewart, was Earl both of Mar and Garioch, and that Robert Lord Erskine after his retour as heir to Isabel, takes the style of Earl of Mar and Garioch, are sufficient to prove that the present Earl, the heir of all the rights of Isabel as derived from her maternal ancestry, is Earl of Garioch as well as Earl of Mar. Even during the usurpation in the fifteenth century, the younger members of the royal family created Earls of Mar were also styled Earls of Garioch likewise. The right in the Erskines ascended to Christiana Bruce, sister of King Robert, and wife of Earl Gratney, on whom her brother bestowed the Earldom or Lordship of Garioch in 1326 on her marriage with Sir Andrew Moray, her third husband. The present Lord Mar is the Countess Christiana's direct representative.

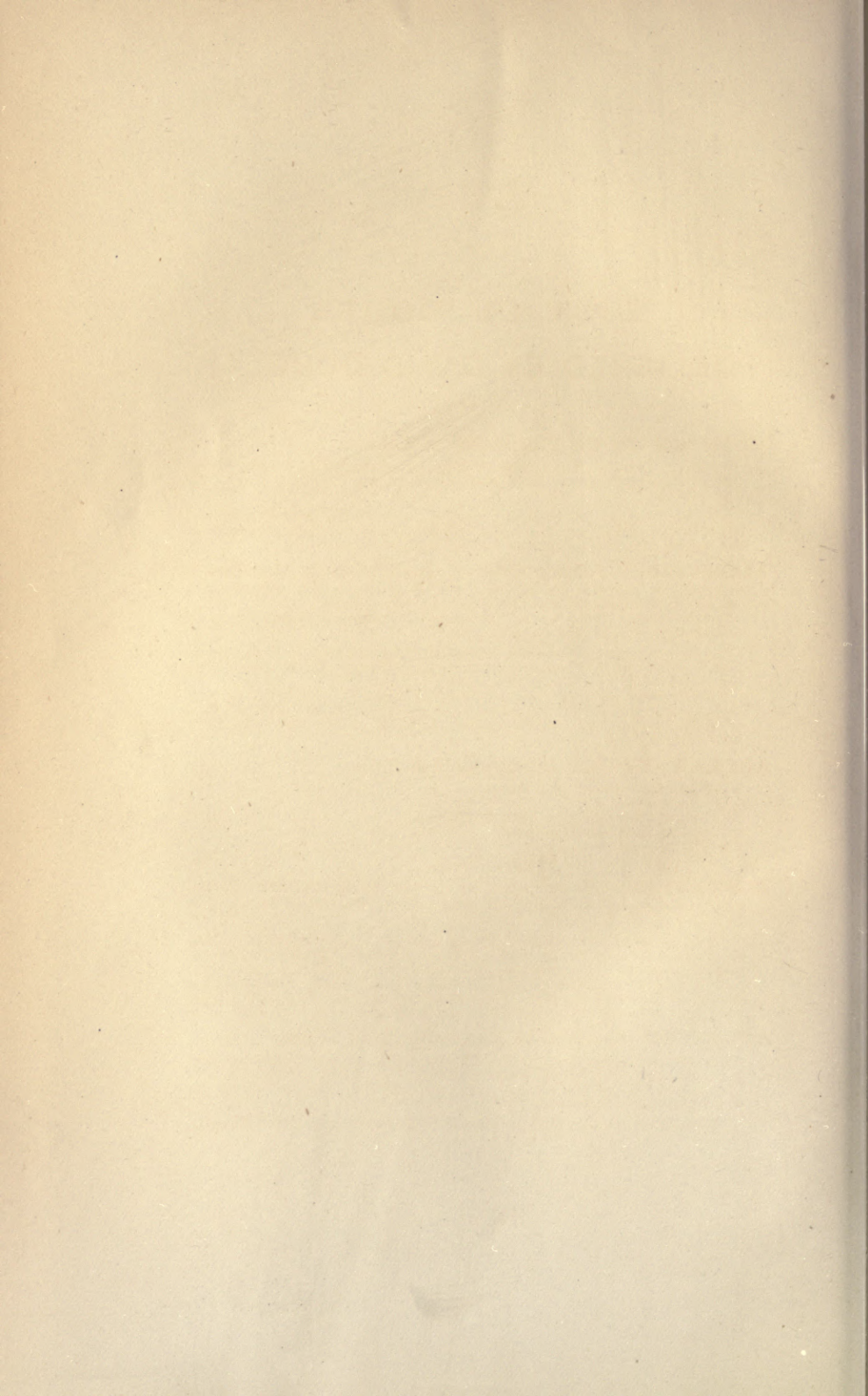
It was upon the grounds exhibited in the last few pages that I based the two Protests which form the subject of Lord Kellie's Letter of Remonstrance to the Peers of Scotland, mainly upon the decret of 1626, and my first Protest emphatically so: and I may here repeat what I then said:—

“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 subsequently, it must have so existed through a new creation in that year, probably by charter, and, in the absence of any charter or writ showing 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 descendibility of the Earldom of Mar to heirs-general has been determined by the decret 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."

END OF VOL. I.





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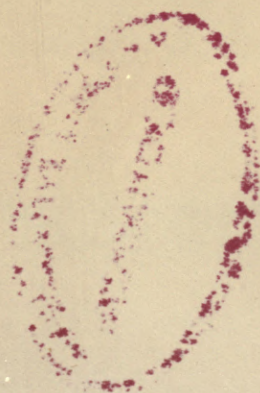
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