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THE SCOTTISH
OR
LYON OFFICE OF ARMS

BY JOSEPH FOSTER.

ARE THERE TWO EARLS OF MAR?

BY J. H. ROUND.

Reprinted from "COLLECTANEA GENEALOGICA," Part XII.

PRINTED FOR THE AUTHOR,
BY
HAZELL, WATSON, AND VINEY, LONDON AND AYLESBURY.

NOTICES OF THE PRESS.

"Mr. Foster's 'Collectanea Genealogica' will bring joy to the heart of pedigree hunters both in England and America. . . . To the historian and the biographer such facts as Mr. Foster diligently gathers are of the utmost importance."—*Daily News*.

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The Scottish (or Lyon) Office of Arms.

ITS WORK—ITS WORTH.

“We have carefully studied the Marjoribanks case from its commencement. It is with great regret that we are compelled to record our opinion that Mr. Foster has completely refuted the Lyon King-of-Arms . . . which, however unwillingly, we are compelled to describe as a complete exposure of the time-serving policy prevalent in the Lyon Office.”—*The Dundee Advertiser*.

“The pedigree of Lord Tweedmouth’s family, which Mr. Foster was called upon to accept, was received by him with serious misgivings, though formally ‘proved and registered’ in the Lyon Court of Scotland. . . . We may state that, when challenged to make good his objections, he proved his case in the most complete manner

from the unimpeachable evidence of the public records.”—*Morning Post*.

“We must admit that Mr. Foster has disproved Lord Tweedmouth’s supposed descent from Thomas Marjoribanks of Ratho.”—*Midland Antiquary*.

“He ruthlessly demolishes this precious production, and displays, in the course of his minute analysis, a singularly exhaustive knowledge of records beyond the Tweed.”—*Academy*.

“The writer seems to have caught the Scottish heralds tripping, and it may be hoped that in future the authorities at the Lyon Office will require more stringent proof of the pedigrees they register.”—*Athenaeum*.

On the 2nd of August last, Mr. Labouchere, M.P., in moving the reduction of the civil service estimates by £625,—being the amount voted for the Lyon Office of Scotland,—observed that he “wished to know the use of maintaining such offices as Lyon King-at-Arms and Heralds.”* The Member for Northampton has but given expression to a wish that is being very widely felt since the recent disclosures on the working of this Office, and specially its signal discomfiture in its desperate encounters with myself.

I have already shown in my *exposé* of the Marjoribanks case, referred to in the above representative extracts, that a peerage pedigree of ten descents compiled by Lyon King-of-Arms, and solemnly recorded in the Lyon Office, can be utterly annihilated by disproving no less than four out of those ten generations, for—

- (1) **IT IS UNTRUE** that Lord Tweedmouth is descended from Edward Marjoribanks and Agnes Murray—as stated in the “proved and registered pedigree” of Lyon King-of-Arms.
- (2) **IT IS UNTRUE** that Lord Tweedmouth is descended from Joseph, son of James Marjoribanks—as stated in the “proved and registered pedigree” of Lyon King-of-Arms.
- (3) **IT IS UNTRUE** that Lord Tweedmouth is descended from James Majoribanks, son of the Clerk Register—as stated in the “proved and registered pedigree” of Lyon King-of-Arms.
- (4) **IT IS UNTRUE** that Lord Tweedmouth is descended from Thomas Majoribanks of Ratho, Clerk Register—as stated in the “proved and registered pedigree” of Lyon King-of-Arms.
- (5) **IT IS UNTRUE** that Joseph Marjoribanks of Leuchie was son of Joseph Marjoribanks of Leuchie and Margaret Sinclair his wife—as stated in the “proved and registered pedigree” of Lyon King-of-Arms.

It is now many months since I publicly challenged the authorities of the Lyon Office to produce any proofs whatever for their “proved and registered” Pedigree. I urged on that occasion “that the whole transaction should be submitted to a searching investigation before an impartial public tribunal.” This challenge I repeated at a subsequent stage, after the attempts of my opponents “to disprove these charges” had “signally and egregiously failed.” For it is no answer to the charges which I have advanced to hunt up the *errata* and printer’s errors in the earlier editions of my own works and to eke them laboriously out by the arts of innuendo and invective. Much less is it an answer on the part of Lyon to distort

* *Times*, 3 Aug. 1883.

my words and pervert my charges. I may well adapt the words of a writer in *Blackwood* when recently exposing the futility of Mr. Burnett's remarks on the death of Rothesay in his introduction to Volume 3 of the Exchequer Rolls of Scotland:—

“Had Mr. Burnett given” Mr. Foster's “passages in full, the gloss he puts upon them would be self-evident. A case must be very weak the defence of which necessitates such paltering with plain language.”—Vol. 123, p. 799.

I still demand a public investigation, from which I, at least, have nothing to fear, and on the issue of which I am perfectly prepared to stake my genealogical reputation.

But the public will hardly fail to draw their own conclusions when they learn that the Scottish Heralds persistently shrink from any such impartial inquiry, and attempt to revenge themselves for the mortification of defeat by loudly proclaiming in anonymous articles, on the one hand, that “the point” (on which they have been worsted) “is one of little interest to genealogists,”* and, on the other, that “the Lyon Office Pedigree *still appears to be* † absolutely unshaken by Mr. Foster's elaborate arguments.” ‡ The *ipse dixit* of an anonymous writer cannot alter the facts of the case, but it is the only refuge left to those who have neither the courage to meet me in the open, nor the honesty to acknowledge their defeat.

That it should have been necessary to have met my charges by retorting upon four separate occasions and in three different journals, is sufficient evidence of their accuracy, and impartial critics on this side of the Tweed not only fully understand the real significance of the counter charges, but are not to be led astray by that red herring which Scotland's greatest genealogists have tried in combination to draw across the scent, in order to divert official and public attention from the real question at issue.

Leaving the case of Lord Tweedmouth's Pedigree, and turning to the scandal of spurious baronetcies, I would remind my readers that in Scotland, as was recently admitted by a Scottish expert before a Select Committee of the House of Lords,—

“There is great difficulty in putting down the assumption of a number of false baronets who use the title.”—*Minutes of Evidence* (DR. ÆNEAS MACKAY), 553.

Here again we may well seek “to know the use of maintaining such offices as Lyon King of Arms and Heralds.” Nay, the unfavourable contrast in this respect which the Scottish Baronetage presents to the English, has been largely due, I fear, to the action of those very officers. “In Scotland,” says a writer in the *Herald and Genealogist* (vol. iv., p. 4), “matters, I am sorry to say, are widely different, and unauthorised assumption of Baronetcies greatly abound. I have shown in my *Baronetage*, under “Chaos,” that of forty-five discredited baronetcies, no less than thirty-six are of Scottish origin, and that for these audacious and wholesale assumptions the Lyon Office is but too often responsible, not only directly, by their actual recognition, as, to take the latest instance, in the case of Turing (see Preface to my *Peerage* for 1883), but also indirectly, through the pernicious example thus set by the very authorities who are specially charged with checking such abuse.

But, worse still, it is not only the Baronetage which has suffered from the influence of the Lyon Office. In Scotland the very Peerage is in a state of chronic chaos, as compared with that of the sister kingdoms. The efforts which have been made ever since the Union to place it on a sounder and more stable footing, the select committees which are so frequently appointed to deal with its unsatisfactory condition, are the fruit of English initiative, necessitated by Scottish neglect. These creditable efforts have been persistently thwarted by the action of Scottish antiquaries, with the Lyon Office at their head; and the result, as the present Lyon has himself admitted, is that

“in Scotland there are individuals as to whom it may be matter of dispute as to whether they are Peers.” *Minutes of Evidence*, 185 (MR. BURNETT), 2 May, 1882.

* *Journal of Jurisprudence*, March 1883. So, too, we are informed by the *Edinburgh Review* that the Marjoribanks Pedigree is “not possessed of much general interest” (cccxxiii. 256). But the question is not whether the Pedigree is of “general interest,” but whether it is true or false.

† The italics are my own.

‡ *Edinburgh Review*, cccxxiii. 256. The writer declines even to discuss the question, but informs his readers that “the points in question have been ably (?) handled in a recent number of the *Scottish Journal of Jurisprudence*, to which reference may be made by any one who happens to be interested in the dispute.” Of this “ably written article” I have, as my readers will remember, already most effectually disposed.

This lamentable anarchy is due, on the one hand, to an obstinate devotion to that most unfortunate doctrine, "succession *jure sanguinis*," which Lyon, in his evidence, so strenuously upheld. Its fruits are seen in such a case as that of Ruthven, where I have been taunted with calling attention to a scandal with which Scotsmen have been familiar for more than half-a-century. I can only marvel that the Lyon Office is not ashamed of such a retort, which convicts it *ipso facto* of conscious negligence and of cynical indifference to this crying scandal. The other cause of these flaws in the Scottish Peerage is to be found in the peculiar action of the Lyon Office, its incidental and casual "recognition" of titles through a matriculation of Arms. We have recently seen one effect of such action in the recognition as "Earl of Mar," of the unsuccessful Mar claimant. Attention has also been called by Mr. ROUND to the recognition, on that occasion, of the Barony of Garioch as an existing title in the Peerage of Scotland.* He has challenged this Barony as a creation of the Lyon Office, and that challenge has not been answered.

Thus we are driven once more to inquire, with Mr. Labouchere, "the use of maintaining such offices as Lyon King at Arms and Heralds."

It might at least be hoped that, in the field of Heraldry, these officers might, if anywhere, be of use, and that they would protect the rights of coat-armour as jealously as the authorities of the College of Arms. In this respect their predecessors were active, but it is admitted even by the present Organ of their Office, that "during the present century . . . armorial assumptions may often have been winked at by the Lord Lyon and his deputies"—witness the pages of the *Landed Gentry*. Unhappily, indeed, they may rather be said to set the laws of arms at absolute defiance, and do their best to bring them into contempt. Two instances occur to me of a most reprehensible practice which is peculiarly illustrative of their system. I mean their matriculations, in favour of Scottish clients, of English armorial insignia.

- (1) FAIRFAX, baronet.—When Sir Henry Fairfax was created a baronet, 14 March, 1836, the Lyon Office certified that his arms (which, it may be mentioned, had been granted by them only three weeks before) were *Azure, a chevron between two fleurs de lis or, etc.* His son, the present baronet, registered his pedigree, and recorded these same arms in the (English) College of Arms, 28 Oct., 1874. Two years later, he succeeded to a property in Scotland, on condition of quartering the arms of its former owners, and accordingly matriculated his coat, in the Lyon Office, as Fairfax quartering Ramsay and Montgomerie. At the same time he expressed his desire "to discontinue the use of the arms then (1836) granted, and to obtain our (*i.e.* Lyon's) sanction to use such arms *as might indicate his paternal descent from the family of Fairfax*" (!)—which descent, it must be remembered, cannot be established. Lyon thereupon unhesitatingly "devised" to the petitioner a Fairfax Coat, dexterously compounded from the Ancient and the Modern Coat of the great Yorkshire House. How indistinguishable it is from them may be seen on reference to the illustrations in Burke's *Peerage*, a work revised by Lyon himself. Nay, the coat assigned by Lyon to the Baronet is actually the one which in Burke's *Armory* is, with Lyon's co-operation, assigned to Viscount Fairfax! The true character of such a transaction as this has been well exposed by the *Scottish Journal of Jurisprudence*:—

"In the eyes of the large and increasing class of persons who understand the historical meaning of heraldry," it "is not a mere piece of foolish vanity, but an offence in kind not unlike the fabrication of evidence to support a fictitious pedigree."

- (2) ELLIOTT OF STOBS, baronet.—When Sir George Elliott, for his memorable defence of Gibraltar (1787), was created Lord Heathfield in the Peerage of England, he had a grant, from the English authorities, of special supporters, being those of his father, differenced by certain distinctions; he had also the arms of Gibraltar granted to him as an augmentation to his paternal coat. In 1859 the Scottish Office re-granted this *English* augmentation and these *English* supporters to a merely collateral relative, the seventh Baronet of Stobs. In this case it strove, however, to keep within the letter of the law by an undignified piece of sharp practice, "a piece of battlement" being substituted for "a mural crown" beneath the feet of the supporters, and the minute "Gibraltar" in the augmentation being dexterously altered to "Plus ultra." The result must be described as a "colourable imitation" of the original *English* augmentation, the right to which, it may be added, is actually vested in Sir F. G. A. Fuller-Elliott-Drake, Bart.

* *Notes and Queries*, 6th, S. VII., 390.

This, however, is not the only device employed by the Lyon Office, for invading the heraldic province of its neighbours, in contemptuous defiance of the laws of Arms. Not content with matriculating in favour of Scottish clients armorial insignia of English origin, it is equally ready to oblige *English* clients with armorial insignia of Scottish origin! On what grounds, for instance, could it possibly be justified in bestowing on an English Baronet, Sir Christopher Baynes, of purely English descent, the much coveted addition of supporters, to be appended to the coat granted him by the (*English*) College of Arms? It could only plead that, in so doing, it was but following the vicious precedent by which the supporters belonging to the (Scottish) Lords Rutherford were granted to Sir Edmund Antrobus, an *English* Baronet, because, forsooth, he had purchased some part of the Rutherford estate! The right to use supporters is, with us, so strictly limited (a special royal warrant being required for their addition to a Baronet's coat), that Lyon's dangerous prerogative of granting them broadcast *ex gratiâ* should unquestionably be viewed with most jealous eyes when it pleases him so to garnish *English* coats, more especially as this privilege has, admittedly, in the past, been exercised with no sparing hand.

It would be easy to show that in purely Scottish Heraldry the Lyon Office can be similarly impeached. Its action in the well-known Haig case will be fresh in the recollection of all,* and its grant of supporters to Sir John Marjoribanks "as representer of Leuchie" is virtually voided by the simple fact that the grantee was nothing of the kind (See note to these supporters in my *Baronetage*). Yet in this it is, as ever, the traditional system of the Office, rather than its *personnel*, that is to blame.

Now, surely, these abuses ought to be taken in hand. On the one hand the (English) College of Arms has a right to make strong official representations to the Earl Marshal, and, indeed, to the Home Office, when it finds its province thus invaded. On the other, the unfortunate persons who have paid for these apocryphal grants should be given to understand that they are valueless and void if contrary to the laws of Arms, and the Office should be called upon to purge its register, and return, in such cases, its fees.

We are aptly reminded by the *Edinburgh Review* that "in the words of an eminent jurist and herald,"—as the writer (who seems fascinated by the Lyon's crown!) is pleased, unwittingly and right quaintly, to describe the present Lyon King-of-Arms,—

"By the civil law (in Scotland), he who bears and uses another man's arms to his prejudice . . . is to be punished arbitrarily at the discretion of the judge."

I would submit that this offence is precisely the one in which Lyon has been "aiding and abetting" his clients in such cases as those I have quoted above. But when we are further informed by this "eminent jurist and herald"—of the theory that "persons who are descended from royalty" are "entitled to quarter the royal arms"—that "in Scotland, at least, if any such individual should be rash enough to act upon the theory in question, the result might prove somewhat serious," as

(By the civil law) "he who usurps his prince's arms *loses his head*, and his goods are confiscated,"

I would suggest that it is the "eminent, etc.," himself who here "*loses his head*," and justifies the confession of Professor Innes, when treating of Heraldry in Scotland, that

"its total and contemptuous neglect in this country is one of the causes why a Scotchman can rarely speak or write on any of these subjects without being exposed to the charge of using a language which he does not understand" (*Scotland in the Middle Ages*, p. 303).

For, in the first place, no one has ever dreamed of suggesting that all "persons descended from royalty" are "entitled to quarter the royal arms," but only those who share in the representation of a royal house; and, in the second, the penal offence consists, not in so quartering the arms, but in "usurping" them, as the antecedents show, in the place of one's own paternal ones, as was attempted to be done, with Lyon's help, in the case of the Fairfax arms. It is, indeed, "a consummation devoutly to be wished," that the consequences of *such* usurpation might prove "somewhat serious" to the guilty parties "in Scotland" as elsewhere!

It is now no less than fifteen years since the learned editor of the *Herald and Genealogist* (the late Mr. J. Gough Nichols), when congratulating Mr. Burnett on his accession to the post of Lyon King-of-Arms, added—

* See *Notes and Queries*, 6th, S. VII., *passim*.

“We are sure that he would be the last to deny that there is still much room for reform in matters of Scottish, as well as English, Heraldry; and that the exercise of all his tact and judgment as well as energy will be required to carry out such measures as may be calculated to restore to its efficient operation this department of our social government.”

And yet so inveterate is the system of this Office that it may be doubted whether matters have much improved since the famous *exposé* of its method and administration in the case of *Dundas v. Dundas* more than a century ago.

Those who are anxious to learn more as to the qualification of that “eminent, etc.,” with whose official services Mr. Labouchere has suggested that we might afford to dispense, may be referred to his evidence before the Select Committee, as analysed in my own and in Mr. Hewlett’s pages,* and also to a masterly article from which I have already quoted, dealing with his work among the Exchequer Rolls.

“We cannot help expressing the opinion that it is unfortunate that State publications such as the Exchequer Rolls—intended to provide the public with original materials for historical study—should be turned into mediums for the ventilation of personal crotchets or preconceived opinions. . . . An editor of such volumes is expected to have a fair knowledge of Scottish history; but there is no call that he should set up for being omniscient, and so putting everybody right on every possible sort of question.”†

Returning, however, to my point of departure, the suggestive *exposé* of the Marjoribanks Pedigree, as “proved and registered” in the Lyon Office, I would express my warm gratification at the outspoken language of the *Edinburgh*:—

“The not unfrequent fabrication of a fictitious ancestry on behalf of wealthy upstarts naturally reminds us of La Rochefoucauld’s happy definition of hypocrisy, ‘The homage which vice pays to virtue.’ the heralds of the Middle Ages were sometimes inclined to carry back their pedigrees to a remote period, and to invent a good many ‘forbears’ for the earliest ancestor on record. . . .

“The modern professors of the science of Genealogy are still bolder in their procedure, and such is the persuasive power of wealth, that in the course of a single week they contrive to furnish the obscurest *novus homo* with an historic name, an elaborate pedigree, and a highly respectable gallery of family portraits.”

“It is much to be regretted that these unscrupulous adventurers are no longer liable to the salutary punishment administered to certain framers of false pedigrees in the sixteenth century—to wit the loss of an *ear*.”

And I would echo, for the benefit of Lyon King-of-Arms, its happy quotation from his revered Riddell:—

“True Genealogy is an austere, stern potentate, governing by unswerving rigid laws founded on truth only, knowing that thereby she can alone act with dignity and advantage; and not a reckless, loose nymph or Bacchante, who in her frolics gives vent to every flattering tale and fable, to cajole and unduly elevate the credulous for her own profit and the amazement of others, to sallies of fancy and imagination.”

JOSEPH FOSTER.

* *Jurisdiction in Scottish Peerage Cases*, 1883.

† “A Tragedy in Scottish History Re-considered” (*Blackwood*, June 1883).

Are there two Earls of Mar?

BY J. H. ROUND, Esq., M.A.

"It cannot stand with the ordour and consuetude of the countrie to honour two earlis with ane title."—JAMES VI. (*Nithsdale Patent*, 1620).

"Your lordship will perceive how impossible it is for me to recognise the existence of two Earls of Mar . . . I am sorry that I cannot myself admit the possibility. . . It is impossible that the two dignities can co-exist."—LORD CRAWFORD (*Earldom of Mar*, 1882).

THE SCOTTISH PEERAGE.

To the Editor of THE TIMES.

SIR,—As a protest, signed by several peers of Scotland and by the gentleman who assumes the title of Earl of Mar, against the provision in the Lord Chancellor's Bill for regulating the procedure at the elections of representative peers for Scotland, which authorizes the House of Lords, upon a petition presented to the House, to correct the roll of the peers of Scotland to be called at the elections, has been noticed in several newspapers, and a *précis* of it was given in the *Times* of the 12th of April, I hope that you will allow me to call attention to the nature of the roll, to the alteration of which by the House of Lords the protesting peers object.

The roll consists of a list of peers settled under a commission granted by King James VI. in 1606, and of the peers created since that year. No question exists, or has since the Union in 1707 been raised, as to the precedency of any of the peers created since 1606, nor as to the precedency of eight of the earls and fourteen of the lords of Parliament named in the list of 1606, as they had been created by King James VI. before he issued the commission. There are now only ten earls and eleven lords of Parliament named in the list in regard to whom any question could ever be raised, and the Earls of Sutherland and Mar and Lord Borthwick are the only peers as to whose precedency any question has in fact been raised, as the precedency of the Buchan peerage was settled by an unopposed Act of Parliament passed on the 28th of June, 1633. The list of 1606, which is called the "Decree of Ranking," was prepared upon short notice, and upon such proofs as the peers who attended the Commissioners were pleased to lay before them; and it contains so many and such grave errors as to render it a document of no real authority regarding the true precedency of the peers named in it. The Earldom of Sutherland was found and declared by the House of Lords in 1771 to have been held in regular succession from William, who was Earl of Sutherland in 1275, and yet in the Decree it was ranked after the Earldoms of Errol and Marischall, which are proved to have been created between 1450 and 1460. It seems strange, with the knowledge of these facts, that the Duke of Sutherland, as Earl of Sutherland, should be one of the protesting lords, and more especially so since his father petitioned the House of Lords to have his place on the roll as Earl of Sutherland corrected by order of the House. The Earl of Crawford, whose dignity was created in 1398, was in the list placed after the Earl of Argyll, whose dignity is said to have been created in 1457, and was certainly created after 1455. The Earl of Menteith, whose earldom was created in 1427, was ranked after the Earl of Errol, the Earl Marischall, and the earls of Rothes and Montrose, whose earldoms were created after 1445. The Earl of Caithness, whose dignity certainly existed in 1471, and apparently much earlier, was ranked after the Earls of Eglinton, Montrose, and Cassilis, whose earldoms were certainly created after the year 1500; and there are errors in the placing of several of the other earls. The errors in placing the lords of Parliament are also numerous and serious. Lord Maxwell, whose ancestor was a lord of Parliament in 1445, was ranked in the list after eight lords of Parliament whose dignities were created after 1455, two of the eight dignities having been created in Parliament in 1487. Lord Borthwick, whose ancestor was a lord of Parliament in 1455, as found by the House of Lords in the recent judgment on the Borthwick peerage claim, was in the list ranked after the Lords Sanquhar and Yester, the two lords whose ancestors had been created peers in Parliament in 1487; after Lord Ogilvie, whose ancestor was created a peer in Parliament in 1491; after Lord Ephinstone, whose ancestor was created Lord Ephinstone on the baptism of the infant son of King James IV. in 1509; and after Lord Herries, whose peerage was proved to have been created after 1486. Lord Ephinstone was also placed above six other lords of Parliament whose dignities were certainly created before the year 1500.

Several other errors in ranking the lords of Parliament might be pointed out, but it is apprehended that a sufficient number of mistakes in ranking both the earls and lords of Parliament have been mentioned to show that the list, as settled in 1606, is of no real authority or weight in determining the precedence of the peerages of Scotland then in existence. The dignity of Lord Somerville, although certainly in existence in 1606, is entirely omitted in the list.

The Decree of Ranking, which embodied the list referred to, contained a provision that any peer aggrieved by the place assigned to him might proceed before the Court of Session to have the Decree amended in his regard. In 1606 there was no separate House of Lords in Scotland, as all the members of the Parliament of Scotland sat and voted in one House as members of the Parliament; and the Court of Session, probably as succeeding to the Court of the Lords Auditors, was allowed jurisdiction in regard to questions concerning the peerage. The object of the protesting peers seems to be to maintain the appeal as provided for in the Decree, but apparently they not only disregard the fact that the Act of Union declared all the peers of Scotland to be peers of Great Britain, and to have all the rights and privileges of peers of the realm, and provided that sixteen of them were to sit by election in the House of Lords, but also that it has constantly been declared, by judgments given in the House of Lords on peerage claims, that since the Union the House alone had jurisdiction on claims to dignities which were before the Union peerages of Scotland. Some of the protesting lords appear also to be desirous that the Decree of Ranking should, by means of proceedings to be taken in the Court of

Session, be so altered as to include as a peer the gentleman who assumes the title of Earl of Mar, although, after a full investigation of the grounds of his claim, the House of Lords decided against his pretensions; and the Queen, to whom he had inadvertently been presented as Earl of Mar, directed his presentation as Earl of Mar to be cancelled.

From the earliest period of parliamentary history, the peers of England have insisted upon and maintained that they were the sole judges of questions of precedence among themselves, and the Courts of Law have on several occasions declared that they had no jurisdiction on such questions, and that the decision of them pertained exclusively to the peers. The Act of Union, which made the peers of England peers of Great Britain, certainly made no alteration in the jurisdiction previously held by them; and when the peers of Scotland became also peers of Great Britain, all questions as to their rights as peers necessarily fell under the jurisdiction which governed the rights of the other peers of Great Britain, one of which was that their rights as peers should be alone determined by their peers. Sixteen of the peers of Great Britain, whose predecessors were peers of Scotland, sit in the House of Lords, and are ranked in the House; and it would be contrary to every principle of Parliamentary law that a Court of inferior jurisdiction—a Court composed of persons not their peers—should determine the place in which any of the sixteen should sit in the House. If such authority were given to the Court of Session, it might alter the place of a peer while he was actually sitting in the House. The peers, however, who so strongly insist upon disallowing the jurisdiction of the House on questions of precedence, appear to overlook the point that, unless the law were altered to meet their wishes, an appeal would lie from any decision which the Court of Session might give to the House, and that, upon the hearing of the appeal, the jurisdiction which they appear so anxious to contravene must be exercised; and they can scarcely ask that the decision of the Court of Session should be made binding and conclusive, so as to deprive a peer of the right, possessed by every other subject of the Crown, of appealing from a judgment of an inferior Court.

There does not, however, appear to be any necessity, in settling a roll to be called at the elections of representative peers for Scotland, to make any provision in relation to questions of precedence, as, if the names and titles of the peers were entered alphabetically in the roll, all difficulty in conducting the elections would be avoided, and questions of precedence might be dealt with according to law as they should hereafter arise.

I remain, Sir, yours faithfully,

WILLIAM O. HEWLETT.

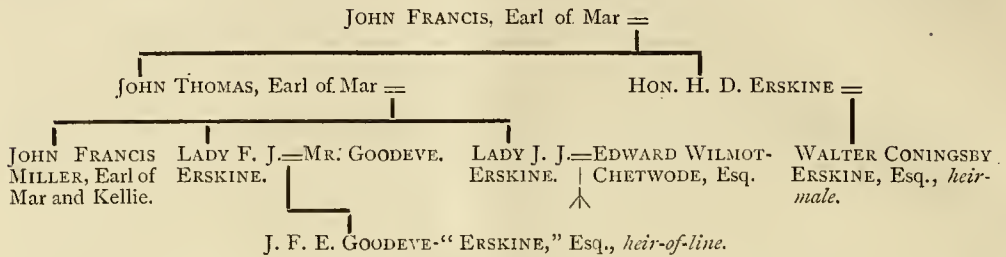
GRAY'S INN, April 26.

THE SCOTTISH PEERAGE.—Mr. Goodeve-Erskine, using the signature of "Mar," writes:—"The letter on the Scotch Peerage, signed by a Mr. W. O. Hewlett, an English solicitor, who exposed ignorance on the subject though he may have achieved his purpose by his name appearing in the *Times* of May 1, demands a brief reply from me; for he attacks me especially as one who joined in the protest of the Duke of Sutherland and twenty other Scotch peers against the Lord Chancellor's Scotch Peerage Bill, which seeks to subject the Union Roll to be (*sic*) manipulated by a small committee of English peers, not conversant with Scotch law. The great importance of the Decree of Ranking (the foundation of the Union Roll), which Mr. Hewlett, for well-known reasons, tries to vilify, was maintained by Lords Mansfield, Cranworth, and Brougham in the Sutherland and Herries cases. The ranking was confessedly final 'only according to documents then produced,' the Decree providing for higher rank being obtained through subsequent proofs before the Court of Session, whose authority by the Treaty of Union (Art XIX.) was upheld unimpaired, as stated in the petition to the House of Lords recently signed (*sic*) by the great majority of the leading legal and historical authorities in Scotland against the Lord Chancellor's Bill. Mr. Hewlett's many errors and fallacies are fully refuted in the *Scotsman* of the 25th of April, (*sic*) in the *Journal of Jurisprudence and Scottish Law Magazine* for May, and in 'The Earldom of Mar during 500 Years,' by the late Earl of Crawford and Balcarres, the acknowledged greatest modern authority on Scotch peerage law. Mr. Hewlett's assertions that I was inadvertently presented at court as Earl of Mar, but (*sic*) the presentation was cancelled, and that the House of Lords decided against my pretensions, are emphatically incorrect, as would be proved on reference to the official *Gazette*, and to the Minutes of the House of Lords, which show that the Law Officers for the Crown summed up that Lord Kellie, the heir-male, had failed in his claim, and that the Earldom of Mar descends to heirs-general; and that (as Lords Cairns and Selborne have since admitted in the House of Lords) the decision of 1875, conceding to Lord Kellie a new Mar title, not on the Union Roll, and which (*sic*) the House in 1877 declared they could not place on the Roll, has not dealt with the ancient Earldom."—*Times*, 10th May, 1883.

I propose to discuss in this paper, not the justice of the Mar decision in 1875, but the actual state of the Earldom of Mar, as determined by that decision. These two questions, though absolutely distinct, have, unfortunately, been hitherto discussed together, and to this must be assigned most of the confusion in which the second of these questions has been involved. For we shall find that this same question—Are there two Earls of Mar?—practically hinges on the view we take of the decision pronounced by the House of Lords, and that, if we loyally accept it, we can arrive at only one conclusion, while, to arrive at any other, we must decide, at the outset, virtually to reject and defy it. Accepting, therefore, in letter and in spirit, the "judgment" of the House of Lords, it will be my endeavour to clear away the tangled web by which the consequence of that decision has been cunningly obscured, and to set it in a clear and simple light, for the benefit of those who have not been enabled to examine the question for themselves, but who are honestly anxious to expiscate the truth, and to bow to the decision of the House of Lords when its consequences have been clearly set before them.

Down to the death of the late Earl of Mar and Kellie in 1866, the facts, so far as the present question is concerned, are happily beyond dispute. It is admitted on both sides that the Earldom of Mar vested in that nobleman was the only one known to exist, and that it was the Earldom which figures on the Union Roll. At his death (19 June, 1866), the state of

affairs was this : His heir-male was his cousin, Mr. W. C. Erskine. His heir-of-line was his sister's son, Mr. J. F. E. Goodeve.* A short Chart Pedigree may make the case clearer :



The late Peer's Earldom of Kellie passed, under the patent, without question, to his cousin and heir-male. But who was to inherit his Earldom of Mar? As this dignity was not held under any Instrument of Creation, its limitation was, so far, an open question. But it is a well-known maxim of the House of Lords, that the legal presumption in such cases is in favour of the heir-male. This maxim is based on "Lord Mansfield's law," expressed in the following *dictum* :—

"I take it to be settled, and well settled, that where 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."

This *dictum*, as is well-known, has been most violently assailed; but we are not here concerned with the arguments for or against it. Sufficient for us that it still rules with the Peers, and that, in accordance with it, the recognised presumption of law was in favour of the Earldom descending to Lord Kellie, until contradicted by the heir-female (Mr. Goodeve-*"Erskine"*). It is unquestionable, however, that there was a general belief that this Earldom was descendible to the heir-female, who clenched the question by assuming the title in defiance of the above presumption of law.

So far this statement of the facts of the case is in complete accordance with that given by the late Lord Crawford in *The Earldom of Mar in sunshine and in shade*. Lord Crawford constituted himself, as is well-known, the champion of Mr. Goodeve-Erskine, by whom he is described in the above letter as "the acknowledged greatest modern authority on Scotch Peerage Law." As we are specially referred by Mr. Goodeve-Erskine to Lord Crawford's defence of his position, we may, without question, accept its statements as the best exposition of his case. Here then is his version of these facts :—

"On the death of the late Earl of Mar in 1866, without issue, and leaving (*sic*) 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" (*i.e.* Mr. Goodeve-Erskine) "having been, not brother's, but sister's son of his predecessor†. . . the House,—acting on the traditions handed down from 1762 and 1771, but which (*sic*) possess (as I have also asserted) no legal validity, refused from the first to recognise Lord Mar" (*i.e.* Mr. Goodeve-Erskine), "even provisionally as Earl in possession." †

Here we come to the first point of divergence, *viz.*, the *legal presumption*. The House acting, as Lord Crawford observes, on its traditions, held that the legal presumption was in favour of Lord Kellie's succession, and that the burden of proving the contrary lay on Mr. Goodeve-Erskine. Lord Crawford, *per contra*, argues that the traditions of the House are wrong, and that the presumption ought to have been in favour of Mr. Goodeve-Erskine's succession, and the burden of disproving it thrown on Lord Kellie. Without pronouncing his view to be right or wrong, we must bear in mind that here, as Lord Redesdale observes, "Lord Crawford sets up his own opinion against Lord Mansfield's,"§ and that we cannot be called upon to accept, as a legal axiom, Lord Crawford's own view with the consequences which flow from it. We are here, in fact, confronted with the difficulty to which I alluded at the outset, *viz.*, the confusion of two distinct questions—(1) the justice or injustice of the Committee's proceedings, and (2) the consequences flowing from their decision, irrespective

* It may be as well to explain that, so far as Dignities are concerned, there are no "co-heirs" in Scotland as in England. Where a dignity is heritable by heirs-female, it is wholly vested in the *eldest* "heir-portioner" and her heirs.

† *Earldom of Mar*, I. 3

„I. 12

§ *Letter on the Earldom of Mar* (1883), p. 5.

of its justice. It is with the latter question, exclusively, that we are dealing, and we must therefore accept without dispute the traditional view of the legal presumption held by the House of Lords. We must, moreover, remember that it was on this view that the proceedings of the Committee were throughout based,* and that it is essential, if we would enter into the spirit of their decision, to keep steadily in mind the point of view from which that decision was pronounced.

So far, however, it will be observed, it is only a question of *presumption*,—a question on whom the *onus probandi* should be thrown. The Lords admitted that Mr. Goodeve-Erskine had a right to disprove, if he could, the presumption in favour of Lord Kellie. The Earl of Crawford admits that Lord Kellie had a right to disprove, if he could, the presumption in favour of Mr. Goodeve-Erskine.†

Passing from the legal presumption to the actual claims to the dignity, it will help us to a clear understanding of the position if we express the rival claims to the disputed Earldom in the logical form of syllogisms. Mr. Goodeve-Erskine's contention, as repeated and enforced by Lord Crawford, will then stand thus :

The (existing) Earldom of Mar descends to the heir-of-line.
I am the heir-of-line.

Ergo, The (existing) Earldom of Mar descends to me.

Here we see the advantage of the syllogism. Lord Crawford, by running the two premisses into one, conceals the *petitio principii* involved in the major premiss. His words are—

“He was served as one and the elder of the two nearest and lawful heir-portioners in general to . . . 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 needed to the full and legal establishment of his status and right” (*Earldom of Mar*, I. 5).

it will, of course, be perceived that the service in question merely proves the minor premiss, and that to speak thus glibly of the Earldom of Mar as “a dignity descending to heirs-portioners” is simply to beg the entire question.

We now come to Lord Kellie's claim, and we discover by the syllogism that its major premiss directly traverses and negatives Mr. Goodeve-Erskine's contention :—

The (existing) Earldom of Mar descends to the heir-male.
I am the heir-male.

Ergo, The (existing) Earldom of Mar descends to me.

Here we have the question *nettement posée*. Was the (existing) Earldom of Mar descendible to the heir-of-line or to the heir-male? This was the point which the House of Lords were called upon to decide. The Dignity in dispute, be it remembered, was simply the *existing* Earldom, the Earldom admittedly vested in the late Earl of Mar and Kellie, the Earldom on the Union Roll.

But the practical and broad issue—“Was the (existing) Earldom of Mar descendible to the heir-of-line or to the heir-male?”—involved a sub-issue, *viz.*, Was the (existing) Earldom of Mar the original territorial and feudal Earldom, or was it a Peerage Dignity created in 1565? The former was the contention of Mr. Goodeve-Erskine, the latter of the Earl of Kellie.

Here, then, we have both an issue and a sub-issue to be severally decided by the House of Lords, but both of them relating, admittedly and avowedly, to the one and only existing Earldom, the Earldom on the Union Roll, *the* Earldom of Mar.

In support of my assertion that this was the Earldom claimed by the late Earl of Kellie, I proceed to quote from the present Earl's “Letter to the Peers of Scotland,” and also from the work of Lord Crawford, the spokesman of Mr. Goodeve-Erskine.

LORD KELLIE.

“The investigations to which I have referred resulted, in a few months, in my father being convinced that the Mar dignity *as at present existing* was limited to heirs-male. . . My father lost no time in presenting a petition to the Queen, claiming *the title of Earl of Mar*, on the grounds. . . 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” (*Letter to the Peers of Scotland*, 1879).

* “The presumption was held throughout by the Committee for Privileges to be in favour of Lord Kellie as heir-male, and the *onus* of disproving Lord Kellie's claim thrown upon Lord Mar (*i.e.* Mr. Goodeve-Erskine) as heir-general” (*Earldom of Mar*, II. 117).

† “He (Mr. Goodeve-Erskine) was, and is, entitled to recognition as Earl of Mar from all men, till the heir-male can establish a preferable right” (*Earldom of Mar*, II. 116.)

LORD CRAWFORD.

"It is no less matter of notoriety that *the dignity of Earl of Mar* was claimed by the late Earl of Kellie . . . 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 . . . 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" (*Earldom of Mar*, I. 5).

"Walter Coningsby, Earl of Kellie, the heir-male, claimed *the Earldom of Mar* by petition to the Crown, dated 23rd May, 1867 . . . Lord Kellie claimed *the Earldom* . . . as a comparatively modern Earldom, affirmed, as I have repeatedly stated, to have been created by Queen Mary in 1565" (*Ib.*, II. 116).

Here, then, we have it recognized on both sides that the dignity claimed by the Earl of Kellie was the ("one and only") *existing* Earldom. Let us now ascertain from the same sources what was the decision of the House of Lords on the claim thus made, and on the plea by which it was supported.

LORD CRAWFORD.

"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 5th 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 . . . hath made out his claim to the honour and dignity of Earl of Mar in the Peerage of Scotland, created in 1565" (*Earldom of Mar*, I. 6).

LORD KELLIE.

"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?" (*Letter to Peers of Scotland*).

LORD CRAWFORD.

"The answers of the Committee for Privileges to the two questions formulated by Lord Kellie, as put to the Committee, may be presented in their simplest form thus:—*The Earldom of Mar which now exists on the Roll of Scottish Peers, and which was held by the Earl of Mar and Kellie who died in 1866*, was a new creation by Queen Mary, and not the restitution by her of an ancient dignity; and, 2, The new dignity created by Queen Mary was limited to heirs-male of the body, and not descendible to heirs-general. These answers are based, as I have fully recognised, on the traditional rules and principles of the House of Lords, adopted since 1762 and 1771" (*Earldom of Mar*, II. 118).

This admission of Lord Crawford's—an admission of vital importance—faithfully and accurately represents the Resolution of the Committee for Privileges, subsequently confirmed and acted upon by the House of Lords. Their Resolution decided the two issues distinctly and severally:—

(1) The issue whether the existing Earldom (which, as we have seen, was admittedly the Dignity claimed by Lord Kellie) was descendible to the heir-male (the claimant) or not; this they decided by the words,—

"The claimant . . . hath made out his claim to *the honour and dignity of Earl of Mar in the Peerage of Scotland*."

(2) The issue whether the existing Earldom was created in 1565 or not; this they decided by the rider,—

"Created in 1565."

And that there may be no question as to this being the true and only meaning of the Resolution, I subjoin, from the "Judgments" of the three Lords, the conclusion at which they had arrived on the two issues raised, which conclusions were embodied in the above Resolution, drawn up by themselves. It follows that it is only in the light of their conclusions that we can interpret the words of their Resolution.

LORD CHELMSFORD.

"My Lords, upon a review of all the circumstances of the case, I have arrived at the conclusion . . . that *the creation of the dignity by her*" (Queen Mary) "*was an entirely new creation*, and there being no charter or instrument of creation in existence, and nothing to show what was to be the course of descent of this dignity, the *primâ facie* presumption of law is, that it is descendible to heirs-male, which presumption has not in this case been rebutted by any evidence to the contrary."

"I am therefore of opinion that the dignity of Earl of Mar created by Queen Mary is *descendible to the heirs-male* of the person ennobled, etc., etc."

LORD REDESDALE.

"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.*"

LORD CHANCELLOR (Lord Cairns).

"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 . . .* 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 . . .

"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."

Having now established, beyond a doubt, that the dignity which was claimed by the Earl of Kellie, and to which, in the words of the Resolution, "he hath made out his claim," was the only existing Earldom of Mar,—or, to employ Lord Crawford's words, "the Earldom of Mar which now exists on the Roll of Scottish Peers, and which was held by the Earl of Mar and Kellie, who died in 1866,"*—I pass to the "Orders of the House" based on the above Resolution.

"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 any 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."

It will be perceived that the third and last of these Orders is in exact accordance with everything that has gone before. It contemplates no other Dignity than the Earldom of Mar standing on the Union Roll ("on the Roll of Peers of Scotland called at such election"), nor indeed could it do so, in view of the avowed nature of Lord Kellie's claim, and of its entire recognition by the Committee for Privileges and by the House. But, superfluous though it may seem, I shall now adduce evidence that the Order has been so interpreted by those most concerned with it and best qualified to judge.

(1) THE LORD CLERK REGISTER OF SCOTLAND.

This officer at the next election (1876) allowed Lord Mar and Kellie to answer to the title of Earl of Mar, when called "according to its place on the roll of Peers of Scotland," and received his vote "in right of the said Earldom," despite the energetic protests of Mr. Goodeve-Erskine and his supporters, on the ground that "he had no choice but to obey the order he had received from the House of Lords, and which was *perfectly clear and distinct.*" †

(2) THE PRESENT LORD CHANCELLOR (Lord Selborne).

Speaking of the order in question (relating to Lord Kellie's Earldom of Mar), Lord Selborne (who had himself been counsel for Mr. Goodeve-Erskine) observed in the famous debate of 1877:—"My Lords, I not only say that the natural meaning of these words is that it should be called according to the actual place which it had upon the Roll . . ., the place which that earldom had and was entitled to upon the existing Roll of Peers. . . . The decision asserted virtually, though not in form, that *there was only one Earl of Mar*, and that there had only been one Earl of Mar since 1565, and that was *the holder of the Earldom created in that year*. But upon the Union Roll, and the Roll of the Peers of Scotland, there always had been an Earl of Mar standing, and *therefore the place of the Earldom of Mar* (if there was only one) upon the Roll of Peers *was its existing place upon that Roll*, and not any new or different place." ‡

* *Earldom of Mar*, II. 118.

† *Earldom of Mar*, II. 154.

‡ Lord Selborne's speech acquires additional importance from being spoken in support of the successful amendment which has been persistently claimed by Mr. Goodeve-Erskine and his supporters as a victory for their principles.

(3) THE LATE LORD CHANCELLOR (Lord Cairns).

Speaking of the order in question, in the debate of 1879, the then Lord Chancellor observed :—

“The order of your Lordships’ House to the Lord Clerk Register is this : That he is to call the title of the Earl of Mar according to its place in the Roll of the Peers of Scotland. He has no authority to put it in a different place ; he must call it in the place where he finds it ; it is only found in one place ; and when he calls it, and it is answered, he is ordered to receive and count the vote of the person who has been adjudged to be Earl of Mar and Kellie in answer to that call. *I cannot myself see that any question can really arise as to the duty of the Lord Clerk Register ; the order of your Lordships’ House speaks for itself ; and the Lord Clerk Register has nothing to do but to obey it.*”

This statement of Lord Cairns is of special importance as a reply to the quotation in an article,—“Jurisdiction in Scottish Peerages,”*—which will subsequently be further noticed, viz.—“The report of the Select Committee, in whose appointment that debate (1877) resulted, drawn up by the same noble and learned Lord (Lord Cairns), himself one of the Committee of Privileges who concurred in the resolution of 1875 remarks,

It may be a question whether under this Resolution it was the duty of the Lord Clerk Register to call the Earldom of Mar in the place in which the Earldom of Mar actually stands on the Union Roll, or in what would be the place of an Earldom of Mar created in 1565 ; but it appears that the Lord Clerk Register called it in the place in which it actually stands on the Union Roll.”

Lord Cairns’ speech, quoted above, is a sufficient rejoinder to the words here attributed to him, and is, it will be seen, in complete accordance with the other authorities quoted.

(4) THE EARL OF CRAWFORD.

Lord Crawford admits that the order directed the Lord Clerk Register “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 again, “The order in question intrudes Lord Kellie, as Earl of Mar, under the alleged creation of 1565, into the place and precedence of the ancient Earldom of Mar, *the only Earldom of Mar on the Union Roll.*”‡ Once more, he speaks of it as “The order upon the plain and obvious sense of which the Lord Clerk Register acted the order . . . commanding him to allow Lord Kellie to vote as Earl of Mar in the place of the *Earldom of Mar on the Union Roll* an order admitting of no hesitation or question. §

It is clear, then, from the admission of these four authorities, that the order directed Lord Mar and Kellie’s vote to be received *in right of the Earldom of Mar standing on the Union Roll*, and that by so doing it identified the Earldom to which he had “made out his claim” with the (only) Earldom on the Union Roll, the only Earldom, as has been repeatedly shown, recognised on either side as existing.

But from the instant that we leave this common ground we are plunged into hopeless confusion. The only means by which we can steer a clear course amid the quibbles and sophistries by which we shall now be beset is by keeping an unswerving gaze on the one fixed point, guided by which, as by a beacon-light, we can never go astray. That fixed point is *the EXISTING Earldom of Mar*. Here at least we know what we deal with. The Earldom held by Lord Mar and Kellie who died in 1866, was admittedly the only *existing* Earldom, the Earldom on the Union Roll. *This* was the Earldom which Lord Kellie claimed, and to *this*, by Lord Crawford’s admission, the Lords held that he had “made out his claim.” My objection to those loose terms, “the ancient” and “the modern” Earldom, is that there is nothing in the meaning of either term to tell us, when it is employed, whether it refers to the (only) *existing* Earldom, the one fixed point from which we must not allow ourselves to be decoyed. It is this very ambiguity which has enabled these terms to be used as the thin end of the wedge for introducing the heresy of a double Earldom, for setting up an *existing* Earldom in the person of Mr. Goodeve-Erskine, by the side of the (only) *existing* Earldom vested in Lord Mar and Kellie (*see p. 167*).

Holding, personally, a view distinct from that held on either side,—namely, that objectively there has never been but one Earldom of Mar, though, subjectively (that is, relatively to its several lines of holders), there have been as many Earldoms as there have been creations,—I recognise the same Dignity under its “ancient” and under its “modern” *avatar*, and see, even more plainly, the fallacy of these misleading terms. But this would lead us into the whole controversy, and that is not now our object.

* *Journal of Jurisprudence and Scottish Law Magazine*, May, 1883.

† *Earldom of Mar*, 1. 6.

‡ *Id.*, II. 148.

§ *Id.*, II. 162.

Lord Crawford's views on (a) the effect, and (b) the validity of the Lords' third Order afford so excellent an illustration of the method pursued by Mr. Goodeve-Erskine's party, that special attention must be called to them.

His views on the *effect* of the Order are summarised in the extracts I have given (p. 152). He asserts that it "intrudes" Lord Kellie's Earldom "into the place and precedency of the *ancient* Earldom of Mar" on the Union Roll. Now it was simply unpardonable that a controversialist, who would not allow the effect of the Mar Resolution to be determined from anything but its own words—not even from the conclusions on which he admitted it to be based—should himself not only import into his description of this Order the term, "the ancient Earldom," which is not to be found in it, but should do so in absolute defiance of what I have shown to be its clear intent! Why, to assume thus coolly that the *existing* Earldom, the Earldom on the Union Roll, was "the *ancient* Earldom," was simply to beg the whole question, and to decide the controversy beforehand. Yet it is on this assumption, and on this alone, that Lord Crawford's position here rests.

His views on the *validity* of the Order flow, as a matter of course, from the above views on its *effect*. Starting from the assumption that the Earldom on the Union Roll was what he was pleased to term "the ancient Earldom," and therefore could not be identified with the "Earldom adjudged to Lord Kellie,"*—an assumption which, whether right or wrong, was nothing but his own assumption, and was directly opposed, as I have shown, to the Lords' view—he argues that the Order intrudes a "newly-discovered Earldom"† into the seat of this "ancient Earldom," and, consequently, that—

"It proceeds upon an assumption that the House had legal power to ordain alteration in the precedency of the Peers of Scotland; in other words, as I have said, to tamper with the Union Roll. . . . The House of Lords has no legal power to deal with the Union Roll; and I shall presently show that the House itself disclaimed such power subsequently to the issue of the Order here in question, thus admitting that this third Order was *ultra vires*, and therefore illegal."‡

But if the House disclaims, as it did disclaim (1877), any legal power" (as the law stands) "to deal with the Union Roll," how is it that this obnoxious Order remains unrescinded by the House of Lords, "a thorn" (says Lord Crawford) "in Lord Mar's side, which ought to be plucked out by those who planted it there?"§ Why, *for the very reason* that, in the opinion of the House, it does *not* "tamper with the Union Roll," and therefore does *not* assume the power which the House has admittedly disclaimed. And if the House holds that it does *not* "tamper with the Roll," it follows that (as we have seen), in the opinion of the House, it "intrudes" no "newly-discovered Earldom," but recognises that the Earldom of Mar *existing on the Union Roll* was the Dignity to which Lord Kellie "hath made out his claim." Thus the conclusion to be drawn from Lord Crawford's argument is, that the House *must have viewed Lord Kellie's Earldom as the Earldom on the Union Roll*.

Lord Crawford's arguments on this obnoxious Order afford, as I have said, an excellent illustration of the method systematically adhered to by Mr. Goodeve-Erskine and his supporters. That method consists in persistently confusing two utterly distinct questions:

(A) Is the decision of the Lords right or wrong?

(B) Accepting that decision "as a competent decerniture"|| (irrespective of the question whether it was right or wrong), how is it intended to affect the Earldom, *i.e.*, the only existing Earldom, the Earldom on the Union Roll? Let us now trace the results of that confusion.

The Mar Resolution of the House of Lords is frankly admitted by both sides to have rested on three propositions—

(1) That the legal presumption was in favour of Lord Kellie's succession to the Earldom¶ till the heir-female could prove the contrary.**

(2) That "the Earldom of Mar, which now exists on the Roll of Scottish Peers, and which was held by the Earl of Mar and Kellie who died in 1866, was a new creation by Queen Mary" (*Earldom of Mar*, II. 117).

(3) That "the new dignity created by Queen Mary" (*i.e.* as above, the *existing* Earldom) "was limited to heirs-male, and not descendible to heirs-general" (*Ib.*)

Let it be carefully observed that both the Resolution and the Order flowing from it, when

* *Earldom of Mar*, II. 22. † *Earldom of Mar*, I. 6. ‡ *Ib.*, II. 148. § *Ib.*, II. 336.

|| *Journal of Jurisprudence* (May), p. 243.

¶ *i.e.*, the existing Earldom, the Earldom on the Union Roll.

** "The presumption was held throughout by the Committee for Privileges to be in favour of Lord Kellie as heir-male, and the *onus* of disproving Lord Kellie's claim thrown upon Lord Mar" (*i.e.* Mr. Goodeve-Erskine) "as heir-general" (*Earldom of Mar*, II. 117).

interpreted by these three propositions, *on which they are admitted to rest*, are perfectly consistent and clear, and present no difficulty whatever.

How then is it possible to evade the consequences flowing from this Resolution, which itself similarly flows from the above three propositions? There is but one honest and consistent way by which this can be done, and that is by declaring, in the words of Lord Crawford's "Additional Protest," that the

"Resolution, although confirmed by the Peers and approved of by the Sovereign, is inoperative, and must be held null and void."*

Unfortunately, however, the way which has been selected is one which most certainly is neither honest nor consistent. Mr. Goodeve-Erskine and his supporters have resolved to accept the Resolution itself "as a competent decerniture," but to reject by a flat and direct negative each one of the three propositions on which it is admittedly based! *They then, on the one hand, forbid us to interpret the words of the Resolution in the light of the propositions on which they admit it to be founded, while, on the other, they themselves insist on interpreting it in the light of their direct negation of each and all of these propositions!* A more audacious device it is not possible to conceive, and yet it can be absolutely established that my statement is literally true.

Here are their three assumptions, which, as I have said, severally negative the three *rationes* on which the Mar Resolution rest:—

(1) That the legal presumption is in favour of the heir-general,† and the *onus* of disproving it on the heir-male. Consequently, in the case of the Earldom of Mar,‡ that Mr. Goodeve-Erskine "was, and is, entitled to recognition as Earl of Mar from all men, till the heir-male can establish a preferable right"§ to the Earldom.

(2) That "the Earldom of Mar which now exists on the Roll of Scottish Peers, and which was held by the Earl of Mar and Kellie who died in 1866," *cannot have been* "a new creation by Queen Mary."

(3) That the said Earldom of Mar *must be* descendible to heirs-general, and *cannot have been* limited to heirs-male, even had it been (which it was not) "a new creation by Queen Mary."||

These assumptions should be carefully compared with the three propositions which they respectively traverse, for it will be found that they are the fundamental axioms on which Lord Crawford based his case, and in the light of which, as I have observed, he interpreted the Mar Resolution. I propose now to show how the attitude which has been assumed by Mr. Goodeve-Erskine and his supporters is entirely based on the application of these axioms to the Resolution of the House of Lords, which Resolution, as we have seen, is admittedly founded on the direct negation of these very axioms!

Here is their argument concisely stated: By the second and third axioms the existing Earldom (admitted on all sides to be the Earldom on the Union Roll) cannot have been created in 1565, and cannot be descendible to heirs-male. But the Earldom of Mar to which, by the Resolution, Lord Kellie "hath made out his claim," is declared to have been "created in 1565," and to be descendible to heirs-male. *Ergo*, Lord Kellie's Earldom of Mar cannot be the existing Earldom, the Earldom on the Union Roll. (If it is not this, what else can it be?) Again, by the first axiom, Mr. Goodeve-Erskine (under the legal presumption in favour of the heir-general) has a right to the (existing) Earldom till the heir-male proves a better right to it. But it has just been shown that the heir-male has not obtained the *existing* Earldom at all. *Ergo*, Mr. Goodeve-Erskine's presumptive right to that Earldom not having been even challenged, he is in possession of this, the only existing Earldom, the Earldom on the Union Roll.¶ Q.E.D.

Moreover, it follows, as a corollary from this, that as Lord Kellie's Earldom of Mar is an "aggression upon the unity and integrity of the one and only Earldom of Mar standing upon the Union Roll" (*Earldom of Mar*, II. 140), of which, as shown above, Mr. Goodeve-Erskine is "in legal possession," and as "it is impossible that the two dignities can co-exist" (*Ib.*, II. 222), Lord Kellie's Earldom of Mar is a "phantom. . . which has no backbone of its own, and exists only through the force of illegal strain."** Consequently the Mar

* *Earldom of Mar*, I. 22.

† *i.e.* the existing Earldom, the Earldom on the Union Roll.

‡ *Earldom of Mar*, I. 107.

§ *Earldom of Mar*, II. 116.

|| "It follows equally that on the hypothesis of a new creation in 1565, the heir-general, and no other, inherits under it" (*Earldom of Mar*, II. 251). . . . "He would have an equal right. . . under the alleged new creation of 1565, founded on by Lord Kellie, . . . if it ever had existed" (*Ib.*, II. 129).

¶ "A peer whose status has not been in the slightest degree legally affected or compromised by anything which has taken place in the House of Lords or out of it" (*Earldom of Mar*, II. 222).

** Letter to the *Scotsman* (18 April), appealed to by Mr. Goodeve-Erskine.

"Resolution, although confirmed by the Peers and approved of by the Sovereign, is inoperative, and must be held null and void."* Q.E.D.

See, then, how logically all follows if we will only accept, as fundamental axioms, the very assumptions which Lord Kellie denied, and which the House of Lords admittedly rejected! Let there be no misunderstanding here. Let us say to Mr. Goodeve-Erskine and his supporters, You have a perfect right to denounce, if you will, the "Resolution and judgment" of the House of Lords "as a Resolution erroneous both in law and fact,"† or even more tersely as a "blunder;"‡ but you have not a right, while confessing with your lips that "as a competent decerniture it must be acquiesced in,"§ to deny, nevertheless, every one of the premisses on which you admit that decerniture to be based, and—*having thus reduced the Resolution itself to unmeaning and unintelligible nonsense—to proclaim that the nonsense which you have thus yourselves evolved is the actual meaning of the decision*, and to apply to this nonsense the words of Lord Cairns, that "we ought to be very careful not to go beyond what the decision *actually was!*"||

I repeat that the Resolution, of which the meaning is clear when we interpret it by its avowed and admitted *rationes*, becomes "unmeaning and unintelligible nonsense" when we interpret it by their opposites. For what does its meaning then become? We are asked to accept as its true meaning that "the Earldom of Mar" to which Lord Kellie had "made out his claim" was not "the Earldom of Mar" at all, but "a new Mar title not on the Union Roll,"¶ a "newly-discovered Earldom,"** a "creation unknown to Scottish law and Scottish history.†† And let us remember that this is represented as the *real intent and meaning of the Resolution itself*, and that we are asked to believe that this Mar Resolution had no intention of identifying the Earldom of Mar, which it recognised as vested in the Earl of Kellie, with the Earldom of Mar on the Union Roll‡‡ (*i.e.* the only existing Earldom, and the only one of which the House could take cognisance!)

This brings us to the key of the position, *viz.* the contention that Mr. Goodeve-Erskine being "in legal possession" of the "*ancient*" Earldom, that possession is not disturbed by Lord Kellie having obtained the "*modern*" Earldom.§§ I invite the closest attention to that "equivocation on the facts of the case"||| (as Mr. Hewlett has well described it) by which it is sought to establish this contention. *What is the meaning of the "ancient" Earldom?* It is on the precious ambiguity of the term "ancient" that the whole equivocation rests. Does it mean the Earldom which Lord Chelmsford believed to have "come to an end more than a century before Queen Mary's time," the Earldom which "existed (in Lord Hailes' words) before the era of genuine history"? or does it mean the now *existing* Earldom, the Earldom vested in the late Earl of Mar and Kellie? Here we have the key to the "equivocation." It is assumed, as a fundamental axiom, by Mr. Goodeve-Erskine and his supporters, that the Earldom of Mar which now exists on the Roll of Scottish Peers, and which was held by the Earl of Mar and Kellie who died in 1866, *was, and could only be, "the ancient Earldom."* But, by the admission of Lord Crawford (p. 148), "the answer" contained in the Mar Resolution was that—

"The Earldom of Mar which now exists on the Roll of Scottish Peers, and which was held by the Earl of Mar who died in 1866, *was a new creation by Queen Mary.*"

Consequently, when *the supporters of that Resolution* speak of the "ancient" or "original" Earldom, they mean by that term, *not* the Earldom on the Union Roll, but a (hypothetical) Dignity "older than and different from"¶¶ that *existing* Earldom which the Resolution declared, as is admitted above, to be "*a new creation by Queen Mary.*" As it was plainly put by Lord Saltoun, at Holyrood, in 1880—

* *Earldom of Mar*, I. 22.

† *Journal of Jurisprudence* (May 1883), p. 243.

‡ *Ib.*, p. 244. § *Ib.*, p. 243.

|| *Ib.* ¶ Mr. Goodeve-Erskine's Letter to the *Times*.

** *Earldom of Mar*, I. 6. It seems to be suggested by their hypothesis that the Lords must have held that Queen Mary conferred the Earldom of Mar in 1565 as a superimposed dignity on a man who was already in possession of the Earldom of Mar under a far earlier creation!

†† Letter to *Scottsman*, *ut supra*.

‡‡ "Mr. Hewlett is therefore on every ground wrong in contending that the decerniture of 1875 has legally settled the question that the old Earldom is extinct, or that the title of 1565 adjudged to the present Earl of Mar and Kellie is to be identified with the Earldom on the Union Roll" (*Journal of Jurisprudence*, May 1883, p. 244).

§§ "The decision of 1875, conceding to Lord Kellie a new Mar title. . . has not dealt with the ancient Earldom" (Mr. Goodeve-Erskine's Letter to the *Times*. See also Lord Crawford's work, *passim*).

||| *Jurisdiction on Scottish Peerage Claims* (1883).

¶¶ *Earldom of Mar*, II. 306.

"If there was another Peerage of Mar, if there was an older Peerage, and if the old territorial Peerage of Mar did not come to an end in 1377, then Mr. Goodeve-Erskine could claim that Peerage, and could go before the House of Lords and there establish his claim."

Or, as the Lord Clerk Register has lately expressed it (see p. 161)—

"It really turns upon the existence of a particular peerage at all."

Thus, when Mr. Goodeve-Erskine tells us that "the decision of 1875. . . has not dealt with the ancient Earldom,"* or when the *Journal of Jurisprudence* declares that it "did not necessarily extinguish the ancient Earldom," these statements may be perfectly true *in the above sense of the term* (the sense in which it is understood by the House of Lords),—viz., an Earldom of which the very existence has yet to be proved,—but they are not true, if by "the ancient Earldom" they mean, as they do mean, the *existing* Earldom, the Earldom on the Union Roll. For to assume that this latter Dignity is necessarily "the ancient Earldom" *is to beg the whole question*. This was just the very issue that, as Lord Crawford admits (p. 148), was raised before the Committee in the Mar case, and was decided against Mr. Goodeve-Erskine.† The House of Lords have, throughout been perfectly consistent in their views. Treating the Dignity claimed by Lord Kellie as the (only) existing Earldom of Mar, they insisted on Mr. Goodeve-Erskine styling himself, not Earl of Mar, but "*claiming to be* Earl of Mar," while the claim to *the* Earldom was pending, and when that Earldom had been adjudged to Lord Kellie, they proved that, in their view, it was the only one existing, by ordering Mr. Goodeve-Erskine to drop even the style—"claiming to be Earl of Mar." As it was expressed by the present Lord Chancellor, when opposing Lord Galloway's motion (14 June, 1880), he

"Rested his objections to the course now proposed on this fact, that there was, on the Union Roll, only one Earl of Mar; there had never been more than one, and *it must be determined judicially that there existed another Earldom of Mar* before their Lordships could rescind the order and adopt the motion, which proceeded essentially upon the assumption that there was another."

It is of such vital importance to obtain a clear grasp of this pivotal point, "the ancient earldom," that it may be as well to illustrate it by the only case which affords some parallel to its peculiar features. I refer to "the Earldoms of Ormond in Ireland," of which I have already treated in these pages. In that case, as in that of Mar, we have, on the one hand, an existing Earldom, descendible to heirs-male; itself created in the sixteenth century, but ranking as of earlier date. So far the correspondence is complete. On the other, we have in both cases an Earldom, homonymous, but earlier in date, known in the case of Ormond, and asserted in the case of Mar, to have been descendible to heirs-of-line. And in both cases this earlier Earldom has neither been held, nor even recognised as extant, for more than three centuries.‡ But at this point begins a wide divergence, for, though the earlier (or Boleyn) Earldom of Ormond has so long remained unclaimed, there is a very strong presumption that it is not extinct, but merely dormant. But in the case of the earlier Earldom of Mar, we not only stand on the most precarious ground, but we have even "the certainty" (as Lord Crawford admits) that it must inevitably be pronounced extinct when (if ever) it is claimed. And the reason of this divergence is not far to seek. For the existence of the Boleyn Earldom of Ormond would, if recognized, be in no way incompatible with the co-existence of the Butler Earldom. But as to the two Earldoms of Mar, Lord Crawford himself hastens to assure us that "it is impossible that the two dignities can co-exist." Indeed the existence of either is incompatible with that of the other, and consequently, as he confesses,

"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."

We are enabled by this comparison to form a clearer idea of Mr. Goodeve-Erskine's position. For we see that the heir-general of the Earls of Berkeley, in whom is now vested the right to the Boleyn Earldom of Ormond, would be infinitely more justified in assuming that Dignity and proclaiming herself "in possession" of the same, than is Mr. Goodeve-Erskine in so assuming his hypothetical Earldom of Mar. The persistent contention that, by Scottish law, he succeeded *jure sanguinis* to his uncle's Dignity, is wholly based, we must remember, on the hypothesis that the Earldom which he has assumed—"the ancient Earldom"—was the Dignity vested in his uncle. But by Lord Crawford's admission, the House of Lords has decided that

* Letter to the *Times*. † *Earldom of Mar*, II. 117, 118.

‡ According to the decision of the Lords that the existing Earldom was that of 1565. ("The decision asserted virtually, though not in form, that there was only one Earl of Mar, and that there had been only one Earl of Mar since 1565, and that was the holder of the Earldom created in that year."—LORD SELBORNE).

the Dignity vested in his uncle was a "new creation by Queen Mary,"* and *not* "the ancient Earldom." Consequently, if we accept the Lords' decision, that contention falls to the ground.

Having now shown how the case truly stands, when cleared from sophistry and quibble, I must deal, as briefly as possible, with the latest effort to obfuscate the truth.

Mr. Goodeve-Erskine, in his letter to the *Times*, announces that Mr. Hewlett "expressed ignorance on the subject," and that

"His many errors and fallacies are fully refuted in the *Scotsman* of the 25th of April, in the *Journal of Jurisprudence and Scottish Law Magazine* for May, and in 'The Earldom of Mar during 500 years,' by the late Earl of Crawford."

As Lord Crawford was dead before Mr. Hewlett wrote, and as the *Scotsman* of the 25th (*sic*) April contains no allusion to the subject, this passage will give us no high idea of Mr. Goodeve-Erskine's accuracy. The *Scotsman* of the 18th April contains a violent letter on the Earldom (but without alluding to Mr. Hewlett), to which I shall refer anon; and there remains the Article in the *Journal*. This article may certainly, in one sense, be described as "ably written," for its author contrives, in the case of Mar, to convey a series of false impressions, without actually committing himself to falsehood,—save, indeed, in the case of the Lord Clerk Register's evidence, where the "suppressio veri" is eked out by something stronger than a mere "*suggestio falsi*." Here is the Lord Clerk Register's evidence, and the garbled version of it in the *Journal* side by side.

MINUTES OF EVIDENCE.

148. *Lord Ker*.] "Taking the matters as they stand, without going into this question, *supposing there was a doubt* with reference to the right of a Peer claiming to vote, *what course do you think is open to him in a case like this*, where there has been a claim as in the two Earldoms of Mar; what would happen to the other Earl of Mar, supposing he has a fair claim?"

L. C. R.]"—"Whoever had the misfortune to be Lord Clerk Register at that time would have to act upon his own judgment as to whether there was a *primâ facie* probability of there being an older Earldom of Mar; and if so he might be inclined to receive the vote; *but on the other hand, if he thought that the Acts defining the 1800 limit, and the decision of the Committee of Privileges, and other considerations, rendered it wrong to receive a double vote for the same title, although in a totally different plane, he would then be obliged to refuse the vote.* It would be a question of extreme difficulty and delicacy, and I am extremely thankful that it has never fallen to my lot to administer it."

It will be observed that the Lord Clerk Register's reply was *not* an answer to a question "how his predecessor ought to have acted on receiving such an order," but how he or his successor "would have to act"; and it will moreover be seen from the suppressed passage (printed in italics) that he never contemplated the idea of Lord Mar and Kellie's vote being refused when "Mar" was called on the Roll of Peers. What he did contemplate was the contingency of Mr. Goodeve-Erskine, not as the holder of the *existing* Dignity, but as the claimant of "an older Earldom of Mar" (of which the very existence was a matter of doubtful probability)—a Dignity for which no vote had been tendered in the present century (or, indeed, at any other time), and which consequently came under the provisions of the Act of 1847,—tendering his vote when "Mar" was called in right of his dormant (if not extinct) Dignity. For in whatever place the title were called, he might always consider that it applied, and applied only, to the (dormant) Dignity which he claimed.† That I have here correctly interpreted the Lord Clerk Register's view, is proved by the reply he had previously given when pressed to recognise Mr. Goodeve-Erskine as a Peer, and not as "a claimant for a Peerage."

L. C. Register]...They (the Protests) had relation to the case of a claimant for a Peerage who was not present.

Lord Brabourne] Is it right to call the gentleman in question a claimant to a peerage?

* Earldom of Mar, II. 118.

† This was pointed out in that Report of the 1877 Committee, to which we are so constantly referred:

"It would be in the power of Mr. Goodeve-Erskine to answer to the name, in whatever order of precedence it was called, or to claim to vote as Earl of Mar, irrespective of any calling of the name."

L. C. Register] I hardly know how to express it otherwise of a gentleman who sincerely believes himself to hold a very ancient Earldom. I wish, of course, to speak of him with all possible respect, but I am obliged to use the word "claimant."*

Similarly, even in the 1877 Report, to which the writer in the *Journal* triumphantly refers, we find the Committee, as Lord Crawford complains, "determinedly bent on representing Mr. Goodeve-Erskine as a claimant,"† as indeed they were bound to do, holding that Lord Kellie had "made out his claim" to the *only existing* Earldom, and, consequently, that if there were an "older and different" Earldom to which Mr. Goodeve-Erskine had a right, it could only be a *dormant* one, which had yet to be claimed. Frankly recognising that Lord Mar and Kellie's object was—

"That Mr. Goodeve-Erskine should not be allowed to answer to the title of Mar whenever it may be called, or to tender his vote,"

the Committee observes that—

"It is clear that no mere alteration of the place on the Roll, when the title of Mar is called, would have this effect,"

and reports that there are—

"Precedents of Orders made by the House, forbidding individuals to take upon themselves the title or the dignity of particular Scotch peerages *until their claim shall have been allowed in due course of law.*"

but that the Act of 1847 has now superseded the necessity for such orders, and has provided an effectual remedy for the annoyance:—

"The Report of the Committee of the House made in 1847, as to the question of what steps should be taken to prevent persons from voting at Elections of Representative Peers for Scotland, *who are not entitled to do so* . . . was followed by the Statute 10 and 11 Vict. c. 52, and this Statute appears to the Committee to have now provided a definite and practical mode of preventing the vote of any person *improperly claiming a title of Peerage in Scotland* being received or counted at any election."

Let it be borne in mind that the "Order" of the House of Lords in 1875 "must necessarily have referred," as Lord Cairns expressed it, to the only existing Earldom, the Earldom on the Union Roll (*See p.* 166). It speaks of "*the Title of Earl of Mar*" (*i.e.* the only existing title), and orders the vote of Lord Kellie, as "the Earl of Mar," to be received (as Lord Crawford frankly admits) "in right of the said Earldom." We shall find that the Report of the Select Committee of 1877 was emphatically based upon the same view. This Report similarly contemplates the existence of one, and only one, Earldom—"the Earldom of Mar" (*See p.* 150). It hints, indeed, at a possible doubt as to the correct place upon the Roll in which that Earldom (as being a creation of 1565) should be called, but it does not recognise the existence of any other Earldom on the Roll. A desperate effort, however, is made by the *Journal of Jurisprudence* (p. 243) to persuade us that the Report was, in Ulster's words, "apparently based on the non-identity of the title on the Union Roll with that of 1565"! The device employed is, as usual, a flagrant *suppressio veri*.

REPORT OF COMMITTEE.

"Where since the Union a title has been established to a Scotch peerage not on the Union Roll, the peerage to which the title has been so established has been placed upon the Roll in its proper precedence, according to the Resolution of the House. *And, on the other hand, where a title has been established to a Peerage already entered on the Roll, a note has been made opposite the peerage on the Roll, stating the title that has been thus established to it.*" . . . It may be a question," etc., etc.

It will be observed that the Committee here narrate, incidentally, the practice in the case of titles (*a*) *not on* the Roll, (*b*) *on* the Roll. But by the daring suppression of the passage in italics, the *Journal* endeavours to convey the impression that the Committee viewed the Earldom of Mar, to which Lord Kellie had "made out his claim," as a "peerage not on the Union Roll"!

It is also asserted in the *Journal* that this Report "recognises that a claim may yet be competently made by the heir-general 'to an Earldom of Mar older,' etc. etc.,"‡ but the true purport of the passage is, it will be seen, very different. The Report views Mr. Goodeve-Erskine in the light of any other claimant to a Peerage, who should assume a dormant (if not extinct) title to which he has not proved his right, and, so viewing him, lays down that

JOURNAL OF JURISPRUDENCE.

"Where since the Union a title has been established to a Scotch peerage not on the Union Roll, the peerage to which the title has been so established has been placed upon the Roll in its proper precedence according to the Resolution of the House. . . . It may be a question whether, under this Resolution, it was the duty of the Lord Clerk Register to call the (*sic*) Earldom of Mar in the place," etc., etc. (*See p.* 150.)

* *Minutes of Evidence*, p. 15.

† *Earldom of Mar*, II. 221.

‡ *Journal of Jurisprudence*, p. 243.

his case is provided for by the Act of 1847, which Act was based on the Report of a Committee that—

“The return of Representative Peers to the House of Lords may be affected, and the public subjected to frauds, by the conduct of persons acting as Peers of Scotland, who are not justly entitled to the honours they assume.”

The practical danger, it urges, of his so exercising the rights of Peerage is obviated by the safeguard that (under this Act) it is “competent for any two Peers to protest against his claim,” to vote in right of the Dignity he has assumed, and so to compel him to establish his right to it,* with the certainty, as Lord Crawford frankly admits, that if he tenders his vote, two peers will be prepared to protest against it. . . ., and the further certainty that, till the House formally abjure its traditional rules, it will decide against the law of Scotland and himself! † ‡

I trust I have now sufficiently unmasked the equivocation contained in the term “the ancient Earldom of Mar,” and have established that Mr. Goodeve-Erskine and his supporters have no right to take expressions which refer to that term in its sense of a dormant (if not extinct) dignity, and then apply them to it in the very different sense which they are pleased to place upon it themselves. Even if we admit with the *Journal of Jurisprudence* that the “Resolution and Judgment” of 1875 has not

“legally settled the question that the old Earldom is extinct” (244),

we must clearly see that Mr. Goodeve-Erskine has no more right to assume the title of that Earldom than the claimant of any other peerage dignity of Scotland who has not yet established his claim. As he was reminded by the Lord Clerk Register, at Holyrood, in 1876,—“At present you are only a Peer of your own creation, and that creation I cannot recognise here.” †

But why, then, it may be asked, when it is in Mr. Goodeve-Erskine’s power to put an end to the chaos which he has himself created, by putting his pretensions to the test, does not he (following the praiseworthy precedent of the titular “Earl of Banbury”) take steps to establish his claim? As Lord Redesdale has on this point well observed,—

“The present claimant particularly refused to take the necessary steps to prove his right to the ancient earldom, when resisting the claim of the present Earl of Mar, and when his doing so would not have been attended with any additional expense. *The traditional doctrine of the family has been to go on claiming the ancient earldom, and protesting against its not being allowed, in the belief that their right to it would, by degrees, be very widely accepted, but on no account to attempt to apply for a legal decision on the subject*” (Letter on the Earldom of Mar, 1883).

There is the very best of reasons why Mr. Goodeve-Erskine should refuse to establish his claim to the title which he persists in assuming, namely the “certainty,” as Lord Crawford expressed it, that the House must decide against his pretensions. And why is there this “certainty” beforehand? Because *the question has been already virtually, though not formally, decided, and because it is only by a legal quibble that this hypothetical dignity can be even so much as claimed.* Thus Lord Selborne, who had himself been counsel for Mr. Goodeve-Erskine, observed, in the House of Lords, speaking as Lord Chancellor (1st July, 1880):—

“Whatever else was doubtful, this was certain, that Lord Cairns” (then Lord Chancellor), “Lord Chelmsford” (a former Chancellor). “and the noble Earl the Chairman of Committees, grounded their decision on reasons absolutely inconsistent with the hypothesis of there being, at the date of the Decree of Ranking, two Earldoms of Mar. *If they had not believed that the evidence then before them proved the extinction, and failed to prove the restoration, of the ancient Earldom of Mar, it would have been impossible for them to hold that a Mar Peerage was created in 1565.*”

And here are Lord Crawford’s own words, emphatically recognizing the same fact:—

“*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.*” §

How, then, it may be asked, can this dignity be even *claimed*, if it has thus been practically decided to be extinct? Merely by the legal quibble, triumphantly set forth by

* “Viewing the claim of Mr. Goodeve-Erskine as a claim to an Earldom of Mar older than and different from that which, according to the Resolution of the House, was created by Queen Mary in 1565, it would, in the event of Mr. Goodeve-Erskine claiming at any future election to vote in respect of such older and different Earldom of Mar, appear to be competent for any two peers to protest against his claim, and the proceedings would thereupon be transmitted to the House, and it would appear to be in the power of the House to call upon Mr. Goodeve-Erskine to establish his claim to such older and different Earldom.”

† *Earldom of Mar*, II. 222.

‡ *Earldom of Mar*, II. 58.

§ *Earldom of Mar*, I. 6.

Lord Crawford, that the avowed grounds (or *rationes*) of a decision which is itself legally binding, are not themselves of any *legal* force, though their recognition is essential to the conclusion embodied in the actual decision.

Let it then be most distinctly understood that Mr. Goodeve-Erskine, though he assumes this title, dares not vindicate his pretensions to the dignity by tendering his vote as Earl of Mar before the assembled Peers of Scotland.

It has now, I trust, been clearly established, that *if we are prepared loyally to accept the Mar Resolution and Order, with the consequences flowing therefrom,—*

- (A) Lord Mar and Kellie is in legal possession of “the Earldom of Mar, which now exists on the Roll of Scottish Peers, and which was held by the Earl of Mar and Kellie, who died in 1866.”
- (B) That Mr. Goodeve-Erskine is, in the eye of the House of Lords, a claimant to a certain Peerage Dignity, of which he persistently assumes the title while refusing to establish his claim.
- (C) That the said Peerage Dignity is, in the view of the House of Lords, “the ancient Earldom of Mar,” in the sense of that feudal and territorial dignity which, the Committee for Privileges held as proved, had become extinct some time before 1565.
- (D) That its extinction not having been formally stated in the Resolution, it is technically competent for Mr. Goodeve-Erskine to advance a claim to that dignity, though with the “certainty” that the House of Lords must inevitably declare it to be extinct.

These conclusions, it will be seen, amply vindicate the soundness of the decision pronounced by the learned Head of the College of Arms—curiously described by Lord Crawford as “the present King-of-Arms for England”^{*}—when applied to by the Lord Chamberlain (*in re* the presentation of Mr. Goodeve-Erskine as Earl of Mar) as to the consequence of “the decision of the House in favour of Lord Kellie,”[†] on Mr. Goodeve-Erskine’s assumption. Lord Kellie having “made out his claim to the Honour and Dignity of Earl of Mar,”[‡] that “Honour and Dignity,” it was pointed out, could not be vested in Mr. Goodeve-Erskine. It was accordingly pronounced by the Lord Chamberlain that his “presentation as such was inept.”[§] This announcement is still in force, and Mr. Goodeve-Erskine is well aware that he cannot be recognized at the Court of his Sovereign as holding the title which he persists in assuming, although it has been decided to be vested in another.

It cannot be too often repeated, in view of such statements as that “no man lays claim to his dignity,”^{||} that Lord Kellie has both laid and “made out his claim to the Honour and Dignity of Earl of Mar,” that Honour being the *existing* Earldom (whatever the date of its creation), which was the Honour, and the only Honour, in dispute between the heir-male and the heir-of-line. Lord Kellie having, as heir-male, successfully “made out his claim” to that Honour, Mr. Goodeve-Erskine can only be regarded—and was so regarded by the Select Committee of 1877—as the claimant “to an Earldom of Mar older than and different from”[¶] the existing Earldom. He has therefore first to prove that this mediæval earldom (a duplicate title unheard of for centuries) is not extinct (as the Law Lords held), but merely dormant. And if he could succeed in proving this thesis, he would still have to prove in addition that he is the individual now entitled to it.

Above all, let it be remembered, that if, as we are so often and so triumphantly reminded, the House of Lords has not *legally* pronounced an opinion on this hypothetical and duplicate title, it is because the House was only called upon to deal with the one known and existing Earldom of Mar, which Earldom is declared to be vested in Lord Kellie. The *onus probandi* is not thereby lightened, but rests, on the contrary, heavier than ever on the shoulders of Mr. Goodeve-Erskine, for he has not only to establish his claim to this title,—“the ancient Earldom of Mar,”—but he has also to establish, before he can do so, that the title itself is not extinct. As it was well expressed by the Lord Clerk Register before the Select Committee, “it really turns upon *the existence of a particular peerage at all.*”^{**} It is not to be wondered at that Mr. Goodeve-Erskine prefers the simpler method of unauthorized assumption, and that, to quote his own words at Holyrood, “I make no claim to that old

^{*} *Earldom of Mar*, I. 13.

[†] *Ib.*

[‡] Mar Resolution.

[§] *Earldom of Mar*, I. 13.

^{||} Letter to *Scotsman* of 24th April.

[¶] Report of Committee of 1877.

^{**} *Minutes of Evidence*, 143.

earldom, by the advice of my counsel, *being already in possession*" (!). Prompt and apposite was the reply of the Lord Clerk Register: "You have not established your right to it, and till you have established your right you cannot be received here." *

Lord Crawford complained, with some bitterness, that

"The application at the Lord Chamberlain's instance ought to have been made to the Lord (*sic*) Lyon of Scotland, and not to the English (*sic*) Garter."

But it would obviously have been nothing but a solemn farce to have referred, for the consequences of the Lords' decision, to an officer who had himself prejudged the case, and whose recognition of the claimant as Earl of Mar had been set at nought and reversed by the decision in question. Lord Crawford, in fact, like many other Scotchmen, attached an undue importance to a "recognition" by a "Lord Lyon King" (!) . . . "a clear recognition and judicial affirmation, as by the supreme judge in his special court of arms and chivalry." †

He might with advantage have remembered the words of his great master:—

"As for the Lyon he was but a *Judex Pedaneus* (*i.e. qui ad aliorum pedes sedet et sese eis accommodat*), and underling of the constable, who (Lyon) crouched before the civil court, who controlled his proceedings (as they did those of the constable), most incumbent certainly in our days,—while they purged his record of faulty matriculations, and signally castigated him for his misdeeds." ‡

Indeed it would seem that the Mar matriculation of 13th Oct. 1866 (*Register of Arms*, vii. 46), imperatively calls for some public correction. To leave it standing on the Lyon Register is to maintain the judgment of Lyon King-of-Arms in opposition to that of the House of Lords. Mr. Goodeve-Erskine, it will be remembered, was allowed, not as heir of tailzie to the Erskine estates (for Lord Kellie was that heir), nor even as "representer" of Erskine, Earl of Mar, but as (*eo nomine*) Earl of Mar, to matriculate as his own the coat of the Earls of Mar standing on the Lyon Register, with its supporters and other *appendiciæ*. Now my *gravamen* is not so much against this matriculation as against Lyon's subsequent action. What that action should have been is fortunately not a matter of question, as it should have been determined by the precedent of the Clan Chattan case (1672), which presents an exact parallel. In that case the then Lyon had designated M'Pherson of Cluny in a Patent of Arms (note that it was a *Patent*) as "the true and only representative of the ancient and honourable familie of the Clan Chattan," and assigned him the consequent supporters. But on the Privy Council deciding, shortly after, that this designation belonged to M'Intosh, Lyon at once, bowing to this decision, matriculated Cluny's Arms as those of "Duncan M'Pherson of Cluny," merely, and without the supporters. And if the present Lyon King-of-Arms should refuse to follow this official precedent, it cannot be that the Peer who has been declared by the House of Lords to be the rightful Earl of Mar is left without "remed of law." Surely this matriculation can be brought, by advocacy, before the Session, and Lyon, as in *Cunningham v. Cunningham* (1849), compelled to reduce it. For even if, as in the Macdonell case (1826), the Peer in question, from want of title and interest, should be denied a *locus standi* so far as the coat is concerned, it must be competent for him to quarrel the designation and the supporters, as trenching on his own Dignity. And, lastly, if Lyon should still be pleased to assign to Mr. Goodeve-Erskine, not as "Earl of Mar," but as "representer" of Erskine, Earl of Mar, the coat of the Erskine Earls of Mar, I may point out that, by the law and practice of Scottish Heraldry, this should be done by a fresh Patent, and not by a mere matriculation as in 1866.

It would seem that Lyon sought consolation for his discomfiture, and for the rejection of his Earl by the House of Lords, in the effort to foist the pretensions of his *protégé* on an unsuspecting public, through the medium of a Work under his special patronage, the *Peerage of Ulster King-of-Arms*. Sir Bernard Burke is careful to inform us that—

"In matters concerning Scotland, Lyon King-of-Arms, whose knowledge of Scottish Peerage law and Peerage incidents is unsurpassed, never fails me. My warmest thanks are also due to Mr. R. R. Stodart of the Lyon Office."—Preface to Burke's *Peerage*, 1883.

The result of this co-operation is clearly seen in the following comment on the Mar judgment and its consequences. Mr. Goodeve-Erskine, we are told,

"Contends that that judgment cannot disturb him in his possession of § the ancient Earldom of Mar. The House of Lords has since then, on the Report of a Special Committee, refused to alter the precedence of the Earldom of Mar on the Union Roll, the Report being,

* *Earldom of Mar*, II. 152. † *Earldom of Mar*, I. 300. ‡ Riddell's *Peerage Law* (1842) p. 4.

§ That is to say, as we have seen above, his claim to, and assumption of, that duplicate and presumably extinct title,

apparently, based on the non-identity of the title on the Union Roll with that of 1565,* and it is, on various grounds (!), difficult to avoid the conclusion that the nephew and heir-of-line of the late Earl of Mar† is the lawful possessor of the ancient Dignity"‡ (Burke's *Peerage*, 1883, "Mar").

Such are the grounds on which Sir Bernard Burke aids and abets Mr. Goodeve-Erskine to masquerade as Earl of Mar. But, whether from the invertebrate attitude of the most benign of modern Heralds, or from the fact that Lyon is responsible for "Mar," and Ulster for "Mar and Kellie," it will at once be seen, on comparing the accounts of these two titles, that they respectively espouse the opposing contentions, thus causing Ulster to contradict himself in the most hopeless and impotent manner. Under "Mar and Kellie" (p. 871) he accepts, without question, the decision of the House of Lords, and informs us that Lord Erskine,

"For great services to Queen Mary, was by her, on 29 July, 1565, made Earl of Mar.

This Earldom he traces, as held by his descendants, down to the late Earl of Mar and the present Earl of Mar and Kellie, repeating of their title, at the end of the account,

"Creation. Earl of Mar, 29 July, 1565."

And yet, only on the preceding page, we are calmly informed, to our utter bewilderment, not that Lord Erskine was created Earl of Mar 29 July, 1565, but that

"After an investigation into his rights, (he) was restored by Queen Mary in 1565 to the Earldom of Mar, of which his ancestor was declared to have been unjustly dispossessed, and was thereafter recognised as Earl of Mar" (!).

And we eventually learn, of *this* Earldom, that Mr. Goodeve-Erskine "takes" (a delicate euphemism for *assumes*) "the title of Earl of Mar as heir-general!" The climax is reached when to the Earldom so "taken" there is assigned a

"Creation—Before 1014. Allowed precedence in Decreet of Ranking and on Union Roll" (Burke's *Peerage*, p. 870).

That an existing "Earldom" should have been "created" before 1014 (!) is sufficiently amusing to any one who has the slightest acquaintance with history, but that it was allowed the precedence of that date (for such must be the meaning of this obscure phrase) "in Decreet of Ranking and on Union Roll," is a statement which can only be described as outrageous, in face of the very notorious fact that the Earls of Mar continuously protested against such precedence having *not* been allowed them!

But if Sir Bernard Burke admits, as he does admit (p. 871), that the title vested in the late Earl of Mar and in the present Earl of Mar and Kellie was a title created on the 29 July, 1565, as was decided by the Committee for Privileges, it follows that the title "taken" by Mr. Goodeve-Erskine, the title created "before 1014," cannot, on Sir Bernard's own showing, be the title vested in the late Earl of Mar, and must be the hypothetical and duplicate title of which the very existence, as we have seen, has yet to be proved, in the teeth not only of common sense, but also of Lord Crawford's own contention that "it is impossible that the two dignities can co-exist."§ We see then that Ulster has even less ground for admitting Mr. Goodeve-Erskine as Earl of Mar than for admitting any other of the numerous class of claimants to Scottish Peerages. It is therefore deeply to be regretted that, as an Officer of Arms, he should take advantage of his high official position to sanction and encourage the usurpation of this title by Mr. Goodeve-Erskine, when the existing Earldom is, by his own admission, vested in the Earl of Mar and Kellie, and when no other Earldom of Mar has even been proved to exist.

The last point to which I need address myself is the persistent perversion and misinterpretation of the action of the House of Lords in 1877. Mr. Goodeve-Erskine asserts in his letter to the *Times*—

"That" (as Lords Cairns and Selborne have since admitted in the House of Lords) "the decision of 1875 conceding to Lord Kellie a new Mar title not on the Union Roll and which the House in 1877 declared they could not put on the Roll, has not dealt with the ancient Earldom."

And Sir Bernard, as we have seen, commits himself to the statement that,

* This statement, as will be shown below, is at direct variance with fact.

† Whose Earldom has passed to the Earl of Kellie.

‡ *i.e.* the hypothetical Earldom, "older than and different from" that vested in his uncle, the Earl of Mar, and now in his cousin, the Earl of Mar and Kellie.

§ *Earldom of Mar*, II. 222.

“The House of Lords . . . refused to alter the precedence of the Earldom of Mar on the Union Roll, *the Report being apparently based on the non-identity of the title on the Union Roll with that of 1565.*”

Now Lord Kellie having, by the Mar Resolution, “made out his claim to the honour and dignity of Earl of Mar in the Peerage of Scotland,” petitioned the House in 1877 that the existing title having been decided to have been “created in 1565,” it might in future be called “in the precedence declared and established under the resolution and judgment of this right honourable House,” its precedence on the Roll being too high for its date of creation as above determined.* “But his petition met with overwhelming opposition, and was rejected, Lord Selborne, on that occasion, urging its rejection.”† It is of the utmost importance that we should clearly realize the grounds on which its rejection was urged, for it can be absolutely shown that the rejection of this petition, so ostentatiously paraded as an admitted victory for Mr. Goodeve-Erskine, was directly due to the strenuous opposition of the late and the present Lord Chancellor, *who, so far from favouring Mr. Goodeve-Erskine’s contention, repudiated it in the most emphatic manner, and based their action upon that very repudiation, and upon their unqualified acceptance of the Earl of Kellie as holding the Earldom of Mar which stands on the Union Roll!*

Lord Crawford admits, of their speeches on this occasion, that—

“Their views, checked by the Report of the Select Committee appointed, as we shall see on the suggestion of the Lord Chancellor, must now be considered as those of the House, for all practical purposes ‡ . . . This Report was presented to the House of Lords, and ordered to be printed on the 27th July, 1877; and the House thus placed the seal of its approbation and acceptance of the views expressed by Lord Selborne in part and by Lord Cairns *in toto*, upon the important question discussed in the debate of the 9th July.”§

Lord Crawford also describes the Report as—

“Recognising the existence of the (*sic*) Earldom of Mar as a new creation, and not a restoration, in the person of John, Lord Erskine, in 1565.”||

We see then how false is the bold pretence that the debate and report represent a victory for Mr. Goodeve-Erskine, and we shall now see how gravely misleading is the audacious statement in Mr. Goodeve-Erskine’s letter that “the House in 1877 declared they could not put” Lord Kellie’s “new Mar title” on the Roll,¶ and how contrary to fact is the assertion put forth in *Burke’s Peerage* that the Committee’s report was—

“Apparently based on the non-identity of the title on the Union Roll with that of 1565.”

It is frankly admitted by Lord Crawford that—

“Both Lord Selborne and the Lord Chancellor laid it down as the indispensable basis of discussion that the decision of 1875 must be considered as final, right or wrong, and not to be questioned . . . This, I may observe, was practically indorsing Lord Redesdale’s opinion on the question of jurisdiction, and echoing his words—‘I do not enter into the question whether that decision was right or wrong; it was the decision of the House.’”**

Here I may point out that this is precisely the standpoint which I have adopted throughout this paper. The expressions of both the speakers upon this point were so emphatic that they deserve to be reproduced—

LORD SELBORNE.

“We are all very well aware that, before that decision and afterwards, there had been various persons who had entertained a different opinion upon the merits of the question, but your Lordships, I think, will hold that it having been determined in one particular way by a resolution of your Lordships’ House, that is a determination which, so far as it goes, is binding upon your Lordships, and that this discussion must proceed upon that assumption . . . The truth is, we have no business at all to go into such discussion. The House has decided, and that which it has decided is law.”

LORD CAIRNS.

“After the most careful and patient investigation, your Lordships’ Committee for Privileges were of opinion that *Mr. Goodeve-Erskine had not substantiated his claim to the Earldom of Mar* . . . My Lords, that conclusion having been arrived at by the Committee for Privileges, and confirmed by your Lordships’ House, I apprehend, is conclusive for all purposes in this House; and I was somewhat surprised to hear not long ago the noble Earl . . . set at absolute defiance the conclusion at which the Committee had arrived, and the conclusion which had been confirmed by this House.”

* For the errors of precedence in the Decree of Ranking and (consequently) on the Union Roll, see Mr. Hewlett’s letter printed above. Mr. Goodeve-Erskine, unable to disprove them, can only retort that Mr. Hewlett “tries to vilify” the Roll, forgetting that Riddell has himself denounced its errors in far stronger language.

† *Outline statement of facts bearing on the Mar Peerage*, issued *ex parte* Mr. Goodeve-Erskine.

‡ *Earldom of Mar*, II. 187.

§ *Ib.*, II. 221.

¶ *Ib.*

¶ See above.

** *Earldom of Mar*, II. 188.

These words are of marked significance in view of the fact that the Earl of Crawford similarly "set at absolute defiance the conclusion at which the Committee had arrived," not only by recognising, like Sir Bernard Burke, Mr. Goodeve-Erskine as "Earl of Mar," but also by denying Lord Mar and Kellie on the very title-page of his work, not merely the Earldom of Mar *par excellence*, but even any Earldom of Mar whatever!*

The resolution was opposed by the learned Lords on four several grounds—two of them special, and two of them general.

(A) SPECIAL.

[1] That instead of strengthening it would, in effect, weaken the decision of 1875, which decision must remain final and inviolate.

"It is, in the first place, not really consistent with what was resolved by the House in 1875, and, in the second place, if it were carried, it would, instead of supporting and fortifying the authority of what was then done, tend as much as anything could do to destroy and to throw discredit upon it. . . . The authority of your Lordships' decision, instead of being supported, would be really impeached and impugned if this resolution were to be adopted. . . . The effect of the resolution would really be to introduce a second Earl of Mar into the Roll. . . . and in that way to encourage instead of repelling the idea that there were two Earls of Mar. Anything really more destructive of the authority of the decision of 1875, I, for my own part, cannot conceive" (LORD SELBORNE).

[2] That the Earldom to which Lord Kellie had "made out his claim" was *the Earldom standing on the Roll*, and that, therefore, no change was required.

"The decision asserted virtually, though not in form, that there was only one Earl of Mar, and that there had been only one Earl of Mar since 1565, and that was the holder of the Earldom created in that year † . . . Now, my Lords, *this title of Mar* is one which has been enrolled and registered by the House ever since the Act of Union. It is one which stood on the Roll at that time, as it stands now, in the precedence given to it by the Decree of Ranking. . . ." (there are) "no precedents whatever for taking away from an existing peerage, which the principle of the decision determined to be the only existing peerage at that time, its actual place and precedence whatever that might be upon the Roll. . . . and your Lordships having decided that *that Earldom*" (*i.e.* the Earldom on the Union Roll) "was merely created in 1565, are surely not now going to take away the precedence which for more than two centuries the Earls of Mar enjoyed" (LORD SELBORNE).

These words, spoken by Lord Selborne ‡ in this same debate of 1877 should be carefully compared with the dexterous assertion of Mr. Goodeve-Erskine that Lord Selborne has

"Admitted in the House of Lords (that) the decision of 1875, *conceding to Lord Kellie a new Mar title not on the Union Roll* (!), and which the House in 1877 declared they could not place on the Roll, has not dealt with the ancient Earldom."

As a matter of fact, when Lord Galloway (14th June, 1880) urged the House to declare that Mr. Goodeve-Erskine was in possession of

"The Earldom of Mar, standing on the Union Roll of Scotland, . . . *the said Earldom having been in no way affected by the resolution of this House*, on 26th February, 1875, which conceded to the Earl of Kellie an Earldom of Mar of 1565,"

the motion was vehemently opposed by Lord Selborne (then Lord Chancellor) as "absolutely unprecedented in any case of either an English, Scotch, or Irish Peerage."

(B) GENERAL.

[1] That it is not competent for the House, under the guise of an ordinary resolution, "to pronounce a judicial decision affecting rights of Peerage."

"It is at least exceedingly doubtful whether what the noble Duke asks your Lordships to do is within your legitimate powers; and I put it to you whether anything could more tend to discredit the decision which was come to two years ago than that your Lordships should take a course not clearly justified by precedent, and not clearly within your constitutional powers" (LORD SELBORNE).

"Your Lordships, by assenting to it, would run the risk of doing what I feel certain your Lordships would only do by inadvertence, namely, under the guise of passing a resolution, really make that which would be a judicial, or if not a judicial, a legislative, declaration; . . . We ought to be very careful not to go beyond what the decision actually was. . . ."

* "The Earldom of Mar . . . in reply to an address . . . by Walter Henry, *Earl of Kellie*."

† That is, the Earldom to which Lord Kellie had "made out his claim."

‡ It must be repeated that Lord Selborne had actually been counsel for Mr. Goodeve-Erskine against Lord Kellie's claim.

It would be entirely re-opening the decision which was arrived at if you were to pass this resolution; . . . and therefore it would be doing what I took the liberty of saying at the outset, your Lordships, in this view of the case, were asked to do, namely, under the shape of a resolution of this House, to pronounce a judicial decision affecting rights of peerage" (LORD CAIRNS).

It will be observed that this point turns, not on the merits of the case but on a general constitutional question. The words, "We ought to be very careful not to go beyond what the decision actually was," so unscrupulously wrenched from their context by the writer in the *Journal of Jurisprudence*, were specially applied to a particular resolution, and were specially addressed to the House of Lords as apart from the Committee for Privileges. The Lord Chancellor did not, as pretended, by these words, refer to, or limit, the functions of that Committee.* What he did question was the right of the House thus to usurp those functions.

[2] That, *as the law then stood*, it was not competent for the House to alter the precedence *inter se* of the titles on the Union Roll.

"It appears to me a question of a very grave and serious importance whether your Lordships have any such right to interfere with the existing precedence upon the existing Roll of Scottish Peers, Mar or any other, as this resolution claims . . . I must say that my inquiries, so far as I have been able to carry them, lead me to entertain a most serious doubt whether it would not be against the spirit of Acts of Parliament upon the subject for your Lordships to assume any such jurisdiction" (LORD SELBORNE). †

Here again it will be seen the question is purely one of law and precedent, and has nothing to do with the merits of the particular case in point. As efforts have been made by the opponents of the Lord Chancellor's Bill to represent that it directly traverses the above contention by giving the House of Lords power to refer such matters of precedence to its Committee for Privileges, it may be as well to point out that the Lord Chancellor merely questioned the jurisdiction possessed by the House *under the existing laws*. To confer the jurisdiction in question on the House by special legal enactment is therefore the natural sequel, rather than the contradiction, of the contention quoted above.

We have seen that Lord Selborne, so far from basing his opposition

"On the non-identity of the title on the Union Roll with that of 1565," (*i.e.* that of Lord Kellie),

based it on the fact of *their absolute identity*. We shall now see that their absolute identity was asserted with equal vigour by the Lord Chancellor (Lord Cairns). Here are the words of the learned Earl, spoken in the House of Lords:—

"In that Roll of Peers there is one entry, and only one entry, of the Earldom of Mar. It may be in its wrong place, or it may be in its right place. I have nothing to do with that. *It is there, and it is only in one place, and to that place this Resolution*" (*i.e.* that the . . . Earl of Kellie. . . hath made out his claim to the honour and dignity of Earl of Mar in the Peerage of Scotland, created in 1565) "*must necessarily have referred, for there was nothing else that it could have referred to.* Therefore the Order of your Lordship's House to the Lord Clerk Register is this: That he is to call the title of the Earl of Mar according to its place in the Roll of the Peers of Scotland, . . . and when he calls it, and it is answered, *he is ordered to receive and count the vote of the person who has been adjudged to be Earl of Mar and Kellie in answer to that call.*"—Speech in the House of Lords, 11 July, 1879.

And after this we are coolly informed by the organ of the Scottish Bar that—

"Mr. Hewlett is, therefore, on every ground wrong in contending, . . . that the title of 1565 adjudged to the present Earl of Mar and Kellie is to be identified with the Earldom on the Union Roll" (1)—*Journal of Jurisprudence*, May, 1883.

* "Nevertheless, as Lord Cairns said, . . . 'we ought to be very careful not to go beyond what the decision actually was.' . . . An additional argument . . . against the power proposed to be given to the House to tamper with the Union Roll is that it may be made use of by *Committees of Privileges* to do what Lord Cairns deprecated, to 'go beyond what the decision actually was'" (*Journal of Jurisprudence*, May, 1883).

† This opinion is in complete accordance with the Committee's Report, that—"The Committee have not been able to discover any precedents for altering the precedence of the Peers of Scotland on the Union Roll." But, it is added, "The Committee do not hereon desire to express an opinion that, in a proper case, the House would not have power to make an order to that effect."

But desperate as is this effort of the *Journal of Jurisprudence* to "kick against the pricks" of Lord Cairns' words, it is fairly outdone by that veracious personage, whose effusions are appealed to by Mr. Goodeve-Erskine, and who writes under the eccentric pseudonym "ONE OF THE BLOOD OF DUGALD STEWART." By him we are deliberately informed, in a letter to the widely-read *Scotsman*,* that—

"Lord Cairns has also shown, in the House of Lords, that the title given to Lord Kellie is not 'the Earldom of Mar on the Union Roll,' so that it must be new."

And the same impression is conveyed by Mr. Goodeve-Erskine himself when he tells us, in his letter to the *Times*, that Lord Cairns has—

"Admitted in the House of Lords (that) the decision of 1875, conceding to Lord Kellie a new Mar title not on the Union Roll, and which the House in 1877 declared they could not place on the Roll, has not dealt with the ancient Earldom."

How are we to reconcile these statements with the above emphatic declaration of Lord Cairns that the Earldom of Mar adjudged to Lord Kellie *was* the Earldom, and the only Earldom, standing on the Union Roll? It can only be effected by a device so unscrupulous that it might well seem incredible. Lord Cairns had begun the very speech in which he made the above declaration by setting forth the case of his opponents, the case he was about to shatter. By a glaring error in Hansard's Report, the views he thus set himself to expose *were represented as his own!* This Report being twice quoted against him by Lord Galloway in the House of Lords, it was pointed out by Lord Cairns and others how erroneously he had been reported. But that this point may be cleared from even a shadow of doubt, I append the Report of what Lord Cairns *did* say, according to no less an authority than Lord Crawford himself:—

"The view of the noble Lord (Lord Huntley), who has just spoken upon that subject, I understand to be this: that the peerage which is called on the Roll the Mar Peerage is not the peerage which, according to the view of the noble Lord, has been adjudged by this House to the Earl of Mar and Kellie."—*Earldom of Mar*, II. 424.

Having thus unmasked the paltry device by which Lord Cairns is represented as holding the very views which he set himself emphatically to condemn, I need not refute at greater length the fallacies of a cause which relies on such practices as these, but may trust that it has now been shown to the satisfaction of every candid reader that, under the decision of the House of Lords in 1875, the Earl of Mar and Kellie is in actual possession of the only Earldom of Mar standing on the Union Roll.

The question discussed in this paper, and answered absolutely in the negative, has been the very practical and important one—"Are there two Earls of Mar?" Strange to say, on this fundamental point Mr. Goodeve-Erskine and his supporters cannot even agree amongst themselves! Sir Bernard Burke, indeed, recognises two Earls of Mar, but Lord Crawford found it "impossible . . . to recognise the existence of two Earls of Mar."† *Per contra*, the *Journal of Jurisprudence* hold the Committee of (*sic*) Privileges responsible for "the awkwardness of there being now (in consequence of their blunder of 1875) *de jure* two Earldoms of Mar instead of one" (p. 288). Surely, it is little less than shameless for those who are endeavouring to set by the side of the existing Earldom of Mar a duplicate and hypothetical Dignity of which not even the existence can be proved—to complain that there are now (in consequence of their action) "two Earldoms of Mar instead of one"! The responsibility for the "awkwardness" thus caused must lie, not with the Committee for Privileges, but with those who, misliking the decision of that Committee, have taken upon themselves to denounce it as a "blunder," and (as the then Lord Chancellor observed, speaking in the House of Lords) to "set at absolute defiance the conclusion at which the Committee had arrived, and the conclusion which had been confirmed by this House."

J. H. ROUND.

* 18th April, 1883. Quoted in "Opinion of the Public on the Lord Chancellor's Bill," issued *ex parte* Mr. Goodeve-Erskine.

† *Earldom of Mar*, I. 23.

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